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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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+ **ITA 165/2017**

ALCATEL -LUCENT INDIA LTD ..... Appellant
Through: Mr. Himanshu Sinha with Ms. Vrinda Tulshan, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX ..... Respondent
Through: Mr. Zoheb Hossain, Senior standing counsel.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE ANIL KUMAR CHAWLA

O R D E R
% **08.05.2017**

CM APPL 7136/2017 (for exemption)

1. Allowed subject to all just exceptions.

ITA 165/2017

2. This appeal under Section 260A (1) of the Income Tax Act, 1961 ('IT Act') filed by Alcatel-Lucent India Limited ('Assessee'), is directed against the impugned order dated 24th August 2016 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 6856/Del/2015 for the Assessment Year ('AY') 2011-12.

3. The issue before the ITAT concerned transfer pricing (TP) adjustments with regard to the arm's length price (ALP) of international transaction

undertaken by the Assessee in the AY in question for two segments, viz., (i) Contract Software Development ('CSD') and (ii) Technical Support Services ('TSS'). With the Assessee having adopted TNMM, the questions involved inclusion and exclusion of 'comparables'.

4. As far as the TSS segment is concerned, in its TP Study, the Assessee selected 13 comparables. While accepting only two of the said comparables, the Transfer Pricing Officer ('TPO') in his order dated 15th January 2015 introduced 12 new comparables. The matter then went before the Dispute Resolution Panel ('DRP'). By its directions dated 5th October 2015, the DRP directed the exclusion of two comparables, i.e., Acropetal Technologies, Limited and Wipro Technologies Limited and the inclusion of Octant Industries Limited. The net result was that there was now a final set of 13 comparables. The matter then travelled, at the instance of the Assessee, to the ITAT.

5. By its impugned order dated 24th August 2016 the ITAT excluded 8 comparables. It however remanded to the TPO the issue regarding inclusion of the following comparables:

(i) Allied Digital Services Limited,

(ii) Helios and Matheson Information Technologies Limited

(iii) Evoke Technologies Limited

(iv) Think Soft Global Services Limited

6. In addition the ITAT remanded to the TPO the issue concerning exclusion of Sasken Communication Technologies Limited ('Sasken') as a comparable.

7. The grievance of the Assessee is that while it is not challenging the remand to the TPO of the comparables for inclusion as noted above, as regards Sasken, the ITAT simply recorded the submissions of the authorized representative (AR) of the Assessee as well as the Department Representative (DR) but gave no finding thereon.

8. Likewise, as regards the TSS Segment, three comparables were selected by the Assessee in its TP Study including Kirloskar Consultants (Kirloskar). Two of these were accepted by the TPO but not Kirloskar. Two new comparables were introduced by the TPO, viz., Mahindra Consulting Engineering Limited (Mahindra) and Water and Power Consultancy Services Limited (WAPCOS). The DRP upheld the order of the TPO. In the appeal by the Assessee the ITAT by the impugned order remanded to the TPO the issue concerning exclusion of Mahindra and WAPCOS but failed to give any finding on the inclusion of Kirloskar as a comparable.

9. On the issue of denial by the TPO and the DRP of Working Capital and Risk adjustment in both segments, the Assessee submits that the ITAT has again not given any finding and has simply remanded the issue to the TPO. Lastly, on the issue of proportionate adjustment in the TSS segment, it is stated that after having recorded contentions of the Assessee in para 10.4 of its order, the ITAT failed to give a finding.

10. Mr. Zoheb Hossain, learned Senior standing counsel for the Respondent-Revenue points out that on some issues that have been remanded back to the TPO the Assessee has no grievance. By entertaining the present appeal, the issues will end up being dealt with piece meal - some by the TPO and some

by the ITAT. He submits that it might be better for the TPO to deal with all the issues remanded to him comprehensively.

11. On the other hand, Mr. Himanshu Sinha, learned counsel for the As points out that there are a large number of issues on which there is no finding by the ITAT. A mere remand to the TPO of those issues for a fresh determination would undue delay the entire exercise and resultant in multiplicity of proceedings.

12. The Court finds merit in the contention of learned counsel for the Assessee. The practice of remand to the TPO should be resorted to by the ITAT only where it is absolutely necessary. It could be either because of lack of clarity on factual aspects or because some facts have emerged since the order of the TPO that require to be taken into consideration since it would have a bearing on the outcome. Further the remand order in such circumstances should clearly spell out what the scope of the remand is. Where all the relevant facts are already before the ITAT and the parties have no new material to provide, simply remanding the issue to the TPO without rendering a finding thereon would be an abdication of the functions of the appellate body.

13. The Court finds from the impugned order that indeed with regard to the issue concerning exclusion of Sasken, there is no finding by the ITAT. That issue ought not to have been remanded without recording a finding. Likewise, with regard to the exclusion of Mahindra and WAPCOS and inclusion of Kirloskar as a comparable for the TSS segment the ITAT has simply remanded the matter to the TPO without a finding.

14. It was submitted by Mr Zoheb Hossain for the Revenue that the remand of the issue of working capital and risk adjustment in both the segments was by way of consent of both the AR and DR before the ITAT. Reference was made in this regard to para 11.3 of the impugned order.

15. The Court finds that the question whether any expert was required for determination of this issue was posed but not answered by the ITAT itself. This issue too ought to have been addressed by the ITAT. Likewise on the issue of proportionate adjustment in the TSS segment, the ITAT failed to give finding after having recorded the submissions of the parties in para 10.4 of its order.

16. Consequently, the following directions are issued:

(i) the impugned order of the ITAT dated 24th August 2016 is modified by directing the following issues will not be remanded to the TPO but will be decided by the ITAT itself on merits after hearing both the parties.

(a) issue concerning exclusion of WAPCOS and Mahindra and inclusion of Kirloskar as comparables for the TSS segment

(b) issue regarding exclusion of Sasken as comparable for the CDS segment

(c) issue of denial of working capital and risk adjustment in both the segments, i.e., TSS and CDS; and

(d) issue of proportionate adjustment in the TSS segment

(ii) The appeal of the Assessee ITA No. 6856/Del/2015 before the ITAT is restored to its file. The said appeal will be listed before the

ITAT on 29th May 2017 for directions.

17. The appeal is disposed of in the above terms but, in the circumstances, with no orders as to costs.

S.MURALIDHAR, J

ANIL KUMAR CHAWLA, J

MAY 08, 2017
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