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

% ***Date of decision:13.07.2023***

\+ **ITA 22/2023 & CM APPL. 1876/2023**

PR. COMMISSIONER OF INCOME TAX-18 ..... Appellant

Through: Mr Zoheb Hossahin, Sr. Standing Counsel with Mr Sanjeev Menon, Jr. Standing Counsel.

versus

M/S SUMITOMO CORPORATION INDIA PVT. LTD

..... Respondent

Through: Mr C.S. Aggarwal, Sr. Adv. with Mr Prakash Agarwal, Adv.

\+ **ITA 23/2023 & CM No. 1880/2023**

PR. COMMISSIONER OF INCOME TAX-18 ..... Appellant

Through: Mr Zoheb Hossahin, Sr. Standing Counsel with Mr Sanjeev Menon, Jr. Standing Counsel.

versus

M/S SUMITOMO CORPORATION INDIA PVT. LTD

..... Respondent

Through: Mr C.S. Aggarwal, Sr. Adv. with Mr Prakash Agarwal, Adv.

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. These appeals concern Assessment Years (AYs) 2013-14 (ITA No. 22/2023) and 2012-13 (ITA No. 23/2023).

2. On 30.01.2023, we had heard the matter at some length, when we had etched out the broad controversy that arose between the parties. For the sake of convenience the said order is extracted hereafter:

> *"1. These appeals impugn a common order dated 21.05.2019 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].*
> *2. ITA No.22/2023 concerns Assessment Year (AY) 2013-14, while ITA No.23/2023 concerns AY 2012-13.*
> *3. According to Mr Vipul Agarwal, who appears on behalf of the appellant/revenue, the impugned order passed by the Tribunal was received by the appellant/revenue on 06.06.2019.*
> *3.1We may note that the affidavits accompanying the appeals indicate that they were sworn on 17.08.2020. Prima facie, there is delay in filing the appeals as well.*
> *3.2. The above-captioned applications [i.e., CM Nos.1876/2023 & 1880/2023], though, seek condonation of delay, only in re-filing the appeals.*
> *3.3. Interestingly, the re-filling applications are also dated 17.08.2020 and are accompanied by an affidavit which has been sworn on the same date.*
> *4. According to us, there is complete lack of clarity on the part of the appellant/revenue, as to whether they are seeking condonation of delay in filing the appeals or re-filing the appeals.*
> *5. That being said, there is a considerable delay, even if one were to take into account the fact that Covid-19 had kicked in. Insofar as this court was concerned, there was disruption in work in and about March 2020 and thereafter.*
> *6. Mr C.S. Aggarwal, learned senior counsel, who appears on behalf of the respondent/assessee, points out that the applications for condonation of delay in re-filing were filed only on 07.01.2023, although, as noticed above, they are dated 17.08.2020.*
> *6.1Mr C.S. Aggarwal also asserts that the defects pointed out by the Registry have not been cured.*
> *7. Insofar as the merits of the case are concerned, the controversy which arises concerns the commission earned by the respondent/assessee, with respect to certain international transactions that it entered into with its Associated Enterprises [hereafter referred to as "AEs"]. These transactions are, broadly, referred to as "indenting transactions".*
> *8. We may note, and qua which there is no dispute, disputes concerning AYs 2007-08 to 2010-11, had reached this court.*
> *8.1. This court via judgment dated 22.07.2016 had remitted the subject appeals to the Tribunal. Via the very same judgment, the*

coordinate bench of this court had given leeway to the Tribunal to remand the matter to the Transfer Pricing Officer (TPO)/Assessing Officer (AO) for fresh examination of the issues relating to transfer pricing, albeit in accordance with the law.

8.2. The said judgment rendered by the coordinate bench was passed in the following appeals:

"ITA Nos.381/2013, 738/2015, 382/2013 & 702/2014."

9. Mr C.S. Aggarwal, in support of submission has placed before us a hard copy of the order dated 22.10.2018 passed by the Tribunal, upon remand by the coordinate bench of this court.

10.We have been taken by Mr C.S. Aggarwal through the order passed by the Tribunal. Briefly put, the Tribunal has returned the following two significant findings of fact:

10.1 First, the Transaction Net Margin Method (TNMM) would be the
most suitable method for determining Arm's Length Price (ALP) for international transactions concerning indenting transactions entered into by the respondent/assessee with its AEs.

10.2 Second, the Berry ratio method for calculating Profit Level Indicator (PLI) would be most appropriate insofar as the respondent/assessee is concerned.

11.In respect of the aforesaid findings of fact, a detailed analysis has been made by the Tribunal in paragraphs 15 to 19 of its order dated 22.10.2018. For the sake of convenience, the relevant paragraphs are extracted hereafter:

> *"15. We have heard the parties at length and also perused the material referred to before us as discussed herein above. The approach of determining the ALP on the basis of average percent of commission reported by the assessee in respect of indenting transactions with the non AEs as held by the Tribunal has not found judicial favour with the Hon'ble High Court and matter has been remanded back for further examination of similarity between the two transactions and to conduct further in depth inquiry to examine the high degree of comparability of relevant control and uncontrolled transactions. Further, if the average rate of commission on such transactions was to be applied to the FOB value of goods involved in the indenting transactions with the AEs, then this Tribunal has to satisfy itself that there is no significant variation in the rate of commission between different products. From the perusal of the*

indenting transactions undertaken by the assessee with AE and non AE under various product segments, it is discerned that, for instance in the product segment 'Automotive', the assessee has undertaken 249 transactions with AE and only 4 with non AE and in the Assessment Year 2007-08 the volume of transaction, FOB value wise is 'Nil' in the case of non AE; and the commission earned with the AE is Rs. 7,50,43,686/- and with the non AE it is only Rs. 9,672/-. Similarly the products dealt with AE in automotive segment are entirely different and the geographies involved are Switzerland, Singapore, Thailand and Japan whereas non AE transactions are with Suzuki Motorcycle India Pvt. Ltd. and Bajaj Auto Ltd in India. Likewise under the product 'chemicals' the assessee has undertaken 1044 transaction with AE and only 112 transaction with non AE and the commission with AE is 1.28%, whereas non AE it is 2.26%. Similarly, the products dealt with AE and non AE under this segment are quite different and geography involved with AE are Spain, Japan, Italy, Switzerland, Thailand, whereas with non AE it is India. Likewise in 'electronics' segment the transaction undertaken with the AE are 253, whereas with the non AE it is 5 and again not only the products are different but also geographical location are different with that of non-AE which are mostly with Indian parties and all AE transactions are with various foreign countries. Similar differences are noted in all across 10 to 11 products dealt by the assessee with AEs and non AEs. The total number of transactions with the AE during the year was 3,145 and with non AE it was only 371. Thus, apparently there is a huge difference in volume on FOB basis and the geographies dealt are also entirely different. The amount of average commission earned with the AE, is 1.58% whereas in the case of non AE it is 2.26. All these differences are permeating in all the Assessment Years as highlighted by the assessee in the chart submitted before us and on perusal of the same, it is quite glaring that under both the transactions, i.e., controlled transaction with the AE and uncontrolled transaction with the non AEs, there are huge dissimilarity between the products, difference in

volume, difference in value, markets and geographical location.

16. ***It is quite settled proposition that while applying CUP method, a very high degree of similarity has to be seen between the control and uncontrolled transactions not only in terms of products, contractual terms, volume, value but also market and geography locations. The reason being under CUP, price charged or paid for the property transferred has to be identified and the differences between the international transaction and the comparable uncontrolled transactions has to be seen which could materially affect the price in the open market. The price of different products cannot be the same as it depends upon the negotiation based on volumes, value and other contractual terms. Further different market and geographical location also affects the pricing factors and therefore, if there are differences on account of these factors CUP cannot be held to be the most appropriate method for bench marking the arm's length price. Here in this case, under the indenting segment there are various dissimilarities in the transaction with the AE and non AE as discussed above and for this reason alone the average commission earned cannot be the benchmarking factor for determining the ALP, and therefore, we hold that neither the CUP method can be applied nor the transaction with the AE and non AE can be taken for the purpose of comparability analysis. Thus, we reject the CUP method by taking the average commission earned in the transaction with the AE and non AE.***

17. ***Now, in these circumstances, we have to see whether TNMM can be considered as most appropriate method. First of all, it has been brought on record before us that right from the Assessment Years 2003-04 to 2006-07, TNMM has been accepted as the most appropriate method by the TPO. However, instead of 'berry ratio' as PLI, TPO has taken OP/TC as PLI. Further, it has been brought to our notice that from the Assessment Years 2011-12 to 2018-19 under the MAP agreement it has been agreed that TNMM should***

be the most appropriate method to determine the ALP of the international transaction of the indent keeping into the fact that assessee is a low risk service provider and there is no change in FAR right from Assessment Years 2003-04 to 2018-19. Once TNMM has been accepted under the similar FAR, we do not find any reason to deviate by adopting some other method. Otherwise also we have held that CUP method cannot be applied and other methods admittedly are incapable of capturing the true arm's length result and therefore, we hold that TNMM should be taken as a most appropriate method for benchmarking the said transaction.

18. Now having accepted that TNMM is the most appropriate method, the second issue which needs to be clarified is what should be the base for computing the PLI. As stated above, the Hon'ble High Court has approved the permissibility of using all 'berry ratio' as PLI in a situation where the functions performed did not entail huge creation of valuable intangibles. ***The nature of the assessee's business is a routine business support services and there is no creation of any human capital or supply chain intangible. The Hon'ble High Court has held that 'berry ratio' can only be applied where the value of goods is not directly linked to the quantum of profits and the profits are mainly determined on expenses incurred. Here in this case, the assessee is acting as an indenting agent commission service provider, i.e., as a facilitator of a trade and has no financial risk, because assessee was not required to raise any invoice for sale and purchase in its financial commitment and risk are insignificant. As a service provider, the key business driver for the assessee is operating expenses incurred on establishment and operation of business, i.e., salary, rent and other such expenses and it does not employ any significant assets in the business except for routine assets like office, furniture and fixtures to run its business and also there is no intangible creation by the assessee company. Besides there is no trading capital employed as goods are neither bought nor sold by the assessee***

in the indenting segment. Under these facts and circumstances, the profit derived by the assessee is mainly depended on its operating expenditure as the value of goods does not enter in its financial. As a low risk service provider, it seeks to obtain adequate return on its operating expenses as the operating expenses incurred represents the value added carried on by the assessee. In other words, the operating expenses adequately and sufficiently represents the functions performed and the risk undertaken by the assessee. Thus, we hold that the 'berry ratio' should be accepted as the most appropriate PLI for taking as base under TNMM while determining the ALP of the Indian transaction for all the five years under appeal.

*19. Accordingly, **we remand the matter back to the file of the TPO to examine and benchmark the international transaction by adopting TNMM as the most appropriate method by taking 'berry ratio' as PLI. The assessee has to substantiate its margin by bringing comparable uncontrolled transactions to demonstrate that its commission earned in this segment is at arm's length; and the TPO shall examine the same and decide accordingly. Needless to say that TPO shall give due and effective opportunity to the assessee to substantiate its ALP as per direction given above.**"*

[Emphasis is ours]

11.1. In the instant matter, the Tribunal, via order dated 21.05.2019 concluded as follows, having regard to the para materia circumstances which obtained when the order dated 22.10.2018 was passed:

> *"5. On perusal of aforestated observations by this Tribunal in immediately preceding assessment year following points emerge:*
>
> - *there are huge differences in volume on F.O.B. basis and the geographies dealt with in AE and non-AE segment are entirely different*
> - *The products involved in controlled and uncontrolled transactions are not similar and identical in volume value market and geographical location.*
> - *The pricing factor which largely depends upon*

the geographical locations are different in AE and non-AE segment and therefore CUP cannot be applied 94 determining ALP of transaction either with AE or with non-AE.
Therefore TNMM is most appropriate method under such circumstances instead of CUP. Considering fact that assessee is a low risk service provider and that there is no change in FAR from assessment year 2003-04 to 2018-19 as has been observed by this Tribunal in preceding assessment year, we do not find any reason to deviate by adopting any other method other than TNMM. Respectfully following view taken by this Tribunal in preceding years, we remand the issue back to file of Ld. TPO to examine and benchmark international transaction by adopting TNMM as most appropriate method by taking Berry ratio as PLI, as has been approved by Hon'ble High Court. Needless to say that assessee shall be granted proper opportunity as per law."

12.Mr Vipul Agarwal, who appears on behalf of the appellant/revenue, says that the Tribunal has not carried out an independent exercise in the AYs in issue, i.e., AY 2013-14 and AY 2012-13.

12.1 It is Mr Vipul Agarwal's submission that the Tribunal has simply followed the judgment of the coordinate bench, whereas, in fact, the decision required the Tribunal to carry an independent exercise bearing in mind the principle laid down therein.

13.Prima facie, the submission advanced by Mr Vipul Agarwal does not impress us. The appellant/revenue has not brought on record anything which would suggest that the analysis carried out by the Tribunal in its order dated 22.10.2018 was egregiously faulty.

13.1 The record does not seem to suggest to us that there is any diametric change in circumstances and facts, as recorded by the Tribunal in its order dated 22.10.2018.

14.At this stage, we may also note that Mr C.S. Aggarwal says that insofar as AY 2012-13 is concerned, there is an upward adjustment of Rs.1,16,22,485/-.

14.1. Therefore, according to Mr C.S. Aggarwal, if this adjustment is taken into account, the tax impact would be less than the prescribed monetary threshold limit. In other words,

the appeal, i.e., ITA No.23/2023 could not have been lodged.
15.Mr Vipul Agarwal, however, says that the fate of the said appeal will not be determined on the basis of tax impact since this is not an appeal that pertains to deletion of the adjustment made.
15.1 This aspect of the matter will be examined on the next date of hearing.
16.We may also note that Mr C.S. Aggarwal has laid stress on the fact that a Bilateral Advance Pricing Agreement (BAPA) has been executed between the respondent/assessee and Central Board of Direct Taxes (CBDT).
17.The record shows that BAPA was executed on 02.08.2016. Therefore, it is Mr C.S. Aggarwal's contention that the parties are governed by the said agreement.
18.Since Mr Vipul Agarwal seeks a short accommodation to ascertain as to whether any appeal has been preferred against the order of the Tribunal dated 22.10.2018, the matters are stood over.
19.List the above-captioned matters on 03.03.2023."

3. The dates and events mentioned by us on 30.01.2023 are not disputed by Mr Zoheb Hossain, learned senior standing counsel, who appears on behalf of the appellant/revenue.

4. As would be evident, this Court, while dealing with the appeals concerning AYs 2007-2008 to 2010-11 had, *via* order dated 22.07.2016, remitted the appeals to the Tribunal.

4.1 The appeals in which the orders was passed were ITA Nos.381/2013, 738/2015, 382/2013 & 702/2014.

5. Pursuant to the said judgment of the coordinate bench of this Court, the Tribunal passed an order on 22.10.2018, whereby it concluded that the Transaction Net Margin Method (TNMM) was the most suitable method for determining the Arm's Length Price (ALP) for international transactions concerning indenting-transactions concerning the respondent/asseessee and its AEs.

6. The Tribunal also concluded (something that we have noted in order dated 30.01.2023), that the Berry ratio method for calculating Profit Level Indicator (PLI) was the most appropriate method, insofar as the respondent/assessee is concerned.

7. Admittedly, the appellant/revenue has not preferred an appeal against the order dated 22.10.2018 passed by the Tribunal.

8. What has compounded the problems for the appellant/revenue is that, pursuant to the order impugned in the instant appeal dated 21.05.2019 passed by the Tribunal, the AO has given effect to the same.

9. We are informed by Mr C.S. Aggarwal, learned senior advocate, who appears on behalf of the respondent/assessee that on 25.09.2021, the AO has passed an order concerning AY 2012-13 and, likewise, on 26.08.2021, the AO passed an order concerning AY 2013-14.

10. As noted on 30.01.2023, an issue had also arisen concerning delay in filing the appeal as well. According Mr Aggarwal, this is not a case of delay in re-filing, but is, actually, a delay in filing the appeal.

10.1 Mr Hossain has attempted to give an explanation as to why it is a delay in re-filing.

11. For the present, it is not necessary to dwell on whether it is a delay in filing or re-filing, having regard to the facts noted above. We are closing the instant appeals in view of the fact that the appellant/revenue chose not prefer an appeal against the order dated 22.10.2018 passed by the Tribunal in the AYs referred to hereinabove. According to us, the issues in the above-captioned appeals are *pari materia* with those that arose in AY 2007-08 to AY 2010-11.

12. Via the impugned order, the Tribunal has, in sum, sought to re-

examine the issue, in the light of the directions contained therein.

13. The above-captioned appeals are, accordingly, closed as no substantial question arises for our consideration.

14. Parties will act based on the digitally signed copy of the order.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

JULY 13, 2023/RY

Click here to check corrigendum, if any