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IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****INCOME TAX APPEAL NO.2426 OF 2013**

Commissioner of Income Tax-2

..Appellant

Versus

M/s. Reuters India Pvt. Ltd.

..Respondent

.....

Mr. Suresh Kumar a/w Ms. Samiksha Kanani for the Appellant.

Mr. P. J. Pardiwalla, Senior Counsel, a/w Jas Sanghvi & Ansh Desai i/b.

PDS Legal for the Respondent.

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**CORAM: M. S. SANKLECHA &
A. K. MENON, JJ.****DATE : 12TH APRIL, 2016**

PC.:

1. This Appeal under Section 260A of the Income Tax Act, 1961 (the Act) challenges the order dated 26th April, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2005-06.

2. The appellant-revenue urge the following questions of law for our consideration:-

“(i) Whether on facts and circumstances of the case, the Tribunal was correct in law in upholding the CIT(Appeals)

order deleting the addition of Rs.10,38,33,814/- being transfer pricing adjustment by applying cash profit to operating cost as Profit Level Indicator under Transactional Net Margin Method for determining Arm's Length Price, without appreciating that no such claim was made before the TPO/AO before whom the ratio of operating profit to the total cost was applied by the assessee itself as provided under Rule 10B(1)(d) of the Income Tax Rules?"

(ii) Whether the Tribunal was correct in law in applying the principle of res judicata referring to the findings of the Transfer Pricing Officer in a later assessment year i.e. A.Y. 2007-08, without appreciating that the principle of res judicata is not applicable to Income Tax proceedings and a finding of later assessment year cannot be applied to the facts of the 2005-06 assessment year?"

3. Regarding Question No.(i):-

(a) The respondent-assessee is engaged in Information Technology enabled services. During the subject assessment year, it had international transactions with its Associated Enterprises(AEs). The respondent applied the Transactional Net Margin Method(TNNM) as the most appropriate method to determine the Arm's Length Price (ALP) of its transaction with its AEs. The respondent choose operating profit to total cost as Profit Level Indicator (PLI) for determining the ALP. To carry out the above

exercise certain comparable cases were selected by the assessee and in terms of the comparables selected by it, the price charged/paid to its AE called for no adjustment as it was at an ALP. However on examination the Transfer Pricing Officer (TPO) restricted the comparables selected and eventually found that an adjustment of Rs.10.38 crores was required consequent to determination of the ALP. The Assessing Officer in his order dated 22nd December, 2008 passed under section 143(3) of the Act carried out the adjustment of Rs.10.38 crores as proposed by the TPO by adding it to the respondent-assessee's income.

(b) Being aggrieved, the respondent-assessee carried the issue in appeal of Transfer Pricing(TP) adjustment to the Commissioner of Income Tax (Appeals) [CIT(A)]. At the hearing the respondent submitted that as the method of charging depreciation on fixed assets differed between the comparables finally selected and the respondent-assessee it resulted in distorting the resulting comparison. Thus the respondent-assessee while continuing to apply the TNMM method sought to apply the ratio of cash profit to operating cost as the PLI . The CIT (A) called for the remand report from the TPO. The TPO in his remand report agreed that the respondents working for determining the PLI on the basis of cash profit to operating cost is appropriate in the present facts for comparison with the

six comparables. Thus the CIT (A) on the basis of the remand report of the TPO allowed the appeal deleting the addition of Rs.10.38 crores made by the Assessing Officer on account of TP adjustment.

(c) Being aggrieved the Revenue carried the issue in appeal to the Tribunal. The Tribunal by the impugned order upheld the finding of the CIT (A). It further also noted the fact that for the subsequent Assessment Years i.e. 2007-08 and 2008-09 the ratio of cash profit/operating cost has been taken as a PLI by the Revenue. In the result, the impugned order dismissed the appeal of the Revenue.

(d) Mr. Suresh Kumar, the learned counsel for the Revenue contended that the ratio of cash profit to operating cost as a PLI was raised for the first time before the CIT (A). Thus ought not to have been allowed.

(e) We note that the entire purpose of determining the ALP is to ensure that there is no Base Erosion and Profit Shifting. The tax proceedings are not adversarial in nature and there can be no estoppel in pointing out the correct facts before the Appellate Authority particularly when all facts are on record. This very objection as urged by the Revenue before us was raised before the Tribunal viz. that the ratio of cost profit to operating

cost was urged for the first time in appeal before the CIT(A). However as the impugned order records all the materials/details relevant to determine the TNMM on application of ratio of cash profit to operating cost was on record before the Assessing Officer. No fresh documents were brought on record before the CIT (A). It was only on the basis of documents which were already on record and were subject matter of examination by the TPO. Thus the TPO in his remand report found that in the facts of this case the ratio of cash profit to operating cost to determine the ALP was correctly raised by the respondent-assessee. Therefore question no.(i) as framed does not give rise to any substantial question of law. Thus not entertained.

4. **Regarding Question No.(ii):-**

(a) Mr. Suresh Kumar, learned counsel for the Revenue urges the fact that the ratio of cash profit to operating cost were applied by the TPO for the subsequent years i.e. A.Y.2007-08 and 2008-09 cannot be the basis to adopt it for the subject assessment year. This on the ground that the principle of res judicata is inapplicable to tax matters.

(b) We find that before the Tribunal, the Revenue contended that the adoption of ratio of cash profit to operating cost is not permissible under

the TNMM method. In the above context, the impugned order observed that the ratio of cash profit/operating cost in application of the TNMM method was infact accepted by the TPO itself for Assessment Years 2007-08 and 2008-09. Thus it is an acceptable ratio while applying the TNMM method. In any case on facts as obtained from the remand report of the TPO, the Authorities under the Act i.e. the CIT (A) as well as the Tribunal have for the subject assessment year found that the ratio of cash profits to operating cost is appropriate to determine the ALP.

(c) In the above view, the question no.(ii) raised for our consideration does not give rise to any substantial question of law. Thus not entertained.

5. The Appeal is dismissed. No order as to costs.

(A. K. MENON, J.)

(M. S. SANKLECHA, J.)