OD-24

ITAT/262/2023
IA No.GA/2/2023

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF INCOME TAX 1, KOLKATA
Vs
M/S. ITC INFOTECH INDIA LIMITED

BEFORE:
The Hon'ble JUSTICE T.S. SIVAGNANAM

The Hon'ble JUSTICE SUPRATIM BHATTACHARYA

Date : 31st January, 2024

Appearance:
Ms. Smita Das De, Adv.
Mr. Soumen Bhattacharjee, Adv.
...for the appellant.

Mr. J.P. Khaitan, Sr. Adv.
Ms. Nilanjana Banerjee Pal, Adv.
..for the respondent

The Court:- This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated 18th October, 2022 passed by the Income Tax Appellate Tribunal, "C" Bench, Kolkata (the Tribunal) in ITA No.1917/Kol/2018 for the assessment year 2014-15.

The revenue has raised the following substantial questions of law for consideration :-

A. *Whether the Learned Tribunal was justified in law in not considering the fact that foreign AES cannot be taken as 'tested party' as per Indian Transfer Pricing Regulation in as much as the tested party* *should be an Indian entity and the level of margin has to be considered for the purpose of establishing arm's length comparability?*

B. *Whether the Learned Tribunal was justified in law in not considering the issue that segmental accounts which do not form part of the audited financial statement can at all be taken into account for determination of arm's length price wherein necessary verification is warranted at the level of TPO regarding use of proper allocation keys/ basis while preparing segmented accounts and acceptability thereof?*

We have heard Ms. Smita Das De, learned standing counsel along with Mr. Soumen Bhattacharjee, learned standing counsel for the appellant and Mr. J.P. Khaitan, learned senior standing counsel appearing for the respondent assessee.

As could be seen from the impugned order passed by the learned Tribunal, substantial question of law as suggested by the revenue does not arise for consideration for the assessment year which is the subject matter of this appeal, namely, 2014-15. Therefore, the said question is not taken up for consideration.

With regard to substantial question no. (A) is concerned, we find from the order passed by the CIT (Appeals) that the said issue arose for consideration in the assessee's own case for the assessment years 2005-06 and 2006-07 as also for the assessment years 2010-11, 2011-12, 2012-13 and 2013-14. This issue was held in favour of the assessee in all the aforementioned assessment years. In respect of the decisions rendered by the learned Tribunal for the assessment years 2005-06 and 2006-07, the revenue had preferred an appeal before this Court and the same was dismissed as reported in *(2016) 384 ITR 380 (Cal).* Furthermore, the law under subject has been decided by this Court in the case of *Principal Commissioner of Income Tax vs. Almatis Alumina Pvt. Ltd. (2022) 445 ITS 632 Cal* and the operative portion of the judgment reads as follows:-

> "6. In the above decision several other decisions have been referred to and legal principle that can be culled out is that the tested party normally should be the least complex party to the controlled transaction and there is no bar for selection of tested party either local or foreign party and neither the Act nor the guidelines on transfer pricing provides so and the selection of the tested party is to further the object of the comparability analysis by making it less complex and requiring fewer adjustment. This legal principle has been rightly noted by the Tribunal. In fact, this issue had arisen only for the assessment year 2012-13 and for the assessment year 2013-14, even in the transfer pricing study (TP study) the assessee had taken the associated enterprises as a tested party. However, the Assessing Officer did not agree with the assessee for the said assessment year by referring to the decision in the case of ***Aurionpro Solutions Limited v. Addl. CIT*** [2013] 27 ITR (Trib) 276 (Mumbai); [2013] 33 taxmann.com 187 (Mum-Trib). The decision in ***Aurionpro Solutions Ltd*** was taken note of ***in Virtusa Consulting Services (P) Ltd.*** and the decision was distinguished by taking note of the issue which was involved in the said case and the discussion is in paragraph 26 of the judgment quoted above. After noting several decisions, it was held that the Indian Transfer Pricing guidelines issued by the Institute of Chartered Accountants of India vide guidance note on report under Section 92E by Institute of Chartered Accountants of India and transfer pricing guidelines issued by OECD does not prohibit associated enterprises to be a tested party. The Tribunal accepted the stand taken by the assessee that the associated enterprises can be selected as a tested party. In the light of the decision in the case of ***Virtusa Consulting***

Services (P) Ltd. as well as on the factual aspect which has been noted by the Tribunal with regard to the function, asset and risk profile of both the assessee-company and the associated enterprises, we are of the considered view that the finding rendered by the Tribunal is just, proper and legally valid."

Further, we find from the impugned order, the learned Tribunal has also examined the facts and concurred with the findings of the CIT(A) by holding that the foreign associated enterprises are least complex entities and, therefore, should be treated as tested parties.

In the light of the above, we find no ground to interfere with the order passed by the learned Tribunal.

Accordingly, the appeal fails and is dismissed and the substantial questions of law are answered against the revenue.

Consequently, the application stands closed.

(T.S. SIVAGNANAM, J.)

(SUPRATIM BHATTACHARYA, J.)

sg./bp