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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Decision delivered on: 28.07.2023

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ITA 208/2023

THE PR. COMMISSIONER OF INCOME TAX -7 Appellant

Through: Mr Ruchir Bhatia, Sr Standing
Counsel with Ms Deeksha Gupta,
Adv.

versus

YAKULT DANONE INDIA PVT. LTD.

..... Respondent

Through: Mr Himanshu Sinha, Adv.

CORAM:**HON'BLE MR. JUSTICE RAJIV SHAKDHER****HON'BLE MR. JUSTICE GIRISH KATHPALIA****[Physical Hearing/Hybrid Hearing (as per request)]****RAJIV SHAKDHER, J. (ORAL):**

1. This appeal concerns Assessment Year (AY) 2012-13.
2. *Via* this appeal, the appellant/revenue seeks to assail the order of Income Tax Appellate Tribunal [in short, "Tribunal"] dated 06.10.2020.
3. The central issue which arises for consideration in the present appeal is: whether Advertising, Marketing and Promotion (AMP) Expenses can be construed as an international transaction, in the facts and circumstances of the present case?
4. The Transfer Pricing Officer (TPO), in this case, seems to have applied the Bright Line Test (BLT). The Tribunal has disagreed with the view of the TPO and, in coming to this conclusion, has relied upon its decision rendered *qua* the respondent/assessee for AY 2011-12.



5. We had called upon Mr Ruchir Bhatia, learned senior standing counsel, who appears on behalf of the appellant/revenue, to ascertain as to whether any appeal has been preferred *qua* the decision rendered by the Tribunal qua AY 2011-12.

5.1 Mr Bhatia says that he has received “verbal instructions” that approval was granted for lodging an appeal in this court. However, what is not clear is as to whether, in fact, an appeal was instituted.

6. That said, Mr Bhatia has drawn our attention to the decision dated 29.03.2019 rendered by the Tribunal in the respondent/assessee’s case for AY 2011-12. In particular, Mr Bhatia has drawn our attention to paragraph 6.9 of the said decision, which alludes to the Tribunal’s decision rendered in ***Pepsico India Holdings (P) Ltd. v. ACIT***, (2018) 100 Taxmann.com 159 (Del-Trib).

6.1 A careful perusal of the said paragraph would show that the Tribunal adverted to the decisions rendered by coordinate benches of this court in ***Sony Ericsson Mobile Communications India (P) Ltd. v. Commissioner of Income-tax-III***, [2015] 55 taxmann.com 240 (Delhi) and ***Maruti Suzuki India Ltd. v. Commissioner of Income-tax***, [2015] 64 taxmann.com 150 (Delhi).

7. Concededly, coordinate benches have ruled that BLT has no “statutory mandate”. This is evident from the following observations made by the coordinate bench in ***Sony Ericsson Mobile Communications India (P) Ltd.***:

“The 'bright line test' has no statutory mandate and a broad-brush approach is not mandated or prescribed. We disagree with the Revenue and do not accept the overbearing and orotund submission that the exercise to separate 'routine' and 'non-routine' AMP or brand



building exercise by applying 'bright line test' of non-comparables should be sanctioned and in all cases, costs or compensation paid for AMP expenses would be 'NIL', or at best would mean the amount or compensation expressly paid for AMP expenses. It would be conspicuously wrong and incorrect to treat the segregated transactional value as 'NIL' when in fact the two AEs had treated the international transactions as a package or a single one and contribution is attributed to the aggregate package. Unhesitatingly, we add that in a specific case this criteria and even zero attribution could be possible, but facts should so reveal and require."

8. This view has also been followed by the Division Bench in ***Bausch & Lomb Eyecare (India) (P.) Ltd. v. Addl. CIT***, [2016] 65 taxmann.com 141/237 and by another coordinate bench in ***Dy. CIT v. Sharp Business Systems (India) (P.) Ltd.***, (2022) 145 taxmann.com 114 (Del).

9. We are told that the appellant/revenue has preferred appeals with the Supreme Court, in matters concerning ***Sony Ericsson Mobile Communications India (P) Ltd.*** and ***Maruti Suzuki India Ltd.***

10. We may also note that it is the submission of Mr Himanshu Sinha, who appears on behalf of the respondent/assessee, that in the subject trademark licensing agreement and royalty agreement, there is nothing which is suggestive of the fact that there was any arrangement or agreement obtaining between the respondent/assessee and its Associated Enterprise (AE), to spend money on AMP.

10.1 In other words, the argument is that the TPO has failed to establish that there was an international transaction obtaining with respect to AMP expenses, with a view to build the brand of the AE, with the object that AE could achieve sales in other territories.

11. Needless to state, this submission has been made by Mr Sinha on the merits of the appeal.



12. Insofar as the position in law is concerned, i.e., concerning the application of BLT, concededly, insofar as this court is concerned, it stands concluded via the decisions referred to hereinabove, albeit, against the appellant/revenue and in favour of the respondent/assessee.

13. Therefore, no substantial question of law arises for our consideration.

14. It is, however, made clear that if the appellant/revenue were to succeed in the appeals pending in the matters concerning *Sony Ericsson Mobile Communications India (P) Ltd.* and *Maruti Suzuki India Ltd.*, it would have leave to approach the court for reopening the appeal, as per law.

14.1 Mr Sinha says that he would have no objection to the appellant/revenue, at that stage, approaching the court for appropriate orders in accordance with the law.

15. The appeal is closed, in the aforesaid terms.

16. Parties will act based on the digitally signed copy of the order.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

JULY 28, 2023

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