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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **ITA 9/2023**

HAIER APPLIANCES INDIA PVT LTD Appellant
Through: Mr. Neeraj Jain, Adv. with Mr.
Aniket D.Agrawal and Mr.
Saksham Singhal, Adv.

versus

DCIT CIRCLE 11(1) NEW DELHI Respondent
Through: Mr. Abhishek Maratha, Sr.
Standing Counsel

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+ **W.P.(C) 261/2023**
HAIER APPLIANCES INDIA PVT LTD Petitioner

Through: Mr. Neeraj Jain, Adv. with Mr.
Aniket D.Agrawal and Mr.
Saksham Singhal, Adv.

versus

DCIT CIRCLE 11(1) NEW DELHI Respondent
Through: Mr. Abhishek Maratha, Sr.
Standing Counsel

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

ORDER
28.02.2024

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1. The assessee has preferred the instant appeal – ITA 9/2023, assailing the order of the Income Tax Appellate Tribunal [‘ITAT’] dated 21 September 2020. Post the rendering of the said judgment by the ITAT, the appellant appears to have approached it by way of a miscellaneous application seeking to invoke its powers conferred by Section 254(2) of the Income Tax Act, 1961 [‘Act’]. That miscellaneous application came to be rejected by the ITAT by its order of 10 August 2022. It is that order which stands impugned in writ petition – W.P.(C) 261/2023.



2. In the appeal, the following questions of law as proposed by the assessee had been admitted by us in terms of the order dated January 10, 2023:

“(i) Whether in the facts and in the circumstances of the case, the impugned order dated 21.09.2020 passed by the Tribunal is perverse / self-contradictory inasmuch as, on the one hand, the Tribunal following the decision of this Hon’ble Court in appellant’s own case in ITA No. 713/2016 specifically allowed the appellant’s contention that AMP expenses should be benchmarked by the applying RPM method and that the adjusted gross profit margin of appellant is higher than the adjusted gross profit margin of the comparable company [thus, resulting in deletion of the entire addition], while on the other hand, adjudicating the alternative (without prejudice) submission of the appellant thereby, upholding AMP adjustment to the extent of Rs.2,85,10,127?

(ii) Whether the impugned order dated 21.09.2020 passed by the Tribunal based on grossly untenable application of legal principles and incorrect appreciation of facts, to the extent of issues raised in the present appeal, is factually and legally perverse?”

3. We note that while dealing with the views taken by the Transfer Pricing Officer [‘TPO’] and Dispute Resolution Panel [‘DRP’], the ITAT had firstly observed that the Resale Price Method [‘RPM’] as adopted by the appellant/assessee would clearly be applicable and thus proceeded to benchmark Advertisement, Marketing, and Promotion [‘AMP’] expenses by applying RPM. This is evident from the following extract of the order dated 21 September 2020 passed by the ITAT:-

“8. In this context we hereby held that in present case the Revenue has not pointed out as to how the Resale Price Method will not be applicable Benchmarking AMP expenses applying RPM is as under:-

Sales	A	2,276,497,423	3,634,123,511
Cost of Goods sold	B	1,702,366,577	3,177,456,936
Gross Profit (‘GP’)	C=A-B	574,130,846	456,666,575
GP/Sales		25.22%	12.57%
AMP Expenses	D	273,602,101	161,113,130



Less selling and Distribution Expenses		101,850,415	24,150,350
Less: Grant received from AE	E	151,210,838	
Net AMP Expense	F=D-E	20,540,848	136,962,780
Adjusted Gross profit	G=C-F	553,589,998	319,703,795
Adjusted GP/Sales	G/A	24.32%	8.80%

4. However, in the very next paragraph, it has proceeded to undertake the quantification of arm's length price in relation to AMP expenditure and held as under:-

“8. This is not disputed by the Revenue as the TPO in order dated 21.10.2011 considered Vivek Limited as appropriate comparable for benchmarking AMP expenses, applying Bright Line Test. The TPO considered Vivek Limited as comparable as it is trader/re-seller of home appliances and does not own any brand. But since, the bright line test is not appropriate as held by the Hon'ble Delhi High Court, we further examine that the element of adding value to the goods by incurring AMP expenditure creating market intangibles and enhancing brand value of the product is missing in present assessee's case. From the perusal of the records it is found that after excluding selling and distribution expense of Rs. 10,18,50,415, the adjustment works out to Rs.2,85,10 127, computed as under:

Particulars	Amount (Rs.)
AMP expense of the assessee	17,17,51,687
ALP margin	4.64%
Arms length margin	79,69,278
Arms length price	17,97,20,965
Grant received	15,12,10,838
Adjustment	2,85,10,127

This computation is not disputed by the Revenue during the course of hearing. Thus, at the best the adjustment made by the TPO/DRP ought to be restricted to Rs. 2,85,10,127/- as against Rs. 13,50,86,400/- . Therefore we direct the TPO/ DRP to restrict the adjustment to the extent of Rs.2,85,10,127/-. Therefore , the appeal of the assessee is partly allowed.

9. In result, appeal of the assessee is partly allowed.”



5. The fact that the aforesaid observations are clearly inconsistent and incompatible is accepted by the ITAT itself as is evident from para 5 of the order dated 10 August 2022, which reads as under:-

“5. We have given a thoughtful consideration to the submissions made by the Counsel and have carefully perused the order of this Tribunal (supra). It is true that the Tribunal has recorded a conclusive finding that application of RPM is appropriate in the instant case. However, thereafter the Tribunal proceeded to determine the arms length price of AMP expenses and directed the TPO to restrict the adjustment to Rs.28510127/.”

6. The ITAT appears to have felt constrained to not attempt to rectify the apparent inconsistency bearing in mind, and in its estimation, the limited extent and scope of power that stands vested upon it by virtue of Section 254(2) of the Act.

7. However, and since the inconsistency is apparent on the face of the record, we allow ITA No. 9/2023 and set aside the order dated 21 September 2020. The matter shall stand remitted to the ITAT for considering the appeal afresh.

8. Bearing in mind the order passed in the connected appeal, no interference would be merited with the order dated 10 August 2022 disposing of the miscellaneous application, which stands impugned in the writ petition before us.

9. The appeal as well as the writ petition shall stand disposed of on the aforesaid terms.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

FEBRUARY 28, 2024

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