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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ITA 966/2018

PR. COMMISSIONER OF INCOME TAX-2, Appellant

Through: Mr. Ashok K. Manchanda, Senior
Standing Counsel with Mr. Aditya
Khamparia, Advocate

versus

M/S. BELKIN INDIA PRIVATE LIMITED Respondent

Through

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

ORDER

% **04.09.2018**

CM No.35749/2018

Allowed, subject to all just exceptions.

Application is disposed of.

CM No.35748/2018

Before issuing notice on this application, we deem it appropriate to examine the appeal on merits.

ITA No.966/2018 & CM No.35748/2018

This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 impugns the order dated 12.12.2017 passed by the Income Tax Appellate Tribunal ('ITAT') in the case of M/s Belkin India Private Limited in ITA No.2292/Del/2017. The appeal pertains to the assessment year 2011-2012.

2. The limited issue raised by the Revenue in the present appeal relates to the exclusion of Media Research Users Council ('MRUC') from the list of comparables for making transfer pricing adjustment.

3. The reasoning given by the ITAT to exclude the MRUC from the

list of comparables vide impugned order are as under:

“11. At the very outset, the Id. AR for the taxpayer contended that the taxpayer only challenges inclusion of one comparables viz. **Media Research Users Council (MRUC)**. Functional profile of the taxpayer is not in question. Method for benchmarking the international transaction has also been accepted by the Id. TPO. Now, we will examine the suitability of **Media Research Users Council (MRUC)** in the light of the contentions raised by the Id. AR for the taxpayer as well as Id. DR for the Revenue.

12. The Id. AR for the taxpayer challenged the inclusion of MRUC as a comparable for benchmarking the international transaction qua market support service segment on grounds of functional dissimilarity; that MRUC is a not-for-profit organisation; that MRUC outsources most of its activities to third party; that MRUC does not qualify the filter applied by the TPO qua Related Party Transaction (RPT) and relied upon the decision of *M/s. Linked in Technology in ITA No.706/Del/2016*.

13. However, on the other hand, Id. DR for the Revenue to repel the arguments addressed by the Id. AR for the taxpayer contended that when the functional profile of a company is similar to the taxpayer, it cannot be excluded for benchmarking international transaction merely because of the fact that it is a not-for-profit organisation.

14. Undisputedly, major source of revenue of MRUC is the income from its members in the shape of membership fee and subscription fee for Indian Readership Survey (IRS) and Indian Outdoor Survey (IOS) reports. When we refer to relevant page 374 of the annual report of MRUC, available in the paper book, it is referred as a not-for-profit organisation representing four different stakeholders in Media Research covering media sellers and buyers, operative portion thereof is extracted for ready reference as under:-

“Membership

The Council has from the beginning, been a non-for-profit organisation representing four different stakeholders in Media Research covering media sellers and buyers. On 31st March 2011, MRUC had members as follows :-

	No.
Advertisers	58
Publishers	107
Advertising Agencies	51
Broadcast and Other media	33
	249

15. When we examine the issue of comparability of taxpayer vis-à-vis MRUC in the light of Rule 10B (2) of the Income-tax Rules, 1962 (for short the ‘Rules’), we are of the considered view that the taxpayer cannot be compared with MRUC because of functional dissimilarity as no risk is assumed by the MRUC being a not-for-profit organisation and only serves the interest of its members and assets employed are only from the membership fee as well as subscription fee collected from its 249 members.

16. Furthermore, benefits/profits of the MRUC are not divided between the members, it being a not-for-profit organisation. So, the MRUC does not qualify the parameters lay down under Rule 10B (2) of the Rules, necessary for comparability analysis. Even otherwise, surplus of MRUC are neither distributed among the members nor are offered for income-tax purposes.

17. Furthermore under section 10B(1)(e) under Transactional Net Margin Method (TNMM), net profit margin established by the TP analysis is taken into account to arrive at the arm’s length price qua international transactions. In case of MRUC being a not-for-profit organisation, profit making is not the motive

rather it is operating in media research covering media sellers and buyers for some specific motive of the company. So, a not-for-profit organisation cannot be compared with the taxpayer which is a company established for making profit.

18. Furthermore it is event from page 386 of the annual report of MRUC, available in the paper book, that MRUC paid expenses to the tune of Rs.9,27,95,904/- (in the earlier year RS.8,19,52,193/-) to the third party research agency for generating income from its member by way of subscription fee for IRS/IOS, meaning thereby MRUC outsourcing expenses comes to 85% of the total expenses. So, in the given circumstances, MRUC cannot be compared with the taxpayer which does not outsource any of its activity.

19. Furthermore MRUC does not qualify turnover filter of Rs.5 crores applied by the TPO for selecting the comparables as is evident from page 382 of the paper book which is income and expenditure account and total income is shown at Rs.2,64,37,978/-. By applying the filters of Rs.5 crores, the TPO has rejected other comparables of the taxpayer viz. "Sporting & Outdoor Ad Agency Ltd." So, the MRUC is liable to be excluded from the final set of comparables on ground of turnover filter of Rs.5 crores also.

20. Even otherwise, the major transactions of MRUC is Related Party Transactions as its substantive income is generated from membership fees and subscription fees for IRS/IOS reports and as such, price cannot be considered as independent controlled price as the major revenue is earned from its 249 members. Suitability of MRUC as a comparable has come up before the coordinate Bench of the Tribunal in ***Linked in Technology*** (supra) and has been ordered to be excluded for the reason discussed in the preceding paras.

21. In view of what has been discussed above, we are of the considered view that MRUC is not a suitable comparable vis-à-vis the taxpayer for benchmarking the international transactions qua market support services segment. Consequently, grounds no.1, 2 & 3 are determined against the taxpayer.”

4. Learned counsel for the Revenue accepts that the MRUC was a not-for-profit organization, but submits that this would be inconsequential and would not make any difference. Rather, profit margin declared and shown by MRUC would be lower than the normal profit margins of an enterprise/organisation working for profit.

5. The reasons recorded for excluding MRUC from the list of comparables are multiple and not confined and restricted to the fact that MRUC was a not-for-profit organization. Reference to ‘not for profit’, motive was to show that major source of income earned by MRUC was in form of membership and subscription fee for Indian Readership Survey (IRS) and Indian Outdoor Survey (IOS) reports. The element of *quid pro quo* or payment of consideration commensurate with the service given was missing and absent. The surveys undertaken by MRUC were on behalf of members of MRUC, consisting of advertisers, publishers, advertising agencies and broadcast and other media, totaling 249 in number. In a way, the MRUC was rendering services and working for its members. The MRUC was also outsourcing most of its activities to a third party research agency. The working pattern and model adopted by MRUC was unlike a commercial organization and completely different. The dissimilarities are too striking and apparent to be ignored. The Transfer Pricing Officer had also contradicted himself as recorded in paragraph 19 of the impugned order.

6. In view of the aforesaid factual position, the Tribunal, in our opinion, was justified in excluding the MRUC from the list of comparables.

7. Accordingly, we are not inclined to issue notice on the application for condonation of delay. The application and the appeal would be treated as dismissed *in limine*, without any order as to costs.

SANJIV KHANNA, J

CHANDER SHEKHAR, J

SEPTEMBER 04, 2018/tp