$~59

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

\+ ITA 394/2019

THE COMMISSIONER OF INCOME TAX-LTU .... Appellant

Through : Mr. Ruchir Bhatia, Sr. Standing Counsel with Mr. Puneet Rai, Adv.

versus

WHIRLPOOL OF INDIA LTD. ..... Respondent

Through : Mr. Ajay Vohra, Sr. Adv. with Mr. Neeraj Jain and Mr. Aniket D. Agrawal, Advs.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN

O R D E R

% **22.04.2019**

Two questions are sought to be urged by the Revenue in its appeal under Section 260A of the Income Tax Act – Firstly, with respect to the advertisement, marketing and promotion (AMP) expenses for determination of Arm's Length Price (ALP) under the Act and secondly, the direction to delete certain amounts brought to tax by the Assessing Officer (AO) under Section 37 given that these were also the subject matter of ALP determination by the Transfer Pricing Officer.

The ITAT in its impugned order has restored the first question to the A.O. by recording the fact that the additions were set aside but made subject to the final decision of the Supreme Court in the Revenue's appeal against the judgment of this court for previous year. As far as the second question is concerned, the ITAT followed the reasoning in the previous judgment i.e. *The Commissioner of Income Tax v. Whirlpool of India Ltd.*, (2016) 381 ITR 154 (Del).

The court had then on similar questions concluded as follows :

"47. For the aforementioned reasons, the Court is of the view that as far as the present appeals are concerned, the Revenue has been unable to demonstrate by some tangible material that there is an international transaction involving AMP expenses between WOIL and Whirlpool USA. In the absence of that first step, the question of determining the ALP of such a transaction does not arise. In any event, in the absence of a machinery provision it would be hazardous for any TPO to proceed to determine the ALP of such a transaction since BLT lias been negatived by this Court as a valid method of determining the existence of an international transaction and thereafter its ALP.

48. Question (i) in the Assessee's appeal viz., "Was there an international transaction between WOIL and its AE involving the AMP expenses within tile meaning of Section 92B of the Act read with Section 92F(v) of the Act?" is answered in the negative, i.e., in favour of the Assessee and against the Revenue. Consequently Question (ii) in the Assessee's appeal is not required to be answered. Further, the only question framed in the Revenue's Appeal viz., "Whether the ITAT erred in deleting the addition of Rs.1,80,73,10,769 made by the AO/TPO on account of AMP expenses under Section 37 of the Act?" is answered in the negative, i.e. in favour of the Assessee and against the Revenue.

49. The impugned order of the ITAT and the corresponding orders of the DRP and the TPO, on the above *issues are hereby set aside. The appeal of the Assessee, ITA No. 228 of 2015 is allowed and the appeal of the Revenue, ITA No. 610 of 2014 is dismissed in the above terms, but in the circumstances with no orders as to costs. "*

In view of the above, the reasoning of the ITAT cannot be faulted with. As in the case of the impugned order, this court clarifies that the parties shall be bound by the final decision of the Supreme Court on both the questions.

This appeal is accordingly dismissed in the above terms.

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

APRIL 22, 2019
aj