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

\+ ITA 455/2024

PR. COMMISSIONER OF INCOME TAX-7, DELHI .....Appellant

Through: Mr. Puneet Rai, SSC with Mr. Ashvini Kumar, Mr. Rishabh Nangia, JSCs & Mr. Nikhil Jain, Adv.

versus

SAMSUNG INDIA ELECTRONICS PVT. LTD. .....Respondent

Through: Mr. Himanshu S. Sinha, Mr. Prashant Meharchandani & Mr. Jainender Kataria, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

O R D E R

% **22.08.2024**

Cav 398/2024

Since learned counsel for the respondent/caveator has entered appearance, caveat stands discharged.

CM APPL. 48060/2024 (811 Days Delay in Refiling)

Bearing in mind the disclosures made, the delay of 811 days in refilling the appeal is condoned.

Application stands disposed of.

ITA 455/2024

1. The Principal Commissioner impugns the order of the **Income**

Tax Appellate Tribunal[1] dated 07 January 2020 and posits the following questions of law for our consideration:

> **<u>"Issue 1</u>**
>
> A. Whether, the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in its decision in holding that AMP expenditure incurred during the year by the assessee does not constitute an 'International Transaction?
>
> B. Whether, the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in holding that the "Brightline Test" was not mandated in law and hence impermissible without considering the facts that BLT was not used as a method to determine the price but only as an economic tool to arrive at the cost of services rendered to foreign enterprises by the Indian entity and when the TP0 has the mandate to determine such cost as a primary step in ALP determination as provided under the Rules?
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> C. Whether, on the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in stating that the existence of an international transaction cannot be arrived at, from the clauses of an Marketing Development Fund (MDF) agreement and also stating that the value of international transaction cannot be expanded beyond the reimbursements received under MDF agreement and that incurring of AMP expenditure docs not lead to Brand Building?
>
> D. Whether, on the facts and circumstances of the case and in law, the Hon'ble ITAT was right in law in observing that on application of TNMM as the Most Appropriate Method at segmental/entity level, then individual component of AMP cannot be segregated for benchmarking, when the TPO is fully empowered for segregation/aggregation of transactions as per the IT Act and international guidance for arm's length determination?
>
> E. Whether, on the facts and circumstances of the case and in law, the Hon'ble ITAT was right in law in stating that protective adjustment to preserve the interest of the revenue cannot be made in this case when the issue of AMP is still sub-judice and is pending before the Hon'ble Apex Court?
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> **<u>Issue 2</u>**
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> F. Whether, on the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in considering that adjustment only on the basis of the outstanding receivables would have distorted the picture and re-characterize the transaction?

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[1] Tribunal

G. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in holding that no adjustment for interest on outstanding receivables is warranted as working capital adjustment account for the impact on profitability and altogether ignoring the Arm's Length analysis conducted by the TPO?

Issue 3

H. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT was justified in deleting the adjustment proposed by the TPO on account of difference in mark-up charged by AEs on purchase of fixed assets by holding that segregation of this transaction cannot be accepted whereas TPO provided due justification for separate benchmarking of this transaction?

I. Whether on the facts and circumstances of the case and in law, the Hon'ble ITAT erred in deleting the reduction in ALP of the transaction of purchase of fixed assets made by TPO by Rs. 6,40,52,422/- and consequently erred in deleting the disallowance of depreciation made by AO of Rs. 2,05,26,740/-?"

2. Having heard Mr. Rai, learned counsel appearing for the appellant, as well as Mr. Sinha, learned counsel for the respondent, we find that the proposed questions 'A' to 'E' stand covered and answered against the appellant bearing in mind the order passed today in ITA 453/2024.

3. That only leaves us to examine questions 'F' and 'G'. We note that the Tribunal has while examining the aforesaid questions observed as follows:

"**8.** Regarding the inter company receivables taken at ground nos. 14 & 15, the Id. AR argued that no interest adjustment on receivables is warranted when working capital adjustment has been assumed in TNMM as the MAM. It was contended that the working capital adjustment subsume the outstanding receivables. It was argued that outstanding receivables would not constitute a separate international transaction u/s 92B of the Act and they ought to be examined in aggregation with the main transaction of export to AEs and after sales support income which have already been accepted to be at arm's length. Reliance placed on Hon'ble ITAT's judgment in the case of Patni Computer System Ltd. in ITA Nos. 426 & 1131/PN/2006. The Id. AR relied on the judgment of Indo-American Jewellery in ITA No. 1052 of 2012 and argued that no addition on account of interest is warranted. We hold that the findings of this case cannot be applied to the instant case as in the case of Indo-American Jewellery, the CIT(A) given relief holding that the profit of one AE is negligible while the other AE has incurred losses and therefore, it cannot be said that the assessee has transferred any profit to the AE outside India by not charging interest on the outstanding payment which has been realized. The Hon'ble High Court desisted from expressing any opinion on the issue and kept the reasoning open for debate in an appropriate case. Hence, this case cannot be considered as the law laid down. Further, the reliance laid down by the Id. AR in the case of Kusum Healthcare 398 ITR 66 (Del.) on the issue of no interest adjustment on receivables is warranted cannot be accepted. In that case, the TPO concluded that the figures of receivables beyond 180 days constitutes an international transaction by itself. In that case, the Hon'ble Court held that every item of receivables appearing in the accounts of an entity which may have dealings with foreign AE would not automatically characterized as an international transaction. The Hon'ble Court held that the impact of the receivables and its effect on the working capital of the assessee have to be studied by making a proper enquiry by the TPO by analyzing the statics war period of time discerning the pattern which would indicate that vis-a-vis receivables for the supply made to an AE, the arrangement reflects an international transaction intended to benefit the AE in some way. We find that the TPO held that as per the provisions any arrangement between two AEs for allocation or apportionment of or any contribution to any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises is an international transaction. In this case, admittedly, the taxpayer has provided benefit to its AE by way of advancement of interest free loan in the garb of delay receipt of receivables. These funds could have been otherwise deployed for at least earning interest income. The taxpayer has therefore incurred cost in connection with a benefit and services provided to the AE by way of delay receipt of receivables. Accordingly, even otherwise the delay in receipt of receivables is an international transaction u/s 92B(1) read with clause (v) of section 92F. The DRP held that the TPO charged interest on receivables beyond 30 days. The assessee mentioned that in one of the invoices to Samsung Dubai the amount was payable within 30 to 45 days and as per the invoice to Samsung South Africa amount was payable in 90 days. In view of this, the DRP directed to re-compute the interest on receivables beyond the period mentioned in the respective invoices.

9. Having gone through entire factum of the issues, we find that the approach of the DRP is not based on sound legal principles. The interest cannot be recomputed treating the transaction as international transaction in case of sale & purchases (receivables and payables) based on each invoice. The test to be applied is whether the compensation paid for the products and services is at arm's length, but at the same time it cannot be ignored that the two entities have a business and a commercial relationship. The transfer pricing is a mechanism to undo an attempt to shift profits and correct any under or over payment in a controlled transaction by ascertaining the fair market price. This is done by computing the arm's length price. The purpose is to ascertain whether the transfer price is the same price which would have been agreed and paid for by unrelated enterprises transacting with each other, if the price is determined by market forces. An entity which permits a longer credit period of realizing its sale proceeds would want to receive compensatory interest which is often inbuilt in the price of goods/services sold. Similarly, a customer who is paying the full price upfront would want a discount to account for the prompt payment that is made. The necessity and desirability of an adjustment for the same is advocated by the OECD and the UN guidelines on Transfer Pricing as well. What is required to be done is to examine, by going through entire transaction between the AE and the non-AE parties regarding the payment pattern and to arrive at a decision as to whether there is any overt or covert scheme to transfer the profits by the way of delaying the payments to the assessee by the AE and thus getting benefited. This pattern unless established by the revenue, no adjustment on outstanding receivables can be made. Hence, the decision of the TPO of determining the 30 days as the credit period for computing interest on outstanding receivables, without appreciating the actual credit terms offered to the AEs cannot be accepted. Once, the pattern has been established the issue of the netting of outstanding receivables and payables arises. Since, no such pattern is established by the revenue, we hereby direct that the addition made be deleted."

4. The view as expressed clearly appears to be in line with what was held by the Court in **Principal Commissioner of Income-tax vs. Kusum Health Care Pvt. Ltd.**[2] and consequently merits no interference.

5. Since while examining remainder Issue no. 3 and which comprises questions 'H' and 'I', the Tribunal has followed the decision of the Court in **Magneti Marelli Powertrain India Pvt. Ltd. vs. Commissioner of Income-tax**[3], we find no justification to

[2] 2017 SCC OnLine Del 12956
[3] 2016 SCC OnLine Del 5758

interfere with the same.

6. The appeal fails and shall stand dismissed.

YASHWANT VARMA, J

RAVINDER DUDEJA, J

AUGUST 22, 2024/kk