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

% *Judgment reserved on: 13.09.2023*
Judgment pronounced on: 04.10.2023

\+ **ITA 1424/2018**

THE PR. COMMISSIONER OF INCOME TAX-4 ..... Appellant
Through: Mr Sanjay Kumar, Senior Standing Counsel with Ms Easha and Ms Hemlata Rawat, Advs.

versus

M/S HELLMANN WORLDWIDE LOGISTICS INDIA PVT. LTD. ..... Respondent
Through: Ms Ananya Kapoor, Mr Sahil Kapoor, Mr Vibhu Jain and Mr Sumit Lalchandani, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA
[Physical Hearing/Hybrid Hearing (as per request)]

GIRISH KATHPALIA, J:

1. By way of this appeal brought under Section 260A of the Income Tax Act, the revenue, pertaining to the assessment proceedings qua Assessment Year 2008-09, has assailed order dated 29.08.2017 of the Income Tax Appellate Tribunal. Upon service of notice, the assessee entered appearance through counsel. We heard learned counsel for both sides.

2. For convenience, the prayer clause of the appeal is extracted below:

> "*In the facts and circumstances of the case, it is most respectfully prayed that Hon'ble Court may be pleased to:-*
> *(i) Set aside the order of ITAT dated 29.08.2017 and restore the order of the Assessing Officer.*
> *(ii)To decide the substantial question of law as formulated in para 2 here in above.*
> *(iii) To formulate and decide any other amended question of law that may arise out of the order of the Tribunal and*
> *(iv) To pass any order/orders as is deemed fit and proper.*"

3. The substantial questions of law as proposed by the appellant/revenue in para 2 of the Memo of Appeal for determination of this Court were as follows:

> "*2.1 Whether ld. ITAT is legally justified in directing both, the assessee and the Assessing Officer to use internal Transactional Net Margin Method (TNMM) under Section 92C of the Income Tax Act, 1961 read with Rule 10B of the Income Tax Rules 1962 even when the internal TNMM was not used by the assessee in its transfer pricing report and record of Functional Assets & Risk Analysis (Far Analysis) was not available?*
> *2.2 Whether under the provisions of Section 92C of the Act read with Rule 10B of the Rule, the ld. ITAT is justified in holding internal TNMM as the most appropriate method even when the transfer pricing documentation using internal TNMM were not filed before the AO by the assessee and requisite comparability analysis to examine the possibility to use of internal TNMM was neither made by the AO nor the Dispute Resolution Panel (DRP)?*
> *2.3 Whether the learned ITAT is legally justified in holding the tolerance limit as stipulated under proviso to Section 92C of the Act is a standard deduction which should be allowed in all the cases before determining arm's length price of international transaction?*"

4. The factual matrix relevant for present purposes, as pleaded in the Memo of Appeal is as follows.

4.1 The respondent/assessee, a Private Limited Company engaged in multiple homogeneous transactions in the area of airfreight and sea freight, filed its return of income on 31.03.2010 declaring an income of Rs.6,55,59,110/- and the same was processed under Section 143(1) of the Act, after which the case was selected for scrutiny assessment, leading to notice under Section 143(2) of the Act.

4.2 The Assessing Officer, having noticed that the assessee during the year under consideration operated as freight forwarding company in domestic and international arena, providing land, air and ocean transport services besides warehousing and custom clearance services, made a reference to the Transfer Pricing Officer (TPO). In the said reference, the Assessing Officer recorded that the respondent/assessee, a wholly owned subsidiary of Hellmann International Forwarders GmbH, Germany started its operations on 01.12.2006 and the year under consideration was the first year for full operations of the Company; that the respondent/assessee being a part of Hellmann Network A.V.V. has been offering its services directly to the customers of Hellmann India or as a part of deliverables sold to overseas customers by Hellmann Network personnel in other parts of the world and the primary international transactions of the Company during the year comprised freight on imports and exports received from and paid by it to its Associated Enterprises (AE); and that the assessee had applied Comparable Uncontrolled Price (CUP) method as the primary method for benchmarking of freight transactions entered into with the AE.

4.3 By way of detailed order dated 27.10.2011 under Section 92CA(3) of the Act, the TPO rejected the CUP method applied by the respondent/assessee, holding the same to be unreliable and not representing the true comparability. The TPO held that external Transactional Net Margin Method (TNMM) in respect of international transactions is the most appropriate method and accordingly directed to enhance the income of the respondent/assessee by Rs.28,87,81,961/- for Assessment Year 2008-09.

4.4 Accordingly, draft assessment order dated 12.12.2011 was prepared by the Assessing Officer under Section 143(3) of the Act, thereby determining the total taxable income as Rs.22,42,12,556/- and the said draft assessment order was forwarded by the Assessing Officer under Section 144C of the Act to the respondent/assessee, granting it an opportunity to oppose the proposed variation(s).

4.5 The objections to the draft assessment order were filed by the respondent/assessee before the Dispute Resolution Panel (DRP), which although concurred with the views of the TPO as regards method applied for determination of arm's length price, but reduced the TP adjustment to Rs.9,57,51,817/- and accordingly final Assessment Order dated 30.10.2012 was passed, declaring the income of the respondent/assessee for the relevant year to be Rs.3,11,82,412/-.

4.6 Feeling aggrieved with the order of the DRP, the respondent/assessee filed an appeal before the Tribunal. By way of order dated 29.08.2017, impugned in this appeal, the Tribunal directed the

respondent/assessee to carry out internal FAR (*functions performed, assets employed and risks taken*) analysis and identify proper revenue and costs vis-a-vis the audited accounts to establish internal comparability under TNMM as most appropriate method (MAM). The learned Tribunal also held that if the respondent/assessee failed to demonstrate the aforesaid, it would file details in respect of external comparables under TNMM as MAM and TPO shall decide the issue as per law after giving proper opportunity to the respondent/assessee.

4.7 It is against the said order dated 29.08.2017 of the learned Tribunal that the revenue filed the present appeal.

5. As reflected from record, there being no stay of the assessment proceedings by way of explicit order dated 11.12.2018 of this Court, after remand of the case by way of the impugned order of the learned Tribunal, the matter was taken up again by the TPO for fresh determination of the arm's length price of the international transactions. In the said remanded proceedings before the TPO, the respondent/ assessee was found to have used internal TNMM as MAM to benchmark its transactions related to freight charges received on import and export and after considering the same, the TPO rejected the internal TNMM during the remanded proceedings also.

5.1 By way of order dated 31.10.2019, the TPO proceeded to hold that it is the external TNMM which should be applied as the MAM under the facts and circumstances of this case for benchmarking of the transactions related to import/export of goods/services. Accordingly, vide order dated

31.10.2019 the TPO computed the arm's length price of the international transactions related to freight charges received on import and export at Rs.3,18,65,395/- as against Rs.9,57,51,817/- which was determined at the time of original assessment.

6. With so much water having flown under the bridge during pendency of this appeal, the learned senior standing counsel for appellant/revenue appears to have obtained a clarification from the appellant/revenue, in response to which a communication from the Assistant Commissioner of Income Tax was received and copy thereof has been filed in these proceedings. The appellant/revenue through the said communication to their counsel have taken a view that since the assessment consequent upon remand back resulted in "huge" reduction of transfer pricing adjustment, the present appeal "*is quite maintenable (sic.) and cannot be withdrawn*".

7. In the above backdrop, learned counsel for appellant/revenue contended that the present appeal deserves to be allowed, thereby quashing the order dated 29.08.2017 impugned in the present proceedings as well as the subsequent order dated 31.10.2019. It was contended by learned counsel for appellant/revenue that since in the original proceedings which led to the impugned order, neither the respondent/assessee nor the Assessing Officer sought to apply internal TNMM as MAM, the learned Tribunal had no authority to direct application of the same and therefore, the impugned order is not sustainable. On the other hand, learned counsel for respondent/assessee contended that the order dated 29.08.2017 impugned in the present

appeal having been already given effect to, now nothing survives in this appeal. Further, placing reliance on judicial pronouncements rendered by coordinate benches of this court, including in the cases titled ***Pr. Commissioner of Income Tax vs Dentsply India Pvt. Ltd,*** ITA199/2022 decided on 18.07.2022 and ***Pr. Commissioner of Income Tax vs Matrix Cellular International Services Pvt. Ltd***., (2018) taxmann.com 54 (Delhi), learned counsel for respondent/assessee contended that there is no infirmity in the view taken by the learned Tribunal whereby the assessee and the Assessing Officer were directed to apply the internal or external TNMM under Section 92C of the Act read with Rule 10B of the Rules.

8. It would be apposite to briefly traverse through the judicial precedents cited in this case.

8.1 In the case of ***Matrix Cellular*** (supra), a Division Bench of this court repelled the argument of revenue that the Tribunal should not have applied the Resale Price Method (RPM) as the most appropriate method in the backdrop of the assessee itself having adopted TNMM in its Transfer Pricing Study Report as the most appropriate method to benchmark the international transactions it had undertaken. This court approved the reasoning of the Tribunal to the effect that since the ultimate aim of the Transfer Pricing exercise is to determine an accurate value of the Arms Length Price for the purpose of taxation, the appellate authorities would not be barred from adopting a method different from that adopted by the assessee in the Transfer Pricing Report, if the latter is not found to be the most appropriate method.

8.2 In the case of ***Dentsply India*** (supra), the learned counsel for revenue contended that the Tribunal had erred in directing application of the Resale Price Method (RPM) as most appropriate method when the selection of the most appropriate method was not under challenge before the lower authorities and the assessee itself had applied the TNMM as most appropriate method in the TP Study. The Division Bench of this court held thus:

> "*5. Further, the mere fact that the assessee had relied on TNMM in its transfer pricing report would not in any way preclude the ITAT from adopting the RPM as the MAM under Section 92C of the Act, if it so finds in the circumstances of the case. The decision of Supreme Court in* ***Kedarnath Jute Manufacturing Co. Ltd. V. Commercial Tax Officer****, AIR 1996 SC 12 is an authority for the proposition that tax authorities and adjudications as well as assessee are not precluded by the positions taken in returns, documents or accounts and have the duty (and a corresponding right) to apply the correct legal principle. Thus, the use of one method in transfer pricing report does not estop the assessee from later claiming that another method is the most appropriate one, provided that is indeed the correct position".*

9. In the present case also, as mentioned above, the grievance of the revenue, conveyed through learned counsel is that the learned Tribunal could not have applied internal TNMM as MAM because neither the respondent/assessee nor the Assessing Officer had considered that method to be the most appropriate method. However, on behalf of the appellant/revenue it was not demonstrated as to how change in MAM would produce better or more appropriate arms length price in the facts of the present case.

10. On the other hand, in the impugned order dated 29.08.2017, the learned Tribunal gave detailed reasons for arriving at a conclusion that

internal TNMM and not CUP method would be the most appropriate method. The learned Tribunal observed that the respondent/assessee had demonstrated the kind of services rendered by it to its AEs as well as non-AEs by placing reliance on agreements and it was argued before the Tribunal that the assessee deals with AEs as well as independent parties being network partners in all regions of the world wherever there were no affiliates of the parent company of the assessee; that agreements of the respondent/assessee with its AEs and non-AEs were in equal ratio; that the DRP had rejected internal TNMM because the respondent/assessee had not carried out an internal FAR and proper identification of revenue and costs vis-à-vis the audited accounts. With these observations, the learned Tribunal set aside the order passed by the TPO and Assessing Officer and directed the respondent/assessee to carry out internal FAR and identify proper revenue and costs vis-à-vis the audited accounts to establish internal comparability under TNMM as MAM. In the impugned order, the learned Tribunal proceeded further and held that if the respondent/assessee failed to demonstrate the internal FAR and identification of proper revenue and costs vis-à-vis the audited accounts, it would file details in respect of external comparables under TNMM as MAM and the TPO would decide the issue as per law. As mentioned above, during the pendency of this appeal, the TPO vide order dated 31.10.2019 held that it is the external TNMM which should be applied as the MAM.

11. We find the reasoning of the learned Tribunal in the impugned order robust and without any flaw. For, the ultimate aim of the transfer pricing exercise is to determine an accurate value of the arms length

price for the purpose of taxation and as laid down in the above cited judicial precedents, the appellate authorities are not precluded from adopting a method different from that adopted by the assessee in transfer pricing report.

12. In the light of aforesaid, we find no substantial question of law arising in this appeal to be answered by us. Accordingly, the appeal stands disposed of.

(GIRISH KATHPALIA)
JUDGE

(RAJIV SHAKDHER)
JUDGE

OCTOBER 04, 2023
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