IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

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ITA-50-2024 (O&M)
Decided on : 05.08.2024

Nikon India Private Limited

. . . Appellant(s)

Versus

Assistant Commissioner of Income Tax,
Circle-3(1), Gurgaon

. . . Respondent(s)

CORAM: HON'BLE MR. JUSTICE SANJEEV PRAKASH SHARMA
HON'BLE MR. JUSTICE SANJAY VASHISTH

PRESENT: Mr. S.S. Tomar, Advocate (**appearing through V.C.**) with
Ms. Simran Sharma, Advocate
for the appellant – assessee.

Mr. Varun Issar, Sr. Standing Counsel
for the respondent – revenue.

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SANJEEV PRAKASH SHARMA, J. (Oral)

CM-5989-CII-2024

For the reasons set out in the application, the same is allowed. Consequently, the delay of 95 days in re-filing the accompanying appeal is condoned.

CM stands disposed of.

CM-5990-CII-2024

Allowed as prayed for.

ITA-50-2024

1. Appellant – assessee before us has preferred this appeal assailing the order dated 27th July, 2023, passed by the ITAT, for the Assessment Year 2017-18, and submits that the appellant – assessee is already before this Court in four different appeals for the Assessment years

2010-11, 2011-12, 2012-13 and 2013-14, respectively, wherein, the same questions of law have been raised.

He, therefore, submits that this appeal should also be admitted on the same questions of law.

2. Learned counsel for the appellant – assessee has submitted that although ITAT has passed an order in their favour, but the question of law No.(iii) requires to be examined, whether the Tribunal erred in leaving open the ground raised by the appellant relating to the preliminary legal issues, (a) that there was no 'international transaction'; and (b) that the TPO has exceeded jurisdiction to *suo-motu* re-characterize the AMP expenditure as an 'international transaction', by merely following its earlier year orders.

3. Learned counsel appearing for the revenue, on advance notice, has invited our attention to the order passed by the ITAT, in specific, towards para Nos.11, 12 & 13 of the said order, wherein, we find that the ITAT has granted full relief to the appellant – assessee, and not only it has passed the orders in favour of the appellant – assessee, but has also recorded the concession of the AR that the *suo-motu* cognizance of the alleged excess AMP expenditure by concluding it to be international transaction with the AE was wrongful and the issue has been decided against the assessee. Para Nos.11, 12 & 13 of the ITAT order are reproduced as under:-

> *"11. The ld. AR also submitted that Rs.60,43,94,333/- out of the total AMP expenses of Rs. 108,55,75,662/- directly relate to the sales and same constitutes sales related expenses. The same has been incurred on dealers' gifts, financial schemes, freebie items, distributor meeting expenses, etc, and would be outside the ambit of AMP expenses. The detailed break-up of expenses of Rs.108,55,75,662/- was given to the Id. TPO, vide letter dated*

27.11.2020. It was pleaded that, in any case, the sales related expenses need to be excluded from the overall AMP expenses as the same is not incurred for brand enhancement of AE, but is connected directly to sale of products in India. We find that this aspect has been duly appreciated by the Tribunal in assessee's own case for AY 2016-17 referred (supra) and, accordingly, we allow this aspect of the ground of the assessee.

12. However, with regard to the remaining AMP expenses, we find that the Id.TPO had made adjustment on protective basis by applying BLT on the ground that the same had been incurred for creating of marketing intangibles and consequently required to be reimbursed by the AEs along with mark up. For this purpose, the Id. TPO had applied a mark up of 20.24% being margin of comparables engaged in marketing support services on the alleged excess AMP expenses incurred by the assessee and had made an upward adjustment on protective basis and Rs.71,45,33,226/- on substantive basis. The Id. AR stated before us that the addition made on substantive basis had been deleted by the Id. DRP against which the Revenue is not in appeal before us. As far as the addition made on protective basis by applying BLT, we find that the issue stands covered in favour of the assessee by the order of this Tribunal for AY 2016-17, the relevant operative part of which have already been reproduced supra. Hence, ground No.7 raised by the assessee is allowed.

13. We find that the assessee had raised ground No.5.1 challenging the action of the Id. TPO in taking suo moto cognizance of the alleged excess AMP expenditure by concluding it to be an international transaction with the AE and, thereafter, proceeding to benchmark the same eventhough the same was neither referred by the Id. AO u/s 92CA(1) of the Act nor reflected by the assessee in Form No.3CEB. The ld. AR fairly conceded that this issue is decided against him and accordingly ground No.5.1 is dismissed."

The issue relating to ground No.5.1, and as noticed herein-above is purely an academic question, as in fact, the assessee has not been burdened with any costs relating to the expenses incurred by it in the ambit of AMP expenditure.

4. In view of above, we do not propose to examine the question when the same is purely academic. Thus, remaining it open for the appropriate case to be examined.

Appeal is accordingly dismissed.

(SANJEEV PRAKASH SHARMA)
JUDGE

(SANJAY VASHISTH)
JUDGE

August 05, 2024
J.Ram

Whether speaking/reasoned: *Yes/No*
Whether Reportable: *Yes/No*