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

% Judgment delivered on: 13.11.2017
 + ITA 971/2017
 + ITA 972/2017

MSD PHARMACEUTICALS (P)LTD. Appellant

versus

ADDITIONAL COMMISSIONER OF INCOME TAX & ANR.
 Respondents

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

ORDER

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13.11.2017

Advocates who appeared in this case:

For the Appellant : Ms. Rashmi Chopra with Ms. Asiya,
 Advocates.

For the Respondent : Mr. Asheesh Jain, Advocate.

CORAM:-
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

S. RAVINDRA BHAT, J. (OPEN COURT)

CM No.40914/2017 (for exemption) in ITA 971/2017
CM No.40915/2017 (for exemption) in ITA 972/2017

Exemptions are allowed subject to all just exceptions.



ITA No. 971/2017 & ITA No.972/2017

1. Issue notice. Mr. Asheesh Jain, Advocate accepts notice.
2. With the consent of the parties, the matters are heard.
3. These two appeals – both by the assessee – concern the same Assessment Year 2011-2012. The issue involved is the transfer pricing adjustment due to the expenditure attributed to the Advertising Marketing Promotion, held to be a part of the international transaction by the assessing authorities in the course of the arms length price (ALP) determination process.
4. It is undeniable that the TPO – while determining the ALP, adopted ‘Bright Line Test’ (BLT) then prevailing in terms of the ruling of the Special Bench of the Income Tax Appellate Tribunal in the case of LG Electronics. That decision was set aside by this Court in *Sony Ericsson Mobile Communications India Pvt. Ltd. vs. Commissioner of Income Tax*, (2015) 374 ITR 118 (Delhi). The ITAT, in these circumstances, directed to remand the matter to the TPO for fresh determination of the ALP, in the circumstances of the case, having regard to the substantial ruling of this Court.
5. The assessee’s grievance is that, firstly, for another AY 2010-11, this Court restored its appeal before the ITAT for a fresh finding on the issues involved. The second ground urged is with respect to the matter which had obtained finality and for which the ITAT did not



render any finding; the matter ought not to be remitted to the AO.

6. We notice that this Court in ITA Nos.432/2017 (Pr. Commissioner of Income Tax vs. MSD Pharmaceuticals Pvt. Ltd.) and 524/2017 (MSD Pharmaceuticals Pvt. Ltd. vs. Additional Commissioner of Income Tax) i.e. the Revenue and Assessee's appeals for AY 2010-11, has observed as follows:-

“4. The dispute before the Tribunal concerns the addition of transfer pricing adjustment on account of Advertisement, Marketing and Promotion (AMP) Expenditure purportedly incurred by the Assessee. The ITAT in the impugned order has referred to the decision of this Court in Sony Ericson Mobile Communications (India) Pvt. Ltd. v. CIT (2015) 374 ITR 118 (Del) and also some of the subsequent judgments where the Court has held that in matters of transfer pricing the first exercise that is to be undertaken is to determine if in fact there existed an international transaction between the Assessee at its Associated Enterprise. Only if the said question is answered in the affirmative, the further question of determining its arm's length price would arise. Counsel on both sides state that all the necessary documents and information for determining the above question already form part of the record of the case in the ITAT.

5. In view of the above submissions, the Court sets aside the order dated 22nd November, 2016 and restore the aforementioned appeal to the file of the IT AT for a fresh de novo adjudication on merits without reference to the order of the IT AT that has been set aside by this judgment.

6. It will be open to both sides to urge their respective contentions on merits before the IT AT which will be decided afresh without reference to the order of the IT AT that has been set aside by this judgment.”

7. Following the above order in these two appeals, which was rendered on 19.07.2017, the impugned order is, hereby, modified; the



ITAT shall consider deciding the appeals on the questions urged by the parties. It goes without saying that the appellant's contentions with respect to what it considers to be the matters settled shall also be gone into and a finding on the merits rendered.

8. The appeals are partly allowed in the above terms.

**S. RAVINDRA BHAT
(JUDGE)**

**SANJEEV SACHDEVA
(JUDGE)**

NOVEMBER 13, 2017

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