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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ ITA 227/2023
PR. COMMISSIONER OF INCOME TAX-7 Appellant
Through: Mr. Sanjeev Menon, Jr.SC for
Mr. Zoheb Hossain, Sr. SC.

versus

M/S ORIFLAME INDIA PVT LTD Respondent
Through: Mr.Himanshu S.Sinha and
Mr.Bhuwan Dhoopar, Advs.

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+ ITA 229/2023
PR. COMMISSIONER OF INCOME TAX-7 Appellant
Through: Mr. Sanjeev Menon, Jr.SC for
Mr. Zoheb Hossain, Sr. SC.

versus

M/S ORIFLAME INDIA PVT LTD Respondent
Through: Mr.Himanshu S.Sinha and
Mr.Bhuwan Dhoopar, Advs.

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+ ITA 231/2023
PR. COMMISSIONER OF INCOME TAX- 7 Appellant
Through: Mr. Sanjeev Menon, Jr.SC for
Mr. Zoheb Hossain, Sr. SC.

versus

M/S ORIFLAME INDIA PVT LTD Respondent
Through: Mr.Himanshu S.Sinha and
Mr.Bhuwan Dhoopar, Advs.

57

+ ITA 234/2023
PR. COMMISSIONER OF INCOME TAX – 7 Appellant
Through: Mr. Sanjeev Menon, Jr.SC for
Mr. Zoheb Hossain, Sr. SC.

versus



M/S ORIFLAME INDIA PVT LTD Respondent
Through: Mr.Himanshu S.Sinha and
Mr.Bhuwan Dhoopar, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINdra KUMAR
KAURAV

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ORDER
05.02.2024

1. The Department has instituted the instant appeals proposing the following questions of law for our consideration:-

(a) Whether on facts and circumstances of the case and in law, the Income Tax Appellate Tribunal ["ITAT"] has erred in excluding Modicare Limited ["Modicare"] as a comparable under the Resale Price Method ["RPM"] despite the fact that reliable data pertaining to the comparable is available in the public domain and its comparability analysis was thoroughly established by the Transfer Pricing Officer ["TPO"] as per Rule 10B(3) of the Income Tax Rules, 1962 ["Rules"]?

(b) Whether on facts and circumstances of the case and in law, ITAT has erred in restricting the TPO to the comparables set by the assessee in his Transfer Pricing analysis, thus restraining the TPO from conducting its independent comparability analysis as laid under Section 92C and Section 92CA(3) of the Income Tax Act, 1961 ["Act"] read with Rule 10B of the Rules?

2. Undisputedly, the respondent-assessee before us is a wholly



owned subsidiary of Oriflame International SA and is engaged in the business of sale of a wide variety of skin care and cosmetic products. As a part of its business operations, the respondent undertook international transactions with its associated enterprises [“**AEs**”]. The said transactions for the assessment years [“**AYs**”] 2009-10, 2010-11, 2011-12 and 2012-13 were referred to the TPO under Section 92CA of the Act for determination of the arm’s length price [“**ALP**”].

3. The TPO vide its orders dated 30 January 2013 [AY 2009-10], 24 January 2014 [AY 2010-11], 08 January 2015 [AY 2011-12] and 19 January 2016 [AY 2012-13] rejected the comparable entities as selected by the respondent and selected Modicare as the comparable entity after considering databases, annual reports and other relevant material and proposed an upward adjustment of the income of the respondent. Consequently, assessment orders were passed by the Department for the said AYs reflecting the upward adjustments as proposed by the TPO.

4. The matter eventually reached the ITAT and the ITAT vide its common order dated 24 March 2017 for AYs 2009-10, 2010-11 and 2011-12 and its order dated 13 June 2017 for AY 2012-13 remanded the matter back to the TPO and directed it to look into the claim of adjustments as required to be made to Modicare in order to enhance its comparability with that of the respondent.

5. Aggrieved by the said orders, the respondent filed an appeal before this Court. This Court vide its judgment dated 10 April 2018 held as follows:

“7. The assessee argued that the dissimilarity with respect to the products sold and the proportion borne by each of the turnover cannot but impact the profitability of the entity as a whole and further emphasized that segmental laid for each of these product lines is missing for the relevant



year (with respect to the data available vis-à-vis Modicare Ltd.). In the opinion of this Court, it is of vital importance and was not addressed by the ITAT which even while noticing the significant differences and seemingly accepting the assessee's arguments nevertheless did not exclude Modicare Ltd. altogether. In the opinion of this Court, this is a very vital infirmity which needs to be corrected.

8. The other was with respect to the differential marketing strategy adopted for the two sets of entities i.e. the trading entity/comparable on the one hand as opposed to the direct marketing entity i.e. assessee on the other hand. The assessee had stressed that if appropriate marketing was made from the data available, the differential marketing strategy per se would not pose a difficulty with respect to the transfer pricing adjustment. The Court finds some merits in the arguments, especially since what the Revenue Authorities would be left with if the ITAT's order was not to be disturbed, would be what a comparable in the form of Modicare Ltd (supra).

9. In view of the above reasons, this Court is of the opinion that the appeal should be re-examined by the ITAT; it should be addressed on these two aspects i.e. firstly, the appropriateness of including Modicare Ltd. having regard to the availability of data with respect to the different product segments, and secondly, involving the comparable, the functional difference with respect to its marketing strategy (i.e. discount, transportation costs, insurance and performing the warranty function). Having regard to the factors mentioned in clause 5.10 of the impugned order, the ITAT is also directed to re-examine whether and to what extent adjustment can be reasonably made, having regard to the available data in respect to the trading comparables offered for ALP determination, for all the relevant years by the assessee. It is also directed to consider the feasibility again having regard to the available data for all the concerned assessment years- marking appropriate adjustments (including with respect to the working capital adjustments as is sought to be urged by the assessee) in regard to the trading comparables offered by the assessee for these given years.

10. ... Having regard to the above directions, it is open to the assessee to urge that TNMM is the most appropriate method instead of RPM. In these circumstances, it is also clarified that in the event the submission is accepted there would be no enlarging of a comparable offered. ”

6. Pursuant to the remand by this Court, the ITAT passed the common impugned order dated 15 April 2019 for the aforementioned AYs. Vide the impugned order, the ITAT after considering various factors such as the non-availability of data of Modicare for various product



segments and marketing strategies, difference between the entities in the treatment of discounts given to consultants/agents and the substantial difference between the entities in the advertising, marketing and promotion expenses incurred by them. It ultimately held that Modicare cannot be considered as a comparable entity under the RPM method. The ITAT also held that the Transactional Net Margin Method [“TNMM”] ought to be adopted as the most appropriate method for benchmarking the respondent’s case. It is against these findings of the ITAT that the Department has filed the instant appeals before us.

7. However, during the course of hearing today, it was brought to our attention that the matter has been resolved *inter partes* in terms of the assessment which came to be finalised for AY 2014-15 and that Modicare Limited has been excluded from the list of comparables to determine the ALP and the upward adjustments of income as proposed by the Department has not been undertaken as well. We are informed that the view taken therein has been duly accepted and followed in the subsequent years.

8. In view of the aforesaid and bearing in mind the principle of consistency, we find no justification to entertain the instant appeals.

9. They shall consequently stand dismissed on that score.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.
FEBRUARY 05, 2024/MJ