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

+ **ITA 447/2016**

PR. COMMISSIONER OF INCOME TAX, DELHI- 9..... Appellant

Through Mr. Raghvendera K. Singh with Mr.
Rahul Chaudhary, Advocates

versus

TREND MICRO INDIA PVT. LTD.

..... Respondent

Through

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE NAJMI WAZIRI

ORDER

% **26.07.2016**

CM APPL. 26425/2016

1. For the reasons stated in the application, the delay of 66 days in filing the appeal is condoned. The application is disposed of.

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2. This appeal by the Revenue is directed against the order dated 20th November, 2015 passed by the Income Tax Appellate Tribunal (ITAT) in ITA No. 1585/Del/2015 for the Assessment Year (AY) 2010-11.

3. The first issue urged concerns the rejection by the ITAT of three comparables included by the Transfer Pricing Officer (TPO) for the purpose of determination of arm's length price (ALP), under Section 92CA (3) of the Income Tax Act 1961 ('Act'), of the international transactions entered into by the Assessee. The three comparables

were— Aptico Limited, Global, Procurement Consultants Limited and TSR Darashaw Limited. The ITAT has discussed the details qua each of the above comparables in some detail and has come to the conclusion that they were functionally dissimilar. The ITAT also adverted to other factors that justified the exclusion of the said comparables.

4. Having heard Mr. Raghvendera K. Singh, learned counsel for the Revenue, and having perused Rule 10B(3)(ii) of the Income Tax Rules, 1962 read with Section 92 C of the Income Tax Act 1961 the Court is not persuaded to hold that the first issue urged gives rise to a substantial question of law requiring examination by the Court.

5. The other question urged by the Revenue in the present appeal concerns the scope of the powers of the ITAT while hearing an appeal. The submission is that the TPO considered 9 comparables of which the Assessee raised objections with regard to the inclusion of three. The order of the TPO was affirmed by the Dispute Resolution Panel (DRP) and therefore there was no occasion for the Revenue to challenge the said order of the DRP. The point now urged by the Revenue is that if three of the nine comparables are to be excluded, then the ITAT ought to *suo motu* have required the TP adjustment exercise to be undertaken afresh by the TPO since the TP adjustment based on six comparables that were to some extent functionally dissimilar to the Assessee could not have reflected the correct picture as far as the determination of ALP was concerned.

6. Admittedly, during the AY in question there was no provision in the Act permitting the Revenue to appeal against the inclusion or exclusion of a comparable by the TPO. which is affirmed by the DRP. While the Assessee had a remedy by filing an objection before the ITAT, the Revenue could not during the relevant AY, do so. It has been urged on the strength of the decision of this Court in ***Commission of Income Tax v. Jansampark Advertising and Marketing Limited (2015) 375 ITR 373 (Del)*** that in such circumstances it is incumbent upon the ITAT to exercise *suo motu* powers and in the interest of justice direct the exercise of TP adjustment to be undertaken afresh.

7. The Court is unable to agree with the above submissions. As rightly pointed out by the ITAT, the statutory scheme at the relevant time did not envisage permitting the Revenue to prefer an objection in the circumstances pointed out hereinabove. The circumstances under which certain observations were made by this Court in ***Jansampark*** (*supra*) concerned an inquiry to be undertaken in proceedings initiated under Section 147/148 of the Act in order to find out the genuineness of the creditors, their credit worthiness etc. There is no comparison with the facts on hand. The Finance Act, 2016 has is done away with the above provision of the Act that permitted the Revenue to file objections against the order of DRP.

8. In the present case we are concerned with AY is 2010-11 when

there was no such provision permitting the filing of cross objection by the Department. It was introduced by the Finance Act, 2012 and again removed under the Finance Act, 2016. Clearly, there is legislative policy governing the insertion of the said provision in Finance Act, 2012 and its deletion in Finance Act, 2016.

9. Consequently, this Court is not inclined to frame a question on the above issue urged by the Revenue. The appeal is accordingly dismissed.

S.MURALIDHAR, J

NAJMI WAZIRI, J

JULY 26, 2016/acm