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

+ **ITA 952/2016**

THE PR. COMMISSIONER OF INCOME TAX-4..... Appellant
Through : Sh. Ruchir Bhatia, Sr. Standing Counsel
with Sh. Puneet Rai, Jr. Standing Counsel.

versus

HERO CORPORATES SERVICES LTD. Respondent
Through : None.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

ORDER

% **30.01.2017**

1. The question of law urged by the Revenue is whether the amount of ₹1,85,53,715/- claimed by the assessee in its P&L Account as “market development expenditure” could be claimed as revenue expenditure or did it fall appropriately under capital expenditure.

2. The Assessing Officer (AO) disallowed the expenditure; that order was affirmed by the CIT(A). The Income Tax Appellate Authority (ITAT) reversed the orders of the lower authorities.

3. The AO’s order shows that the assessee had paid the amount in question to one M/s. CRM International [hereafter “CRMI”], which in turn agreed to provide the following services:

“(a) Introduce HERO to CRMI Customers located in the territory to enable HERO to provide its service; and

(b) Shall project HERO as the ideal call centre and CRM

service provider in India;

(c) Shall exclusively promote and market the software products and services of HERO;

(d) Shall provide to only HERO, the CRMI services.”

4. The CRMI also agreed to provide assistance and its services to the assessee to enable it to provide its services to its customers. The ITAT, while directing the deletion, reasoned as follows:

“15. On the perusal of these services it is apparent that these services are routine in nature for promotion of the sales. On receipt of these services the assessee will not get any benefit of enduring nature or it does not create any asset of intangible nature. These are in fact plain vanilla customer relation management and customer support services. On reading of the clause XVI.1 of the agreement it provides that during the term of this agreement CRMI shall have exclusive arrangement with HERO and shall not enter into any arrangement with any other person to provide any services that are similar to the CRMI services being offered herein by CRMI to HERO. However, Hero is free to avail the similar services from any person to promote its business in the territory. It is further provided that there are non- compete condition imposed on CRMI. These are normal contractual terms and conditions in any commercial agreement but existence of such arrangement cannot create and benefit of enduring nature in favour of either of the parties because they do not create any asset but merely safeguards the interest of the parties. For the purposes of determining whether the expenditure incurred on services is capital expenditure or revenue one needs to look at the nature of services received by the assessee and not the other terms and conditions attached therein. Further looking to the tenure of the contract, right of termination with the parties and conditions attached on termination of the contract, it does not suggest in any manner that assessee has acquired any benefit which is of enduring nature except the services. Hon Supreme Court in case of

Empire Jute Co. Ltd. v. CIT 124 ITR 21 has held that what is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit is, therefore, not certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case. However, even if this test were applied in the present case, it does not yield a conclusion in favour of the Revenue. In the present case the expenditure are merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched. Therefore on this count the expenditure incurred by the assessee are revenue' in . nature. The question whether a particular item of expenditure incurred by an assessee is of a capital or revenue nature is a vexed question invariably presenting difficulties. Though courts have laid down tests for making a distinction between capital expenditure and revenue expenditure, a caution has also been administered that the tests laid down are not exhaustive and that it is not easy to reconcile the reasoning given therein. Further, it has been uniformly held and emphasized that the character of expenditure will have to be decided on the facts and circumstances of each case not by the application of rigid tests but deriving support from many aspects of the circumstances and the ultimate answer could depend upon a commonsense appreciation of the guiding features. The decision relied up on by the a ld DR of Chelpark Park limited V

CIT 191 ITR 249 was on non compete expenditure paid to managing director r(sic) and therefore nature of expenditure is distinguishable and further non compete fees in order to ward off damaging competition from a potential competitor, resulting in the acquisition by the assessee of a right as well as protection to carry on its business activities as a whole for so long as the assessee carried on such business. Further, the provisions of section 32 defines intangible assets. We do not find any support on reading of that definition that market support services and customer support services creates any right in favour of the assessee. Further, in assessee's own case for AY 2003-04 as well as in AY 2005-06 and AY 2006-07 the similar expenditure are allowed as deduction. To prove this ld AR submitted that copies of the Assessment orders passed u/s 143(3) of the Act where no such disallowance have been made. These facts are not controverted by revenue. Though the provisions of res judicata does not apply to income tax proceedings, however, rule of consistency provides that unless there is change in facts and circumstances of the case there has to be consistency in approach of the revenue as well as assessee. Hon'ble Supreme Court in case of Excel Industries Vs. CIT has once again reiterated the above principles, therefore even on that principal the disallowance of market development expenditure of customer relation management services cannot survive. In view of above we reverse the finding of the ld CIT(A) confirming disallowance holding that payment made for services rendered by CRMI are capital expenditure. In the result ground Nos. 1 to 5 of the appeal are allowed, However, the depreciation allowance granted by the lower authorities on franchise the assessee are allowed. However, the depreciation allowance granted by the lower authorities on franchise fees and market development' expenditure considering them as intangible asset is directed to be withdrawn.

16. In the result appeal of the assessee is allowed and the appeal of the revenue is dismissed.”

5. This Court is in agreement with the decision of the ITAT. Besides stating that intangible assets would be created, the AO was unable to demonstrate how and what kind of assets arose as a result of CRMI's services. All that it did was to introduce its customers/clients to the assessee and also advertise the assessee's services.

6. In these circumstances, the Court is of the opinion that since no enduring asset could have arisen, the assessee's claim, as revenue expenditure, was justified. No question of law arises. The appeal is accordingly dismissed.

S. RAVINDRA BHAT, J

NAJMI WAZIRI, J

JANUARY 30, 2017/ajk