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

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Judgment delivered on: 30.10.2017

+ ITA 913/2017

PRINCIPAL COMMISSIONER OF INCOME TAX-8

..... Appellant

Through

versus

ST MICROELECTRONICS PRIVATE LTD. Respondent

Through

Advocates who appeared in this case:

For the Appellant : Mr Sanjay Kumar with Mr. Rahul Chaudary,
Advocates.

For the Respondent : None.

CORAM:-

**HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SANJEEV SACHDEVA**

S. RAVINDRA BHAT, J. (OPEN COURT)

CM NO.38878/2017 (for condonation of delay)

For the reasons stated in the application, the application is allowed.

The delay of 69 days in filing the appeal is condoned.

ITA 913/2017

1. The question of law urged in this case is whether the deletion of 16 comparables originally proposed by the Transfer Pricing Officer

(TPO) in the course of assessment for AY 2007-2008, in the ALP (Arms Length Price) determination, conducted in respect of the assessee, is erroneous.

2. The facts are that the assessee is engaged in software development services to its associated enterprise (AE Group) Genesis Microchip Inc., US. With regard to transfer price required to be furnished in the Court, the assessee compared its activities to 55 comparable entities performing similar functions. The TPO upon his undertaking analysis discard 45 of them while retaining 10.

3. In the course of analysis, some more companies were added as comparables; the total of 26 such comparable entities were taken into account for conducting the ALP determination. Ultimately, the arithmetic mean of the PLI (Profit Level Indicator) was determined at 124.51% of the operating cost at Rs.54,30,79,601/-. The resultant transfer pricing adjustment recommended was Rs.4,64,98,881/-, under Section 92CA. This figure was later rectified to Rs.3,99,84,625/- under Section 154 of the Act.

4. The TPO's decision was left undisputed by the Dispute Resolution Board (DRP). Consequently, the AO finalized the assessment on 29.08.2011.

5. The assessee appealed to the ITAT. By then, the decision of the ITAT in *Hewlett Packard India Global Soft Pvt. Ltd. vs. DCIT* in IT(TP)A No.1031/Bang/2011 dated 23.09.2015 had been rendered.

The assessee placed reliance upon it to contend that the comparables included by the TPO leading to the ALP determination in its case were either based on the identical terms to the comparables included in the *Hewlett Packard India Global Soft Pvt. Ltd.*. It was also contended that there was complete identity of functionality between the assessee's business operations and that of *Hewlett Packard India Global Soft Pvt. Ltd.*

6. ITAT considered the submissions of the parties in para 12 of the impugned order and elaborately extracted the relevant passage of its reiterated decision in *Hewlett Packard India Global Soft Pvt. Ltd.* (pages 558 to 585 of the paper book). It was of the opinion that since the functional profile of the assessee was identical to that of *Hewlett Packard India Global Soft Pvt. Ltd.*, no different conclusions could have been arrived at.

7. It is argued on behalf of the Revenue that the ITAT fell into error in mechanically following the decision in *Hewlett Packard India Global Soft Pvt. Ltd.(supra)*. It was urged that the ITAT, who had, after taking into account its previous ruling in *Hewlett Packard India Global Soft Pvt. Ltd.(supra)*, remitted the matter for reconsideration of the TPO to determine whether, as a matter of fact, functional profile of the entities, which the assessee sought exclusion of, were, in fact, different or identical. It was further submitted that the assessee was engaged in chip designing and embedded software development.

8. The Court is of the opinion that the arguments of the Revenue

are unsubstantial and without merit. Whereas the TPO clearly noticed that the assessee's business profile is – rendering 'software development services' to its AE. Furthermore, the TPO notes as follows:-

“1. Software Development Services

The transactions pertaining to the Software Development Services segment are analysed as under. As the method followed by the TPO and the taxpayer is TNMM (a discussed below), these transactions are aggregated for the transfer pricing study along with reimbursement of expenses received and paid along with other payments routed through the profit and loss account.”

9. From the above facts, it is evident that the assessee was engaged in software development services which were provided to its AE.

10. The essential submission of the Revenue is that without fresh determination as to the identical of the comparable entities taken into account in *Hewlett Packard India Global Soft Pvt. Ltd.(supra)*, the ITAT could not have 'blindly' followed its previous rule.

11. Here the arguments cannot be accepted. If the reasoning of the ITAT were merely to accept the ratio in previous decision without noticing the relevant fact, the Revenue's arguments would have been merited in the present case. As noticed previously, the ITAT extracted its previous ruling in *Hewlett Packard India Global Soft Pvt. Ltd.(supra)* to the extent of 26 pages. This extract contained an

analysis of each of 16 comparables that are in issue in the present appeal. Therefore, the submission of the Revenue lacks merit.

12. The Revenue or for that matter any party may be correct in contending, that a blind application of precedent, merely because in a previous ruling the Tribunal accepted or did not accept the comparables, cannot *per se* be a ground for excluding it or including it later. At the same time, while testing the application of that Rule, the Court has to be careful to discern whether, in fact, the subsequent ruling, which relies on the previous ruling, carries out such a factual analysis. In this case, the ITAT clearly did communicate and carry out such a functional and factual analysis.

13. In view of the above reasons, we are of the opinion that no substantial question of law arises.

14. The appeal is, therefore, dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**SANJEEV SACHDEVA
(JUDGE)**

**OCTOBER 30, 2017
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