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

+ **ITA 505/2017**

CORNING SAS-INDIA BRANCH OFFICE Appellant
Through: Mr.Ajay Vohra, Sr.Advocate with
Mr.Aniket D.Agrawal, Mr.Neeraj Jain, Advocates.

Versus

DEPUTY DIRECTOR OF INCOME-TAX Respondent
Through: Mr.Rahul Chaudhary, Sr.Standing
Counsel, Mr.Sanjay Kumar, Jr.Standing Counsel.

**CORAM: JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH**

ORDER

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18.09.2017

C.M.No.24210/2017 (delay in re-filing)

1. For the reasons explained in the application, delay in re-filing is condoned. The application is disposed of.

ITA No.505/2017

2. This is an appeal by the Assessee under Section 260A of the Income Tax Act, 1961 ('the Act') against an order dated 23rd November, 2016 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No.5713/Del/2012 for the Assessment Year ('AY') 2008-09.

3. Notice. Mr. Rahul Chaudhary, the learned Senior Standing Counsel accepts notice for the Respondents.

4. **Admit.** The following question of law is framed for consideration:

Whether on the facts and in the circumstances of the case, the ITAT erred in law in directing the Transfer Pricing Officer (TPO) to undertake a fresh Transfer Pricing (TP) study for benchmarking of the international transactions involving the Assessee and its Associated Enterprises (AE)?

5. The Appellant Assessee is a Branch Office of the French company Corning S.A. which is a leading manufacturer of high grade ophthalmic and non-ophthalmic glass products, ophthalmic blanks for eye glasses and optical fibre etc. It is stated that the Assessee's business operations can be divided into following three business segments:

(i) Distribution segment - The Assessee imports rough ophthalmic blanks (ROBs) from its AE, Corning S.A. France, warehouses and sells these products to independent third parties in India.

(ii) Agency segment - The Assessee provides limited agency services to its AE in relation to the direct sales made by AE in India. The Assessee states that the limited agency services provided by it are in the nature of administrative and coordination assistance to the AE, to ensure timely delivery of materials/products to end-customers. These services are provided by the same personnel who are engaged in the trading/distribution activity. The Assessee gets a commission of 3% of the sales in respect of such direct sales. According to the Assessee, the efforts involved in the agency function are minimal and it is not possible to segregate/identify the costs relating to provision of such agency function. Therefore, in the TP study prepared by

the Assessee, the distribution and agency functions were aggregated and benchmarked on a combined transaction basis.

(iii) Market Support segment - The Assessee provides market support services to its AE for non-ophthalmic products, for example, optical fibre, optical fibre cable, automotive substrates etc. The Assessee states that it provides services such as collecting market information on potential buyers, visiting distributors, direct customers and strategic partners, liaising and meeting with existing and potential customers/distributors, follow up until delivery in respect of the orders which are directly placed by distributors and other customers to its AEs, etc. In lieu of these services, the Assessee is reimbursed all the costs incurred by it along with a mark up of 5%.

6. It is further stated that during the financial year relevant to AY 2008-09, the Assessee entered into following international transactions with its AE:

S. No.	International Transactions	Amount (Rs.)	Method Applied
1.	Import of Rough Ophthalmic Blanks	22,85,05,530	TNMM
2.	Provision of Agency Services	81,97,038	
3.	Provision of Market Support Services	6,04,00,045	TNMM
4.	Reimbursement of actual expenses	32,04,022	-

7. In its transfer pricing (TP) study, the Assessee considered the international transactions at (1) and (2) above as closely linked and part of one segment, namely, distribution segment and benchmarked the same applying TNMM. The Assessee undertook a separate benchmarking analysis for the international transaction at (3) above, viz., provision of market

support services (marketing support segment) by applying TNMM. For this purpose, the Assessee selected 12 comparable companies with weighted average operating profit margin of 8.86% in the TP study.

8. During the course of the assessment proceedings, the Assessee revised the aforementioned set of comparables and restricted it to the following 8 comparables with an average operating profit ('OP') margin of 7.48%.

S. No.	Name of comparable	OP/OC (%)
1.	ICRA Management Consulting Services Ltd.	3.22
2.	I D C (India) Ltd.	14.87
3.	Educational Consultants (India) Limited (Segmental)	5.20
4.	India Tourism Development Corporation Limited (Segmental)	9.40
5.	In House Productions Ltd. (Segmental)	0.56
6.	Asian Business Exhibition and Conferences Ltd.	15.85
7.	Overseas Manpower Corpn. Ltd.	3.23
8.	Times Innovative Media Ltd.	(-)2.21
	Average	7.48
	Operating Margin of Appellant	5.73

9. The Assessee on the basis of the aforementioned TP analysis considered the international transaction of market support services to be at arm's length under Chapter X of the Act.

10. The return filed by the Assessee for the AY in question was picked up for scrutiny and a reference was made by the Assessing Officer ('AO') to the TPO under Section 92CA(1) of the Act. By an order dated 7th October,

2011, the TPO rejected the Assessee's TP study and recommended an upward TP adjustment of Rs.1,32,99,572/- to the Arms Length Price ('ALP') of the international transaction undertaken by the Assessee during the relevant year. The TPO segregated the agency services from the distribution segment and clubbed them with the marketing support services for the purposes of the benchmarking analysis applying TNMM.

11. The TPO determined the income from the agency services by allocating common expenses aggregating to Rs.2,08,04,010/- relating to the distribution sales and imputed sales to earn agency commission in the ratio of 52.25% and 47.75%. The TPO picked up ten comparables and worked out the upward TP adjustment of Rs.1,32,99,572 as under:

Particulars	Amount (Rs.)
Total Cost of provision of services under Agency Segment and Marketing Support segment.	6,70,62,443
Arm's length margin @ 22.12%	1,48,34,212
Arm's length price of aggregated international transactions (A)	8,18,96,655
Price charged by appellant (B)	6,85,97,083
Transfer Pricing Adjustment (A - B)	1,32,99,572

12. Aggrieved by the above order of the TPO, the Assessee filed objections before the Dispute Resolution Panel ('DRP'). By the order dated 30th July, 2012, the DRP upheld the reasoning of the TPO as regards, *inter alia* (i) segregation of international transactions under the Distribution segment and

Agency segment and aggregating the latter with the transaction under the Marketing Support segment; and (ii) allocation of common expenses to the Agency segment on the basis of sales/revenue under the said segment *vis-a-vis* the Distribution segment and not in the ratio of their gross margins.

13. The DRP in the order dated 30th July, 2012 directed exclusion of 2 of the comparables, that is, Rites Ltd. and Vapi Waste & Effluent Management Co. Ltd. The revised average OP margin of the remaining comparables was worked out at 23.21% by the TPO. The TP adjustment stood increased to Rs.1,40,30,533/-. On the basis of the above order of the DRP and the consequential order of the TPO, the AO passed the final assessment order dated 10th September, 2012 making the aforementioned increased TP adjustment.

14. Aggrieved by the aforementioned final assessment order, the Assessee went before the ITAT. Before the ITAT, the Assessee did not press the challenge to aggregation of the agency segment with the marketing support segment in view of a similar order for AY 2003-04 having attained finality. Likewise, the Assessee did not challenge the allocation of the common expenses under the agency segment on the basis of sales/revenue earned under the said scheme *vis-a-vis* distribution scheme and not in the ratio of their respective gross margin. However, the Assessee contended that the TPO had erred in selecting 3 of the comparables, that is, Apitco Ltd. ('Apitco'), Choksi Laboratories Ltd. ('Choksi') and Wapcos (India) Ltd. ('Wapcos') for the combined benchmarking of international transaction under the agency and marketing support segments.

15. In the impugned order dated 23rd November 2016, the ITAT relying on its order for AY 2003-04 partly allowed the appeal holding that for the combined benchmarking of the international transaction common expenses were to be selected for the agency services in the ratio of gross margin and not in the ratio of their sales/revenue. However, the ITAT gave no conclusive finding on the issue of selection of comparables ground by observing that adjudication of the said issue would be futile. It directed the TPO to undertake a fresh TP study analysis to benchmark the international transaction undertaken by the Assessee after giving the Assessee an adequate opportunity of being heard.

16. The Assessee thereafter filed a Miscellaneous Application dated 28th March, 2017 before the ITAT under Section 254 (2) of the Act. The said application is stated to be still pending before the ITAT.

17. Mr. Ajay Vohra, the learned Senior Counsel appearing for the Assessee submitted that the ITAT ought not to have remanded the matter to the TPO for undertaking the TP analysis afresh. He pointed out that merely because the computation of operation margin of the Assessee as tested party was to be reworked by the TPO in terms of the ITAT's finding as regards the allocation of expenses, it did not preclude the ITAT from examining whether the selection of comparables was correct. He submitted that for the purposes of the benchmarking analysis, comparable companies have to be selected on the basis of the functions performed, assets acquired and risks assumed ('FAR' analysis) vis-a-vis the tested party. With the Assessee having accepted the aggregated benchmarking of international transactions

under the agency and marketing support segments, the FAR of the said international transactions stood frozen. He submitted that the ITAT was required to decide the issues raised by the Assessee regarding incorrect selection of comparables and this did not warrant a remand of the entire matter to the TPO to embark on a fresh search of comparables.

18. The learned counsel for the Revenue on the other hand submitted that there the exercise of determining which of the comparables had to be chosen could not be undertaken piecemeal. He, accordingly, submitted that the impugned order of the ITAT does not call for interference.

19. A perusal of the impugned order of the ITAT reveals that there was indeed no occasion for the ITAT to direct the TPO to undertake a fresh TP study analysis to benchmark the international transactions undertaken by the Assessee. The issue before the ITAT was whether three comparables viz., Apitco, Choksi and Wapcos were rightly included and the Assessee's three comparables viz., Educational Consultants (India) Limited, ITDC and In House Productions Ltd. were rightly excluded. This required an FAR analysis to be undertaken vis-a-vis these comparables.

20. The direction to the TPO to allocate the expenses on the basis of gross margin in the agency segment and not in the ratio of sales for the purpose of computing ALP of the international transactions, had nothing to do with the above issue concerning selection of comparables. For the latter purpose, Rule 10B (2) read with Rule 10B (3) of the Income Tax Rules require the said exercise to be undertaken with reference to *inter alia* "the functions performed/taken into account, assets ought to be employed and the risks

assumed” by the tested party and the comparable. A specific characteristic of the property transferred or services provided in both the controlled and uncontrolled transactions had to be taken into consideration.

21. It is not understood why the ITAT did not undertake such exercise regarding the correctness of the inclusion and exclusion of comparables. Consequently, the Court answers the question framed in the affirmative, that is, in favour of the Assessee and against the Revenue. The impugned order dated 23rd November, 2016 passed by the ITAT inasmuch as it remands the matter to the TPO is hereby set aside.

22. The Assessee’s appeal being ITAT No.5713/Del/2012 for the AY 2008-09 is restored to the file of the ITAT for disposal on merits and, in particular, the issue concerning validity of the inclusion by DRP of the three comparables, Apitco, Choksi and Wapcos and the exclusion of the three comparables as suggested by the Assessee, viz., Educational Consultants (India) Limited, India Tourism Development Corporation Limited and In House Productions Ltd.

23. The aforementioned appeal of the Assessee shall be listed before the ITAT on 23rd October, 2017 for directions.

S.MURALIDHAR, J

PRATHIBA M. SINGH, J

SEPTEMBER 18, 2017/‘anb’