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

% **DECIDED ON: 04.07.2014**

\+ ITA 322/2014
CM APPL.10445/2014

MITSUBISHI CORPORATION INDIA PVT. LTD. ..... Appellant
Through: Mr. M.S. Syali, Sr. Advocate with
Mr. Mayank Nagi, Advocate.

versus

ADDITIONAL COMMISSIONER OF INCOME TAX
..... Respondent
Through: Mr. Sanjeev Sabharwal, Sr. Standing Counsel with Mr. Ruchir Bhatia, Jr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE VIBHU BAKHRU (ORAL)

1. This is an appeal filed under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') impugning the order dated 23.08.2013 (hereinafter referred as the 'impugned order') passed by the Income Tax Appellate Tribunal (ITAT).

2. The grievance of the appellant/assessee is that the Assessing Officer, Transfer Pricing Officer (TPO) as well as the Disputes Resolution Panel (DRP) has not considered its functional profile while determining its character as that of a trader.

3. Briefly stated, the relevant facts are that the assessee is a wholly

owned subsidiary of Mitsubishi Corporation-a company incorporated under the laws of Japan. The assessee filed its return for the assessment order 2006-07 on 29.11.2006 declaring a total income of ₹6,39,59,620/-. The return was taken up for scrutiny and a notice under Section 143(2) was issued on 11.10.2007. The Assessing Officer made a reference to the Transfer Pricing Officer (TPO) under Section 92CA(1) of the Act in respect of international transaction between the assessee and its holding company.

4. The TPO rejected the Profit Level Indicator (PLI) used by the assessee to bench mark its international transactions which was a ratio of net revenue and operating expenses. The sales and cost of sale had been excluded by the assessee. The TPO computed the Arm's Length Price (ALP) by assuming a margin of 19.6% and by its order dated 29.10.2009 held that income of the assessee was to be enhanced by a sum of ₹1,55,27,14,989/-.

5. The Assessing Officer made a draft assessment order on 31.12.2009, which was not accepted by the assessee and the assessee filed its objection before the Dispute Resolution Penal (DRP) under Section 144C of the Act. By an order dated 30.09.2010 , the DRP rejected the objections preferred by the assessee in respect of transfer pricing additions made by the TPO and directed the Assessing Officer to complete the assessment as per the draft assessment order. Thereafter, on 25.10.2010, the Assessing Officer passed a final order, which was carried in appeal before the Tribunal by the assessee. The appeal was disposed of by the impugned order.

6. We have heard the learned counsel for the parties.

7. The international transactions reported by the appellant are of four kinds; services, commission, cost to cost reimbursement as well as from sale of products imported from the Associated Enterprise. While, there is no

dispute as to the international transactions resulting in receipts as commission and cost to cost reimbursement for rendering service, the assessee seriously contests the addition made on account of transactions of sale and purchase of goods. The assessee is aggrieved by the margin of 19.6% being applied with respect to transactions of sale and purchase.

8. It was submitted by the learned counsel that its functional profile was not that of a trader but that of a service provider. It was explained that the assessee places orders for purchase with its parent company on the basis of confirmed orders from its customers. It was submitted that in substance the assessee only front ends the transactions of its parent company. The assessee is, thus, not exposed to the risk of carrying any inventory and/or deploying any significant working capital. Accordingly, it was claimed by assessee that the cost of goods sold should not be taken into consideration while computing the profit margins which should be calculated on the operating costs and the appropriate ratio to be considered for comparing with other entities would be the ratio of net revenue to operating costs.

9. The said contentions had also been advanced by the assessee before the ITAT. In the alternative, the assessee had submitted, before the ITAT, that if the transactions of buying and selling were considered to be trading then the ALP should be determined in comparison with companies which were similarly situated.

10. The Tribunal had considered the submissions of the assessee and held as under: -

> *"10. The second ground of the assessee is on the issue of transfer pricing adjustment. The nature of assessee's business as described in the DRP order is to undertake (sogo shosha) activities i.e. role of a*

> *trade intermediary. The purchases are made by the assessee are recorded as such in its books of accounts and there after when sold, the sales recorded as such. The title in the goods is held by the assessee for some time. The assessee deals on a principle to principle basis. Though it is claimed that it is intermediary activities, in our view, the activity cannot be bracketed with the activity of a commission agent or a broker. In our view the activity in question is akin to trading activities. Thus we uphold these findings of the revenue authorities."*

11. It is apparent from the order of the ITAT that the ITAT had concluded that the transaction entered into by the assessee work on principal to principal basis and that the activities were in the nature of trading. Accordingly, the ITAT has held that the activities undertaken by the assessee could not be classified as activities of a commission agent or a broker. It is not disputed that the transactions of purchase and sale between the assessee and Mitsubishi Corporation are done on a principal to principal basis. We find no infirmity with the reasoning of the ITAT that such transactions are akin to trading and cannot be considered activities of a commission agent or a broker. However, the learned counsel for the assessee has expressed his apprehension that in view of the findings of the ITAT, the assessee is likely to be treated as an ordinary trader and compared with other traders who may not be similarly situated. We do not find any ground for such apprehension as the ITAT has made it clear that appropriate comparables would have to be considered for determination of the ALP. This would obviously mean that entities which are similarly placed as the assessee including in respect of their functional and risk profile as well as working capital exposure would be chosen as comparables.

12. We accordingly find no reason to interfere with the order of the

Tribunal. The appeal is accordingly dismissed with the above clarifications.

VIBHU BAKHRU, J

S. RAVINDRA BHAT, J

JULY 04, 2014
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