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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision : 18th September, 2018
+ ITA 1010/2018 & CM APPL.37728/2018
THE PR. COMMISSIONER OF INCOME TAX -6....Appellant
Through: Mr.Ruchir Bhatia, Adv.
versus
MARY KAY COSMETIC PVT. LTD.Respondent
Through: Mr.Prakash Kumar and
Ms.Rashmi Singh, Adv.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.(ORAL):

This appeal by the Revenue under Section 260A of the Income Tax, 1961 ('Act' for short) in the case of M/s Mary Kay Cosmetics Pvt. Ltd. ('respondent - assessee' for short) pertains to the Assessment Year 2010-11 and impugns the order dated 28th March, 2018 of the Income Tax Appellate Tribunal ('Tribunal' for short).

2. The respondent-assessee a wholly owned Indian subsidiary of M/s Mary Kay Inc., a company incorporated in United States of America, was appointed and had acted as an exclusive distributor of products manufactured by and procured from the holding company, i.e. M/s Mary Kay Inc., and its associated enterprises. As a distributor the respondent-assessee had undertaken marketing and sales activities of the products manufactured, procured and purchased from M/s Mary Kay Inc. and their associated companies.

3. In the return for the Assessment Year 2010-11 filed on 13th October, 2010 the respondent-assessee had declared loss of Rs.10,06,07,118/-.

4. The respondent-assessee had, in the transfer pricing report, declared three international transactions and applied Transaction Net Margin Method with Operating Costs/Total Cost as the Profit Level Indicator to determine the Arm's Length Price for (i) purchase of finished goods and (ii) purchase of products for business and applied Comparable Uncontrolled Price Method to determine Arm's Length Price for (iii) reimbursement of expenses as per details given below:

S.No	Description of the transactions	Amount (in Rs.)
(a)	Purchase of finished goods	32,501,399
(b)	Purchase of products for business	1,288,481
(c)	Reimbursement of expenses	1,997,176

5. The Assessing Officer vide Assessment Order dated 21st March, 2013, did not disturb the Arm's Length Price as declared in respect of the three international transactions, but he treated advertisement and sales promotion expenses of Rs.2,78,95,257/- as a separate and an independent international transaction. The Assessing Officer observed that advertisement and sales promotion expenses of Rs.2,28,76,787/- on the turnover of Rs.11,07,04,873/-, in the ratio of 25.2 per cent, was exceptionally high. He applied "Bright Line Method" by referring to advertisement, marketing and sales promotion expenses viz. the sales ratio in the case of M/s Hindustan Unilever of 13.14 per cent, M/s Jyothy Laboratories of 7.4 per cent and M/s Surya Vinayak of 0.09 percent. Accordingly, transfer pricing addition of Rs.2,28,76,787/-

was made. In alternative, the Assessing Officer held that the expenditure incurred by the respondent-assessee on advertisement and sales promotion of Rs.2,28,76,787/- was not allowable under Section 37(1) of the Act. The respondent-assessee not being the brand owner should not have incurred these expenses as they were incurred for promoting a brand belonging to the associated enterprise.

6. The Commissioner of Income Tax (Appeals) vide order dated 11th June, 2014 reversed the findings and deleted the addition made by the Assessing Officer by applying "Bright Line Method". He held that expenditure incurred on advertisement and sales promotion was allowable under Section 37(1) of the Act.

7. The aforesaid decision has been affirmed by the Tribunal by the impugned order which has dismissed the appeal filed by the Revenue. The Tribunal, while doing so, has referred to the earlier decision in the case of the respondent-assessee relating to Assessment Year 2009-10.

8. The issue whether the respondent-assessee is entitled to deduction of advertisement and sales promotion expenses under Section 37(1) of the Act is covered against the Revenue by decision of this Court in *Sony Ericsson Mobile Communications India Pvt. Ltd. vs. Commissioner of Income Tax - III*, (2015) 374 ITR 118 (Delhi) and *Commissioner of Income Tax vs. Whirlpool of India Ltd.*, (2016) 381 ITR 154 (Delhi). In *Sony Ericsson Mobile Communications India Pvt. Ltd.* (supra), a decision authored by one of us (Sanjiv Khanna, J.), "Bright Line Method" has been disapproved and rejected.

9. We have examined the Assessment Order and do not find any good ground and reason given therein to treat advertisement and sales

promotion expenses as a separate and independent international transaction and not to regard and treat the said activity as a function performed by the respondent-assessee, who was engaged in marketing and distribution. Further, while segregating/debundling and treating advertisement and sales promotion as an independent and separate international transaction, the Assessing Officer did not apportion the operating profit/income as declared and accepted in respect of the international transactions.

10. ITA No.213/2018 filed by the Revenue in the case of the respondent-assessee against the order of the Tribunal for the Assessment Year 2009-10 was dismissed by this Court vide order dated 20.2.2018. This order also records that the respondent-assessee having suffered losses had closed its business in India.

11. There is no merit in the present appeal and the same is dismissed as it is covered by the afore-stated decisions. No costs.

SANJIV KHANNA, J

CHANDER SHEKHAR, J

SEPTEMBER 18, 2018/rk