IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 15TH DAY OF JANUARY 2021

PRESENT

THE HON'BLE MR. JUSTICE ALOK ARADHE

AND

THE HON'BLE MR. JUSTICE NATARAJ RANGASWAMY

I.T.A. NO.680 OF 2015

BETWEEN:

1. THE PR. COMMISSIONER OF INCOME TAX
C.R. BUILDING, QUEENS ROAD
BANGALORE-560001.

2. THE DEPUTY COMMISSIONER OF INCOME TAX
CIRCLE-11(1), NEW DELHI.

... APPELLANTS

(BY SRI. T.N.C. SRIDHAR, ADV.,)

AND:

M/S. EDS ELECTRONICS DATA
SYSTEMS INDIA PVT. LTD.,
[NOW MERGED WITH MPHASIS LIMITED]
ABACUS SQUARE, 6TH FLOOR
BLOCK-A, BAGMANE PARIN
BAGMANE TECHNOLOGY PARK
C.V. RAMAN NAGAR
BANGALORE-560093
PAN: AAACB 6820C.

... RESPONDENT

(BY SRI. SURYANARAYANA T, ADV.)

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THIS I.T.A. IS FILED UNDER SEC. 260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 23.06.2015 PASSED IN ITA NO.1050/DEL/2009 FOR THE ASSESSMENT YEAR 2004-05, PRAYING TO DECIDE THE FOREGOING QUESTION OF LAW AND/OR

SUCH OTHER QUESTIONS OF LAW AS MAY BE FORMULATED BY THE HON'BLE COURT AS DEEMED FIT. SET ASIDE THE APPELLATE ORDER DATED 23.06.2015 PASSED BY THE ITAT, 'C' BENCH, BENGALURU, AS SOUGHT FOR, IN THE RESPONDENT-ASSESSEE'S CASE, IN APPEAL PROCEEDINGS IN ITA NO.1050/DEL/2009 FOR A.Y.2004-05.

THIS I.T.A. COMING ON FOR HEARING, THIS DAY, **ALOK ARADHE J.,** DELIVERED THE FOLLOWING:

JUDGMENT

This appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act for short) has been preferred by the revenue. The subject matter of the appeal pertains to the Assessment year 2004-05. The appeal was admitted by a bench of this Court vide order dated 24.08.2016 on the following substantial question of law:

> *"Whether the Tribunal is correct in law and facts in upholding the Commissioner of Income Tax (Appeals)'s order ignoring the basic mistake therein that having accepted Transaction Net Margin Method and the Profit Level Indicator as OP/TC when the application of the Profit Level Indicator on the total cost is proper and not on the payments made*

to the Associated enterprises?".

2. Facts leading to filing of this appeal briefly stated are that the respondent provides its technical consultancy services to third parties and operate as entrepreneur. The business of providing technical consultancy services is an independent business segment. The parent company of the assessee is EDS Sweden and another Swedish company i.e., SKF AB had entered into a Master Service Agreement. As per the aforesaid agreement, EDS entities across the globe had to provide IT services to SKF entities in their respective regions. In pursuance of the Master Service Agreement, the assessee entered into a local / domestic contract with SKF India for providing IT services. The assessee bears all the entrepreneurial risks associated with the contract with SKF India.

3. Apart from SKF India, the assessee also entered into various other contracts with other third

parties for rendering technical services. The revenue from the technical consultancy services segment of the assessee is thus derived from a number of contracts including SKF India, which have been entered by the respondent globally and locally. Although, the technical consultancy services segment made a loss of 14.76%, the respondent was able to bifurcate the revenues and costs on the basis of SKF and non SKF contracts and profitability of the technical consultancy segment from SKF contract and non SKF contract was -103% and 36% respectively. Thus, the technical consultancy service segment was profitable segment, whereas, SKF contract was loss making contract. The respondent also availed of certain assistance of its group entities across the globe and one such entity was EDS Singapore, for which assessee had paid cost plus 10% mark-up, which was used by non Indian EDS entities globally. The aforesaid payment was made by EDS India to EDS Singapore, which includes the cost of services of all other segments

of EDS India as well and does not pertain to technical consultancy segment alone.

4. The assessee claimed the benefit of deduction under Section 10A of the Act in respect of profits derived from export of software STP Units and claimed deduction under Section 80HHE in respect of profits derived from export of computer software available to any entity. However, the Transfer Pricing Officer by order dated - 06.05.2006 considered the loss of 14.76% in the entire technical consultancy services agreement and was of the view that since, independent parties had an average margin of 17.02% therefore, there ought to be an adjustment. Thus, an adjustment of Rs.7,91,44,777/- was made. Thereafter, the Assessing Officer by an order dated 26.12.2006 under Section 143(3) of the Act assessed the income at Rs.33,98,72,603/- after making disallowances with regard to addition on account of income from other sources, addition on account of foreign exchange loss and addition on account of Arms

Length Price (ALP).

5. The assessee thereupon filed an appeal before the Commissioner of Income Tax (Appeals) who by an order dated 21.01.2009 *inter alia* held that respondent has earned a profit in technical service segment in contracts other than contracts with SKF India, the Transfer Pricing Officer (TPO) should not have loaded the mark-up on the costs / expenses in meeting the obligations other than the contracts with SKF India, on which the assessee had earned 36% profits. Accordingly, the Commissioner of Income Tax (Appeals) reduced the Transfer Pricing Adjustment from Rs.7,91,44,777/- to Rs.1,29,43,376/- by meeting the adjustment to SKF contract. Being aggrieved, the assessee as well as the revenue filed appeals before the Income Tax Appellate Tribunal (hereinafter referred to as 'the tribunal' for short). In order to bring the quietus to the controversy, the assessee did not prosecute its appeal, whereas, the tribunal by an order dated

23.06.2015 dismissed the appeal preferred by the revenue. In the aforesaid factual background, this appeal has been filed.

6. Learned counsel for the revenue submitted that the Transfer Pricing Officer/ has adopted transaction net method or bench marking cost as the profit level indicator and the Commissioner of Income Tax (Appeals) has confirmed the aforesaid finding of the Transfer Pricing Officer. It is submitted that having concurred with the finding recorded by the Transfer Pricing Officer on the method adopted by him, the Commissioner of Income Tax (Appeals) ought to have held that the adjustment has to be restricted to SKF contracts, which has made losses and by adopting transaction net margin method, the profit margin of 17.02% ought to have been applied on the total cost of Rs.17,11,64,696/- and therefore, mistake in computation of the adjustment in the order of the Commissioner of Income Tax needs to be corrected. It is

also submitted that the Transfer Pricing Officer had adopted a method in accordance with Section 92 read with Rule 10B of the Act and therefore, re-computation of Arms Length Price made by Commissioner of Income Tax (Appeals) and the tribunal is not correct. It is further submitted that the tribunal has failed to assign any reasons for disturbing the findings of Transfer Pricing Officer that arithmetic mean of 17.02% of the comparables determined for Arms Length Price computation is erroneous.

7. On the other hand, learned counsel for the assessee submitted that only the revenues from the contract entered into between the assessee and SKF India if at all could be subjected to Arms Length Price test which has been held by the Commissioner of Income Tax (Appeals) as well as by the tribunal. It is further submitted that making an adjustment to the entire segment merely because transactional net margin method is applied would lead to unintended

consequences which would give rise to unnecessary load being created on a segment which is otherwise profitable. It is further submitted that where there are no international transactions or where the price of international transaction is already at arms length no adjustment can be made. It is further submitted that the revenue has neither challenged the findings of the tribunal as being perverse nor has brought any material on record to demonstrate perversity. Therefore, in view of concurrent findings of fact recorded by the tribunal no substantial question of law arises for consideration. In support of aforesaid submissions, reliance has been placed on decisions of the Supreme Court in ***'SUDARSHAN SILKS & SAREES VS. COMMISSIONER OF INCOME-TAX', (2008) 169 TAXMAN 321 (SC)*** and a decision of this court in ***PCIT AND ANOTHER VS. SAMSUNG R & D INSTITUTE BANGALORE PVT. LTD. I.T.A.NO.622/2017 DATED 30.11.2020.***

8. We have considered the submissions made by learned counsel for the parties and have perused the record. Section 92(1) of the Act provides that any income arising from an international transaction shall be computed having regard to Arms Length Price. Section 92B(1) deals with meaning of international transaction, which means a transaction between two or more associated enterprises either or both of whom are non residents in the nature of purchase, sale or lease of tangible or intangible property or provisions of services or rendering or borrowing money. Section 92C of the Act deals with computation of Arms Length Price. The Commissioner of Income Tax (Appeals) has recorded a finding that since the assessee had earned profit in a technical service segment in contracts other than contracts with SKF and therefore, the Transfer Pricing Officer should not have loaded the mark-up on the costs / expenses incurred in meeting the obligations under contracts other than the contracts with SKF on which the

assessee had earned a profit of 36% on operating cost. The aforesaid finding of fact has been affirmed in appeal by the tribunal. The aforesaid findings are findings of fact, which have been arrived at by the Commissioner of Income Tax (Appeals) as well as the tribunal on the basis of meticulous appreciation of evidence on record.

9. It is the cardinal principle of law that tribunal is fact finding authority and a decision on facts on the tribunal can be gone into by the High Court only if a question has been referred to it, which says the finding of the tribunal is perverse. ***[SEE: 'SUDARSHAN SILKS & SAREES VS. CIT', 300 ITR 205 SCC @ 211 and 'MANGALORE GANESH BEEDI WORKS VS. CIT', 378 ITR 640 (SC) @ 648].*** It is pertinent to note that even in the substantial question of law, no element of perversity is either pleaded or demonstrated before this court.

In view of preceding analysis, the substantial question of law framed by a bench of this court is answered against the revenue and in favour of the assessee. In the result, we do not find any merit in this appeal, the same fails and is hereby dismissed.

Sd/-
JUDGE

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