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

% *Date of Decision: 19.09.2023*

+ **ITA 538/2023**

PR. COMMISSIONER OF INCOME TAX-7 Appellant
Through: Mr Puneet Rai, Sr Standing Counsel
with Mr Ashvini Kumar and Mr
Rishabh Nangia, Advs.

versus

OPTIMAL MEDIA SOLUTIONS LTD. (MERGED WITH TIMES
BUSINESS SOLUTION LTD. WHICH AMALGAMATED INTO
TIMES INTERNET LTD.) Respondent
Through: Nemo.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

CM Appl.48336/2023

1. Allowed, subject to just exceptions.

CM Appls.48337-38/2023*[Applications moved on behalf of the appellants seeking condonation of delay of 31 days in filing and 131 days in re-filing the appeal]*

2. These are the applications moved on behalf of the appellant/revenue, seeking condonation of delay in filing and re-filing the appeal.

2.1 According to the appellant/revenue, there is a delay of 31 days in filing and 131 days in re-filing the appeal.



3. For the reasons given in the applications, delay is condoned.
4. The applications are, accordingly, closed.

ITA 538/2023

5. This appeal concerns Assessment Year (AY) 2009-10.
6. *Via* the instant appeal, the appellant/revenue seeks to assail the order 30.09.2022, passed by the Income Tax Appellate Tribunal [in short, “Tribunal”].
7. The record shows that the Assessing Officer (AO) had selected the respondent/assessee’s return for enquiry under Computer Aided Scrutiny Selection [CASS] process.
 - 7.1 Upon scrutiny, the AO framed an assessment order dated 29.12.2011, under Section 143(3) of the Income Tax Act, 1961 [in short, “Act”].
 - 7.2 Consequent to the said order, the respondent/assessee’s income was assessed at Rs.68,57,99,019/-, as against the declared income amounting to Rs.57,14,28,530/-.
8. In framing the assessment order, the AO made the following two significant disallowance/additions, which is the subject matter of the instant appeal:
 - (i) First, the AO disallowed Rs.11,20,43,563/- by taking recourse to provisions of Section 40(a)(ia) of the Act. This step was taken by the AO as according to him, the respondent/assessee had not deducted Tax at Source (TAS) as required under Section 194H of the Act.
 - (ii) Second, an addition was made amounting to Rs.23,26,926/- under Section 14A of the Act read with Rule 8D of the Income Tax Rules, 1962.
9. The respondent/assessee, being aggrieved, preferred an appeal with



the Commissioner of Income Tax (Appeals) [in short, “CIT(A)”].

9.1 The CIT(A) deleted the disallowance made under Section 40(a)(ia) of the Act.

9.2 As far as the other addition was concerned, the CIT(A) restricted the disallowance to Rs.13,45,785/-.

10. The record shows that the respondent/assessee is engaged in the business of selling space for advertorials in the publication of the Times of India Group.

10.1 It appears that the advertising unit of the Times of India Group offers print media solutions to the clients using multiple mediums available with the said Group and thus, towards this end a trade discount of 15% was offered to the advertising agencies.

10.2 The record also discloses that the respondent/assessee had not entered into an agency agreement with the Times of India Media Group.

11. It appears that the respondent/assessee received consideration for having advertisements placed in the print and other mediums made available by the Times of India Media Group.

11.1 Typically, the agencies, against the invoices raised *qua* them, remitted the billed amount to the respondent/assessee after retaining 15% of the said amount. The net amount was recorded by the respondent/assessee in its books of account.

12. The AO concluded that the amount retained by the agencies was in the nature of commission and therefore, cast an obligation on the respondent/assessee to deduct the TAS under the provisions of Section 194H of the Act.

13 The AO, thus, veered to the position that since TAS had not been



deducted, disallowance of Rs.11,20,43,563/- had to be made by taking recourse to the provisions of Section 40(a)(ia) of the Act.

13.1 It was the AO's view that the amount retained by the agencies engaged in providing advertorials was in the nature of commission, and therefore, tax had to be deducted under Section 194H of the Act.

14. Likewise, insofar as the other issue is concerned, the AO, while disallowing the expenses connected with earning exempt income, applied the formula in the manner which he took into account the entire investment made by the respondent/assessee, which included income which was exempt from tax.

15. The CIT(A), as noted hereinabove, scaled down the expenses which were disallowed by taking into account the investments made to earn exempt income.

15.1 The CIT(A)'s view on both counts has been sustained by the Tribunal.

16. We have heard Mr Puneet Rai, learned senior standing counsel, who appears on behalf of the appellant/revenue, with regard to the aforementioned issues.

17. According to us, insofar as the first issue is concerned, since the relationship between the respondent/assessee and the agencies was found by the statutory authorities below to be on a principal-to-principal basis, the amount retained by the agencies it could only be construed as trade discount and not commission.

17.1 Therefore, as rightly concluded by the Tribunal, there was no obligation on the part of the respondent/assessee to deduct TAS under Section 194H of the Act.

18. We may note that the Tribunal in this regard has noted the contents of



the CBDT's Circular No.05/2016 dated 29.02.2016.

18.1 For convenience, the relevant parts of the said Circular as noted are extracted hereafter:

“3. However, another issue has been raised in various cases as to whether the fees/ charges taken or retained by advertising companies from media companies for canvassing/ booking advertisements (typically 15% of the billing) is commission or discount, it has been argued by the assesseees that since that relationship between the media company and the advertising company is on a principal-to-principal basis such payments are in the nature of trade discount and not commission and therefore, outside the purview of TDS under section 194H. The Department, on the other hand has taken the stand in some cases that since the advertising agencies act on behalf of the media companies for procuring advertisements, the margin retained by the former amounts to constructive payment of commission and, accordingly, TDS under section 194H is attracted.

4. The issue has been examined by the Allahabad High Court in the case of jagran prakashan Ltd and Delhi High Court in the matter of Living media Limited and it was held in both the cases that the relationship between the media company and the advertising agency is that of a principal to principal and therefore, not liable for TDS under section 194H. The SLPs filed by the Supreme Court vide order dated 11.12.2009 and order dated 05.05.2014 respectively, though these decisions are in respect of print media, the ratio is also applicable to electronic media/ television advertising as the broad nature of the activities involved is similar.”

19. The record also discloses, something which CIT(A) has noted, that no disallowance under Section 40(a) (ia) was made either in the years preceding or following the AY in issue.

19.1 This emanates from the perusal of paragraph 7 of the order passed by the CIT(A).

20. In our view, no substantial question of law arises for our consideration insofar as the first issue is concerned.

21. As regards the second issue as well, it is our opinion that the CIT(A) has correctly applied the formula prescribed under Rule 8D(2)(iii) of the



Income Tax Rules, 1962.

22. The AO, in our view, has wrongly taken into account the investments other than the investments made to earn exempt income. [See *Cargo Motors (P.) Ltd. vs. Deputy Commissioner of Income-tax* [2022] 145 taxmann.com 641 (Delhi)].

23. Thus, for the foregoing reasons, we are of the view that no substantial question of law arises for our consideration.

24. The appeal is, accordingly, closed.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

SEPTEMBER 19, 2023/pmc