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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ITA 269/2016

DAIKIN AIRCONDITIONING INDIA PVT LIMITED..... Appellant
Through: Mr. Mukesh Butani with Mr. Gaurav
Gupta, Mr. Vivek Bansal and Ms. Khyati
Dadhwal, Advocates

versus

ASSISTANT COMMISSIONER OF INCOME TAX Respondent
Through: Ms. Lakshmi Gurung, Advocate

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE NAJMI WAZIRI

ORDER
27.07.2016

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1. The Assessee is in appeal against an order dated 8th October, 2015 passed by the Income Tax Appellate Tribunal (ITAT) in ITA No.5090/DEL/2010 for the Assessment Year (AY) 2006-07.

2. The appeal before the ITAT by the Assessee raised several questions. The first ground pertained to advertisement, marketing and sales promotion (AMP) expenses. It was urged by the assessee before the ITAT that the Assessing Officer (AO) and the Dispute Resolution Panel (DRP) erred in upholding the adjustments proposed by the Transfer Pricing Officer (TPO) to the extent of Rs. 6,89,06,377/- to the income of the assessee after holding that AMP spend of the

Assessee answered the description of an international transaction as defined under Section 92B of the Act between the Assessee and its Associated Enterprise (AE). The case of the assessee throughout in the proceedings has been that there does not exist any international transaction involving the Assessee and its AE in relation to AMP expenses.

3. During the pendency of the appeal before the ITAT, this Court in ***Sony Ericsson Mobile Communications India Pvt. Ltd. v CIT [2015] 374 ITR 118 (Del)*** delivered a comprehensive judgment on the issue of AMP expenses. The said decision of this Court was common to the appeals filed by Sony Ericsson Mobile Communications India Pvt. Ltd./Sony Mobile Communication India Pvt. Ltd.; Discovery Communications India, Haier Appliances Pvt. Ltd.; Reebok India Co.; Canon India Pvt. Ltd. and the present Assessee i.e. Daikin Air Conditioning India Pvt. Limited. Para 2 of the said judgment set out in tabular form the entire list of appeals dealt with by the Court. Two of the appeals pertained to the present Assessee i.e. ITA No. 92 of 2014 for AY 2008-09 and ITA No. 93 of 2014 for AY 2007-08.

4. *Inter alia*, in ***Sony Ericsson Mobile Communications India Pvt. Ltd. v CIT (supra)***, this Court concluded that the “Bright Line Test” (BLT) was not a valid basis for determining the existence of an international transaction in relation to AMP expenses. In doing so, this Court overruled the decision of the Special Bench of the ITAT in ***LG Electronics India P. Ltd. v. Asst. CIT (2013) 22 ITR (Trib) 1***

(Delhi). Secondly, in *Sony Ericsson Mobile Communications India Pvt. Ltd. v CIT* (*supra*) the Court proceeded on the basis that “there is no dispute or *lis* that the assessed are AE who entered into controlled transactions with the foreign AEs”. The further premise adopted by the Court was: “It is also uncontested that the controlled international transactions can be made subject matter of transfer pricing adjustment in terms of Chapter X the Income Tax Act, 1961.” In para 52 of the decision in *Sony Ericsson Mobile Communications India Pvt. Ltd. v CIT* (*supra*), the Court held: “The contention that AMP expenses are not international transactions has to be rejected.”

5. Mr. Mukesh Butani, learned counsel for the Assessee, pointed out that against the decision of this Court in *Sony Ericsson Mobile Communications India Pvt. Ltd. v CIT* (*supra*) the Assessee has preferred an appeal before the Supreme Court of India and the said appeal is pending consideration. It is submitted that as far as the AY in question i.e., 2006-07 is concerned, the Assessee has questioned the decision of the AO/TPO that there exists an international transaction between the Assessee and its AE in relation to AMP expenses. The consistent stand of the Appellant- Assessee is that there is no such international transaction. In the impugned order the ITAT has, while purportedly following the decision of this Court in *Sony Ericsson Mobile Communications India Pvt. Ltd. v CIT* (*supra*) remanded the matter to the TPO for a fresh determination of the Arm's Length Price (ALP) of the international transaction between the Assessee and its AE in regard to AMP expenses. It is submitted that

ITAT has abdicated its responsibility of determining the central issue that arose in the matter viz., whether on the basis of the materials on record it could be said that there exists an international transaction between the Assessee and its AE involving AMP expenditure?

6. In response, it is pointed out by Ms. Laxmi Gurung, learned Standing counsel appearing for the Revenue, that the remand to the TPO by the ITAT was on account of the absence of material from which a proper determination could be made of the ALP of the international transaction concerning AMP expenses.

7. The Court finds that the ITAT has not rendered any categorical finding one way or the other on the central issue raised before it by the Assessee viz., there exists an international transaction between the Assessee and its AE involving AMP expenses? If that question is answered in negative then no other question survives. The Court also notes that in similar circumstances in the case of Sony Ericsson, for AY 2010-11, this Court passed an order on 28th January 2016 in ITA No. 638 of 2015 requiring the ITAT to decide the appeal by Sony Ericsson for the said AY afresh including the point with regard to existence of an international transaction involving AMP expenses.

8. An apprehension is expressed by Mr Butani, learned counsel for the Assessee, that the ITAT might instead of deciding the above question itself, remand the matter further to the TPO or the DRP. He clarifies that all the materials necessary for determining the above

question are already on record. If that is true, there should be no occasion for the ITAT to remand the determination of the above question to the DRP or the TPO or even the AO. Consequently, in the light of the above submissions, the Court directs that above question will be determined by the ITAT itself and not be remanded by it to any other authority.

9. Mr. Butani pointed out that there was another important question of law raised in the present appeal which would require determination depending on the decision of the ITAT on the above question concerning the existence of an international transaction. This concerns the jurisdiction and power of the TPO to determine the existence of an international transaction even where it is not reported by an Assessee and, therefore, not referred by the AO to the TPO. It is submitted that for AY 2006-07, there was no provision in the form of under Section 92CA(2B) which permits the TPO to undertake such an exercise. The further question, therefore would be whether the said provision can have retrospective effect to validate the action of the TPO in the present case?

10. As far as above said submission is concerned, the Court is of the view that in the event that the ITAT decides the question regarding the existence of an international transaction between the Assessee and its AE in the negative, then obviously no other question will survive as far as the Assessee is concerned. In the event it is answered in the affirmative, then in the further appeal that may be filed by the

Assessee before this Court, it will be open to the Assessee to urge, apart from the other grounds it may have, the question concerning the jurisdiction and power of the TPO to determine the existence of an international transaction even though it is not reported by the Assessee and the further question regarding the retrospective application of Section 92CA(2B) of the Act.

11. In the event the ITAT finds the existence of an international transactions, it will proceed to decide the further question concerning the ALP of such transaction in accordance with law. If the materials available for the said decision are inadequate, it will be open to the ITAT to remand the question further to the TPO.

12. Accordingly, the Court directs as under:

(a) The impugned order dated 8th October, 2015 passed by the ITAT in ITA No. 5090/DEL/2010 for the AY 2006-07 is set aside and the said appeal is restored to the file of the ITAT;

(b) The ITAT will first decide the question regarding the existence of an international transaction involving AMP expenses between the Assessee and its AE. This question will not be remanded by the ITAT to any other authority for decision. If the said question is answered in favour of the Assessee, then no other question would arise. If answered against the Assessee, then the ITAT will decide the further issues that arise in the appeal in accordance with law.

13. The appeal is disposed of in the above terms.

S.MURALIDHAR, J

NAJMI WAZIRI, J

JULY 27, 2016/_{acm}