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

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Date of Decision: 01.09.2023

+ **ITA 497/2023**

UOP INDIA PRIVATE LIMITED

..... Appellant

Through: Mr Deepak Chopra with Ms Rashi
Khanna and Mr Pulkit Pandey, Advs.

versus

PCIT 9 PRINCIPAL COMMISSIONER OF INCOME
TAX -9

..... Respondent

Through: Mr Aseem Chawla, Sr Standing
Counsel with Ms Pratishtha
Chaudhary, Mr Rishabh Nangia, Ms
Anuja Pethia and Mr Aditya Gupta,
Advs.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (Oral)

1. We have heard learned counsel for the parties.
2. We are inclined to admit the appeal. Accordingly, the following question of law is framed for consideration:
(i) Whether the Income Tax Appellate Tribunal [in short, "Tribunal"] has misdirected itself on facts and in law in excluding the comparable Onward Technologies Limited [in short, "OTL"] while benchmarking the engineering, technical and inspection segment, in the course of exercising its powers under Section 254 of the Income Tax Act, 1961 [in short, "Act"]?"



3. With the consent of the counsel for the parties, the appeal is taken up for final hearing and disposal, at this stage itself.

4. Briefly, the record shows that the Transfer Pricing Officer (TPO) had accepted OTL as a comparable, which was embedded in the appellant/assessee's transfer pricing study report.

4.1 The record also shows that the appellant/assessee had carried the matter in appeal before the Commissioner of Income Tax (Appeals) on other grounds, not connected with the exclusion of OTL as a comparable.

4.2 The CIT(A), *via* order dated 18.05.2017, excluded two comparables, i.e., M/s L&T Ramboll Engineering Consulting Services [in short, "L&T"] and Mitcon Consultancy Services [in short, "Mitcon"].

4.3 This resulted in both the appellant/assessee as well as the respondent/revenue preferring appeals with the Tribunal.

5. The Tribunal, *via* the impugned order dated 03.03.2023, passed the following operative directions:

"13. In a nutshell, we hold that the following comparables are directed to be excluded:-

- *Mitcon Consultancy Services*
- *L&T Ramboll Consulting Engineers Ltd*
- *Onward Technologies Ltd*
- *HCCA Business Services Pvt. Ltd*
- *Killick Agencies & Mktg. Limited*
- *Cyber Media India Online Limited*
- *Times Innovative Media Limited*
- *Global Procurement Consultants Limited*
- *Indiacom Limited"*

6. The record shows that in the course of the proceedings conducted by the Tribunal, the following additional grounds were entertained by the



Tribunal, at the behest of the respondent/revenue:

(i) *The Ld. CIT(A) has erred in directing to exclude the comparable namely, M/s Mitcon Consultancy Services by holding that functional profile & economic activities of the assessee are very different from this comparable. The Id. CIT(A) has also erred in ignoring that fact that the assessee had admitted that this comparable is broadly engaged in the similar business of technical consultancy and engineering services deriving revenue worth 57% from the consultancy segment.*

(ii) *The Ld. CIT(A) has erred in concluding that the comparable namely, M/s L&T Rambo// Consulting Engineers Ltd. is fact that the revenue of this comparable for F.Y. 2008-09 is from Engineering Services Consultancy only, as per the available financials and the annual report of this comparable.*

(iii) *The Ld. CIT(A) should have also removed the comparable namely M/s. Onward Technology Ltd as this comparable can also be considered to be functionally different since, it is predominantly in automobile engineering segment. If the assessee is allowed to remove M/s Mitcon Consultancy Services and M/s L&T Rambol Consulting Engineers Ltd. on the grounds of functional dissimilarity, then, on the same analogy, M/s Onward Technologies Ltd. should also have been removed."*

7. Against this backdrop, arguments on behalf of the appellant/assessee have been advanced by Mr Deepak Chopra, while on behalf of the respondent/revenue, submissions have been made by Mr Aseem Chawla, learned senior standing counsel.

8. Mr Chopra contends that once the TPO accepted the comparable OTL, it could not have been excluded by the Tribunal in the exercise of powers under Section 254 of the Act.

8.1 Mr Chopra contends that the Assessing Officer (AO) had no option but to accept the order passed by the TPO.

8.2 According to Mr Chopra, if the respondent/revenue was aggrieved, it could have, at a relevant point in time, exercised revisionary power under Section 263 of the Act.

9. On the other hand, Mr Chawla contends that the Tribunal under



Section 254 of the Act has the same plenary power as the first appellate authority.

10. Mr Chawla contends that since facts were in dispute, the Tribunal could have entertained the additional grounds referred to hereinabove by us and excluded OTL as a comparable.

11. We may note that Mr Chopra has drawn our attention to paragraph 11, wherein, *inter alia*, the Tribunal has recorded the following as regards the TPO's observation *qua* the exclusion of OTL as a comparable:

"The professional and consultancy segment can be used as comparable."

12. Clearly, even according to Mr Chawla, the TPO had accepted the comparable OTL.

13. A perusal of the impugned order shows that the Tribunal has only recorded the contentions of both sides and perhaps, proceeded based on incorrect facts. The comparable OTL, according to the counsel for the parties, was indeed included in the Transfer Pricing Study Report. It is also not in dispute that the TPO had accepted OTL as a comparable. The Tribunal, in our view, without discussing the scope and ambit of its power under Section 254, has proceeded to issue operative directions, which, *inter alia*, excluded OTL as a comparable.

14. Given this position, counsel for the parties say, and something that we tend to agree with, that the matter needs a relook by the Tribunal, with regard to the scope and ambit of its power under Section 254 of the Act.

15. Accordingly, the question of law, as framed, is answered in favour of the appellant/assessee for statistical purposes.

16. The impugned order is set aside.



17. The Tribunal will decide the issue as regards the scope and ambit of its powers under Section 254 of the Act and then, having regard to the facts on record, reach a conclusion one way or the other, as to the validity of OTL's exclusion as a comparable.

18. The appeal is disposed of in the aforesaid terms.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

SEPTEMBER 1, 2023/pmc