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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of decision: 01.12.2023*

+ **ITA 675/2023 and CM APPL. 61984/2023**

PR. COMMISSIONER OF INCOME TAX, DELHI-7 Appellant

Through: Mr Puneet Rai, Sr. Standing Counsel
with Mr Ashvini Kumar, Mr Rishab
Nangia and Mr Nikhil Jain,
Advocates.

versus

WSP CONSULTANTS INDIA PVT LTD Respondent

Through: Mr Ajay Vohra, Sr. Advocate with
Mr Manuj Sabharwal, Advocate.

CORAM:

HON'BLE MR JUSTICE RAJIV SHAKDHER

HON'BLE MR JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

CM APPL. 61984/2023

1. Allowed, subject to just exceptions.

ITA 675/2023

2. This appeal concerns Assessment Year (AY) 2012-13.

3. *Via* the instant appeal, the appellant/revenue has assailed order dated 24.03.2023 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].

4. To adjudicate the instant appeal, the following facts must be noticed.



5. The respondent/assessee filed its Return of Income (ROI) for the AY in issue, i.e., AY 2012-13, on 30.11.2012. The ROI declared a loss amounting to Rs.5,58,25,905/-.

6. The record shows that the respondent/assessee's case was referred to the Transfer Pricing Officer (TPO) under Section 92CA of the Income Tax Act, 1961 [in short, "the Act"]. The TPO, *via* order dated 27.01.2016, proposed an upward adjustment amounting to Rs.4,76,89,336/- concerning international transactions pertaining to building design services.

7. The TPO's order impelled the respondent/assessee to prefer objections before the Dispute Resolution Panel (DRP). On the objections preferred by the respondent/assessee, the DRP rendered a decision dated 22.09.2016. The DRP, *via* its decision scaled down the adjustment made by the TPO to Rs.4,26,08,980/-.

8. Consequentially, the Assessing Officer (AO) passed a final assessment order under Section 143(3) read with Section 144C(1) of the Act on 29.11.2016. The AO thus made an addition amounting to Rs.4,26,08,980/- in line with the directions issued by the DRP.

9. It is against this backdrop that the respondent/assessee preferred an appeal with the Tribunal. The Tribunal *via* the impugned order has partly allowed the appeal of the respondent/assessee.

10. Mr Puneet Rai, learned senior standing counsel, who appears on behalf of the appellant/revenue, says that insofar as this appeal is concerned, there are two issues which arise for consideration.

(i) First, whether the Tribunal was justified in rejecting the Profit Level Indicator (PLI) (which is a ratio of operating profit to total cost) adopted by the AO?



(ii) Second, whether the Tribunal was justified in rejecting M/s Korus Engineering Solutions Pvt. Ltd. [in short, “Korus”] as a comparable, which was taken into account by TPO?

11. In support of the first issue, Mr Rai submitted that since separate segmental accounts were not available, it was difficult to segregate the cost incurred by the respondent/assessee in the deployment of employees concerning AEs and non-AEs.

11.1 Mr Rai, thus, submitted that the method adopted by the TPO, whereby costs of salaries were allocated based on turnover was the correct approach.

12. As regards the rejection of the comparable, it is Mr Rai’s contention that adequate information was available and that Korus could have been used to benchmark the subject international transaction, contrary to what has been held by the Tribunal.

13. Mr Ajay Vohra, learned senior counsel, who appears on behalf of the respondent/assessee, on the other hand, submitted that the expenses incurred on account of the deployment of employees were available project-wise.

13.1 It is also Mr Vohra’s contention that the accounts were available segment-wise and therefore, the turnover method could not have been used for allocating cost.

13.2 Furthermore, Mr Vohra submitted that persons employed with AEs were clearly identifiable, and therefore cost allocation had been done accordingly by the respondent/assessee.

14. As regards the rejection of the comparable Korus, it is Mr Vohra’s contention that sufficient information was not available concerning the said entity and therefore a proper functional analysis could not be carried out.

14.1 In any event, it is Mr Vohra’s contention that the functional profile of



Korus and the respondent/assessee was different and hence, a proper comparison could not have been made for the purposes of benchmarking.

15. We have heard the learned counsel for the parties and have perused the record. In our view, insofar as the first aspect is concerned, what is required to be noticed is that the dispute between the parties veered around building design services rendered by the respondent/assessee. It is also not in dispute that the respondent/assessee benchmarked the said transaction by adopting the most appropriate method, i.e., Transactional Net Margin Method i.e., TNMM.

16. In this regard, the respondent/assessee had taken recourse to the ratio of operating profit and total cost in arriving at the PLI. The Tribunal has returned a finding of fact that the PLI shown by the respondent/assessee was 11.52%, which was more than the average PLI of the comparables furnished by the respondent/assessee, i.e., 9.23%. Based on this, the respondent/assessee had stated that the transaction with the AEs was at arm's length.

17. Concededly, what bothered the TPO was the computation of the operating cost, though he was also concerned with some of the comparables furnished by the respondent/assessee.

18. As indicated above, the TPO's view was that there was opaqueness with regard to allocation of operating expenses concerning salaries paid to employees who worked in the AE and non-AE segment. It is on account of this view that the TPO concluded that expenses incurred on salaries which are part of the operating expenses had to be allocated based on the turnover of the AE and non-AE segments.

19. The Tribunal, however, disagreed with the aforesaid approach adopted



by the TPO and returned in this regard the following findings of fact.

(i) The respondent/assessee had maintained segmental accounts, and accounts *vis-a-vis* salary expenditure were maintained project-wise. In other words, the employees deployed with regard to the transactions entered with AEs were identifiable.

(ii) The conclusion arrived at by the DRP that common employees were allocated was a finding that did not emerge from the record. The Tribunal evidently was of the view that the employees deployed with AEs and non-AEs were identifiable as the accounts were maintained project-wise.

(iii) The view taken by the DRP that hourly worksheets of employees were not maintained was unsustainable, as there was no such requirement in law. This conclusion was reached by the Tribunal also for the reason that salaries to employees were not paid on an hourly basis.

20. Given the aforesaid findings of fact, in our view, the Tribunal correctly concluded that the PLI had been properly computed by the respondent/assessee.

21. As regards the other issue, which concerned rejection of the comparable Korus, once again we find the Tribunal has returned a finding of fact that the functional profile of Korus which was available in the public domain was deficient.

21.1 In this context we may note that the DRP, after recorded the submission advanced on behalf of the respondent/assessee as to how the functional profile of the Korus was different from its own, accepted Korus as a comparable without doing a deep-dive.

21.2 The respondent/assessee had emphasised that Korus was in the business of providing engineering services to steel industry, right from the



stage of conceptualization to commissioning. Furthermore, the respondent/assessee had said that Korus also provided engineering consultancy for greenfield steel plants, technology upgradation and expansion projects. The DRP, while dealing with the assertions made by the respondent/assessee simply stated the following: “functionally comparable should therefore be retained.”

22. According to us, the DRP made no attempt to establish as to how Korus was functionally comparable with the respondent/assessee. It is for this reason perhaps that the Tribunal stated that the information which was obtained from the website of Korus was “sketchy” and therefore Korus could not be used as comparable to benchmark international transactions entered into between the respondent/assessee and its AEs.

23. Having regard to the foregoing, we are of the opinion that the Tribunal has returned findings of fact and adopted the correct approach *qua* both issues, and hence no interference is called for with the impugned order.

24. In our opinion, no substantial question of law arises for consideration by this court.

25. The appeal is, accordingly, closed.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

DECEMBER 01, 2023 / tr