

ITAT/263/2023
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.1816/Kol/2019 for the assessment year 2015-16.

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?*
- C. Whether the Learned Tribunal was justified in law in not considering that the accounts prepared by the assessee without any basis and breakup of expenses allocated to its segments is not justified and not acceptable as per law?*

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, the Tribunal noted that the issues which arise for consideration had been decided in favour of the assessee in the assessee's own case for the assessment years 2005-06, 2006-07, 2010-11, 2011-12, 2012-13 and 2013-14. The orders passed in favour of the assessee for the assessment years 2005-06 and 2006-07 have been affirmed by this Court in the judgment reported in (2016) 384 ITR 380 (Cal). Apart from that, the law and the subject is in favour of the respondent assessee in the light of the decision of this Court in the case of

Principal Commissioner of Income Tax vs. Almatris 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.”

In the light of the above, the appeal filed by the revenue 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.