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

Decided on: 29th April, 2019

\+ W.P.(C) 4467/2019 & CM APPL.19840/2019

VODAFONE IDEA LTD. ..... Petitioner
Through: Mr.Deepak Chopra, Mr.Harpreet Singh Ajmani & Mr.Manasvini Bajpai, Advocates

versus

ASSISTANT COMMISSIONER OF INCOME TAX & ORS. ..... Respondents
Through: Mr.Ajit Sharma, Sr.Std.Counsel with Mr.Adeeba Majahid, Jr.Std.Counsel & Mr.Ashutosh Senger, Advocate

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN

S. RAVINDRA BHAT, J. (OPEN COURT)

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1. Issue notice. Mr.Ajit Sharma, Senior Standing Counsel accepts notice.

2. By the order impugned in this writ petition, the ITAT, according to the petitioner, has conclusively determined certain issues on which it had at the same time directed a remand. This Court had on 01.06.2018, in the assessee's appeal for the concerned year [ITA No.660/2018], directed as follows:

"The Court has considered the submissions of the parties; the ITAT remitted for fresh reconsideration of the issue relating to advertising, marketing and promotion (AMP) expenses. Furthermore, it also, through stray sentences in the impugned order not premised on any reason in no manner observed that the benchmarking of international transactions pertaining to payment of royalty cannot be done by using comparables with transactions entered into between two foreign parties. This observation in the opinion of the Court is not warranted to. Having regard to the fact that all materials were available with it, the ITAT is directed to consider the transactions involving AMP expenditure as well as the issue of royalty. In this regard its observations with respect to the comparables used by the assessee vis-a-vis the two foreign parties shall not be treated conclusive. The ITAT shall carry out necessary inquiry if need be by resorting to a limited remand to the TPO or DRP as the case may be having regard to the overall facts and circumstances and decide whether AMP expenses required in the present case involve international transaction, if so, to what extent."

3. By the impugned order, passed pursuant to the remit by this Court, the ITAT noticed certain facts and discussed certain relative merits observing as follows:

"22. On the aspect of quantitative filters adopted by the assessee are with related to the payments. In the agreement entered into by the assessee the payment terms are payment of specified percentage over the net service revenue. However, the assessee adopted a filter of payment terms of percentage of gross sales. There is no such condition in any of the agreement entered into by the assessee with both the parties with respect to the payment of fees on gross sales. There is no justification found in the transfer pricing study report with respect to the above filter applied by the assessee.

23. Therefore one of the quantitative filters applied by the assessee also deserves to be rejected is devoid of any justification.

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25. Now coming to the single agreement which was found to be comparable by the assessee, This agreement was where the licensor is Motorola incorporation USA and the licensee is forward industries incorporation USA, the period of the agreement was January 2008 to March 2009 and services were trademark license fees for the use of Motorola signature and the M logo (Emsignia) where the payment of royalty was 7% of net sales. Therefore the assessee stated that this is the only agreement which is between 2 foreign parties, both from USA is the only comparable, hence applying CUP method, comparing transaction of its AE with that solitary transaction stated that it is transaction of payment of royalty is at arm's-length. It is important to note that assessee is paying only 0.15% and 0.30% as trademark license fees and it is comparing the transaction where the royalty was paid as 7% of net sales, which is almost 50 times more than what the assessee has paid. Such a huge margin between the comparable price stated by the assessee and actual international transactions entered into by the assessee clearly makes the comparability analysis unjustified and devoid of any reasoning.

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27. As the Honourable High court has directed ITAT to determine the ALP of the Royalty (Trademark License fees) payment and only comparable was stated to be payments by Forward Industries Inc to Motorola inc, and further as assessee did not provide any details about the agreement between Motorola and forward incorporation, we are duty-bound to make our own research on the issue.

28. We looked at the functional profile of the Forward Industries inc from (yahoo. Finance. Co) which shows that Forward Industries, Inc., together with its subsidiaries,

designs, markets, and distributes carry and protective solutions primarily for hand held electronic devices. It provides carrying cases and other accessories for medical monitoring and diagnostic kits; and other portable electronic and non-electronic products, such as sporting and recreational products, bar code scanners, smartphones, GPS location devices, tablets, firearms, and other products. The company sells its products to original equipment manufacturers in the Americas, the Asia-Pacific, Europe, the Middle East, and Africa. Forward Industries, Inc. was founded in 1954 and is headquartered in West Palm Beach, Florida.

30. In view of this, the transfer pricing study document prepared by the assessee
for benchmarking the royalty payment does not inspire any confidence but merely eyewash.

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32. Though the honourable High Court has directed us to determine the arm's length price of the royalty payment, however very kindly looking at the complexity of the issue, honourable High Court was also pleased to authorize the coordinate bench to carry out necessary enquiries and if need be to resort to a limited remand to the learned transfer pricing officer or dispute resolution panel.

33. During the course of hearing both the parties also submitted that identical issue is involved with respect to the determination of the arm's-length price of the international transaction of the payment of royalty to associated enterprises in all those years from assessment year 2009 - 10 to 2012- 13. Therefore, it was requested that if the issues remanded to the learned transfer-pricing officer then similar direction to both the parties may be given for all those years and all those appeals may be disposed of with respect to the above ground based on the above limited remand. Therefore, at the request of the parties we also agree to give similar directions for all these years.

34. Therefore, in view of

a) *the inadequate facts about the product comparability for technology for which trademark fees is paid as Royalty*
b) *Absence of availability of agreement between two foreign parties, as well as terms, economic indicators, risk etc*
c) *No adjustment on account of geographical difference between two prices*
d) *Use of database PowerK without justification and not using other specific databases*
e) *Use of inappropriate filters*

35. Therefore, for all these years, i.e. A Y 2009-10 to 2012- 13, We direct limited remand to the ld TPO to examine the comparability analysis for determination of the arm's-length price of the royalty fees paid by the assessee. For the examination of the learned transfer pricing officer we direct the assessee to submit a fresh comparability analysis before the learned transfer pricing officer justifying the use of various database with the rationale for using them, justifying each and every filter that assessee would like to use, justify the various differences in the prices and it is adjustment to be made and all the necessary details before the learned transfer pricing officer on or before 15/04/2019. The learned transfer-pricing officer will also examine them, also make his own determination of ALP of Royalty on or before 05/05/2019, and seek any explanation/submission clarification on or before 22nd of May 2019. Based on examination and on his finding on the submission of the assessee, ld TPO/AO is directed to submit on or before 30/05/2019 remand report before the coordinate bench and the copy to the assessee on the determination of ALP of the above royalty payment. Needless to say that both the parties are free to decide any other method or mechanism of determination of ALP of above royalty payment, if in case it is found that CUP is not the correct method in absence of availability of the comparable data. After

that on 03/06/2019, the matter is posted for hearing before the coordinate bench. Interim order pronounced in the open court on 25/03/2019."

4. The assessee is aggrieved and contends that though characterized as an interim order and not conclusive of the merits, yet, the finality precludes the assessee/petitioner from urging the grounds with respect to the precise issues that were subject to remand and for which the ITAT felt the need fails to make a further remand and set up inquiry by the TPO.

5. This Court is of the opinion that till the remand directed by the ITAT is worked out and a report on that aspect is received, the ITAT's observations in the impugned order, particularly the ones quoted above, or any other observation like them which tend to indicate finality, shall in no way be treated as conclusive of the merits. All rights and contentions of the parties are accordingly kept open. The concerned Bench of the ITAT dealing with the final merits shall be uninfluenced by the said observations.

6. The writ petition is disposed of.

7. Copy of the order be given *dasti.*

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

APRIL 29, 2019
'hkaur/pv'