

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1120 OF 2014

The Commissioner of Income Tax-7 .. Appellant.
v/s.
M/s. Tata Power Solar Systems Ltd., .. Respondent.

Mr. N. C. Mohanty, for the Appellant.
Mr. Srihari Iyer, for the Respondent.

**CORAM: M.S.SANKLECHA, &
A.S.GADKARI, JJ.
DATE : 16th DECEMBER, 2016.**

P.C:-

This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 15th January, 2014 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order dated 15th January, 2014 relates to the Assessment Year 2008-09.

2 The Revenue urges the following questions of law for our consideration:

“(a) Whether on the facts and in the circumstance of the case and in law, the Tribunal was justified in excluding two comparables viz. Indowind Energy Ltd. and B. F. Utilities Ltd. for determination of Arm's Length Price (ALP) of international transaction with AEs, when these two comparables were originally included by the assessee company among the comparables?”

“(b) Whether on the facts and in the circumstance of the case and in law, the Tribunal was justified in directing for determination of Arm's Length Price (ALP) with regard to Sales of Rs.641,49,36,255/- made to AEs and not on entire sales of Rs.909,91,45,631/-/?”

3 **Re Question (a):-**

- (a) The Respondent-Assessee is engaged in design, development and manufacture and sale of Solar Modules and Systems. During the previous year relevant to subject Assessment Year, the Respondent-Assessee had reported International Transaction with its Associated Enterprises (AE). In the Transfer Pricing Study submitted by the Respondent-Assessee to the Revenue, it had included M/s. Indowind Energy Ltd. and B. F. Utilities Ltd. in the list of two comparables for the purpose of arriving at Arms Length price (ALP) in respect of its transactions entered into with its A. E. However, before the Transfer Pricing Officer(TPO)itself, the Respondent-Assessee sought to withdraw M/s. Indowind Energy Ltd. and B. F. Utilities Ltd. from the list of comparables. This, inter alia on the ground of functional differences. However, the same was not permitted by the TPO and was taken into consideration while determining the ALP. This resulted in a draft Assessment Order based on ALP arrived at on a comparability study inclusive of M/s. Indowind Energy Ltd. and B. F. Utilities Ltd.
- (b) The Draft Resolution Panel (DRP) on an application made to it by the Respondent-Assessee did not disturb the inclusion of M/s. Indowind Energy Ltd. and B. F. Utilities Ltd. among the list of comparables to determine the ALP as reflected in the draft Assessment Order. This essentially on the ground that the Respondent-Assessee had itself relied upon by M/s. Indowind Energy Ltd. and B. F. Utilities Ltd. as comparables. Therefore, it was not permissible for the Assessee now to withdraw the two companies from comparability analysis.

- (c) By the impugned order, the Tribunal allowed the Respondent-Assessee's appeal. It held that merely because an Assessee has included M/s. Indowind Energy Ltd. and B. F. Utilities Ltd. in its list of comparables to determine the ALP would not by itself estop a party from establishing that these companies are not comparable. The impugned order found that the two comparables viz: M/s. Indowind Energy Ltd. and B. F. Utilities Ltd., were engaged in completely different line of business i.e. generation of wind energy while the Respondent-Assessee is engaged in generation of solar energy. Thus, not functionally comparable. In the above view, the impugned order on the basis of Function, Assets & Risk (FAR) analysis excluded M/s. Indowind Energy Ltd. and B. F. Utilities Ltd. from the list of final comparables to determine the ALP.
- (d) We find that the impugned order of the Tribunal holding that a party is not barred in law from withdrawing from its list of comparables, a company, if the same is found to have been included on account of mistake as on facts, it is not comparable. The Transfer Pricing Mechanism requires comparability analysis to be done between like companies and controlled and un-controlled transactions. This comparison has to be done between like companies and requires carrying out of FAR analysis to find the same. Moreover, the Assessee's submission in arriving at the ALP is not final. It is for the TPO to examine and find out the companies listed as comparables which are, in fact comparable. The impugned order has on FAR analysis found that M/s. Indowind

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Energy Ltd. and B. F. Utilities Ltd. are not comparable. They are in a different area i.e. wind energy while the Respondent-Assessee is in the field of solar energy.

- (e) In the above view, question (a) as proposed does not give rise to any substantial question of law. Thus, not entertained.

4 **Re Question (b):-**

- (a) Mr. Mohanty, learned Counsel appearing for the Revenue very fairly states that the issue raised herein is concluded against the Revenue and in favour of the Respondent-Assessee by the decision of this Court in *CIT v/s. Tara Jewellers Pvt. Ltd., 381 ITR 404*.
- (b) In view of the above, the question as framed does not give rise to any substantial question of law. Thus, not entertained.

5 Accordingly, **Appeal dismissed.** No order as to costs.

(A.S.GADKARI,J.)

(M.S.SANKLECHA,J.)