Form No.(J2)

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

Present :

THE HON'BLE JUSTICE T.S. SIVAGNANAM

A N D

THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

ITAT/35/2020
IA NO.GA/2/2020 (Old No.GA/1133/2020)

PRINCIPAL COMMISSIONER OF INCOME TAX-3,KOLKATA
-Versus-
ALMATIS ALUMINA PVT. LTD.

For the Appellant: ***Mr. P.K. Bhowmik, Adv.***
Mr. Soumen Bhattacharjee, Adv.

For the Respondent: ***Mr. J.P. Khaitan, Sr. Adv.***
Mr. Anirban Ghosh, Adv.
Mr. Akhilesh Gupta, Adv.
Mr. Hareram Singh, Adv.

Heard on : 18.02.2022

Judgment on : 18.02.2022

T. S. SIVAGANANAM, J. : This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the 'Act' in brevity) is directed against the order dated 16th April, 2019 passed by the Income Tax Appellate Tribunal, "C" Bench, Kolkata

(the 'Tribunal' in short) in ITA Nos.726 & 2361/Kol/2017 for the assessment years 2012-13 and 2013-14.

The revenue has raised the following substantial questions of law :-

(a) *Whether the Hon'ble Tribunal has committed substantial error in law in considering a foreign AE as tested party as per Indian Transfer Pricing Regulations?*

(b) *Whether the Hon'ble Tribunal has committed substantial error in law in considering the segmental accounts which do not from part of the audited financial statements for determination of arm's length price?*

(c) *Whether the Hon'ble Tribunal has committed substantial error in law in holding intra-group services in the nature of stewardship activities/shareholder activities?*

We have heard Mr. P.K. Bhowmik, learned standing counsel, assisted by Mr. Soumen Bhattacharjee, learned counsel for the appellant/revenue and Mr. J.P. Khaitan, learned senior standing counsel, assisted by Mr. Anirban Ghosh and Mr. Akhilesh Gupta, learned counsel for the respondent/assessee.

Three issues arise for consideration in the case on hand. The first issue is whether the Associated Enterprises (AE) of the respondent/assessee could have been accepted as a tested party for the purpose of determining the Arms Length Price (ALP) and whether there is a bar from doing so under the Indian Transfer Pricing

Regulations. The second aspect is whether the Tribunal was right in directing the assessing officer to accept the segmental analysis for the transaction of purchase of finished goods, receipt of commission and sale of finished goods by the assessee from the AE. The third issue is with regard to whether the administrative support services and IT support services received by the assessee from the AE could have been treated as stewardship functions.

On the first issue, the Tribunal has discussed the same very elaborately. Perusal of the Function, Asset and Risk profile (FAR profile) of the assessee shows that substantial amount of risk is borne by the assessee company and, therefore, has to be treated as a complex entity. In paragraph 15 of the order passed by the Tribunal, the FAR profile of the assessee company has been set out. On going through the same one would agree with the Tribunal that the assessee company is a more complex entity when compared to its AE. The assessee was non-suited from requesting the assessing officer to treat the AE as a tested party largely by observing that the Indian Transfer Pricing Regulations do not permit the same. The correctness of this submission was tested by the Tribunal and held that the assessee cannot be non-suited from treating the AE as a tested party. The characteristics of the AE were also taken note of and it was found on facts that the AE was a least complex entity than that of the assessee. The Tribunal

placed reliance on the decision in the case of Deputy Commissioner of Income Tax Vs. Quark Systems (P) Ltd. (2010) 38 SOT 307 (CHD). In the said decision it was held that when substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in injustice being done due to some mistake on its part. Further, in terms of the United Nations Practical Manual of Transfer Pricing for Developing Countries, 2013, India Chapter in Regulation 10.4.1.3 it has been stated that the Indian Transfer Pricing Administration prefers Indian comparables in most cases and also accepts foreign comparables in cases where the foreign associated enterprise is less or least complex entity and requisite information is available about the tested party and comparables. Identical issue was considered in Virtusa Consulting Services (P.) Ltd. Vs. Deputy Commissioner of Income Tax, Company Circle 5(2), Chennai [2021] 124 taxmann.com 309 (Madras). The relevant portion of the judgment is quoted hereinbelow :

> *"20. Now, we move on to consider the issue as to whether the assessee has to be taken as tested party for the purpose of determination of ALP or by applying the least complex theory, the AE outside the Country has to be taken as tested party. The Tribunal while considering the said question proceeded to examine the scheme of transfer pricing as provided under the Act. It referred to section 92B which defines 'International*

transaction', section 92A which defines 'Associated Enterprise', Rule 10D which deals with the most appropriated method for determination of ALP and rule 10B(1)(e) which provides the method for determination of ALP by adopting TNMM. After referring to these statutory provisions, the Tribunal would observe that the main object is to compute the net profit margin realised by the enterprise from the international transaction; the comparison shall be with regard to the transaction of unrelated enterprise from comparable uncontrolled transaction. Thus the Tribunal opined that the net profit margin of the enterprise shall be computed in the international transaction by comparing comparable uncontrolled transaction. The Tribunal noted the definition of Enterprise as defined in section 92F(iii) and reading the said provision along with rule 10B(1)(e) of the Rules, the Tribunal held that the net profit margin of the Enterprise which is in India, has to be determined by applying the Transfer Pricing Regulations. The Tribunal was largely guided by the decision of the Mumbai Tribunal in Aurionpro Solutions Limited, wherein it was held that the tested party for the purpose of determination of ALP is always the assessee and not the AE.

21. The assessee had referred to the decision of the Delhi Tribunal in Ranbaxy Laboratories Ltd. which was distinguished by observing that the said decision had proceeded on the basis of OECD guidelines. The Tribunal further went on to observe that the determination of least complex party and functions performed by the AE outside the Country are not available on record and it is not known the amount of risk assumed by AE and its

capital employed and the complexity of the functions performed by it. It is further observed that in the absence of any such documentation with regard to assumption of risk, complex functions, the capital employed, etc., the decision in Ranbaxy Laboratories Ltd. cannot be applied in the case of the assessee unless it is established with material evidence that the AE outside the Country performed least complex operation with a minimum risk. The Tribunal further has observed that the assessee miserably failed to establish functional risk assumed by the AE and in the absence of any material on record with regard to the risk assumed by the AE, the assessee has to be taken as tested party for the purpose of transfer pricing adjustment. Thus, the assessee was non-suited on the ground that they have failed to establish functional risk assumed by the AE outside the Country. This finding appears to be factually incorrect as could be seen from the grounds raised before the Tribunal as well as the grounds which were canvassed before the TPO and specifically raised in the objections filed before the DRP.

22. The Tribunal had distinguished the decision in Ranbaxy Laboratories Ltd. on the ground that the Delhi Bench of the Tribunal has proceeded on the basis of the OECD guidelines. However, we find in paragraph 25 of the judgment of the Tribunal the principles that emerge in selection of tested party has been culled out wherein it has been held that the tested party normally should be the least complex party to the controlled transaction and that there is no bar for selection of tested party either local or foreign party and neither

the Act nor the guidelines on transfer pricing provides so and the selection of tested party is to further the object of comparability analysis by making it less complex and requiring fewer adjustment. Therefore, we do not agree with the reasons given by the Tribunal for not considering the decision in Ranbaxy Laboratories Ltd.

23. Furthermore from the grounds canvassed in the miscellaneous application filed before the Tribunal on 28-9-2017, after the impugned order was passed by the Tribunal, would clearly show that all materials were available on file. Therefore, to non-suit the assessee stating that they miserably failed to establish functional risk is incorrect. If such is the conclusion which we have to arrive at, we have no hesitation to set aside the order of the Tribunal and we shall do so.

24. Before doing so, we may point out the following. The assessee in ground Nos.6 to 8 before the Tribunal had contested the issue relating to consideration of the foreign AE as tested party. The assessee has submitted evidences and documents relating to the assessee's transfer pricing documentation, global transfer pricing reports of the foreign AE at United Kingdom, Australia and German; extracts of inter-company service agreement, reconciliation of operating credits earned by the overseas subsidiaries, etc. So far as the risks assumed by the assessee, the same has been elaborately brought out in the TP documentation as could be seen from paragraph 4.03.3 under the sub heading Risks Assumed and paragraph 4.06 under the sub heading Associates Employed. This vital material has

not been considered by the TPO but the assessee has been precluded from canvassing the said issue on the ground that the stand taken during the course of TP proceedings was not what was the subject matter of the TP documentation/TP study of the assessee. The question would be whether this could be the reason for rejecting the assessee's plea. This issue has been considered by the Tribunal in several decisions.

25. In Yamaha Motor (P.) Ltd., the question arose as to whether the word 'Associated Enterprise' can be given a restrictive meaning to mean the other party to whom the assesee has sold or purchased goods. It was held that under the Act and the Rules, the words 'Enterprise' and 'Associated Enterprise' have been used interchangeably and the arguments that the Enterprise will mean the assessee and the Associated Enterprise will mean the other party to whom the assessee has sold or purchased goods is incorrect. As could be seen from the definition of Enterprise given in section 92F(iii) and Associated Enterprise as defined in section 92A of the Act, it is evidently clear that the statute does not indicate that 'Enterprise' shall mean the assessee and the 'Associated Enterprise' will mean the other party. As pointed out earlier, the words 'Enterprise' and 'Associated Enterprise' have been used interchangeably. Therefore, the conclusion of the Tribunal in this regard is not sustainable.

26. The Tribunal was largely guided by the decision in Aurionpro Solutions Ltd.. The learned senior counsel for the assessee has referred to various decisions of the Tribunal which were rendered subsequently, more

particularly, the decision of the Ahemdabad Tribunal in the case of General Motors India (P.) Ltd., which had taken note of the decision of the Mumbai Tribunal in Aurionpro Solutions Ltd. and noted the facts of the said case and held that the said decision cannot be applied as the main issue in Aurionpro Solutions Limited was the percentage of interest to be calculated on the loan advanced by the assessee to its AE. Thus, on facts the decision in Aurionpro Solutions Ltd. could not have been applied to the facts of the assessee's case before us. As already pointed out, it is not a case where there were no material produced by the assessee to establish the functional risk assumed by the foreign AEs. The material was available before the TPO but the TPO non-suited the assessee on the ground that such contention by referring to the foreign AEs as tested party was not part of TP documentation. This finding is incorrect. Interestingly in the case of in the case on hand the TPO rejected the data placed by the assessee in their TP documentation and undertook a fresh search for external comparables and arrived at a final list of 12 comparables. Therefore, when the TPO himself has not attached any sanctity to the TP documentation as submitted by the assessee, could not have foreclosed the assessee from canvassing the issue that the subsidiaries are least complex entities which should be taken note of."

In the above decision several others decisions have been referred to and legal principle that can be culled out is that the tested party normally should be the least complex party to the controlled transaction and there is no bar for selection of

tested party either local or foreign party and neither the Act nor the guidelines on transfer pricing provides so and the selection of the tested party is to further the object of the comparability analysis by making it less complex and requiring fewer adjustment. This legal principle has been rightly noted by the Tribunal. In fact, this issue had arisen only for the assessment year 2012-13 and for the assessment year 2013-14, even in the Transfer Pricing Study (TP study) the assessee had taken the AE as a tested party. However, the assessing officer did not agree with the assessee for the said assessment year by referring to the decision in the case of Aurionpro Solution Ltd. Vs. Addll. CIT (2013) 33 taxmann.com 187 (Mum – Trib.). The decision in Aurionpro Solution Ltd. was taken note of in Virtusa Consulting Services (P.) Ltd. and the decision was distinguished by taking note of the issue which was involved in the said case and the discussion is in paragraph 26 of the judgment quoted above. After noting several decisions, it was held that the Indian Transfer Pricing guidelines issued by the Institute of Chartered Accountants of India vide guidance note on report under Section 92E by ICAI and transfer pricing guidelines issued by OECD does not prohibit AE to be a tested party. The Tribunal accepted the stand taken by the assessee that the AE can be selected as a tested party. In the light of the decision in the case of Virtusa Consulting Services (P.) Ltd. as well as on the factual aspect which has been noted by the Tribunal with regard to

the FAR profile of both the assessee company and the AE, we are of the considered view that the finding rendered by the Tribunal is just, proper and legally valid.

The second issue is with regard to the consideration of the segmental accounts. The facts which are relevant for such purpose are that the assessee purchased goods from AE for sale to third parties and it has also been ad hoc sales of traded finished goods lying in stock to the AE. Further, the assessee has received commission at 3 per cent on account of facilitating the direct sale by AE to third parties in India. So far as the nature of activities of the assessee is concerned, the assessee made purchases only from AEs and received commissions from AEs and there are three AEs in different countries and the TPO took entity level margins of the assessee and made the transfer pricing adjustment on that basis. It appears that the assessee did not raise this issue during the proceedings before the TPO. However, before the DRP the assessee has raised such an issue contending that the assessing officer failed to provide due cognizance to the fact that in relation to the purchase of the finished goods, receipt of commission and sale of finished goods, the assessee was engaged in trading functions and on the contrary selected a set of comparables having different functional profile. The DRP, on noting that such issue was raised by the assessee before it for the first time, forwarded the contention to the TPO for his

consideration and submit a remand report. The TPO in his remand report held that the segmentation of profitability provided by the assessee has no basis and is far fetched and not audited. Upon consideration of the remand report submitted by the TPO, the DRP accepted the same and denied relief to the assessee for the assessment year 2012-13. However, for the assessment year 2013-14 and the subsequent assessment year 2014-15 the DRP has accepted the stand of the assessee with regard to the segmentation of the profitability. These factors were taken into consideration by the Tribunal and on facts it was noted that the adjustment can be made only on the basis of the transaction and not on aggregation and, accordingly, accepted the segmentation analysis of the assessee. Noting that the facts are same for the assessment year 2013-14 as well as 2014-15, hence, we find that the conclusion arrived at by the Tribunal cannot be faulted.

The third issue is with regard to the administrative support services and IT support services, which was has held against the assessee. When the matter was dealt with by the Tribunal, it noted the decision of the Tribunal in the assessee's own case dated 9th June, 2017 for the assessment year 2011-12 and accepted the case of the assessee. In paragraph 39 of the impugned order the order passed by the Tribunal dated 9th June, 2017 for the assessment year 2011-12 has been quoted from which we find that a thorough factual

analysis was done by the Tribunal for the said year and noted the following :-

> *"The Assessee does not have a full capacity to provide a range of services to its business and to the personnel working for it. In the interests of economy and efficiency the assessee desired to obtain these services from its associated enterprise Almatis-Germany. Almatis-Germany has expert resources in commercial, financial, accounting and other matters which would be employed for the benefit of the Almatis India. The Almatis India would have access to the resources and would pay appropriate consideration which would be commensurate with the amount paid to third party service providers. These support services relate to certain functional categories which have set out in the earlier part of this order and hence, we do not wish to repeat the same. As we have already observed in the earlier part of this order, the practice of multinational enterprises providing intra group services is a global practice wherein, various activities are frequently concentrated for the benefit of the entire group. Since, the multinational group operates globally, such concentration is essential to be able to react in the most flexible and cost effective manner. According to the assessee the benefits derived from availing the above services outweigh the cost incurred in receiving such services. It is also the claim of the Almatis India that with the help of such services it achieved substantial cost efficiencies and hence it would be incorrect to categorise such services to be in the nature of stewardship services. It is the claim of the*

Assessee that the above services are essential for the operations of the Assessee and had it not received the access to the above services, it would have been required to perform them by itself (in-house) or by hiring experienced service providers."

After noting the above facts, the Tribunal held that the assessee has established the nature of services including the quantum of services received from the AE and such services were provided in order to meet specific need of the assessee for such services, economic and commercial benefit derived by the assessee. Thus, we find that the third issue raised by the revenue is entirely factual and no substantial question of law arises for consideration.

In the result, the appeal filed by the revenue stands dismissed and the substantial questions of law (a) and (b) are answered against the revenue and in respect of substantial question of law (c) we find that there is no question of law much less the substantial of law arising for consideration.

With the dismissal of the appeal, the stay application stands closed.

(**T.S. SIVAGNANAM, J.**)

I agree.

(HIRANMAY BHATTACHARYYA, J.)

S.Das/K. Banerjee