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

+ ITA 997/2018

THE COMMISSIONER OF INCOME TAX-  
INTERNATIONAL TAXATION -2 ..... Appellant

Through: Mr. Sanjay Kumar and Ms.  
Easha, Advocates.

versus

LUMMUS TECHNOLOGY HEAT TRANSFER BV  
..... Respondent

Through: Mr. Vishal Kalra and Mr.  
Snigdha Gautam, Advocate.

16

+ ITA 482/2023

COMMISSIONER OF INCOME TAX (INTERNATIONAL  
TAXATION)-2 ..... Appellant

Through: Mr. Sanjay Kumar and Ms.  
Easha, Advocates.

versus

LUMMUS TECHNOLOGY HEAT TRANSFER BV  
..... Respondent

Through: Mr. Vishal Kalra and Mr.  
Snigdha Gautam, Advocate.

17

+ ITA 484/2023

COMMISSIONER OF INCOME TAX (INTERNATIONAL  
TAXATION)-2 ..... Appellant

Through: Mr. Sanjay Kumar and Ms.  
Easha, Advocates.

versus

LUMMUS TECHNOLOGY HEAT TRANSFER BV  
..... Respondent



Through: Mr. Vishal Kalra and Mr.  
Snigdha Gautam, Advocate.

**CORAM:**

**HON'BLE MR. JUSTICE YASHWANT VARMA**

**HON'BLE MR. JUSTICE PURUSHAINDR KUMAR  
KAURAV**

**ORDER**

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**17.05.2024**

**ITA 997/2018 & ITA 482/2023**

1. These appeals have been preferred against the order dated 20 March 2018 [ITA 997/2018] and 24 January 2023 [ITA 482/2023] for Assessment Years [“AYs”] 2009-10 and AY 2007-08 respectively.
2. Although various questions have been framed for our consideration by the appellants, we note that the primary issue pertains to the transfer pricing adjustment as was sought to be made by the Transfer Pricing Officer [“TPO”] and the issue of attribution of profits between the respondent assessee and the foreign **Associated Enterprise** [“AE”].
3. The TPO appears to have been influenced by the sheer size of the transaction set which was undertaken between the respondent assessee and its foreign AE. It has, in the aforesaid backdrop, taken the view that internal comparables would not be acceptable.
4. We note, however, that when the matter reached the Income Tax Appellate Tribunal [“ITAT”], it has in its order observed as follows-

“8. We have considered the submissions of both the parties and perused the material available on the record. In the present case, it is noticed that an identical issue having similar facts was a subject matter of adjudication in the preceding assessment year 2008-09 in ITA No. 6227/Del/2012 wherein vide order dated 21.02.2014, the issue has been decided in favour of the assessee and the relevant findings have been given in paras 4 & 5 which read as under:



*“4. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case in the light of the applicable legal position.*

*5. Rule 10B(1)(e) of the Income Tax Rules, which deals with the Transactional Net Margin Method, provides requires that “the net profit margin realized by the enterprise (i.e. the assessee) from an international transaction entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise or having regard to any other relevant base” is compared with “the net profit margin realized by the enterprise (i.e. the assessee) or by an unrelated enterprise from a comparable uncontrolled transaction or a number of such transactions is computed having regard to the same base” - of course, subject to comparability adjustments which could affect the amount of net profit margin in uncontrolled conditions. It is not at all necessary, as the authorities below seem to suggest, that such net profit computations, in the case of internal comparables (i.e. assessee's transactions with independent enterprise), are based on the audited books of accounts or the books of accounts regularly maintained by the assessee. In our considered view, all that is necessary for the purpose of computing arm's length price, under TNMM on the basis of internal comparables, is computation of net profit margin, subject to comparability adjustments affecting net profit margin of uncontrolled transactions, on the same parameters for the transactions with AEs as well as Non AEs, i.e. independent enterprises, and as long as the net profits earned from the controlled transactions are the same or higher than the net profits earned on uncontrolled transactions, no ALP adjustments are warranted. It is not at all necessary that such a computation should be based on segmental accounts in the books of accounts regularly maintained by the assessee and subjected to audit. We are, therefore, of the view that the authorities below were in error in rejecting the segmental results on the ground that the segmental accounts were not audited and that these segmental accounts were not maintained in the normal course of business. As regards vague generalizations by the TPO to the effect that these accounts are manipulated, that allocation basis of expenses is unfair and that these accounts conceal true profitability, we find that these observations are too sweeping and generalized the observations to have any merits. In any event, learned counsel for the assessee has painstakingly taken us through the segmental accounts, pointed out the basis of allocation of the expenses. We have*



*noted that the allocation of expense is on the man hour basis, which is quite fair and reasonable, and that every person has to punch in hours on a specific project. We have also noted that all these details and expense allocation basis were also before the TPO and even then, no specific defects were pointed out by the TPO. Taking into account all these factors, as also entirety of the case, we are of the considered view that the TPO indeed erred in rejecting the segmental accounts and thus declining to accept the internal comparable. We are also of the view that the size of the uncontrolled transaction or transactions being smaller, by itself, does not make these transactions incomparable with the transactions in controlled conditions. Size of the comparable does matter in entity level comparison because scale of operations substantially vary and so does the underlying profitability factor, but in a transaction level comparison within the same entity, mere difference in size of the uncontrolled transactions does not render the transaction incomparable. If the size of uncontrolled transaction is too big, it may call for an adjustment for volume business. If the size of the uncontrolled transaction is too small, it may provoke an inquiry by the TPO to ensure that it is not a contrived transaction outside the normal course of business or with regard to other significant factors surrounding smallness of such transaction. However, in our considered view, in none of these cases, a comparable can be rejected on the basis of its size per se. In this view of the matter, the authorities below were clearly in error in rejecting the internal comparable, i.e. profitability of assessee's transactions with non AEs, on the ground that the volume of business with non AEs was too small vis-a-vis business with AEs. In view of these discussions, as also bearing in mind entirety of the case, the assessee was quite justified in adopting internal TNMM and comparing the profit earned on its transactions with AEs with profit earned with non AEs. Accordingly, the ALP adjustment of Rs 2,72,42,940 deserves to be deleted. We order so. The assessee gets the relief accordingly."*

5. We find no justification to interfere with the view as expressed. This additionally bearing in mind the following pertinent operations which were made in **Sony Ericsson Mobile Communications India P. Ltd. v. Commissioner of Income-tax** (2015 SCC OnLine Del 8083):



“68. The five methods stipulated in sub-section ( 1) of section 92C, are set out and articulated step-wise in detail in rule 10B of the Rules. Be it any of the five methods, the first step to be exercised is to identify the international transaction and the transfer price paid for the same by two associated enterprises. The second step is to carry out functional analysis, i.e., the functions to be performed by the two associated enterprises taking into account the assets used, risk assumed, the contractual terms, the economic circumstances of the parties and the business strategy pursued by the parties. On the question of comparability analysis, the United Nations' Practical Manual on Transfer Pricing in paragraph 5 .1.1 states that the analysis is used to designate two distinct but related analytical steps. First being to understand the economic significant characteristic of the controlled transaction between the two associated enterprises and the respective roles of the parties thereto. This has reference to the 5 characteristics, i.e., (a) characteristic of property or services transferred; (b) functions performed by the parties taking into account assets employed and risk assumed, i.e., functional analysis ; (c) contractual terms ; (d) economic circumstances and (e) business strategies pursued. The second analytical steps is comparison of those conditions of the controlled transactions with uncontrolled transactions, i.e., transactions between the two associated enterprises taking into account the economically significant characteristics of the controlled transactions and the respective roles of the 5 comparability factors. The aforesaid analysis, therefore, requires selection of appropriate comparables, i.e., an uncontrolled transaction which is to be compared with a tested party. The comparables can be internal, i.e., when one of the associated enterprises enters into a similar uncontrolled transaction with an independent enterprise ; or external, i.e., involving an independent enterprise in the same market or industry. It is obvious that an internal comparable could in several cases be more dependable and reliable than an external comparable. A comparable is acceptable, if based upon comparison of conditions a controlled transaction is similar with the conditions in the transactions between independent enterprises. The comparison must be with reference to the comparability analysis as elucidated in paragraph 5.1.1 of the United Nations Practical Manual on Transfer Pricing. In other words, the economically relevant characteristics of the two transactions being compared must be sufficiently comparable. This entails and implies that difference, if any, between controlled and uncontrolled transaction, should not materially affect the conditions being examined given the methodology being adopted for determining the price or the margin. When this is not possible, it should be ascertained whether reasonably accurate adjustments can be made to eliminate the effect of such differences on the price or margin. Thus, identification of the potential comparables is the key to the transfer pricing analysis. As a sequitur, it follows that the choice of the most



appropriate method would be dependent upon the availability of potential comparable keeping in mind the comparability analysis including befitting adjustments which may be required. As the degree of the comparability increases, extent of potential differences which would render the analysis inaccurate necessarily decreases.”

6. Insofar as the issue of attribution is concerned, Mr. Kalra, learned counsel has drawn our attention to the following details which have been set forth in the shape of a chart which is reproduced hereinbelow:-

| <b>AY</b> | <b>Decision of the Hon'ble Tribunal</b>                                                                                          | <b>Before Hon'ble High Court/Hon'ble Supreme Court</b>                                                                                                                                                                        |
|-----------|----------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 2006-07   | Decided in favour of Respondent Assessee<br><br>Refer para 4.1-4.3 on page 7 of the compilation for order of Hon'ble Tribunal.   | ITAT order accepted by the Revenue                                                                                                                                                                                            |
| 2007-08   | Impugned AY                                                                                                                      |                                                                                                                                                                                                                               |
| 2008-09   | Decided in favour of Respondent Assessee<br><br>Refer paras 7-8 on pages 14-15 of the compilation for order of Hon'ble Tribunal. | Appeals filed by the Revenue Department dismissed by Hon'ble High Court and Hon'ble Supreme Court on delay in filing.<br><br>Refer pages 16-20 of the compilation for orders of Hon'ble High Court and Hon'ble Supreme Court. |
| 2009-10   | Impugned AY (Revenue Department has filed appeal only on the transfer pricing issue and not on attribution issue).               |                                                                                                                                                                                                                               |

7. Following the principle of consistency, we find no justification to entertain these appeals on the issue of attribution. They consequently fail and shall stand dismissed.



**ITA 484/2023**

8. In light of the decision rendered today on ITA 997/2018 and ITA 482/2023, learned counsels for parties are *ad idem* that the questions canvassed in ITA 484/2023 would clearly not survive.

9. In view of the aforesaid, the appeal shall consequently stand dismissed.

**YASHWANT VARMA, J.**

**PURUSHAINDRA KUMAR KAURAV, J.**

**MAY 17, 2024**

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