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

\+ **ITA 187/2019**

THE PR. COMMISSIONER OF INCOME TAX -9 ..... Appellant

Through: Mr. Ajit Sharma, Senior Standing Counsel for the Revenue.

versus

USHA INTERNATIONAL LTD. ..... Respondent

Through: Mr. V.P. Gupta with Mr.Anunav Kumar, Advocate.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE TALWANT SINGH

O R D E R

% **07.08.2019**

CM APPL.9289/2019 (delay)

1. For the reasons explained in the application, the delay of 40 days in re-filing the appeal is condoned and the application is allowed.

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2. This is an appeal by the Revenue against an order dated 27th June 2018 passed by ITAT in ITA Nos.4747/Del/2011 and 4903/Del/2011 for the Assessment Year ('AY') 2006-07.

3. The 8 questions sought to be urged by the Revenue read as under:

> "2.1 Whether ld. ITAT erred in deleting the addition of Rs.2,40,61,300/- made by the Assessing officer on account of advance/interest paid to Assessee under section 40A(2)(b) of the Income tax Act,1961 ?
>
> 2.2 Whether ld. ITAT ld. ITAT erred in deleting the addition

of Rs.202,97,475/- made by Assessing officer on account of cash discount under section 40A(2)(b) of the Income tax Act, 1961?

2.3 Whether ld. ITAT erred in deleting the addition of Rs.90,91,255/- made by the Assessing officer incurred and reimbursed on account of publicity/advertisement expenses under section 40A(2)(b) of the Income tax Act,1961?

2.4 Whether ld. ITA T erred in deleting the addition of Rs.84,14,272/- made by the Assessing officer on account of Sales Promotion expenses under section 40A(2)(b) of the Income tax Act,1961?

2.5 Whether ld. IT AT erred in deleting the addition of Rs.32,96,717/- made by the Assessing officer on account of reimbursement of art work expenses
incurred for new design 40A(2)(b) of the Income tax Act,1961?

2.6 Whether ld. ITAT erred in deleting the addition of Rs. 39,89,793/- made by Assessing officer on account of reimbursement of expenses on account of travelling, salary and rent incurred by Assessee 40A(2)(b) of the Income tax Act,1961?

2.7 Whether ld. ITAT erred in deleting the addition of Rs.1,39,29,8511- made by the Assessing officer being 50% of the commission paid to Assessee for booking of orders of supply of fans 40A(2)(b) of the Income tax Act, 1961 ?

2.8 Whether ld. IT AT erred in deleting the addition of Rs.39,52,663/- made by the Assessing officer on account bill discounting charges ignoring the fact that the. said expenditure was not incurred wholly and exclusively for the purposes of the business by the Assessee?"

4. Learned Counsel for the Respondent/Assessee appearing on advance

notice has prepared a chart from which it is clear that by the impugned order of the ITAT had in fact remanded questions 1, 4, 5 and 6 to the Commissioner of Income Tax (Appeals) for a fresh adjudication. Consequently, there is no occasion to frame any question on the above issues. Learned counsel for the Revenue also very fairly stated that he would not press the above issues.

5. As far as Issue 2.2 concerning the addition made by the Assessing Officer ('AO') on account of cash discount under Section 40A (2)(b) of the Income Tax, 1961 ('Act') is concerned, it is seen that the ITAT allowed the claim of the Assessee following its order in the Assessee's appeal for AY 2005-06 following the judgment of this Court in ***Hive Communication Pvt. Ltd. v. CIT (2013) 353 ITR 200 (Del)***. Against the above order of the ITAT for AY 2005-06 the Revenue filed ITA 326 of 2017 which was dismissed by this Court on the ground of delay. The Court finds that the ITAT's order for AY 2005-06 was based on its factual determination that the expenses were incurred for legitimate business needs and was consistent with the legal position explained by this Court in ***Hive Communication Pvt. Ltd*** (*supra*). With there being no change in the factual position for the AY in question, this Court declines to frame any question on this issue.

6. Likewise in regard to the Issue 2.3 above on the publicity/advertisement expenses under Section 40A (2) (b) of the Act which were disallowed by the AO, it is seen that the ITAT had deleted the said addition by the AO by following its order for AY 2005-06. It is pointed out by learned counsel for the Assessee that in ITA 326 of 2017 filed by the Revenue for the

aforementioned AY no issue was raised on this aspect. In other words, the Revenue accepted the decision of the ITAT for AY 2005-06 on this issue. The Assessee is right in invoking the principle of consistency as explained by the Supreme Court in ***Commissioner of Income Tax v. Excel Industries Ltd. (2013) 358 ITR 295 (SC)*** to argue that the Revenue should not be permitted to raise this issue for the AY in question. The Court accepting the above plea declines to frame any question on this issue.

7. Turning next to the Issue 2.7 on the addition made by the AO of Rs.1,39,29,851/- being 50% of the commission paid by the Assessee for booking of orders for supply of fans under Section 40A(2) (b) of the Act and Issue 2.8 concerning the addition of Rs.39,52,663/- on account of bill discounting charges, it is seen that the ITAT followed orders of the earlier AYs i.e. 2002-03, 2003-04 and 2005-06. In the appeal filed by the Revenue against the order of the ITAT for AY 2005-06 no issue was raised on these aspects and the Revenue accepted the decision of the ITAT. Again following the principle of consistency Court is not inclined to frame any question on these issues.

8. For the aforementioned reasons the appeal is dismissed.

S. MURALIDHAR, J.

TALWANT SINGH, J.

AUGUST 07, 2019 / *tr*