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

% **Decision delivered on: 12.10.2023**

+ **ITA 34/2019**

THE PR. COMMISSIONER OF INCOME TAX -3..... Appellant

versus

FUJITSU INDIA PRIVATE LIMITED Respondent

+ **ITA 224/2019**

THE PR. COMMISSIONER OF INCOME TAX -3..... Appellant

versus

FUJITSU INDIA PRIVATE LIMITED Respondent

+ **ITA 243/2019**

THE PR. COMMISSIONER OF INCOME TAX -3 Appellant

versus

FUJITSU INDIA PRIVATE LIMITED Respondent

Present: Mr Ruchir Bhatia, Sr. Standing Counsel with Ms Deeksha for appellant/revenue.
Dr. Shashwat Bajpai, Mr Shashank Garg and Mr Mahir Khanna, Advocates for the respondent.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

1. These appeals concern Assessment Year (AY) 2011-12 [ITA 243/2019], AY 2012-13 [ITA 224/2019] and AY 2013-14 [34/2019].
2. We have heard arguments in the above-captioned appeals.
- 2.1 The following substantial question of law is framed for consideration:



(i) Whether the Tribunal misdirected itself on facts and in law in rejecting the Transactional Net Margin Method (TNMM) which was used by the Transfer Pricing Officer (TPO) in ascertaining the Arm's Length Price (ALP)?

3. With the consent of counsel for the parties, the appeals are taken up for hearing and final disposal at this stage itself.

4. The record shows that the Assessing Officer (AO) passed orders dated 30.01.2016, 30.01.2017 and 30.10.2017 under Section 144C read with Section 143(3) of the Income Tax Act, 1961 [in short, "Act"] *vis-à-vis* the aforementioned AYs i.e., AYs 2011-12, 2012-13 and 2013-14.

5. The record also shows that according to the TPO as well as the Dispute Resolution Panel (DRP), the Most Appropriate Method (MAM) for ascertaining the ALP was the TNMM.

6. The respondent/assessee, however, contended to the contrary.

7. According to the respondent/assessee, since it was a distributor which did not make any value addition to the goods received by it from its principal, the MAM for ascertaining ALP concerning the international transaction in issue was the Resale Price Method (RPM).

8. The AO, however, *via* the impugned orders referred to hereinabove, made upward adjustments for each of the AYs in issue and in this regard, as noticed above, relied upon the TNMM.

9. The Tribunal, however, has returned findings of fact in paragraphs 17 to 23 of the impugned order.

10. In a nutshell, the Tribunal has held that although the TPO and the DRP have observed that the respondent/assessee is a full-fledged risk-bearing distributor performing various functions and therefore the MAM is not RPM, no comparable instances have been brought on record by the TPO



and the DRP.

11. Furthermore, the Tribunal has also found as a matter of fact (something that we have noted above), that the respondent/assessee resold the goods in the market without any value addition and therefore, the gross margin earned on such transaction was the only determinative factor for analysing the gross compensation after the cost of sale.

12. Bearing these two aspects in mind, the Tribunal concluded that RPM was the MAM available to benchmark the concerned international transactions.

13. We may note that this view has found resonance in the judgment of a coordinate bench of this court rendered in ***Principal Commissioner of Income-tax-6 v. Matrix Cellular International Services (P.) Ltd.***, [2018] 90 taxmann.com 54 (Delhi).

14. The following observations made in the said judgment will be apposite and are extracted hereafter:

“7. The dispute before the Court is whether the ITAT erred in adopting the RPM in order to determine the arms’ length price in relation to the assessee’s business. In the relevant assessment year, the assessee had four AEs. Three of them were wholly owned subsidiaries, whereas in the fourth, the assessee held 49% shareholding. The ITAT found that the AEs were engaged in the business of identifying, negotiating and buying SIM cards from the networks of different countries and selling them to the assessee. This arrangement, according to the assessee, foreign networks were reluctant to deal with foreign companies. The ITAT, relying on the TPO’s order, found that the business of the assessee only involved re-selling or distributing the SIM cards imported from the AEs, without making any value addition. The ITAT also found that there was no distinction between airtime and SIM cards, as no value could be added to the airtime resold by the assessee. Since the SIM cards are resold without making any value addition, the ITAT concluded that the assessee carried out purely trading business, and hence the RPM was the Most Appropriate Method for calculating arms’ length price.

8. This Court finds that once the ITAT, on considering the



relevant facts as well as the order of the TPO, had concluded that the business of the assessee was merely that of a pure trader, and there was no value addition made before re-selling the particular products (i.e. the SIM cards), its consequent finding that RPM is the Most Appropriate Method, is irreproachable. In *Nokia India (P)Ltd. v. Deputy Commissioner of Income Tax*, (2015) 167 TTJ (Del) 243, the Delhi bench of the ITAT held:

“A close scrutiny of the above two sub-clauses along with the remaining sub-clauses of r. 10B(1)(b) makes it clear beyond doubt that RPM is best suited for determining ALP of an international transaction in the nature of purchase of goods from an AE which are resold as such to unrelated parties. Ordinarily, this method presupposes no or insignificant value addition to the goods purchased from foreign AE. In a case the goods so purchased are used either as raw material for manufacturing finished products or are further subjected to processing before resale, then RPM cannot be characterized as a proper method for benchmarking the international transaction of purchase of goods by the Indian enterprise from the foreign AE.”

9. Similarly, in *Swarovski India Pvt. Ltd. v. ACIT*, ITA No. 5621/Del/2014, the ITAT held:

“Adverting to the facts of the instant case, we find that the assessee purchased Crystal goods and Crystal components from its AE. No value addition was made to such imports. The goods were sold as such. In the given circumstances, the RPM is the most appropriate method for determining the ALP of the international transaction of Import of Crystal goods and Crystal components.”

10. A similar view has been adopted by the Mumbai bench of the ITAT in *Mattel Toys v. Deputy Commissioner of Income Tax*, (2013) 158 TTJ (Mum) 461:

“Thus, the RPM method identifies the price at which the product purchased from the A.E. is resold to a unrelated party. Such price is reduced by normal gross profit margin i.e., the gross profit margin accruing in a comparable controlled transaction on resale of same or similar property or services. The RPM is mostly applied in a situation in which the reseller purchases tangible property or obtain services from an A.E. and reseller does not physically alter the tangible goods and services or use any intangible assets to add substantial value to



the property or services i.e., resale is made without any value addition having been made.”

11. This view has also been affirmed by the Bombay High Court in its judgment dated 07.11.2014 in *Commissioner of Income Tax v. L’Oreal India Pvt. Ltd.* (ITA No. 1046 of 2012), where the Court found that there was no error in law committed by the ITAT when it held that RPM was the Most Appropriate Method in case of distribution or marketing activities especially when goods are purchased from associated entities and there are sales effected to unrelated parties without any further processing. In fact, a Division Bench of this Court in its decision in *Bausch & Lomb Eyecare (India) Pvt. Ltd. v. Additional Commissioner of Income Tax*, (2016) 381 ITR 227 (Del), while considering the decision of this Court in *Sony Ericsson Mobile Communications India Pvt. Ltd. v. Commissioner of Income Tax*, (2015) 374 ITR 118 (Del), noted that:

“The RP Method loses its accuracy and reliability where the reseller adds substantially to the value of the product or the goods are further processed or incorporated into a more sophisticated product or when the product/service is transformed.”

15. Having regard to the findings of fact returned by the Tribunal and the principle of law enunciated by the coordinate bench of this court in ***Matrix Cellular International Services (P.) Ltd.***, we are of the view that the question of law framed will have to be decided against the appellant/revenue and in favour of the respondent/assessee. It is held accordingly.

16. Resultantly, the above-captioned appeals are disposed of, in the aforesaid terms.

17. Parties will act based on the digitally signed copy of the order.

RAJIV SHAKDHER, J.

GIRISH KATHPALIA, J.

OCTOBER 12, 2023/RV

[Click here to check corrigendum, if any](#)