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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ ITA 123/2017, C.M. APPL.4663/2017

PR. COMMISSIONER OF INCOME TAX-3 Appellant
Through : Sh. Rahul Chaudhary, Sr. Standing
Counsel with Sh. Anurag Vijay, Jr. Standing
Counsel.

versus

FRIGOGLASS INDIA PVT. LTD. Respondent
Through :None.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

% **ORDER**
03.03.2017

The Revenue's appeal under Section 260A of the Income Tax Act, 1961 challenges an order of the Income Tax Appellate Tribunal (ITAT) which on one hand remitted one issue, i.e. benchmarking of management fee and overruled the opinion of the Dispute Resolution Panel (DRP) and on the other, payment of royalty to the tune of ₹8,47,65,448/-.

It is urged that the Transfer Pricing Officer (TPO) and the DRP correctly approached the matter with respect to payment of ₹8,47,65,448/-, claimed as royalty towards treatment provided by the Associated Enterprises (AE). The DRP in its order, it is emphasized, had noticed that even though the AE had presence in 120 locations with 15 sales operations spread across the world, it chose to allocate

treatment royalties only to 10 countries and their subsidiaries/enterprises located there. The DRP cited prominently that the enterprise in China was not loaded with such costs and that in these circumstances, the TPO's conclusion that the AO was unable to justify the royalty and the mark-up for its decision led to a justified adjustment. It is submitted that the ITAT fell into error in holding that the assessee was justified in claiming these as pay-outs or expenses.

The assessee was aggrieved and had approached the ITAT, complaining that, firstly, the CUP method could not be applied and that instead the TNMM method had to be applied. The second argument was that the assessee's AO had required the payment of royalties and that the issue concerned was one of real business arrangements.

The findings of the ITAT are premised upon the decision of this Court in *CIT v. EKL Appliances* 341 ITR 241 (Del) and are *inter alia* extracted as follows:

“16. We have heard the rival parties at length and carefully perused the material on record. As far as the issue of royalty is concerned, we find that the assessee had filed in the course of the TPO, assessment as well as before the DRP, detailed submissions regarding agreement between AE and the assessee, justifying how the technical know-how supplied by its AE was crucial to the running of its business. In CIT vs EKL Appliances 341 ITR 241 (Del), the Hon'ble Delhi High Court had the occasion to consider

an issue of disallowance of royalty by TPO because the assessee in that case had been suffering losses, the Hon'ble High Court while holding that so long as the expenditure or payment by assessee has been demonstrated to have been incurred or laid out for the purposes of business, it is no concern of the TPO to disallow the same on any extraneous reasoning, observed as follows:-

XXXXXX XXXXXX XXXXXX”

17. *Here, in the present appeal, what we see is the TPO sitting on judgment on the business and commercial expediency of the assessee which is erroneous as per the provisions of the Act as laid down clearly by the Hon'ble Delhi High Court in EKL Appliances (supra). As far as the Department's reliance on the Hon'ble Delhi High Court's judgment in Abhinandan Investments (supra) and on the decision of the co-ordinate I Bench of the Delhi Tribunal in the case of Bombardier Transportation India Pvt. Ltd. is concerned, these judgments were rendered on a different set of facts and hence the ratio as laid down by these are not applicable to the facts of the present appeal.*

18. *Furthermore, we are of the opinion that once TNMM has been applied to the assessee company's transaction, it covers within its ambit the royalty transactions in question too and hence the Department's contention for applying the CUP method is erroneous. We draw support from the decision of the Mumbai Bench of the Tribunal in Cadbury India Ltd. vs ACIT in I.T.A. No. 7408/Mum/2010 and I.T.A. No. 7641/Mum/2010 wherein the Bench has upheld the use of TNMM for royalty by holding:*

XXXXXX XXXXXX XXXXXX.”

This Court is of the opinion that having regard to the previous

decision in *EKL Appliances (supra)*, the ratio of which was correctly applied, no substantial question of law arises. On the first issue, i.e. management fees, the matter stands remitted by the ITAT. The appeal is accordingly dismissed with the pending application.

S. RAVINDRA BHAT, J

NAJMI WAZIRI, J

MARCH 03, 2017/ajk