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

+ ITA 269/2019

PR. COMMISSIONER OF INCOME TAX -2 Appellant

Through: Mr. Shlok Chandra, SSC with
Ms. Madhavi Shukla & Mrs.
Priya Sarkar, JSCs, Mr. Ujjawal
Jain, Ms. Shashank Kesarwani,
Advs.

versus

M/S COIM INDIA PVT. LIMITED Respondent

Through: Mr. Nageswar Rao & Mr.
Aman Rewaria, Adv.

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+ ITA 429/2022

PR. COMMISSIONER OF INCOME TAX-1 Appellant

Through: Mr. Sanjay Kumar, SSC with
Ms. Easha & Ms. Hemlata
Rawat, Adv.

versus

COIM INDIA PVT. LTD. Respondent

Through: Mr. Nageshwar Rao & Mr.
Aman Rewaria, Adv.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR

KAURAV

ORDER

19.02.2024

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1. The Principal Commissioner has instituted these appeals
assailing the judgment rendered by the **Income Tax Appellate**



Tribunal¹ dated 07 May 2018 and 27 September 2021. ITA 269 of 2019 pertains to **Assessment Year**² 2013-14. Connected appeal being ITA 429 of 2022 pertains to AY 2016-17 and essentially follows the judgment rendered by the ITAT and which forms subject matter of ITA 269 of 2019. In view of the aforesaid, we propose to briefly notice the facts as they obtain in the aforenoted appeal for AY 2013-14.

2. The respondent / assessee is stated to be a constituent of **Chimica Organica Industriale Milanese**³ group of companies and is engaged in trading of polyurethane products, manufacture and trading of polycondensation products and laminating adhesives under the brand name of NOVACOTE and IMUTHANE. It submitted its **Return of Income**⁴ for AY 2013-14 on 28 November 2013. Its case was referred to the **Transfer Pricing Officer**⁵ in terms of Section 92CA(3) of the **Income Tax Act, 1961**⁶ for determination of the **Arm's Length Price**⁷ in respect of international and domestic transactions concluded in **Financial Year**⁸ 2012-13. The TPO upon due consideration suggested the following cumulative adjustments totalling an amount of INR 5,62,52,600/- under the following heads:-

“Royalty: Rs.5,15,215/-
Technical Assistance Fees: Rs.18,98,460/-
Commission Amount: Rs.5,38,38,925/-”

3. Pursuant to the above, a Draft Assessment Order came to be

¹ ITAT

² AY

³ COIM

⁴ ROI

⁵ TPO

⁶ Act

⁷ ALP

⁸ FY



framed by the **Assessing Officer**⁹ on 27 December 2016. The assessee filed its objections before the **Dispute Resolution Panel**¹⁰ which came to be negated on 25 September 2017 and whereafter a Final Assessment Order came to be framed on 31 October 2017 evidencing an addition of INR 5,62,52,600/- on account of ALP and INR 37,298/- on account of disallowances of depreciation.

4. Aggrieved by the aforesaid order, the assessee preferred an appeal before the ITAT which has come to be allowed in terms of the order impugned before us. The Principal Commissioner has commended the following questions for our consideration:-

“A. Whether on facts & circumstances of the case and law, the Hon'ble ITAT has erred in law & on facts in deleting the adjustment proposed by the TPO on account of ALP adjustment of international transactions from Associated Enterprises for the A.Y 2016-17?

B. Whether ITAT was right in deleting adjustments made on account of royalty and technical fees when the functional profile of the assessee is that of a pure trading concern without any value addition to product and when assessee is also incurring marketing expenses for the products purchased from AE?

C. Whether ITAT has erred in deleting the adjustment without considering the fact that there was no change in functional profile of the Assessee and any third party would not have agreed to such a reduction in commission rate?

D. Whether ITAT has erred in deleting the adjustment without considering the fact that not charging interest on receivable after a stipulated time is subject matter of benchmarking?”

5. The ITAT has principally faulted the decisions and directions rendered by the TPO and DRP upon finding that the assessee had adopted the **Transactional Net Margin Method**¹¹ as being the most appropriate method for the purposes of computation of ALP which was never discarded. It has found on facts that even though neither the

⁹ AO

¹⁰ DRP

¹¹ TNMM



TPO nor the DRP doubted that TNMM was the most appropriate method, they had proceeded to direct additions as noticed above. Holding that the aforesaid procedure as followed was clearly untenable, the ITAT has observed as follows:-

“11. Moreover, it can be seen that neither the TPO nor the DRP has discarded the most appropriate method adopted by the assessee which was TNMM. Without discarding the methodology of the assessee, the TPO cannot proceed further. For this proposition, we draw support from the judgment of the Hon'ble Jurisdictional High Court of Delhi in the case of Li and Fung India [P] Ltd Vs. CIT reported at 361 ITR 85 [DEL]. The relevant findings of the Hon'ble Jurisdictional High Court read as under:

“44. Another important aspect which cannot be overlooked is that the transfer pricing documentation maintained in terms of section 92D of the Act read with rule 10B of the Income-tax Rules, determined the arm's length price of the "international transaction" of the provision of buying services applying the TNMM, by comparing operating profit margin of LFIL with that of the comparable companies, as under:

Weighted average OP/OC per cent of 4.07 per cent.
26 comparable companies

OP/OC per cent of LFIL 5.17 per cent.

This exercise has not been discarded. In other words, the TPO and the appellate fora were aware that in accordance with the rules, a comparison the profit margin of LFIL with that of other similarly functioning companies was shown, and is, at the first instance, relevant to determine the ALP. The profit margin, as well as the cost plus model adopted by LFIL, was not shown to be distorted or of such magnitude as to persuade the tax authorities into discarding the exercise altogether. Having not contradicted this comparison the Revenue proceeded to its own determination and calculations. This however, is improper, given that the assessment carried out by the assessee must first be rejected, for any ITA 306/2012 Page 36 further alterations to take place. Indeed, it cannot be that the Revenue admits to the correctness of LFIL's assessment but nonetheless proceeds to adopt a different method.

45. Indeed, once the TNMM was deemed most appropriate method, the distortions, if any, had to be addressed within its framework. Here, the unrelated transactions which



were compared by LFIL have not been adversely commented upon, and neither has the choice of the TNMM. The TPO therefore, ignored the relevant and crucial material, and straightaway proceeded to broaden the base for arriving at the profit margin, for attributed income of the assessee. Not only is this a clear infraction of the terms of the Act and Rules; the TPO went ahead to introduce what is clearly alien to the provisions of law and travelled outside the Rules

46. The assessee had argued no such adjustment was made in the earlier assessment years, for which assessment orders of previous four years were submitted, wherein the TNMM with operating profit over total cost (OP/TC) as a profit level indicator was accepted previously. Reliance was placed on decisions of the Supreme Court in Radhasoami Satsang (supra) and CIT v. New Poly Pack (supra) to support the aforementioned argument. Although previous tax assessments do not bar subsequent claims as re judicata each assessment must be justified on its own terms, and as detailed above, the assessment by the TPO/AO, and the subsequent acceptance of these methods by the appellate authorities, is inconsistent with the IT Rules and the IT Act."

12. Facts on record show that the TPO has not discarded the exercise undertaken by the assessee in determining the ALP of the international transaction relating to payment of royalty and technical fees. In light of the afore stated judgment of the Hon'ble Jurisdictional High Court [supra], action of the TPO is bad in law and the DRP grossly erred in affirming the action of the TPO."

6. It has also adversely commented upon the TPO as well as the DRP undertaking an exercise in seeking to re-evaluate the cost of raw materials purchased. Insofar as this aspect is concerned, it has found that both the TPO as well as the DRP erred in proceeding to consider issues which travelled far beyond the determination of ALP. It has also been found on facts that the TPO has compared controlled transactions with other controlled transactions, losing sight of the imperative of the comparison being made with "*uncontrolled transactions*". It has thus found that the direction as framed would clearly be contrary to Section 92F(ii) of the Act and which mandates



that ALP would be the price identified for a “*transaction between persons other than associated enterprises in uncontrolled conditions*”.

7. It is on a cumulative consideration of the aforesaid aspects that the additions have come to be annulled. The view as taken by the ITAT cannot possibly be faulted.

8. The appeals fail to raise any substantial question of law. They shall consequently stand dismissed.

YASHWANT VARMA, J.

PURUSHAINdra KUMAR KAURAV, J.

FEBRUARY 19, 2024

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