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

+ ITA 185/2020 & CM APPL. 9128/2020

PR. COMMISSIONER OF INCOME TAX, DELHI-9 Appellant
Through: Mr. Ajit Sharma, Advocate.

versus

YUM RESTAURANTS INDIA PVT. LTD. Respondent
Through: Ms. Ananya Kapoor, Advocate with
Mr. Salil Kapoor, Advocate.

% Date of Decision: 10th December, 2020

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

MANMOHAN, J (Oral):

1. The appeal has been heard by way of video conferencing.
2. The present appeal has been filed challenging the order dated 29th January, 2019 passed by the Income Tax Appellate Tribunal ('ITAT') Delhi in ITA No.1993/Del/2015 & 897/Del/2015. By virtue of the impugned order, the ITAT has remanded the matter back to the Transfer Pricing Officer ('TPO') and directed it to consider the combined effect of 14 factors for determining the cost/ value of international transactions in accordance with the Special Bench order passed immediately preceding year of the respondent-assessee in *LG Electronics India Pvt. Ltd. vs. ACIT 2013 152 TTJ (Del) (SB) 273*.

3. Mr. Ajit Sharma states that the said judgment of the Special Bench has already been set aside by the learned Predecessor Division Bench vide judgment and order dated 13th January, 2016 in ITA Nos. 349/2015 and 388/2015, the relevant portion of the said Division Bench order reads as under :

“26. The Court is of the view that after the decision in Sony Ericsson Mobile Communication India P.Ltd. (supra), the adoption of the BLT for determining the existence of an international transaction involving AMP is expenses no longer legally permissible. In that scenario, there would be a need for a detailed examination of the operating Agreement between Yum India, Yum Marketing and the franchisees to ascertain if any part of the AMP expenses is for the purpose of creating marketing intangibles for the AE of Yum India. It is only after an international transaction involving Yum India and its AE in relation to AMP expenses is shown to exist, that the further question of determining the ALP of such international transaction would arise.

27. It is not possible to state that the Revenue has not placed any material to even prima facie show the existence of an agreement regarding AMP expenses. The question however remains whether it discloses an international transaction between Yum India and its AE in regard to AMP expenses for creating of marketing intangibles for the AE. If it is shown to exist the further question would be whether it is at ALP. The submission on behalf of Yum India that for that purpose, the franchise marketing model of JFL is an ideal comparable would then require to be considered.

28. For the above reasons, without commenting one way or the other on the submissions of either the Revenue or the Assessee, the Court sets aside the impugned order dated 12th December 2014 of the ITAT in ITA No. 935/Del/2014 for AY 2009-10 and the corresponding orders of the AO/TPO and the DRP as regards the issue of AMP expenses and remands the issue

concerning the determination of the existence of an international transaction between the Assessee and its AE involving AMP expenses and the further question of determination of its ALP to the AO /TPO for a fresh decision in light of the judgment of this Court in Sony Ericsson Mobile Communication India P. Ltd. (supra). The question framed is answered in the affirmative.”

4. Learned counsel for the respondent also has no objection if the TPO is directed to decide the remand in accordance with the Division Bench order in ITA Nos.349/2015 and 388/2015 dated 13th January, 2016.
5. Accordingly, the TPO is directed to determine the cost/ value of international transactions.
6. Accordingly, the impugned order of the ITAT is set aside to a limited extent and the TPO is directed to decide the matter in accordance with the directions contained in paragraphs 26, 27 and 28 of ITA Nos. 349/2015 and 388/2015
7. With the aforesaid directions, the present appeal stands disposed of.

MANMOHAN, J

SANJEEV NARULA, J

DECEMBER 10, 2020

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