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

\+ ITA 408/2022

THE PR. COMMISSIONER OF INCOME TAX -4 ..... Appellant

Through: Mr. Ruchir Bhatia, Senior Standing Counsel for Revenue.

versus

MOET HENNESSY (I) PVT. LTD. ..... Respondent

Through: Mr. Sumit Mangal, Mr. Mayank Aggarwal & Ms. Radhika Sharma, Advocates.

% Date of Decision: 02nd November, 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):

ITA 408/2022

1. The Appellant, Revenue, has impugned the common order dated 13th December, 2019, passed by the Income Tax Appellate Tribunal ('ITAT') in cross appeals bearing ITA No. 1051/Del/2016 and ITA No. 1070/Del/2016, for the Assessment Year ('AY') 2011-12 in ITA No. 408/2021.

2. Brief facts leading to the filing of the present appeal are that the Respondent, Assessee, filed its Return of Income ('ROI') on 30th November, 2011, for AY 2011-12. The Assessee's return was processed under Section

143(1) of the Income Tax Act, 1961, (the 'Act') and its case was selected for scrutiny assessment. The Assessing Officer ('AO') observed that the Assessee Company had entered into international transactions with its Associated Enterprises ('AEs') and consequently, made a reference to the Transfer Pricing Officer ('TPO') for determining the Arms's Length Price ('ALP') of the international transactions under Section 92CA(3) of the Act.

3. The TPO in its order dated 12th January, 2015, observed that the Assessee incurred huge Advertising, Marketing and Promotion ('AMP') expenditure with the objective of expanding the reach of the AE's brand in India, who is the legal owner of the brand. The TPO thus concluded that the Assessee has created marketing intangibles in favour of the AE. Consequently, the TPO determined the ALP of international transaction of promotion of the brand name, by using the Bright Line Test ('BLT'), and made an adjustment of Rs. 7,10,04,420/- on account of AMP expenditure incurred by the Assessee. Pursuant to the aforesaid, the AO passed its draft assessment order under Section 144C of the Act.

4. Being aggrieved by the aforesaid adjustment made by the TPO on account of AMP expenditure, the Assessee filed its objection before the Dispute Resolution Panel ('DRP'). The DRP vide its order dated 16th November, 2015, allowed the Assessee's objection, by deleting the ALP adjustment made by the TPO by applying BLT method in light of the judgment of this Court in ***Sony Ericsson Mobile Communications India (P.) Ltd. v. Commissioner of Income Tax – III, (2015) 374 ITR 118 (Del)***.

5. The DRP held that comparables of similar functional intensity are to be taken into consideration for determining the ALP. However, DRP after

observing the comparables concluded that the Assessee herein has a better financial performance when compared to the comparables, with a lower spend, and therefore held that proposed ALP adjustment is not called for in the facts of this case.

However, the DRP on a separate reasoning disallowed AMP expenditure for an amount of Rs. 6,64,24,161/- under Section 37(1) of the Act, holding that the Assessee had undertaken promotional activities in violation of bar on advertising and promotion of liquor in India, as per the provisions of the Cable Television Network Rule, 1994 and code of Advertising Standards Council of India ('ASCI'). The DRP held that as per the Explanation 1 to Section 37(1) of the Act, there is bar on allowability of expenses that is on account of any activity that is an 'offence' or which is prohibited, by law and issued a direction in this regard to the AO.

Pursuant, to the aforesaid DRP directions, the AO passed its final assessment order dated 30th December, 2015, under Section 143(3)/144C of the Act, confirming the aforesaid disallowance of AMP expenditure for an amount of Rs. 6,64,24,161/- under Section 37(1) of the Act.

6. Being aggrieved by the aforesaid, cross appeals were preferred before the ITAT, wherein the ITAT held the following: -

Qua disallowance of Rs. 6,64,24,161/- under Section 37(1) of the Act

6.1. The Assessee in its appeal before ITAT contended that as per Section 144C(8) of the Act, DRP may confirm, reduce or enhance the variation proposed in the draft order. However, DRP is not empowered to set aside any proposed variation or issue any direction under Section 144C(5) for

further enquiry for passing the assessment order and therefore, the disallowance proposed under Section 37 (1) of the Act was without jurisdiction.

6.2. The ITAT agreed with the contention of the Assessee that the direction of the DRP to AO for determining the disallowance of AMP expenditure under Section 37(1) of the Act after hearing the Assessee was in the nature of a remand. It held that such a direction by DRP is impermissible under Section 144C of the Act and held that AO is not empowered to make a fresh determination under Section 144C.

6.3. The ITAT also held that the DRP/AO has taken a general view, and there is no finding of facts, that the provisions of Cable Television Network Rule, 1994 or ASCI has indeed been violated by the Assessee with respect to the advertisement and promotion.

6.4. Lastly, the ITAT placed reliance and followed the decision of its coordinate Bench for AYs 2012-13 and 2013-14 in Assessee's own case, wherein it was held that the expenditure incurred by the Assessee was to enhance its sales and profits and therefore, it cannot be treated as capital in nature. ITAT held that the said expenses are revenue in nature having been incurred for commercial expediency. Consequently, the ITAT deleted the disallowance of AMP expenses of Rs. 6,64,24,161/-, made in light of Explanation 1 to Section 37(1) of the Act.

Qua discard of the BLT method by DRP and consequent rejection of the comparables

6.5. The ITAT dismissed the cross appeal filed by Revenue challenging

the order of the DRP discarding the BLT applied by TPO and held that the said issue has been decided by its coordinate bench for AY 2009-10 and 2010-11 and various judicial precedents in favour of the Assessee and held that the DRP had rightly deleted the adjustment made, merely on the basis of ALP. The ITAT, further held that no facts contrary to the order passed by the ITAT in Assessee's own case for AY 2009-10 & 2010-11 have been brought on record. The ITAT consequently, dismissed the appeal of the Revenue.

7. The learned senior counsel for the Revenue states that the ITAT fell in error in holding that the AMP expenditure incurred by the Assessee is revenue in nature. He states that the said expenditure is capital in nature. He states that the ITAT erred in holding that the BLT was not a proper method for bench marking the AMP expenditure ignoring the fact that the Revenue has not accepted the decision in the case of ***Sony Ericsson*** (supra) and has filed an SLP against the same.

8. We are unable to accept the contention of the Revenue. The deletion of the transfer pricing adjustment on account of the AMP expenditure proposed by applying BLT method is impermissible as the said method has been expressly negatived by the Court in ***Sony Ericsson*** (supra) for determining the ALP. Though the judgment of this Court in ***Sony Ericsson*** (supra) is pending adjudication before the Supreme Court, yet there is no stay of the said judgment till date. Consequently, in view of the judgment passed by the Supreme Court in ***Kunhayammed & Ors. v. State of Kerala & Anr. (2000) 6 SCC 359***, the present appeal is covered by the judgment passed by this Court in ***Sony Ericsson*** (supra).

9. We are not persuaded by the contention of the learned counsel for the Revenue that the AMP expenditure incurred by the Assessee is capital in nature, the said contention is vague and unsubstantiated from the record. The Revenue itself has treated the AMP expenditure incurred by the Assessee in the previous assessment years as a revenue expenditure. The ITAT while adjudicating the appeals of the Assessee for AY 2009-10 and 2010-11 has held that the AMP expenditure incurred by the Assesee was in the nature of bonafide business expenditure in furtherance of its legitimate business interests. The Revenue has not assailed the said findings of ITAT in the appeals filed for the said assessment years. It is therefore, evident that Revenue's contention that the AMP expenditure should be treated as capital expenditure is without any legal basis.

10. We are of the considered view that there is no substantial question of law in the present appeal. The facts and law have been properly and correctly assessed by the ITAT. Thus, we see no merits in the appeal and it is accordingly dismissed.

MANMEET PRITAM SINGH ARORA, J

MANMOHAN, J

NOVEMBER 02, 2022/hp