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

\+ ITA 548/2018

PR. COMMISSIONER
OF INCOME TAX, DELHI- 1 ..... Appellant

Through : Mr. Sanjay Kumar, Senior Standing Counsel for Revenue along with Ms. Easha Kadian, Advocate.

versus

M/S. AMADEUS INDIA PVT. LTD. ..... Respondent

Through : Mr. Mayank Nagi and Mr. Tarun Singh, Advocates.

% Date of Decision: 18th October, 2022

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

1. Present appeal has been filed by the Appellant, Revenue, under Section 260A of the Income Tax Act, 1961 ('the Act'), to set aside the impugned order dated 23rd October, 2017, passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 1835/Del/2015 for the Assessment Year ('AY') 2010-11.

2. The following question of law was framed on 20th January, 2020:

"Whether the Ld. ITAT is justified in holding that provisions of services of market development (services of carrying out advertisement, market & business promotion i.e. AMP) are not

international transactions in the light of provisions of sub-clause (d) of clause (i) of explanation to section 92B of the Income Tax Act, 1961?"

3. The facts relevant for determining the aforesaid question of law are that the Assessee filed its return of income (ITR) for AY 2010-11.

4. The Assessee's case was selected for scrutiny assessment and a notice was issued under Section 143(2) of the Act, which was complied with. The Assessing Officer ('AO') observed that in the year under consideration, the Assessee had entered into international transactions with its Associated Enterprises (AEs) and in order to determine the Arm's Length Price ('ALP') of the said international transactions, the AO made a reference to the Transfer Pricing Officer ('TPO'). During the transfer pricing, the TPO observed that the Assessee has incurred more than normal sales and marketing expenses to build 'Amadeus' brand in India, which is legally owned by the AE i.e. M/s Amadeus IT Group SA ('Amadeus Spain'). The TPO concluded that such higher than normal market expenses i.e. AMP constitute an international transaction between the Assessee and its AE. The TPO computed the adjustment by applying the Bright Line method.

5. The AO issued a draft order dated 29th March, 2014, incorporating the additions made by the TPO. In response to the said draft order, the Assessee filed its objections before the Dispute Resolution Panel ('DRP'), which were dismissed and the additions made by the AO were upheld. Following the directions of the DRP, the AO passed the final assessment order dated 23rd February, 2015, and made additions which included an addition of transfer pricing adjustment for the AMP expenses at Rs. 81,16,72,668/-. The Assessee aggrieved by the assessment order filed an appeal before the ITAT.

6. The ITAT allowed the appeal and relied upon the order passed by its predecessor bench in Assessee's own case for the AY 2009-10, to delete the said addition of transfer pricing adjustment made on account of AMP expenditure after holding that it does not constitute an international transaction. Pertinently, the earlier order of ITAT for AY 2009-10 was upheld by this Court in ITA No. 154/2017, decided on 22nd May, 2017.

7. The learned senior standing counsel for the Revenue, states that the ITAT erred in law while holding that the provision of services of market development (service of carrying out advertisement, market and business promotion i.e., AMP) are not international transaction by ignoring the provisions of sub-clause (d) of clause (i) of Explanation to Section 92B of the Act of 1961. He states that even though the transfer pricing adjustment made on account of AMP expenses was deleted by the ITAT in AY 2009-10, which order was upheld by this Court in ITA No. 154/2017 decided on 22nd May, 2017, since the principles of *res judicata* are not applicable in tax proceedings, the Court can examine the legality of the impugned order passed by the ITAT.

8. In reply, learned counsel for the Respondent, Assessee, has drawn our attention to another order of the ITAT dated 27th February, 2019, in Assessee's own case for subsequent AY 2011-12, wherein similarly the ITAT has deleted the transfer pricing adjustment made on account of AMP expenses and thereafter, this Court in ITA No. 901/2019 vide order 16th October, 2019, upheld the said order of the ITAT.

9. He states that this Court declined to refer any question of law for AY 2009-10 as well as AY 2011-12. He states that in fact, for both the years, the decision of the Appellate Tribunal to the effect that there is no international

transaction between the Assessee and the AE, was not doubted by this Court and the appeals filed by the Revenue in the said two years were dismissed holding that no referable question of law arose for its decision.

10. He states that the ITAT for the assessment year under consideration i.e. AY 2010-11 has concluded there has been no change of facts and circumstances when compared with AY 2009-10 and he, therefore, contends that following the rule of consistency the ITAT rightly held that the transaction should be treated similarly in the assessment year under consideration.

11. The learned counsel for the Assessee has relied upon the judgment of this Court in the case of ***Bausch & Lomb Eyecare Pvt. Ltd. vs. Additional Commissioner of Income Tax, [2016] 381 ITR 227,*** to contend that expenses incurred by the Assessee under the head 'AMP' cannot be termed as an international transaction, in the absence of any provision for the same in the agreement in this regard with Associated Enterprise. He has also placed reliance on the judgment of this Court in the case of ***Maruti Suzuki vs. CIT, [2016] 381 ITR 117*** to contend that there is no machinery provision for determining the Arm's Length Price of AMP expenditure**.**

Learned senior standing counsel for Revenue in rebuttal submits that the Department has not accepted the judgment in the case of ***Bausch & Lomb Eyecare Pvt. Ltd. (supra)*** and a Civil Appeal impugning the said judgment is pending before the Supreme Court, however, he admits there is no stay of the said judgment.

12. The learned counsel for the Respondent, Assessee, further states the the orders of the predecessor benches of this Court dismissing Revenue's appeal for AY 2009-10 and 2011-12 are pending challenge before the

Supreme Court. He states that Assessee has no objection if this Court observes that the order passed in this assessment year will abide by the final decision in the aforesaid appeals.

13. We have heard the learned counsel for the parties. A perusal of the impugned order shows that the ITAT in its impugned order concluded that the factual matrix has remained consistent in AY 2009-10 and AY 2010-11 and, therefore, relied upon the findings recorded for AY 2009-10 to hold that the expenses incurred on AMP does not constitute an international transaction between the Assessee and its AE. The findings of the ITAT in previous AY 2009-10, as relied upon in the impugned order reads as under:-

> *"8.2 On a careful consideration of the facts on record we are of the opinion that there is nothing on record to show that the appellant by incurring AMP expense wanted to promote its AE. The Ld TPO has failed to prove that the appellant by incurring AMP expenses wanted to benefit the AE and not to promote its own business. Submission of Ld TPO that clauses 10.02, 10.5, 11.01 and Article XVI of the agreement indicate existence of a "transaction" for brand promotion is not supported by contents of those clauses. Appellant's objections before the learned DRP, which we have quoted above, are acceptable. These clauses nowhere provide that the appellant will be incurring brand promotion expenses for and on behalf of its AE or solely for its business purposes and interests. Agreement dated 01st October 2004 between appellant and its AE is based upon revenue sharing model in which 46% revenue is being shared by Amadeus Spain with the appellant and hence it is difficult to visualize that appellant will not be incurring routine advertisement expenses in its entrepreneur capacity. Excluding payment of incentives, which in earlier years have been held, to be pure selling expenses the ratio of AMP/Sales of the appellant is mere 2.29%. Ld AR is also right in relying upon the decision of Hon'ble Jurisdictional High Court in case of Sony Mobile Communications (supra) for submitting that events which would transpire on termination of distribution might require a TP adjustment at that stage but the same will be*

immaterial to presume existence of an agreement, arrangement or understanding in the year under consideration. In this regard Hon'ble High Court at para 153 of its reported judgment has been pleased to be hold as under:

> *"153. Economic ownership of a brand is an intangible asset, just as legal ownership. Undifferentiated, economic ownership brand valuation is not done from moment to moment but would be mandated and required if the assessed is deprived, denied or transfers economic ownership. This can happen upon termination of the distribution-cum-marketing agreement or when economic ownership gets transferred to a third party. Transfer Pricing valuation, therefore, would be mandated at that time. The international transaction could then be made a subject matter of transfer pricing and subjected to tax."*

8.3 As held above appellant has raised objections before the learned DRP that none of the above clauses of the agreement make it mandatory for the appellant to incur brand promotion expenses for and on behalf of the AE. Ld DRP has not disturbed these objections but has upheld the case of Ld TPO on some other grounds i.e (i) by relying upon Special Bench decision in case of LG Electronics reported in 140 ITD 41(Del)(SB) (ii) by holding that since appellant is a Dependent Agency PE of its AE hence all the expenses on AMP are being incurred by it for the benefit of AE and (iii) by relying upon amended provisions of section 92B. We do not find any substance in the above approach of the Ld DRP. Decision of Special Bench in LG Electronics (supra) is no more good law post above decisions of the Jurisdictional High Court. We have already reproduced above findings of Jurisdictional High Court in case of Bausch & Lomb Eyecare (India) (P.) Ltd (supra) wherein it is held that " As far as the legislative intent is concerned, it is seen that certain transactions listed in the Explanation under clauses (i)(a) to (e) to Section 92B are described as an 'International transaction'. This might be only an illustrative list, but significantly' it does not list AMP spending as one such transaction" hence amendments to section 92B by Finance Act 2012 also do not support the case of the

Revenue. Lastly on the observations made by the Ld. DRP that since the appellant a Dependent Agency PE of its AE, hence all its expenses on AMP are being incurred by it for the benefit of AE we would like to state that this is also entirely irrelevant. While alleging as above the Ld DRP has not appreciated that appellant has been held to be a Dependent Agent Permanent Establishment of Amadeus Spain for determination of Amadeus Spain's income, which is taxable in India. Moreover, we may refer here decision of Hon'ble Jurisdictional High Court in case of Whirlpool of India Ltd (supra) wherein it is held by the Hon'ble High Court as under:

> *"37. The provisions under Chapter X do envisage a 'separate entity concept'. In other words, there cannot be a presumption that in the present case since WOIL is a subsidiary of Whirlpool USA, all the activities of WOIL are in fact dictated by Whirlpool USA. Merely because Whirlpool USA has a financial interest, it cannot be presumed that AMP expense incurred by the WOIL are at the instance or on behalf of Whirlpool USA. There is merit in the contention of the Assessee that the initial onus is on the Revenue to demonstrate through some tangible material that the two parties acted in concert and further that there was an agreement to enter into an international transaction concerning AMP expenses.*
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> *46. As already mentioned, merely because there is an incidental benefit to Whirlpool USA, it cannot be said that the AMP expenses incurred by WOIL was for promoting the brand of Whirlpool USA. As mentioned in Sassoon J David (supra) "the fact that somebody other than the Assessee is also benefited by the expenditure should not come in the way of an expenditure being allowed by way of a deduction under Section 10(2)(xv) of the Act (Indian Income Tax Act, 1922) if it satisfies otherwise the tests laid down by the law"*

8.4 <u>Considering the material facts like absence of an agreement, arrangement or understanding between the appellant and its AE for sharing AMP expenses or for incurring AMP expenses for sole</u>

benefit of the AE, payments made by the appellant under the head AMP to the domestic parties cannot be termed as an "international transaction" specifically when the Ld TPO has not been able to prove that expenses incurred were not for the business carried out by the appellant in India. We are thus of the opinion that the TPO had wrongly invoked the provisions of Chapter X of the Act for the said AMP spent. Addition of Rs 75,40,09,515/- is therefore directed to be deleted. Ground Nos 4 to 4.4 are therefore allowed. Considering our conclusions above ground nos 5 and 5.1 do not require any adjudication."

(Emphasis supplied)

14. The relevant finding of ITAT that there has been no change in facts and circumstances in AY 2010-11 when compared with AY 2009-10 reads as under: -

> *"4.5 In the year under consideration there is no change in facts and circumstances as compared to the Assessment year 2009-10 and the agreement relied upon in assessment year 2009-10 between the parties is continued in the year under consideration also."*

15. The learned senior standing counsel for the Revenue fairly admits that there are no distinguishable facts in the present assessment year from that of AY 2009-10 as well as 2011-12.

16. The learned counsel for the Revenue has admitted that the agreement which is subject matter of scrutiny in AY 2009-10, AY 2010-11 (the year under consideration) and AY 2011-12 is the same agreement. The ITAT for AY 2009-10 and 2011-12 has given a finding on facts that the AMP expenses incurred by the Assessee cannot be termed as an international transaction and that there was no evidence on record to enable the TPO to hold that the expenses were not incurred for the business carried out by the Assessee in India. The said finding of ITAT has been upheld by the

predecessor benches of this Court in favour of the Assessee.

17. The ITAT while upholding deleting the said addition, has followed the judgment of this Court in ***Bausch and Lomb Eyecare Pvt. Ltd. (Supra),*** wherein this Court held as under:-

> *"...*
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> ***64****. In the absence of any machinery provision, bringing an imagined transaction to tax is not possible. The decisions in CIT v. B.C. Srinivasa Setty [1981] 128 ITR 294 and PNB Finance Ltd. v. CIT [2008] 307 ITR 75 make this position explicit. Therefore, where the existence of an international transaction involving AMP expense with an ascertainable price is unable to be shown to exist, even if such price is nil, Chapter X provisions cannot be invoked to undertake a TP adjustment exercise.*
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> ***65****. As already mentioned, merely because there is an incidental benefit to the foreign AE, it cannot be said that the AMP expenses incurred by the Indian entity was for promoting the brand of the foreign AE. As mentioned in Sassoon J Davit & Co. (P.) Ltd. v. CIT [1979] 118 ITR 261 "the fact that somebody other than the Assessee is also benefitted by the expenditure should not come in the way of an expenditure being allowed by way of a deduction under Section 10 (2) (xv) of the Act (Indian Income-tax Act, 1922) if it satisfies otherwise the tests laid down by the law".*
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> ..."

18. We may also note the judgment of this Court in ***Maruti Suzuki (Supra)***, where this Court has held that there is no machinery provision in Chapter X which enables an AO to determine what should be a fair compensation an Indian entity would be entitled to if it is found that there is an international transaction with respect to AMP between the Assessee and the AE.

19. It is an admitted position that the facts and circumstances in the present appeal for AY 2010-11 are similar to the facts and circumstances in

AY 2009-10 and AY 2011-12. Undoubtedly, the principles of *res judicata* and estoppel are not applicable taxation matters. However, it has been held by this Court in ***Principal Commissioner of Income Tax vs. Power Links Transmission Ltd., [2022] 138 taxmann.com 542 (Delhi),*** that it is not appropriate to allow re-consideration of an issue for a subsequent assessment year if the same fundamental aspect permeates in different assessment years and the relevant paragraph of the judgment reads as under:-

> *"7. The Supreme Court in **Principal Commissioner of Income Tax, New Delhi vs. Maruti Suzuki India Ltd., [2019] 107 taxmann.com 375 (SC)** has emphasized the importance of promoting the 'principle of consistency and certainty' in tax matters. The Apex Court has held "There is a value which the court must abide by in promoting the interest of certainty in tax litigation. The view which has been taken by this Court in relation to the respondent for AY 2011-12 must, in our view be adopted in respect of the present appeal which relates to AY 2012-13. Not doing so will only result in uncertainty and displacement of settled expectations. There is a significant value which must attach to observing the requirement of consistency and certainty. Individual affairs are conducted and business decisions are made in the expectation of consistency, uniformity and certainty. To detract from those principles is neither expedient nor desirable."*
>
> *8. Consequently, this Court is of the view that all similar matters should receive similar treatment except where factual differences require a different treatment so that there is assurance of consistency, uniformity, predictability and certainty of judicial approach."*
>
> **(Emphasis supplied)**

20. The law on the issue of AMP is well settled by the aforesaid

judgements of this Court and the same has been consistently applied by the appellate authorities below and the predecessor benches of this Court to the facts of the Assessee in AY 2009-10 and AY 2011-12. Therefore, we are unable to agree with learned senior standing counsel for the Revenue that there is any change in law which would merit reconsideration of said issues of AMP in the present proceedings. We, therefore, hold that the ITAT has properly and correctly assessed the fact and law while concluding that services of AMP are not international transactions in light of the provisions of sub-clause (d) of clause (i) of Explanation to Section 92B of the IT Act, 1961.

21. The question of law raised in the present appeal was also raised before this Court in Revenue's appeal for AY 2009-10 in ITA No. 154/2017 and an appeal against the same is pending before the Supreme Court. Since the ITAT has relied on the judgment of AY 2009-10, therefore, taking the statement of the counsel for the Assessee on record it is made clear that the final result qua dispute between the parties will abide by the judgment of the Supreme Court in SLP bearing Diary no. 5968 of 2018, referred to hereinabove.

22. Accordingly, the present appeal stands disposed of.

MANMEET PRITAM SINGH ARORA, J

MANMOHAN, J

OCTOBER 18, 2022
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