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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ITA 252/2016

PR. COMMISSIONER OF INCOME TAX-6 Appellant
Through: Mr. Rahul Chaudhary, Senior Standing
counsel with Mr. Anup Kesari, Advocate.

versus

MITSUI & CO. INDIA PVT. LTD. Respondent
Through: Mr. Piyush Kaushik, Advocate.

And

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ITA 253/2016

PR. COMMISSIONER OF INCOME TAX-6 Appellant
Through: Mr. Rahul Chaudhary, Senior Standing
counsel with Mr. Anup Kesari, Advocate.

versus

MITSUI & CO. INDIA PVT. LTD. Respondent
Through: Mr. Piyush Kaushik, Advocate.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE VIBHU BAKHRU

ORDER

% 28.04.2016

CM 13722/2016 in ITA 252/2016

1. Allowed, subject to just exceptions.

ITA Nos. 252 and 253 of 2016

2. These appeals by the Revenue are directed against the common order dated 20th August 2015 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA Nos. 6463 & 5082/Del/2011 for the Assessment Years ('AYs') 2007-08 & 2008-09 respectively.

3. The Assessee is a wholly owned subsidiary of Mitsui & Co. Ltd., Japan which is one of the leading *Sogo Shosha* establishments in Japan. A *Sogo Shosha* is a company undertaking general trading and links buyers and sellers for a wide range of products.

4. The Assessee being a subsidiary of Mitsui & Co. Ltd. provides support services to the various group entities of Mitsui & Co. Ltd. It acts as a facilitator for the transactions entered into by Mitsui & Co. Ltd. and other group entities.

5. The Assessee disclosed the transactions entered into during the AYs in question and a reference was made to the Transfer Pricing Officer ('TPO') who noted that the Assessee had used the Transactional Net Margin Method ('TNMM') as the most appropriate method for determining the Arm's Length Price ('ALP') with the Berry ratio selected as the Profit Level

Indicator ('PLI'). The TPO disagreed with the contention of the Assessee and was of the view that the cost of sale is to be included in the denominator of the PLI. The TPO, referring to Rule 10B(1)(e)(i) held that the net profit margin realized by the Assessee from an international transaction entered into with associated enterprises is to be computed in relation to the costs incurred, sales effected or assets employed by the Assessee. The services were treated as equivalent to trading and the income received by the Assessee from the support services was treated as income from trading and comparison was made accordingly.

6. As against the disclosed income, the TPO proposed an adjustment of Rs. 107,53,92,764/- calculating the ALP on the above basis for AY 2007-08. With the Dispute Resolution Panel ('DRP') upholding the order of the TPO, barring exclusion of one comparable, the adjustment was increased to Rs.110,73,05,095 for AY 2007-08. For AY 2008-09, the DRP directed the TPO to exclude three comparables consequent to which the margin got reduced to Rs. 112,93,80,700/-.

7. The final assessment orders passed by the AO were in line with the orders of the DRP and were challenged before the ITAT by the Assessee.

8. In the impugned common order, the ITAT has followed the decision of this Court in *Li & Fung India Pvt. Ltd. v. Commissioner of Income Tax (2014)361 ITR 85 (Del.)*, where an identical issue had come up for consideration. This Court, in the said decision, came to the conclusion that the computation of the operating profit margin by increasing the cost of the sales leads to an arbitrary adjustment of the Assessee's income and that such alteration “resides plainly outside the Rules and the provisions of the Act”. The Court held that the TPO’s reasoning to enhance the costs by considering the cost of manufacture and export of finished goods was nowhere supported by Rule 10B(1) (e) of the Rules.

9. The Court is of the view that the questions sought to be urged by the Revenue in the present appeals stand covered against it by the aforementioned decision in *Li & Fung India (supra)*. Learned counsel for the Revenue pointed out that the said decision has been challenged by the Revenue before the Supreme Court. Nonetheless, following its decision in *Li & Fung India (supra)* this Court declines to frame the questions urged in the present appeals.

10. It was then earnestly urged by learned counsel for the Revenue that this Court should keep open the question concerning the correctness of the consequential determination of the additions to be made to the taxable income of the Assessee whereby the TPO had construed the transactions of the Assessee to be within the +/- 5% range in terms of the second proviso to Section 92C of the Act. As far as this question is concerned, since it is merely a consequential issue with the main issue having been decided in favour of the Assessee, the Court does not find any basis for the apprehension of the Revenue that the impugned order of the ITAT on this aspect would constitute a precedent for later cases. The Court therefore declines the request of the Revenue.

11. The appeals are accordingly dismissed.

S.MURALIDHAR, J

VIBHU BAKHRU, J

APRIL 28, 2016
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