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

\+ ITA 891/2019

THE PR. COMMISSIONER OF INCOME TAX -6..... Appellant

Through: Mr. Ruchir Bhatia, Advocate.

versus

MSD PHARMACEUTICALS PVT. LTD. ..... Respondent

Through: Ms. Rashmi Chopra and Ms. Asiya, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE SANJEEV NARULA

O R D E R

% **11.10.2019**

CM APPL. 44786/2019

Issue notice. Learned counsel for the respondent accepts notice.

Considering the fact that the delay in filing the appeal is 30 days, learned counsel for the respondent fairly does not oppose the application. Accordingly, the same is allowed.

The application stands disposed of.

ITA 891/2019

The Department has preferred the present appeal to assail the order dated 07.03.2019 passed by the Income Tax Appellate Tribunal (ITAT) Delhi Bench: ‘I-1’, New Delhi in ITA No. 7569/Del/2018 in respect of the respondent assessee for the assessment year 2014-15. The Transfer Pricing Officer had sought to apply the Bright Line Method for determination of the price adjustment on protected basis since this Court has already rendered its decision in the case of ***Sony Ericsson Mobile Communications India Private Limited Vs. Commissioner of Income Tax***, (2015) 374 ITR 118. At the same time, he applied the intensity adjustment as an alternative approach on substantive basis. The Tribunal has set aside the protective assessment made by the Assessing Officer by following its earlier decisions in the case of the assessee itself relating to assessment year 2013-14 in ITA No. 6565/Del/2017. It appears that no further appeal was filed by the Revenue from the said decision. The extract from the order passed by the Tribunal in ITA No. 6565/Del/2017 reads as follows:

> *"6. Having heard the rival contentions and having perused the material on record, we are unable to see any merits in the impugned ALP adjustment of Rs. 23,83,92,783 on, what has been termed as, protective basis. Learned Departmental Representative has not even disputed that the issue is covered against the revenue authorities by binding judicial precedents, but his worry is about protecting legitimate interests of the revenue. These apprehensions, however, are not really justified. There is no dispute that the application of bright line test, for making ALP adjustments in respect of the AMP expenses, is held to be unsustainable in law by Hon'ble jurisdictional High Court, and the TPO himself states so in so many words. It is also elementary that it is not, cannot be, open to us to disregard the binding judicial precedents and uphold the application of bright line test, for determining the ALP adjustment in respect of AMP expenses, merely because a binding judicial precedent from Hon'ble jurisdictional High Court has been challenged by the revenue authorities before the Hon'ble Supreme Court. The binding nature of a judicial precedent, as long as it holds the field i.e. is not overturned, remains unaffected by whether or not it has been challenged before a higher forum. As a corollary to this legal position, the impugned addition of Rs.23,83,92,783 must stand deleted. The very concept of protective addition is relevant only when an income is to be added in the hands of more than one taxpayer, in a situation in*

which there is an element of ambiguity as to in whose hands the said income can be rightly brought to tax. That's not the case before us. In our humble understanding, therefore, the concept of protective assessment', as is known to the income tax law, has no application in the cases like the one before us."

Considering the fact that this Court has already rendered its decision in ***Sony Ericsson*** (supra) rejecting the adoption of the Bright Line Method by the TPO, in our view, the Assessing Officer could not have proceeded to make the protective assessment by applying the Bright Line Method. However, we make it clear that we have not examined the legality of the observation made by the Tribunal in para 6 of its decision in ITA No. 6565/Del/2017, and the said issue shall be considered in an appropriate case.

In view of the aforesaid position, no question of law arises for our consideration in the present appeal.

Dismissed.

VIPIN SANGHI, J

SANJEEV NARULA, J

OCTOBER 11, 2019

B.S.Rohella