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

11&12.

\+ **ITA 638/2015**

SONY ERICSSON MOBILE COMMUNICATIONS
INDIA PVT. LTD.
(NOW MERGED WITH SONY INDIA PVT LTD) .... Appellant

Through: Mr. Nageswar Rao, Advocate with Mr. Sandeep S. Karhail, Advocate.

versus

DEPUTY COMMISSIONER OF INCOME TAX ..... Respondent

Through: Mr.Dileep Shivpuri, Senior Standing Counsel and Mr. Zoheb Hossain, Advocate.

And

\+ **ITA 648/2015**

PR. COMMISSIONER OF INCOME
TAX - 8 NEW DELHI ..... Appellant

Through: Mr. P.Roy Chaudhary and Ms. Laxmi Gurung, Standing counsel.

versus

M/S SONY MOBILE COMMUNICATIONS
(INDIA) PVT. LTD. ..... Respondent

Through: Mr. Nageswar Rao, Advocate with Mr. Sandeep S. Karhail, Advocate.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VIBHU BAKHRU

O R D E R

% 28.01.2016

1. These two appeals, one by the Assessee and the other by the Revenue are directed against the order dated 27th February 2015 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No.554/Del/2015 for the Assessment Year ('AY') 2010-11.

2. The central issue before the Tribunal was with regard to advertisement, marketing and sales promotion ('AMP') expenses incurred by the Assessee. The issue was whether there was an was an international transaction in regard to the AMP expenses incurred by the Assessee on behalf of its foreign associated enterprise ('AE') within the meaning of Section 92B of the Income Tax Act, 1961 ('Act'). The consequential question was how the arm's length price ('ALP') of such an international transaction should be determined.

3. In the impugned order the ITAT has followed the decision of its Special Bench in ***LG Electronics India Pvt. Ltd. v. ACIT 2013 22 ITR (Trib) 1 (ITAT[Del])*** and remanded the matter to the file of the Assessing Officer ('AO') to decide the issue in the light of that decision.

4. The decision of the Special Bench of the ITAT in ***LG Electronics*** *(supra)* was examined by this Court in ***Sony Ericsson Mobile Communications India P. Ltd. v. Commissioner of Income Tax (2015) 374 ITR 118 (Del)***. The decision of this Court was rendered on 16th March 2015, which was shortly after the impugned order of the ITAT in the present case. One of the significant conclusions in ***Sony Ericsson*** *(supra)* was that the Bright Line Test ('BLT') could not be applied for either determining the existence of an international

transaction involving AMP expenses or for determining the ALP of such transaction. Therefore, the very basis of the decision of the Special Bench of the ITAT in ***LG Electronics*** *(supra)* was rendered non-existent.

5. This Court in ***Sony Ericsson*** *(supra)*, after discussing the various dimensions of the exercise of determining the ALP of an international transaction involving AMP expenses incurred on behalf of the foreign AE, gave a series of directions for the ITAT to reconsider the issue on remand.

6. This Court in ***Sony Ericsson*** *(supra)* decided the appeals of six Assessees i.e. Sony Ericsson Mobile Communications India Pvt. Ltd. (the Assessee herein), Discovery Communications India, Daikin Air-conditioning India Pvt. Ltd., Haier Appliances (India) Pvt. Ltd., Reebok India Company and Canon India Pvt. Ltd. It noted that they were engaged in the distribution and marketing of imported branded products. A significant factor noted by the Court was: "There is no dispute or lis that the assessed are AEs who had entered into controlled transactions with the foreign AEs". Secondly, the Court noted: "It is also uncontested that the controlled international transactions can be made subject matter of the transfer pricing adjustment in terms of Chapter X of the Income Tax Act, 1961." As was noted by this Court in the subsequent decision in ***Maruti Suzuki India Ltd. v. Commissioner of Income Tax***. (***2016) 282 CTR (Del)1***, the decision in ***Sony Ericsson*** *(supra)* proceeded on the basis that the Assessees therein did not contest the existence of an international transaction with their respective AEs involving incurring of AMP expenses. As far as the present Assessee is concerned, the appeal disposed of by the decision in ***Sony Ericsson*** *(supra)* pertained to AY 2008-09. The present appeal pertains to AY 2010-11.

7. The present appeals were initially adjourned to await the decision of this Court in an application for clarification filed by the Assessee in relation to the decision in ***Sony Ericsson****(supra)*. That application, however, has been dismissed as withdrawn on 20th November 2015.

8. Mr. Nageswar Rao, learned counsel for the Assessee, points out that before the Dispute Resolution Panel ('DRP') a specific ground was raised by the Assessee that the incurring of AMP expenses by the Assessee was a function performed by it, which was part of its role and responsibility, and that this cannot be regarded as an international transaction under Section 92B of the Act. It is further pointed out that this was reiterated in grounds 3,4 and 5 before the ITAT. It is accordingly urged that at least for the AY in question i.e. 2010-11, the Court should not proceed on the basis that there is any concession by the Assessee regarding the existence of an international transaction involving AMP expenses.

9. Mr. Dileep Shivpuri, learned counsel for the Revenue, on the other hand, submits that this issue has already been answered against the Assessee by the earlier decision of this Court in ***Sony Ericsson*** *(supra)* and if the Court accepts the plea of the Assessee it would amount to reviewing the earlier decision. He also drew attention to the specific finding in para 52 of the decision of ***Sony Ericsson*** **(***supra*) that: "The contention that AMP expenses are not international transactions has to be rejected."

10. As already noticed, the earlier decision of this Court in ***Sony Ericsson*** *(supra)* proceeded on the basis that the Assessees whose cases were being disposed of did not dispute the existence of an international transaction

involving AMP expenses. This Court is not required to opine whether such concession was rightly made or not. However, as far AY 2010-11 is concerned, the Assessee appears to have raised a specific ground both before the DRP as well as the ITAT regarding existence of an international transaction and this is reiterated in this Court in the present appeal of the Assessee as well. Such plea will have to be decided by the ITAT in accordance with law.

11. Consequently, it is ordered that:

(i) The impugned order of the ITAT dated 27th February 2015 in ITA No.554/Del/2015 is set aside and the said appeal stands restored to the file of the ITAT.

(ii) The ITAT will decide the aforementioned appeal afresh in light of the directions issued by this Court in ***Sony Ericsson*** *(supra)*.The ITAT will examine all the grounds including the one regarding the existence of an international transaction involving AMP expenses.

12. The appeals are disposed of in the above terms.

S.MURALIDHAR, J

VIBHU BAKHRU, J

JANUARY 28, 2016/mg