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

\+ ITA 453/2024

PR. COMMISSIONER OF INCOME TAX-7, DELHI .....Appellant

Through: Mr. Puneet Rai, SSC with Mr. Ashvini Kumar, Mr. Rishabh Nangia, JSCs & Mr. Nikhil Jain, Adv.

versus

SAMSUNG INDIA ELECTRONICS PVT. LTD. .....Respondent

Through: Mr. Himanshu S. Sinha, Mr. Prashant Meharchandani & Mr. Jainender Kataria, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

O R D E R

% 22.08.2024

Cav 396/2024

Since learned counsel for the respondent/caveator has entered appearance, caveat stands discharged.

CM APPL. 48028/2024 (807 Days Delay in Refiling)

Bearing in mind the disclosures made, the delay of 807 days in refilling the appeal is condoned.

Application stands disposed of.

ITA 453/2024

1. The Principal Commissioner impugns the order of the **Income Tax Appellate Tribunal**[1] dated 20 December 2019 and posits the following questions of law for our consideration:

[1] Tribunal

"A. Whether, the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in its decision in holding that AMP expenditure incurred during the year by the assessee does not constitute an 'International Transaction?

B. Whether, the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in holding that the "Brightline Test" was not mandated in law and hence impermissible without considering the facts that BLT was not used as a method to determine the price but only as an economic tool to arrive at the cost of services rendered to foreign enterprises by the Indian entity and when the TP0 has the mandate to determine such cost as a primary step in ALP determination as provided under the Rules?

C. Whether, on the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in stating that the existence of an international transaction cannot be arrived at, from the clauses of an MDF agreement and also stating that the value of international transaction cannot be expanded beyond the reimbursements received under MDF agreement and that incurring of AMP expenditure docs not lead to Brand Building?

D. Whether, on the facts and circumstances of the case and in law, the Hon'ble ITAT was right in law in observing that on application of TNMM as the Most Appropriate Method at segmental/entity level, then individual component of AMP cannot be segregated for benchmarking, when the TPO is fully empowered for segregation/aggregation of transactions as per the IT Act and international guidance for arm's length determination?

E. Whether, on the facts and circumstances of the case and in law, the Hon'ble ITAT was right in law in stating that protective adjustment to preserve the interest of the revenue cannot be made in this case when the issue of AMP is still sub-judice and is pending before the Hon'ble Apex Court?

F. Whether, the Hon'ble ITAT erred in not appreciating that the Arm's Length Price of an international transaction, as defined in Section 92F(ii) of the Income Tax Act, 1961, is the price applied or proposed to be applied in an uncontrolled transaction, and consequently must remain un-influenced by extraneous factors and post-transaction events like foreign exchange fluctuation which are likely to materially affect the actual receipt or payment but do not impact the price intended to be charged or paid?

G. Whether, the Hon'ble ITAT erred in not appreciating the facts that the TPO followed the provisions of Rule 10B(3) by similarly treating foreign exchange fluctuation, Provision for doubtful debts & Provisions written back as non operating cost/revenue of the tested party as well as of the comparables to eliminate the

differences, thereby leading to a consistent and reliable basis for comparison?

H. Whether, on the facts and circumstances of the case and in law, the Hon'ble ITAT erred in holding that forex gain/loss could not be made the subject matter of adjustment, without further holding that even if this were to be the case, appropriate adjustments were required to be carried out under Rule 10B(3) of the Income Tax Rules so as to eliminate the differences in factors like credit period allowed and risk-management policy between the comparables and the assessee?"

2. We note that insofar as questions 'A' to 'G' are concerned, and to the extent that they pertain to **Advertisement, Marketing and Promotion**[2] expenditure, the same would merit being answered against the appellant bearing in mind the decision rendered by the Court in ITA 419/2024 dated 05 August 2024. While dealing with this aspect, and while examining identical questions, we had in that appeal passed the following order:

> "1. The Principal Commissioner of Income Tax impugns the order of the Income Tax Appellate Tribunal ["**Tribunal**"] dated 14 December 2020 and posits the following questions of law for our consideration:-
>
> "2.1 Whether, the facts and circumstances of the case and in law, the Id. ITAT was justified in its decision in holding that AMP (advertisement, market promotion) expenditure incurred during the year by the Assessee does not constitute an 'International Transaction'?
>
> 2.2 Whether, the facts and circumstances of the case and in law, the Id. ITAT was justified in holding that the 'Brightline Test' was not mandated in law and hence impermissible without considering the facts that BLT was not used as a method to determine the price but only as an economic tool to arrive at the cost of services rendered to foreign enterprise by the Indian entity and when the TPO has the mandate to determine such cost as a primary step in ALP determination as provided under the Rules?
>
> 2.3 Whether, on the facts and circumstances of the case and in law, the Id. ITAT was justified in stating that existence of

[2] AMP

an international transaction cannot be arrived at, from the clauses of an MDF agreement and also stating that the value of international transaction cannot be expanded beyond the reimbursements received under MDF agreement and that incurred of AMP expenditure does not lead to Brand Building?

2.4 Whether, on the facts and circumstances of the case and in law, the Id. ITAT was right in law in observing that on application of TNMM as the Most Appropriate Method at segmental/entity level, then individual component of AMP cannot be segregated for benchmarking, when the TPO is fully empowered for segregation/aggregation of transactions as per the LT. Act and International guidance for Arm's Length determination?

2.5 Whether, on the facts and circumstances of the case and in law, the kl. ITAT was right in law in stating that protective adjustment to preserve the interest of the revenue cannot be made in this case when the issue of AMP is still sub-judice and is pending before the Hon'ble Apex Court.

2.6 Whether, in the facts and circumstances of the case of the ld. ITAT was right in law in excluding OTS E Solutions Pvt. Ltd. as functionally non comparable without considering the finding of the TPO w.r.t. broad level of products similarity under TNMM after conducting a detailed FAR analysis while ITAT has failed to give detailed FAR w.r.t inclusion and exclusion of comparable?

2.7 Whether, in the facts and circumstances of the case the Id. ITAT was right in law in including Rendington India Pvt. Ltd. which is functionally non comparable without considering the findings of the TPO w.r.t. product similarity. ITAT has failed to give detailed FAR w.r.t. inclusion and exclusion of comparable?

2.8 Whether, in the facts and circumstances of the case the Id. ITAT was right in law in including HCI. Infosystems Ltd. functionally comparable without considering the findings of the TPO w.r.t. this company has different financial year data?"

2. We note that insofar as questions 2.1 to 2.5 are concerned, the Tribunal has rested its view on the decision rendered by this Court in **Sony Ericsson Mobile Communications India Pvt. Ltd. vs. Commissioner of Income-Tax**[3]. The view so expressed is clearly

[3] 2015 SCC OnLine Del 8083

unexceptionable.
3. That only leaves us to examine the findings which were returned in respect of three comparables. We note that the assessee company is stated to be engaged in the business of manufacturing and distributing various Samsung products falling in the consumer electronics and home appliances category. We are, however, in the present appeal concerned with the trading segment of the aforesaid operations."

3. That only leaves us to examine the issues which are sought to be canvassed and pertain to foreign exchange gain/loss. Those questions too stand answered against the appellant in light of the judgment rendered in ITA 206/2016 dated 23 March 2016. We take note of the following observations as they appear in that decision:

> "**3.** The question sought to be urged by the Revenue is whether the ITAT was correct in directing the foreign exchange gain/loss to be considered as an item of operating revenue/cost?
>
> **4.** The ITAT has in the impugned order noted the fact that the foreign exchange gain earned by the Assessee is in relation to the trading items emanating from the international transactions. Since the foreign exchange loss directly resulted from trading items, it could not be considered as a non-operating loss. Further, it is noted by the Dispute Resolution Panel that the service agreement between the Associated Enterprise (AE) and the Assessee stated that for the specified products and services provided by the Assessee, it "shall raise invoices on Ameriprise USA on the basis of a cost plus pricing methodology." The ITAT was therefore right in holding that the AO was not justified in considering the foreign exchange loss as a non-operating cost."

4. Consequently, we find that the appeal fails to raise any substantial question of law. It shall, consequently, stand dismissed.

YASHWANT VARMA, J

RAVINDER DUDEJA, J

AUGUST 22, 2024/kk