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

\+ **ITA 531/2019**

PR. COMMISSIONER OF INCOME TAX- 4 ..... Appellant
Through: Mr. Zoheb Hossain, Advocate

versus

M/S GAP INTERNATIONAL SOURCING (INDIA) PVT. LTD.
..... Respondent
Through: Mr. Kamal Sawhney with Mr.Prashant Meharchandani & Mr. Divyansh Singh, Advocates

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE I.S.MEHTA

O R D E R

% **22.05.2019**

Cav 557/2019

1. Since the caveator has appeared, the caveat stands discharged.

CM Appl.No 24639/2019 (Exemption)

2. Exemption allowed, subject to all just exceptions.

CM No. 24638/2019 (delay in re-filing)

3. For the reasons stated in the application, the delay of 148 days in re-filing the appeal is condoned. The application is disposed of.

ITA No. 531/2019& CM Appl.No. 24637/2019 (for delay)

4. The Court has perused the application for condonation of delay. The explanation offered is not satisfactory. Nevertheless, the appeal has also been examined on merits.

5. This appeal by the Revenue is directed against an order dated 13th June,

2017 by the Income Tax Appellate Tribunal (ITAT) in ITA no. 929/Del/2017 for the Assessment Year (AY) 2012-2013.

6. By the impugned order, the ITAT has restored the matter to the file of the Transfer Pricing Officer (TPO) to benchmark the international transaction afresh by examining the suitable comparables after providing an opportunity of being heard to the Assessee.

7. The ITAT in the impugned order noted that the 'commission based model' adopted by the Transfer Pricing Officer (TPO) in the earlier AYs had been rejected by the ITAT "in view of low procurement support services performed by the Assessee and the cost plus model had been accepted." In the AY in question the TPO had adopted three comparables based on the earlier years' comparables. Accordingly, the ITAT was of the view that a fresh search had to be undertaken by the TPO and the matter was restored to the file of the TPO for the exercise to be undertaken anew.

8. Learned counsel for the Assessee has drawn the attention of the Court to the fact that for AYs 2006-2007 and 2007-2008 involving same assessee the ITAT had by an order dated 18th September, 2012 allowed the Assessee's appeals in part. It was further pointed that the said order was affirmed by this Court by dismissing the Revenue's appeal on account of delay. It is further pointed out that the ITAT has followed its own order for the above AYs 2006-2007 and 2007-2008 in the subsequent AYs including AY 2011-2012.

9. The order of the ITAT for AY 2011-2012 was challenged by the Revenue in this Court by filing ITA No.1033/2017. On the aspect of the Arm's Length Price (ALP) of the international transaction involving the Assessee, this Court in its order dated 10th April, 2018 declined to frame any question of law.

10. Subsequently, in the said appeal ITA No. 1033/2017 an application, being CM No.16423/2018, was filed by the Assessee to point out to the Court that its case was different on the functional aspects from the case of ***Li & Fung India Private Limited [2014] 361 ITR 85 (Del)***, which had been referred to by this Court in its order dated 10th April, 2018. In CM No.16423/2018, this Court passed an order on 11th October, 2018 clarifying that "there is no functional similarity" between the Assessee and Li and Fung and further "the revenue model, though similar, is not identical".

11. The ITAT has in its order dated 18th September, 2012 for AYs 2006-2007 and 2007-2008 [which order has been affirmed by this Court] noted that the functions of the Assessee and its activities are "limited to scrupulously following the hand book and other instructions provided by the parent group". It was noted that there was no authority or discretion to the Assessee "in deviating or changing from the policies and procedures prescribed by the parent company." It was accordingly concluded that the Assessee had not incurred any significant risk in its functions. It was further noticed by the ITAT that the supply chain of garment manufacturers in India was provided by the parent in USA and not the Assessee. The labour costs including the procurement services were low and did not impinge on the

Assessee's profitability. There was also no separate additional allocation called for on account of 'location sales'. All these factors led to the ITAT concluding that "the Assessee is a low risk procurement support service provider". Such a service provider mostly worked towards recovering its cost and earning a reasonable mark-up in line with its functions performed. It was further noted by the ITAT as under:

> "The procurement service provider work on various models including the percentage of value of goods procured and the cost plus mark-up model depending upon the set of facts.
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> iv. In percentage model the procurement service provider is remunerated only in the event of goods procured by the procurer; if the goods are not procured then the service provider will incur loss to the tune of costs incurred in the process and notional loss on account of time spent by the service provider which it would have spent on other profit generating activity. Accordingly, percentage model puts the procurer at significant advantage and the procurement service provider at significant market risk."
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> v. The cost plus mark-up model is in absolute contrast to the percentage model whereby the service provider is assured of cost recovery along with a mark-up irrespective of the fact whether the procurer purchases any goods or not. This model puts the procurer at the disadvantage with a significant advantage to service provider.
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> vi. It is important to note that the irrespective of the model followed, both procurer and service provider will set the terms which work in serving the best interest of both the parties, meaning putting both the parties at a win-win situation. In percentage model if the procurer feels that the percentage agreed is resulting in very high profitability for service provider, then the procurer would proceed to re-negotiate the percentage for bringing it down to reasonable

> level. Similarly, under the cost plus model if the service provider feels that reasonable mark-up would be more than the agreed mark-up then the service provider will take appropriate steps to get it corrected.
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> vii. The essence of above discussion is to the effect that market forces will interact in any business model and lead to reasonably acceptable profitability. Considering this we now proceed to decide the PLI which would result in reasonable profitability."

12. The ITAT also noted, as did this Court in its order dated 11th October, 2018 in CM No. 16423/2018 in ITA 1033/2017, the lack of functional similarity between Li & Fung India and the Assessee on various parameters. The ITAT upheld the 'net profit/total cost remuneration model' adopted by the Assessee in determining the ALP of its international transactions.

13. The Court notes that the ITAT has consistently followed its orders for AYs 2006-2007 and 2007-2008 which was affirmed by this Court. Accordingly the impugned order calls for no interference. No substantial question of law arises for determination by this Court.

14. The appeal is accordingly dismissed. No costs.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MAY 22, 2019

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