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

\+ **ITA 40/2017, C.M. APPL.2421/2017**

COMMISSIONER OF INCOME TAX -DELHI-III..... Appellant

versus

E.I. DUPONT INDIA PVT.LTD. ..... Respondent

Through : Ms. Vibhooti Malhotra, Advocate, for Revenue.

Ms. Kavita Jha and Sh. Udit Naresh, Advocates, for respondent, in Item No.3.

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

O R D E R

% 01.03.2017

The Revenue urges the following two questions of law:

"(i) Whether, having regard to the reasons that are to be assessed under Rule 10B of the Income Tax Rules, in relation to an international transaction, the exclusion of unutilized cost claimed by the assessee, is legally warranted, while arriving at the PLI for the ALP determination of issue.

(ii) Whether in the circumstances, the ITAT's order with respect to segmental data by excluding the non-comparable operations of the M/s. Hikal Limited was warranted."

As far as the first question is concerned, it is pointed out by learned counsel for the assessee that the issue stands remitted. Learned counsel for the Revenue urges, however, that the Income Tax Appellate Tribunal (ITAT) has impliedly assumed that set-off or unused capacity cost is permissible, and that without a proper discussion and finding on such issue, the assumptions and findings of the ITAT are not warranted.

This Court notices that the ITAT in its impugned order had relied upon the previous years' discussion in its findings, especially para 7 of its order for AY 2006-07. That, however, *per se* does not address the issue which the Revenue argues today, i.e. whether having regard to the terms of the Rule 10B(1)(e)(iii), the adjustment of unutilized capacity cost could have been arrived at on the basis of exclusion of unused capacity cost. The further question which will have to be addressed is with regard to the comparables to be taken into consideration for exclusion/inclusion of such unused capacity cost. Therefore, even while upholding the remand, this Court keeps the question open for decision on the merits, i.e. whether such costs could be excluded having regard to the terms of Rule 10B.

As far as the second issue is concerned, i.e. the ITAT's order on the segmental data, we are of the opinion that having regard to the clarity of law on account of the decision of this Court with respect to aggregation and desegregation of data [in *Sony Ericsson Mobile Communications India Pvt. Ltd. v. CIT* (2015) 374 ITR 118 (Delhi) and *Magneti Marelli Powertrain India Pvt. Ltd. v. DCIT,* ITA 350/2014, decided on 25.10.2016] (2016) 389 ITR 469 (Delhi), the approach of the ITAT is in confirmity with Rule 10B in the circumstances of the case.

In view of the above discussion, no substantial question of law arises on the second issue. The first issue stands remitted to the ITAT.

The appeal is accordingly disposed of.

S. RAVINDRA BHAT, J

NAJMI WAZIRI, J

MARCH 01, 2017/ajk