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

\+ **ITA 760/2018**

PR. COMMISSIONER OF INCOME TAX, DELHI - 01
..... Appellant

Through: Mr. Zoheb Hossain, Senior Standing Counsel for Revenue.

versus

M/S. ABERCROMBIE & KENT INDIA PVT. LTD. ..... Respondent

Through: Mr. Rhishabh Jetley and Mr. Shubham Jain, Advocates.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE TALWANT SINGH

O R D E R

% **03.07.2019**

CM APPL. 29035/2018 (Exemption)

1. Exemption allowed subject to all just exceptions.

CM APPL. 29036/2018 (Delay in filing) and CM APPL. 29037/2018 (Delay in filing)

2. For the reasons explained in the applications, the delay in filing and re-filing the appeal is condoned and the applications are allowed.

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3. This is an appeal against the order dated 9th March, 2017 of Income Tax Appellate Tribunal (ITAT) in ITA NO. 5742/De1/2014 for the Assessment Year (AY) 2007-2008.

4. The question sought to be urged by the Revenue is whether the ITAT erred in confirming royalty payments @5.6% made by the Assessee to its

Associated Enterprise (AE) and accepting that to be at Arm's Length Price (ALP)?

5. The Assessee is a wholly owned subsidiary of A&K Group of Companies, SA and is engaged in the business of providing comprehensive travel and tour related services. The payments of royalty are made by the Assessee to its AE for three specific items: (i) the right to use the trademark/ brand; (ii) Marketing Support and (iii) Technical inputs.

6. The present appeal is concerned with AY 2007-2008. In the years earlier to said AY, the Assessee had paid royalty at 2% of the earnings in foreign currency for each of the aforementioned items to its AE. In its Transfer Pricing Analysis, the Assessee chose the CUP as the most appropriate method for determining the ALP. According to Assessee, payments of royalty up to 8% of exports and 5% of domestic sales under the 'Automatic Route' in terms of press note No. 2 dated 24.06.2003 was permissible and therefore the royalty payments made by the Assessee to its AE @ 6% during the AY in question was at ALP.

7. The TPO did not accept the explanation offered by the Assessee on the ground that when compared to the earlier AYs, the Net Profit Ratio of the Assessee had in fact dropped during AY in question. Therefore, the higher payment of royalty by the Assessee to its AE was not justified. In particular, according to the TPO, the payment of such higher royalty did not result in any benefit to the Assessee whatsoever. The TPO noted that the Assessee was already sharing the AE's marketing expenses and was separately paying

royalty for marketing support. For all of the aforementioned reasons, the TPO felt that the higher payment of royalty was not justified and a mere facade had been raised to give an impression that some benefit had passed to the Assessee, when in fact that was not the case.

8. After the Dispute Resolution Panel (DRP) partially agreed with the TPO, the Assessee went in appeal before the ITAT. The ITAT noted that for the subsequent AY 2008-09, the DRP followed a survey report prepared by 'Franchising World', in which, it was noted that the average royalty percentage paid in the travel industry was 5.6%. The ITAT observed that in holding against the Assessee, the TPO had not referred to any data concerning the travel industry. Since the DRP had accepted the data provided in the aforementioned publication for AY 2008-09, the ITAT considered it reasonable to direct the TPO to allow the average royalty percentage at 5.6% (against 6% claimed by the Assessee) for the AY in question.

9. Learned counsel for the Assessee points out that the order of DRP for the subsequent AY 2008-09 is a detailed one which referred to the average royalty percentage payment made generally in the travel industry. Indeed, the Court finds that the order of the TPO, relied upon by the counsel for the Revenue, does not make any reference to the prevalent practice in the travel industry which would give an indication as to the trend in the royalty payment. That could give reasonable indication whether the payment of royalty by the Assessee to its AE for the AY in question was unreasonable. In the absence of such empirical data, to merely conclude that the payment

of higher royalty was not justified only because it did not result in any tangible benefit to the Assessee was not be the right approach. With the DRP having accepted the change in the average royalty percentage payment in the travel industry for the following AY at 5.6%, the direction issued by the ITAT to the TPO to adopt the same percentage for the AY in question does not appear to be unreasonable or give rise to any substantial question of law.

10. The appeal is accordingly dismissed.

S. MURALIDHAR, J.

TALWANT SINGH, J.

JULY 03, 2019
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