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IN THE HIGH COURT OF DELHI AT NEWDELHI

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ITA 97/2017

BECHTEL INDIA PRIVATE LIMITED

..... Appellant

Through: Mr. Himanshu Sinha & Mr. Manan
Jain, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX

... Respondent

Through: Ms. Lakshmi Gurung, Advocate.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE PRATHIBA M. SINGH

ORDER

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25.07.2017

1. This is an appeal by the Assessee under Section 260A of the Income Tax Act, 1961 ('Act') against the order dated 14th July, 2016 of the Income Tax Appellate Tribunal ('ITAT') in ITA No.6779/Del/2015 for the Assessment Year ('AY') 2011-12.

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

Whether the ITAT erred in ordering a *de novo* determination of the Arms Length Price by the Transfer Pricing Officer upon a fresh benchmarking?

3. The Appellant/Assessee is a wholly owned subsidiary of Bechtel Corporation, USA. Its services include construction and construction management; development and financing of projects and customers

internationally; engineering and technology; procurement; project management; safety; and sustainability development.

4. During the AY under consideration, the Assessee, as a captive service provider, was engaged in the business of providing Engineering Design Support Services ('EDS') in the nature of export of customised electronic data in the form of designs, drawings, calculations and other relevant datasheet relating to Project Engineering and Commercial Solutions (PCS) for power plants, refineries, petrochemical plants etc. In addition, the Assessee also provided Informational Technology Infrastructure Support Services ('IT Infra') and Financial Accounting Support Services ('FAS') and to its Associated Enterprises ('AEs') to support the overseas offices' turnkey project execution. Therefore, the business segments of the Assessee are- EDS, FAS and IT Infra.

5. The Assessee filed its return of income, for the AY in question, on 23rd November, 2011 after adjusting a book profit under Section 115JB of the Act. A revised return was filed on 21st March, 2013 declaring an income of Rs.21,99,19,228.

6. The Assessee submitted a Transfer Pricing ('TP') study as well as Form 3CEB listing out the nature of the international transactions undertaken by it, the value thereof, the most appropriate method, profit level indicator and the Arms Length Pricing ('ALP') results.

7. The Transfer Pricing Officer ('TPO') by the order dated 29th January, 2015 discarded the approach followed in the TP study and proposed an

adjustment of an amount of Rs. 25,22,91,427 attributable to the difference in the ALP of the international transactions entered by the Assessee with its AEs. Thereafter, by an order dated 5th February, 2015 the TPO *suo moto* rectified the adjustment made in the EDS segment and enhanced it to Rs. 29,64,46, 099. An upward revision of the ALP in the EDS, FAS and IT Infra segments, as well as interest on outstanding receivables, was made by the TPO.

8. The Deputy Commissioner of Income Tax/Assessing Officer ('AO') passed a draft assessment order on 3rd February, 2015 proposing to add the aforementioned amounts as recommended by the TPO to the total income of the Assessee. The Assessee then filed objections before the Dispute Review Panel ('DRP'). The DRP by order dated 28th October, 2015 issued the following directions:

EDS segment: the DRP re-characterized the functional profile of the Appellant as being engaged in providing Engineering Procurement Construction ("EPC") and directed to exclude four companies from comparable set (Ashok Leyland Project Services Ltd, Bengal SREI Infrastructure Development Ltd., NTPC Electric Supply Company Ltd. and Pallavan Transport Consultancy Services Ltd.) and include Arvind Accel Limited.

FAS and IT Infra: the DRP re-characterized the functional profile of the Appellant as a high end Knowledge Process Outsourcing ("KPO") and upheld the approach and the comparable set considered by TPO. Further, the DRP directed the TPO to be consistent in the allocation of overhead costs across segments and to follow revenue based allocation as done for EDS segment.

Adjustments: the DRP directed the TPO/AO to provide working capital adjustment. However, the DRP rejected the risk

adjustment claimed by the Appellant.

Interest on Receivables: The DRP granted partial relief and directed the TPO/AO to use 6 month LIBOR plus 300 basis points as the interest rate while computing the interest on intercompany receivables.

9. Thereafter the AO passed the final assessment order on 30th November, 2015 making an addition of a sum of Rs.26,03,31,157 to the total income of the Assessee on account of ALP of international transactions and determined the income of the Assessee at Rs.48,02,50,390.

10. The Assessee then filed an appeal before the ITAT which was partly allowed by the impugned order dated 14th July, 2016. The summary of the ITAT's order reads thus:

- i. As far as the EDS segment was concerned, the ITAT remanded the issue to the TPO for *de novo* consideration by observing that there were multiple changes in the comparable set from the TP study to different levels of assessment casting doubt on process of selection and retention of comparable relied upon by both the Assessee as well as the Revenue.
- ii. As far as the FAS segment was concerned, it was stated that as regards re-characterising of the profile of the Assessee as a Knowledge Process Outsourcing ("KPO") service provider, it had not offered any arguments. The ITAT directed exclusion of TCS E Serve Ltd. as a comparable as it was functionally different.

- iii. As regards the IT Infra segment, the ITAT remanded the selection of Sankhya Infotech Ltd. and Sasken Communications Technologies Ltd. to the file of the TPO as the ground against their selection was being presented for the first time before the ITAT. The ITAT directed exclusion of Infosys Limited, E-Infochips India Pvt. Ltd. and E-Zest Solutions as comparables.
- iv. As regards interest on receivables, the ITAT restored the matter to the TPO to enable the Assessee to demonstrate that the facts relating to the AY 2010-11 were also present in the AY in question.
- v. Even on segmental accounts, the ITAT restored the matter to the TPO to apply the directions issued by the DRP across the segments by allocating the cost in the ratio of the revenue.

11. According to the Assessee, the ITAT failed to adjudicate the claim of the Assessee by denying it the benefit of economic adjustment on account of difference in risk profile of the assessee in arriving at ALP.

12. At the hearing of the present case on 14th March, 2017 the Assessee was asked to file a chart explaining the approach of the TPO, DRP and the ITAT in respect of determination of ALP for each of the segments.

13. Mr. Himanshu Sinha, learned counsel appearing for the Assessee has placed on record a detailed chart showing the approach of the TPO, the DRP and the ITAT. This chart *prima facie* shows that in the EDS Segment the ITAT had failed to give any finding with regard to the exclusion of five comparables- Global Procurement Consultant Ltd.;

Mitcom Consultancy & Engineering Ltd.; Usha Hydrodynamics Ltd.; TCE Consulting Engineers Ltd. and IBI Chematur (Engineering and Consultancy) Ltd.

14. Although, Ms. Lakshmi Gurung submitted that the facts relating to these comparables were not available on record which prompted the ITAT to remand the matter to the TPO, Mr. Sinha denied this by pointing out the specific page numbers of the record where the said details were available.

15. The chart produced by the Assessee also indicates with regard to each of the segments as to the manner in which the ITAT failed to render a finding, even though, the facts were available on record before it.

16. The Court does not propose to examine each of these issues since it is of the view that it would be more appropriate for the ITAT itself to decide the said issues without remanding the matter to the TPO.

17. Consequently, the question framed by this Court is answered in the affirmative by holding that the ITAT ought not have remanded the matter to the TPO for the *de novo* determination of the ALP of the international transactions in the various segments. This exercise should be performed by the ITAT itself. This is on the basis of the submission of the Assessee that all the details relevant for such determination are already available on record.

18. The impugned order of the ITAT is accordingly set aside. The Assessee's appeal ITA No. 6779/Del/2015 for the concerned AY 2011-12 is restored to the file of the ITAT. The said appeal will be listed before it for directions on 21st August, 2017.

19. The appeal is disposed of in the above terms.

S.MURALIDHAR, J.

PRATHIBA M. SINGH, J.

JULY 25, 2017

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