IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.06.2019

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case No.763 of 2017

The Commissioner of Income Tax,
Chennai. ...Appellant

-vs-

M/s.Saipem India Projects Ltd.,
[formerly known as Saipem India
Project Services Ltd.,]
Yarigadda Towers, 4, Fourth Lane,
Off Nungambakkam High Road,
Chennai - 600 034. ...Respondent

Tax Case Appeal under Section 260-A of the Income Tax Act, 1961, is directed against the orders passed by the Income Tax Appellate Tribunal "D" Bench, Madras in I.T.A No.1596/Mds/2012 dated 31.08.2016 for the assessment year 2008-09 O/o the Assistant Commissioner of Income Tax Company Circle VI(1) Mahatma Gandhi Road, Aayarkar Bhavan, New Block, Chennai 34 made in GIR. No. PAN.AAAC17915F with Assessment year 2008-2009 dated 06.07.2012 and against the Income Tax Department, Nungambakkam, Chennai 34 made in PAN.AAAC17915 with assessment year 2008-2009 dated 04.06.2012.

For appellant : Mr.T.R.Senthil Kumar, assisted by Mrs.K.G.Usha Rani
For Respondent : Mr.R.Sandeep Bagmar

JUDGEMENT
[Judgement of the Court was made by T.S.Sivagnanam, J.]

This Tax Case Appeal by the Revenue filed under Section 260-A of the Income Tax Act, 1961, ('the Act' for brevity) is directed against the orders passed by the Income Tax Appellate Tribunal "D" Bench, Madras in I.T.A No.1596/Mds/2012 dated 31.08.2016 for the assessment year 2008-09.

2.The above Tax Case Appeal has been filed raising the following substantial question of law:-

"Whether in the facts and in the circumstances of the case, the Tribunal was right in directing the Assessing Officer to exclude M/s.Engineers India Ltd., in the transfer pricing study on the ground of functional dissimilarity while retaining M/s.Tele Communication Consultants India Ltd., when both the comparables are engaged in turnkey projects and whether such decision is in violation of provisions of 92C of the Income Tax Act?”

3.We have heard Mr.T.R.Senthil Kumar, learned Senior Standing Counsel assisted by Mrs.K.G.Usha Rani for the appellant/Revenue and Mr.Sandeep Bagmar, learned counsel for the respondent/assessee.

4. Firstly, we will have to consider as to whether any substantial question of law arises for consideration, only then, we will have to go into the arguments raised by the learned counsel for the Revenue. The assessment for the year under consideration namely 2008-09 was completed by an order passed under Section 92CA of the Act by the Joint Commissioner of Income Tax vide an order dated 30.09.2011.

5. The issue is whether M/s. Engineers India Limited could have been included in the list of comparables. The Transfer Pricing Officer (TPO) in his order dated 30.09.2011 referred to the assessee's case for the assessment year 2007-08 in which M/s. Engineers India Limited was included as one of the comparables, therefore, rejected the contention.

6. When the matter was carried to the Disputes Resolution Panel (DRP), the assessee raised three contentions namely that M/s. Engineers India Limited has a revenue of about Rs.607 Crore, when compared to the assessee whose revenue per year was Rs.72.45 Crores. Further, it was submitted that M/s. Engineers India Limited is a Government of India Enterprise engaged in turnkey projects and several of the clients to whom they cater are primarily Public Sector Undertakings. Apart from this, the assessee raised two other contentions, as to how M/s. Engineers India Limited should not be taken as a comparable. It was contended that since the said company was engaged in turnkey projects, which has not been done by the assessee, engineering services which are implemented by the assessee may be one of the keys and therefore there is no justification to include M/s. Engineers India Limited as one of the comparables.

7. Further, it was contended that so far as the inclusion of M/s. Tele Communication Consultant India Limited as one of the comparables is justified because they have taken only the operating margin cost of 0.56% which relates to engineering services and not the whole of the operating cost. The DRP did

not considered two of the issues raised by the assessee but held that the M/s. Engineers India Limited has been awarding contracts on competitive basis and they are not Government companies but are private companies and rejected the contention raised by the assessee.

8. The assessee preferred an appeal before the Tribunal and demonstrated as to how the DRP committed an error. The Tribunal after examining the factual aspect has recorded a specific factual finding that the assessee is not engaged in turnkey projects and therefore, there is no functional similarity between the assessee's company and M/s. Engineers India Limited and hence it has to be in excluded. This factual finding has not been disputed in the memorandum of grounds of appeal nor in the course of arguments by producing any material. The only ground canvassed is that the Tribunal ought to have appreciated that comparable company M/s.Tele Communications Consultants India Ltd., is engaged in turnkey projects. However, as pointed out by Mr.Sandeep Bagmar, learned counsel for the assessee, that what has been taken is 0.56% of the operating margin cost and not the entire operating margin cost.

9. This aspect of the matter has not been dealt with by the Revenue nor been contested before us. So far as, the finding rendered by the TPO in his order dated 30.09.2011, pertaining to the assessment year 2007-08 to justify the inclusion of M/s. Engineers India Limited as one of the comparables, is no longer sustainable in the light of the speculation order dated 31.10.2016 passed by the TPO, pursuant to a remand order passed by the Tribunal in I.T.A.No.1809/ Mds/2011, dated 11.12.2015. On a reading of this order, it is clear that M/s. Engineers India has not been included as one of the comparables for the assessment years 2007-08.

10. In our considered view, the factual exercise done by the Tribunal cannot be faulted in the absence of any material placed by the Revenue either before the Tribunal or before us disputing the correctness of the factual finding.

11. For the above reasons, there is no substantial question of law arising for consideration. Accordingly, the appeal fails and stands dismissed. No costs.

s/d-
Assistant Registrar(CS V)

True Copy

Sub-Assistant Registrar

To

1.The Income Tax Appellate Tribunal “D” Bench, Madras

2.The Assistant Commissioner of Income Tax, Company CircleVI(1) Chennai 34.

3.The Income Tax Department, Dispute Resolution Panel, Chennai 34.

+1 CC to Mr.T.R.Senthil Kumar, Advocate sr 45755.

Tax Case No.763 of 2017

RR(CO)
SP(30/07/2019)