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% 22.09.2009

Present: Ms. P.L. Bansal, Adv. for the revenue.
Mr. K. Sampath with Mr. R.K. Raghavan, Advs. for the respondent.

+ ITA No. 265/2009

For the Assessment Year 1997-98, the respondent (herein as the assessee) had filed the return declaring loss of Rs.2,95,52,700/-. During the assessment proceedings, the Assessing Officer noticed that the assessee had incurred an expenditure of Rs.1,05,67,143/- on the advertisements. The assessee is a company which was incorporated on 26.12.1995 as an Indian company. It is joint venture of M/s. Magnum International Trading Co. Ltd. as well as M/s. Adidas A.G. Germany. German Company had 80% share holding in the Indian company at the time of setting up of joint venture. Ultimately, the German company acquired 100% shares holding in the Indian company.

Technical Assistant agreement dated 14.02.1997 was entered into between the Indian company and M/s. Adidas A.G., Germany represented by its 100% subsidiary company M/s. AIPL. As per this agreement, M/s. AIPL was to provide exclusive, non-transferable, non-assignable right to manufacture, distribute and sell the licensed products



in India, Nepal and Bhutan on payment of royalty @5% of the effective of the licensed products in the aforesaid territories.

The Assessing Officer was of the opinion that the trademark Adidas belonged to the assessee's parent company and since the assessee was already paying royalty @ 5% of sales, the aforesaid expenditure on advertisements was not incurred by the assessee wholly and exclusively for the purpose of the business of the assessee inasmuch as it was to promote the brand name of the licensor company and on this ground the AO held that the said advertising expenditure was not allowable under Section 37(1) of the Income Tax Act. In appeal preferred by the assessee before the CIT(A), the order of the AO was confirmed and appeal was dismissed. On further appeal before the ITAT, the Tribunal has reversed the decision of the CIT(A) holding that the aforesaid expenditure incurred by the assessee on advertisement and publicity was incurred by the assessee for its own business purposes. Challenging this decision, the present appeal is preferred by the Revenue.

We find from the order of the ITAT that the Tribunal has discussed in detail the terms of Technical Assistant Agreement dated 14.02.1997, as per which the assessee was provided the technical know-



how and was also allowed to use the brand name 'Adidas' products manufactured by the assessee, which are to be sold in India, Nepal and Bhutan. The Tribunal observed that merely because the assessee was paying royalty @ 5% to M/s. AIPL would not mean that the assessee could not incur the expenditure on advertisement to popularize the products dealt with by it in Indian market. No doubt, brand name of 'Adidas' is already a well-known brand which belongs to the parent company of the assessee. However, to popularize the said product in India and to promote its sale in the Indian territories, it became essential for the assessee to incur expenditure on advertising to propagate the aforesaid brand name. The benefit thereof had to necessarily accrue to the assessee as well, as the main purpose of the advertisement is to augment the sales. The contention of the assessee that it was a commercial practice and commercial expediency has rightly been accepted by the Tribunal. The relevant portion of the judgment of the Tribunal dealing with this aspect is reproduced below:

"17. The assessee company is itself engaged in the trading of various products under the brand name or logo "ADIDAS". The expenditure on advertisements is only in respect of products, which are sold by the assessee company, and payments for such expenditure have been made only to third parties, which are not in any way related to the assessee company or M/s



Adidas A.G. Germany or AIPL or not in any way managed and controlled or promoted by M/s Adidas A.G., Germany or AIPL.

19. In the present case, the expenditure has been incurred by the assessee in the carrying on of its business activities of manufacturing and selling the product under the brand name Adidas. The expenses are thus have the direct nexus with the sales or the business promotion of the assessee. At this stage, it is also pertinent to mention that merely because the assessee company has been paying royalty to M/s Adidas A.G. for the use of the brand name Adidas, that by itself cannot be a ground to disallow the assessee's claim on account of advertisement expenses which were made to promote the assessee's business in India and to increase its business and the sales of the products under the brand name Adidas. The assessee was paying royalty for using brand name Adidas to the customers in various parts of India to make them aware about the nature of the products being sold by the assessee at different outlets as per assessee's business strategy. To promote business and commerce by any business man would certainly come within the expression of commercial expediency and no label of any oblique motive with a view to reduce tax incidence can be fastened. The activity to promote ones sales by advertising the product which were being sold by him are certainly to come within the expression "wholly and exclusively incurred for the purpose of business", which is to be considered and looked into having regard to the realities of business form the point of view of a prudent business man and not from the point of view of a tax collector.

20. In the light of the discussions made above and having found that since the assessee had incurred the advertisement and publicity expense with a view to promote its sale of products under the brand name Adidas which were sold by the assessee, the advertisement expenses incurred by the assessee are to



be held as incurred to facilitate the assessee's business and would thus be eligible for deduction while computing the assessee's profit from business. At this stage, it is also pertinent to note that the expression "wholly and exclusively" used in Section 37 of the Act would not mean "necessarily". It is for the assessee to decide whether any expenditure should be incurred to facilitate its business activities. It is also well settled that even such expenditure incurred voluntarily and not for any necessity but are incurred for promoting the business and to earn profit, the assessee can claim deduction u/s 37(1) of the Act. This was so observed by the Hon'ble Supreme Court in the case of *Sasson J. David & Co. (P) Ltd. v. CIT (supra)*. We, therefore, reverse the order of the CIT (A) and direct the AO to allow the assessee's claim of deduction on account of advertisement and publicity expenses in all the three assessment years."

We, therefore, do not find any substantial question of law that arises for our consideration. This appeal is accordingly dismissed.


A.K. SIKRI, J.


VALMIKI J. MEHTA, J.

September 22, 2009

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