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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Decision delivered on: 18.12.2023

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ITA 29/2020**BOMBARDIER TRANSPORTATION INDIA
PVT. LTD.**

..... Appellant

Through: Mr Vishal Kalra and Mr S.S. Tomar,
Advs.

versus

DEPUTY COMMISSIONER OF INCOME TAX RespondentThrough: Mr Shailendera Singh, Sr Standing
Counsel with Ms Dacchita Shahi,
Standing Counsel.**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. We had heard the matter at some length on 21.02.2023, when the issues arising in the appeal were, broadly, etched out. Thus, for convenience, the relevant parts of the order dated 21.02.2023 are extracted hereafter:

1. This appeal is directed against the order dated 09.08.2019 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"] in ITA No.1358/DEL/2017 concerning Assessment Year (AY) 2011-12

2. To be noted, the appellant has also preferred an appeal concerning AY 2010-11 [i.e., ITA 223/2018] in which, via the order dated 09.04.2018, questions of law were framed after admitting the said appeal. This order is appended on page 372 of the electronic case file.

3. Mr Vishal Kalra, who appears on behalf of the appellant, says that there are two broad issues which arise for consideration.

3.1. First, as to what method should be adopted for determining the Arm's Length Price (ALP). It is Mr Kalra's submission that while, according to the appellant, the Comparable Uncontrolled Price (CUP) Method should have been applied, the respondent/revenue has taken the position that the Transactional Net Margin (TNN) is the most appropriate Method in the given circumstances.

3.2. Second, which is an alternate issue, according Mr Kalra, a factual [aspect] i.e., whether or not any excess price was recovered by the appellant in supplying the bogies/wagons to its Associated Enterprise (AE) i.e., Bombardier



Transportation GmbH.

4. It is Mr Kalra's submission that while the appellant raised an invoice on its AE [i.e., its German counterpart] at a particular price, the AE, in turn, raised an invoice on the ultimate purchaser i.e., Delhi Metro Rail Corporation (DMRC), albeit, at the same rate.

4.1. Mr Kalra, however, says that since the bogies and wagons were manufactured in India by the appellant/assessee, they were physically transported from its manufacturing unit in India to DMRC.

4.2. In this context, Mr Kalra has drawn our attention to paragraph 5.2 of the impugned order passed by the Tribunal, whereby this issue has been remitted by the Tribunal to the Commissioner of Income Tax (Appeals) [in short, "CIT(A)"].

5. It is Mr Kalra's submission that this aspect can also be examined by the Transfer Pricing Officer [in short, "TPO"], having regard to the evidence already on record.

6. In sum, Mr Kalra says that, if the appellant/assessee is able to establish that the ultimate price at which the DMRC bought bogies/wagons remained the same i.e., at the price the appellant/assessee charged from its AE [i.e., the German counterpart], then the first aspect, as to which method is to be applied, would be rendered academic.

7. A perusal of paragraph 5.1 of the impugned order passed by the Tribunal is indicative of the fact that the Tribunal was constrained by the observations made by the coordinate bench in the order dated 09.04.2018 passed in ITA 223/2018 as regards the first issue concerning the method to be applied.

7.1. For the sake of convenience, paragraph 5.1 and 5.2 of the impugned order dated 09.08.2019 are extracted hereafter:

"5.1 We further note that the issue of rejection of CUP by the TPO and as upheld by the ITAT was not challenged by the assessee before the Hon'ble High Court also and, thus, the issue has attained finality for all practical purposes. Therefore, we have no other alternative but to dismiss ground nos.3,4,4.1, and 4.2 of the assessee's appeal in this year also by respectfully following the ratio laid down by the Coordinate Bench in assessee's own appeal for assessment year 2010-11 as aforesaid. Thus, ground nos.3,4,4.1 and 4.2 stand dismissed. "

5.2 In ground nos. 4.3, 5 and 5.1, the assessee has raised an alternate ground that remuneration to the assessee from the international transaction cannot be greater than the overall revenue received from the third party. In this regard, the assessee has drawn our attention to the order of the Delhi Tribunal in the case of Global Vantage vs. CDIT in ITA No.2763 and 2764/Del/2009 wherein the Tribunal had held that adjustment on account of arm's length price of international transactions cannot exceed the maximum arm's length price. Reliance has also been placed on the fact that the Hon'ble Delhi High Court had upheld this order of the Tribunal and the SLP of the revenue before the Hon'ble Apex Court was also dismissed and further reliance has been placed by the assessee in the case of Pepsico India Housing Pvt. Ltd. vs. ACIT in ITA No.834/Del/2010 and also some other case laws which are part of the written submissions filed by the assessee. The contention of the assessee, while relying on these judicial precedents, is that the entire amount recovered by the AE from the third party i.e. DMRC had been passed on to BTIPL and, therefore, BTIPL could not have recovered any amount which is higher than the amount charged by the AE from the third party. It has been pleaded that although this ground was vehemently raised before the Ld. CIT (A), the Ld.



*CIT(A) did not specifically adjudicate this ground and proceeded to dismiss the assessee's challenge to rejection of the CUP method without considering these alternate arguments of the assessee. **We have perused the order of the Ld. CIT (A) and we do note that although the Ld. CIT (A) has duly reproduced the submissions of the assessee in this regard, he, however, has not adjudicated this issue specifically.** The discussion of the Ld. CIT (A) centers around the rejection of CUP method but does not refer to the submissions of the assessee regarding the issue as aforesaid. **Therefore, it is our considered opinion that interest of substantial justice would be served if these grounds are reconsidered by the Ld. CIT (A) and the Ld. CIT (A), after giving due opportunity to the assessee, passes a speaking order on the issue. Accordingly, ground nos. 4.3, 5 and 5.1 are restored to the file of the Ld. CIT (A) to be considered afresh and for the purposes of passing a speaking order after giving due opportunity to the assessee to present its case.** Thus, ground nos. 4.3, 5 and 5.1 stand allowed for statistical purposes."*

[Emphasis is ours]

8. Mr Shailendera Singh, learned senior standing counsel, who appears on behalf of the respondent/revenue, will return with instructions as to whether the matter can be remitted to the TPO for considering the second aspect of the matter, as captured in paragraph 5.2 of the impugned order dated 09.08.2019 passed by the Tribunal.

9. List the matter on 13.03.2023."

2. As would be evident, Mr Vishal Kalra, learned counsel who appears on behalf of the appellant/assessee, had raised the following broad issues for consideration:

2.1 First, which would be the Most Appropriate Method (MAM) for determining the Arm's Length Price (ALP). It is the appellant's/assessee's contention that given the facts and circumstances obtaining in the Assessment Year (AY) in issue, i.e., AY 2011-12, Comparable Uncontrolled Price (CUP) Method should be applied, while the respondent/revenue contends that this aspect has already attained finality, in view of the order passed by this court in ITA No.223/2018 concerning AY 2010-11.

2.2 Second, which, in fact, is an alternate issue and is culled out in paragraph 3.2 of the order dated 21.02.2023, concerns the following aspect i.e., whether the appellant/assessee had recovered a price from its Associate



Enterprise (AE), against supply of bogies/wagons, which was higher than that which the AE had received from the third party, i.e., Delhi Metro Rail Corporation (DMRC).

2.3 Mr Shailendera Singh, learned senior standing counsel, who appears on behalf of the respondent/revenue, says that since this very issue is pending before the Commissioner of Income Tax (Appeals) [in short, “CIT(A)”] vis-a-vis AY 2010-11 and has been remitted by the impugned order as well to the said authority, he cannot have any objection to the said direction continuing to operate.

2.4 To be noted, this issue concerns a factual aspect.

3. Furthermore, it is common ground that insofar as the aspect pertaining to certain comparables was concerned, it has been remitted to the Transfer Pricing Officer (TPO), while others have been excluded to the prejudice of the appellant/assessee *via* the impugned order.

4. Mr Kalra says that since the issue concerning whether or not the appellant has recovered from its AE price in excess of what the AE received from the third party, i.e., DMRC- is required to be examined by the CIT(A), the issue involving comparables should also be examined by him.

4.1 Likewise, it is Mr Kalra’s submission that the aspect concerning ascertainment of MAM in the instant case [i.e., CUP or Transactional Net Margin (TNM) Method], should also be examined by the CIT(A).

5. Mr Singh, as indicated above, emphasized that this court *via* order dated 09.04.2018, passed in ITA No.223/2018 has clearly held that the TNM Method is the MAM.

5.1 Thus, according to Mr Singh, this aspect has attained finality.

6. Insofar as the other two aspects [i.e., whether appellant/assessee had



recovered from its AE a price higher than that which the AE received from DMRC, and the aspect concerning comparables], Mr Singh says that they could be looked at by the CIT(A).

7. Having heard learned counsel for the parties, according to us, this appeal can be disposed of with the consent of learned counsel for the parties, with the following directions.

7.1 The matter is remitted to the CIT(A) for examination of the issues set forth hereafter:

- (i) Whether or not the appellant/assessee recovered from its AE a price higher than that which the AE received from DMRC against the supply of bogies/wagons.
- (ii) The comparables against which ALP should be benchmarked.
- (iii) Whether, in the facts and circumstances obtaining in the AY in issue, i.e., AY 2011-12, requires the usage of CUP Method for determining ALP as against TNM Method, as held by this court in its order dated 09.04.2018 passed in ITA No.223/2018. In other words, only if the CIT(A) finds that facts and circumstances subsist which distinguish it from those obtained in AY 2010-11, would he adopt a method different from the TNM method.

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

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

DECEMBER 18, 2023/aj