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

\+ **ITA 174/2020 & CM APPL. Nos.8721-8722/2020**

PR. COMMISSIONER OF INCOME TAX-I ..... Appellant

Through: Mr.Zoheb Hossain, Sr.Standing Counsel for the Revenue with Mr.Vipul Agrawal and Mr.Parth Semwal, Advocates.

versus

AMADEUS INDIA PVT. LTD. ..... Respondent

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

\+ **ITA 175/2020 & CM APPL. Nos.8825/2020, 8827/2020**

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

Through: Mr.Zoheb Hossain, Sr.Standing Counsel for the Revenue with Mr.Vipul Agrawal and Mr.Parth Semwal, Advocates.

versus

AMADEUS INDIA PVT. LTD. ..... Respondent

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

% Date of Decision: 27th 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):

CM APPL Nos. 8721-22/2020 in ITA 174/2020

CM APPL. Nos. 8825/2020, 8827/2020 in ITA 175/2020

Keeping in view the averments in the applications, the delay in filing and re-filing the appeals is condoned.

Accordingly, the present applications stand disposed of.

ITA 174/2020
ITA 175/2020

1. The present appeals have been filed by Revenue under Section 260A of the Income Tax Act, 1961 (the 'Act'), against the common impugned order and judgment dated 27th February 2019, passed by the Income Tax Appellate Tribunal ('ITAT') in ITA Nos. 1811/Del/2017 and 7691/Del/2017, dated 27th February, 2019, for the Assessment Years ('AYs') 2012-13 and 2013-14 respectively.

2. The facts in assessment years forming subject matter of the present appeal(s), with respect to the substantive addition on account of Advertisement, Marketing and Promotion ('AMP') expenditure, are similar to that of previous AYs 2009-10 to 2011-12, with the only distinction being that in the assessment years under consideration the TPO has made protective as well as substantive addition on account of AMP expenditure. The agreement between the Assessee and its Associated Enterprise ('AE') which formed the basis for previous AYs, remained operational for the years under consideration as well. It is pertinent to mention here that the AMP expenditure issue already stands settled in favour of the Assessee by this Court and the said addition has been deleted in the previous AYs.

For the assessment years under consideration the protective addition has been made by the TPO by applying the Bright Line Test to the alleged

AMP expenditure of the Assessee including incentives paid to the travel agent; and substantive addition has been made by applying Cost Plus Method to the AMP expenditure while excluding payments of expenses made to the travel agent. In the assessment years under consideration there is also an addition on account of disallowance made under Section 14A of the Act.

3. Learned counsel for the Appellant, Revenue, states that the ITAT erred in deleting the addition on account of AMP expenditure and fell in error in holding that provisions of Chapter X of the Act cannot be invoked for the said expenses. He states that the ITAT failed to consider that as per the distribution agreement dated 01st October, 2004, entered between Amadeus Global Travel Distribution SA Madrid ('Amadeus Spain') and the Assessee, Amadeus India Pvt. Ltd., receipts in the hands of the Assessee were in the nature of distribution fee and as per the said agreement, the main income of the Assessee was in the nature of marketing and distribution of products of Amadeus Spain. He states that ITAT failed to appreciate that the Assessee by means of AMP expenditure has assisted its foreign AEs in penetrating the Indian market and building a brand in India. He states that the ITAT failed to consider that by means of AMP expenditure, the Assessee is creating a market of intangible for its foreign AE which translates into higher sales of brand loyalty in India.

4. He states that as per the agreement, the Assessee is termed as the National Marketing Agent ('NMA') of Amadeus Spain, which makes it evident that it is the responsibility of the Assessee to carry out marketing work for its AE and it is remunerated for the same. He, further, states that

the Assessee is the agent of the parent company and has earned income under the name of the distribution agreement from the foreign company.

5. He lastly states that the ITAT erred in deleting the disallowance made by the Assessing Officer under Section 14A of the Act, without considering the CBDT Circular No. 5/2014, dated 11th February, 2014.

6. We have heard the submissions made by the learned senior standing counsel for the Revenue.

7. It is pertinent to mention here that qua both the protective and substantive addition made on account of AMP expenditure, the ITAT has observed that the said action of the TPO appears to have been prompted due to the decision of this Court in the case of ***Sony Ericsson Mobile Communications India (P.) Ltd. v. Commissioner of Income-tax – III, (2015) 374 ITR 118,*** wherein, *inter alia*, this Court has held that the Bright Line Test cannot be used as a method for computing Arm's Length Price and selling expenses are to be excluded from the ambit of AMP expenditure. The ITAT also noted the decision of its predecessor bench in Assessee's own case for AY 2007-08, wherein it was observed that incentive paid to travel agents constitutes selling expenses and are to be excluded from the ambit of AMP expenditure. The ITAT on the basis of the findings of the TPO and DRP presumed that since Revenue has not accepted either of the said decisions and has filed a petition before the Supreme Court, the TPO to keep the issue alive, has made both the protective and substantive AMP adjustments in the assessment years under consideration.

8. However, the ITAT, following the law laid down by this Court in ***Bausch & Lomb Eyecare Pvt. Ltd. vs. Additional Commissioner of Income Tax, [2016] 381 ITR 227*** and ***Maruti Suzuki vs. CIT, [2016] 381 ITR 117,*** held that in the facts and circumstances of the present appeals, there is no international transaction between the Assessee and its AE for incurring AMP to promote the brand of AE. Consequently, the ITAT, *mutatis mutandis* applied the conclusion drawn by it while deciding the appeal for AY 2011-12 to the facts of the present appeals. The ITAT concluded that in the absence of a transaction for brand promotion between the Assessee and its AE, the TPO and the Dispute Resolution Panel ('DRP') were not justified in proposing either a protective adjustment or a substantive adjustment and accordingly, directed deletion.

In this regard, we may note that the order of the ITAT in Assessee's own case for AY 2011-12, deleting the transfer pricing adjustment made on account of AMP expenditure has been upheld by the predecessor bench of this Court in ITA No. 901/2019 vide order dated 16th October, 2019. The ITAT's orders for AY 2009-10 and 2010-11 deleting the disallowance on account of AMP expenditure has also been upheld by this Court in ITA 154/2017 and ITA 548/2018 respectively.

9. With respect to the disallowance under Section 14A of the Act, it is admitted that no exempt income was earned by the Assessee in AYs 2012-13 and 2013-14. The ITAT following the judgment of this Court in ***Cheminvest Ltd. v. Commissioner of Income Tax - VI, (2015) 378 ITR 33,*** has deleted the said disallowance made on account of Section 14A of the Act.

10. We are of the considered view that the deletion of the said disallowance under Section 14A of the Act, by the ITAT is correct in the facts of this case. The contention of the Revenue that ITAT failed to consider the CBDT Circular 5/2014 dated 11th February, 2014, is also untenable inasmuch as, another division bench of this Court in ***Principal Commissioner of Income Tax - 04 v. IL & FS Energy Development Company Ltd., (2017) 399 ITR 483,*** has held as under: -

> *"…*
> ***18.*** *The CBDT Circular upon which extensive reliance is placed by Mr. Hossain does not refer to Rule 8D(1) of the Rules at all but only refers to the word "includible" occurring in the title to Rule 8D as well as the title to Section 14A. The Circular concludes that it is not necessary that exempt income should necessarily be included in a particular year's income for the disallowance to be triggered.*
> ***19.*** *In the considered view of the Court, this will be a truncated reading of Section 14 A and Rule 8D particularly when Rule 8D(1) uses the expression 'such previous year'. Further, it does not account for the concept of 'real income'. It does not note that under Section 5 of the Act, the question of taxation of 'notional income' does not arise. As explained in Commissioner of Income Tax v. Walfort Share and Stock Brokers Pvt. Ltd. [2010] 326 ITR 1 (SC), the mandate of Section 14A of the Act is to curb the practice of claiming deduction of expenses incurred in relation to exempt income being taxable income and at the same time avail of the tax incentives by way of exemption of exempt income without making any apportionment of expenses incurred in relation to exempt income. Consequently, the Court is not persuaded that in view of the Circular of the CBDT dated 11 May 2014, the decision of this Court in Cheminvest Ltd.(supra) requires reconsideration.*

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24. *For all of the aforementioned reasons, this Court is of the view that the CBDT Circular dated 11 May 2014 cannot override the expressed provisions of Section 14A read with Rule 8D.*

…"

11. Admittedly, the issues of law and fact raised by the Appellant in the present appeals, with respect to the addition on account of AMP expenditure, are similar to the case decided by the Division Bench of this Court in ITA Nos. 154/2017, 548/2018 and 901/2019.

12. With respect to the deletion of the disallowance made under Section 14A of the Act**,** the said issue is also covered against the Revenue by the decision of this Court in ***Cheminvest (supra)*** and therefore, the same does not give any rise to any substantial questions of law.

13. Consequently, on the issue of transfer pricing adjustment on account of AMP expenditure, the present appeals are disposed of in terms of the judgment of the Division Bench in the aforesaid Income Tax Appeals, however, it is made clear that the present decision will abide by the judgment of the Supreme Court in S.L.P.(C) No. 5968/2018 preferred by the Revenue against the order passed by this Court in ITA No. 154/2017.

MANMEET PRITAM SINGH ARORA, J

MANMOHAN, J

OCTOBER 27, 2022/msh/aa