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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

INCOME TAX APPEAL NO. 1141 OF 2016

The Pr. Commissioner of Income Tax-4 ...Appellant
vs
Wika Instruments India Pvt. Ltd. ...Respondent.

.....

Mr Suresh Kumar for the Appellant.

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CORAM : AKIL KURESHI &
B.P.COLABAWALLA, JJ.
FEBRUARY 13, 2019.

P.C. :

This appeal is filed by the Revenue to challenge the Judgment of Income Tax Appellate Tribunal. Learned counsel for the Revenue has filed reframed questions of law for our consideration. These questions read as under;

"(1) Whether on the facts and circumstances of the case, the Hon'ble ITAT is justified in excluding M/s Schrader Duncan Ltd. as comparable on grounds that the products of the company and assessee are different without appreciating that the assessee had applied transactional net margin method (TNMM) as Most Appropriate Method (MAM) which does not require product similarity but comparability is analysed on the basis of Functions performed, Assets employed and Risks taken (FAR) as per Rule 10B(2) and the assessee itself had taken other companies as comparables which only had similar functions as that of the assessee and did not have the same products as that of the assessee as is evident from the description of final comparables by the assessee as given in Annexure-5 of its Transfer Pricing Study Report?

(2) Whether on the facts and circumstances of the case, the Hon'ble ITAT is justified in excluding M/s Shrander Duncan Limited as comparable on grounds that the company is functionally different without appreciating that the assessee itself had selected the company as comparable in

Transfer Pricing Study Report?

3) Whether on the facts and circumstances of the case, the Hon'ble ITAT is justified in excluding M/s Areva T & D as comparable on grounds that the turnover of the company is very high as compared to that of the assessee company without appreciating the turnover is not one of the criterion for judging the comparability as per Rule 10B(2) of the Income Tax Rules, 1962?

2 Question Nos. 1 and 2 overlap and revolve around the issue of ascertaining the Arms Length Price ("ALP" for short) through the method of Transactional Net Margin Method ("TNMM" for short) with the aid of the results of one M/s Schrader Duncan Limited being taken as comparable. In the first question, the Revenue argues that when the assessee itself for the purpose of TNMM, had referred to the said M/s Schrader Duncan Ltd as a comparables, it would not thereafter be open for the assessee to take up a different stand during the course of the assessment. The second question concerns the Revenue's contention on the exclusion of M/s Schrader Duncan Ltd. as a comparable on the ground that the company was functionally different from that of the assessee.

3 In this context, the Tribunal in the impugned Judgment rejected the Revenue's contention that the assessee itself having showed M/s Schrader Duncan Ltd. as comparable, could not have later on argued to the contrary. On merits also the Tribunal held that M/s Schrader Duncan Ltd. was functionally different from the

assessee. In this context the Tribunal noted that the assessee was engaged mostly in manufacturing of measuring instruments which would in turn be used in different industries. They were, however, not pneumatic products. On the other hand M/s Schrader Duncan Ltd. was engaged in the fields of automatic industry and pneumatic industry. The main activity undertaken by M/s Schrader Duncan Ltd. was of manufacturing hydraulic and pneumatic equipments. It was also engaged in trading of such equipments. Such equipments are used as tyre pressure gauges in automotive sector. The Tribunal, therefore, accepted the assessee's contention that the products manufactured by the assessee were vastly different from those manufactured by M/s Schrader Duncan Ltd. It was because of these reasons that the Tribunal held that the margin shown by M/s Schrader Duncan Ltd. cannot be applied in order to benchmark the international transaction of the assessee, because in order to do so, the comparable which are selected should be functionally similar which in the present case was not the situation.

4 Having heard the learned counsel for the Revenue, we are broadly in agreement with the view of the Tribunal. Firstly, merely because the assessee at one stage had referred to M/s Schrader Duncan Ltd. for the purpose of benchmarking, would not mean that

the assessee cannot, even though the facts so suggest, take the legal contention that two were not comparable. On merits also the Tribunal examined the facts on record, found that the products manufactured and dealt with by the two companies were vastly different and that, therefore, there was no functional similarity between the assessee and the suggested comparable. No question of law, therefore, arise.

5 Question No.3 pertains to the exclusion of one M/s Areva T & D as comparable on the ground that the turnover of the said company was high as compared to the assessee. In this respect, the record would suggest that the Transfer Pricing Officer ("TPO" for short) had rejected the assessee's objections to the selection of said company on the ground of vast difference in the turnover and dis-similarities of the products between the two companies. The Dispute Resolution Panel) ("DRP" for short), however accepted the assessee's objections. The Tribunal in appeal upheld the view of the DRP. The Tribunal noted that the said M/s Areva T & D was engaged in Power Transmission and Distribution Business and dealt in products such as circuit breakers, transmitters switch gears, distribution transformers etc. The company was designing, manufacturing, installing complete range of high and medium voltage products and also secondary distribution equipments for the electricity

transmission and distribution networks. On the other hand the assessee company was engaged in the activity of manufacturing and marketing measuring instruments. The Tribunal also noted that the said M/s Areva T & D had turnover of Rs.2,800 Crores as compared to the assessee's total turnover for the year under consideration being Rs.600 Crores. In totality of such facts, the Tribunal upheld the order of DRP excluding M/s Areva T & D as comparable and dismissing the ground of appeal of the revenue.

6 In this context also, we do not find that the Tribunal has committed any error. The Tribunal has referred to the relevant materials on record and noted that the products manufactured by M/s Areva T & D were firstly different from those manufactured by the assessee and further ordered that there was substantial difference in the turnover between the two companies. No question of law, therefore, arises. The Income Tax Appeal is dismissed. No order as to costs.

(B.P.COLABAWALLA, J.) **(AKIL KURESHI, J.)**