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

\+ ITA 548/2016

THE PR. COMMISSIONER OF INCOME TAX-6 ..... Appellant
Through : Sh. Ruchir Bhatia and Sh. Puneet Rai, Advocates.

versus

NORTEL NETWORK INDIA PVT. LTD. ..... Respondent
Through : Ms. Manasvini Bajpai, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

O R D E R
% 21.09.2016

The ground urged in support of the present appeal under Section 260A of the Income Tax Act, 1961 by the revenue is that the Income Tax Appellate Tribunal (ITAT) fell into error in upholding the decision of the CIT (Appeals) *vis-a-vis* the inclusion of M/s. Himachal Futuristic Communication Ltd. as a comparable in the ALP determination.

The assessee had, for AY 2005-06 relied upon the data for 10 comparables – two of which were loss-making concerns. The Transfer Pricing Officer excluded M/s. Himachal Futuristic Communication Ltd. on the ground that it was recording "persistent" losses. CIT (Appeals) allowed the assessee's appeal. The revenue felt aggrieved and approached the ITAT.

Learned counsel for the appellant/revenue urges that both the CIT (Appeals) and the ITAT fell into error in overlooking the fact that the FAR analysis was not conducted in respect of M/s. Himachal Futuristic Communication Ltd.

We notice firstly that this contention was never urged before the CIT(Appeals) and more importantly, before the ITAT when the revenue had appealed to the ITAT. Secondly, the record only shows that FAR analysis was carried out only in respect of one comparable which was sought to be excluded but not in respect of others. Having regard to this conspectus of facts, we are of the opinion that since the revenue never urged this plea before the ITAT, it cannot be considered as a question of law. The rule is otherwise silent as to whether loss-making companies can or should be included in the list of comparables. No question of law arises. The appeal is accordingly dismissed.

S. RAVINDRA BHAT, J

DEEPA SHARMA, J

SEPTEMBER 21, 2016
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