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

\+ **<u>ITA 313/2022</u>**

THE PR. COMMISSIONER OF INCOME TAX -3 ..... Appellant

Through: Mr. Sanjay Kumar, Advocate.

versus

M/s AMWAY INDIA ENTERPRISES ..... Respondent

Through: None.

% Date of Decision: 8th September, 2022

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

1. Present Income Tax Appeal has been filed challenging the order dated 8th October, 2021 passed by Income Tax Appellate Tribunal ('ITAT') in ITA No. 2833/Del/2018 for the Assessment Year ('AY') 2013-14.

2. The respondent assessee is engaged in the business of direct selling of consumer products through multi-level marketing. The assessee filed its return for AY 2013-14 declaring an income of Rs.3,04,03,40,790/-. Since, the assessee admittedly had international transaction with its Associated Enterprises ('AEs'), the case was referred to the Transfer Pricing Officer ('TPO') for determination of Arm's Length Price ('ALP'). The TPO vide order dated 31.10.2016, recommended an adjustment of Rs.15,66,27,250/- on account of ALP determined for royalty payment and Rs.7,54,77,412/- on account of managerial remuneration to the director. The Assessing Officer

('AO') vide order dated 31.01.2017 confirmed the addition made by the TPO and assessed the income of the assessee to the tune of Rs.3,27,24,45,452/-.

3. Aggrieved by the same, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals) ['CIT(A)'], which was partly allowed vide order dated 28.02.2018, the AO/TPO was directed to delete the addition made on account of transfer pricing adjustment for transaction related to royalty.

4. Aggrieved by the order of the CIT(A), the Revenue herein preferred an appeal before the ITAT, challenging the deletion of the adjustment of transaction related to royalty, however vide the impugned order, the ITAT dismissed the appeal by confirming the order of the CIT(A).

5. In the present appeal, the learned counsel for the Appellant states that the ITAT erred in confirming the order of the CIT(A) and failed to appreciate the fact that the royalty payment is excessive and not at arm's length on consideration of Advertisement, Marketing and Promotion ('AMP') expenses incurred by the assessee for the benefit of the AE's trademark and brand. He states that the ITAT erred in not appreciating that the foundation of the adjustment with respect to royalty payment suggested by the TPO was that the assessee was incurring huge commission expenditure, which has created marketing intangibles for its AEs, and, for incurring this expenditure, the assessee should be compensated with a payment from the AE and that there may not be a need for a huge payment of royalty as rightly noted by the TPO. He also states that the ITAT and CIT(A) has wrongly placed reliance on the judgment of this Court in ***Chrys Capital Investment Advisors (India) Pvt. Ltd. v. Deputy Commissioner of***

Income Tax, ITA No. 417/2014, passed on 27.04.2015.

6. He further states that the ITAT erred in confirming the order of CIT(A) whereby it was held that the rejection of two comparables, namely, Columbia Laboratories Inc. and Premier Consumer Products Inc., by the TPO while retaining the balance four comparables was based on a summary fashion and that no cogent reason was provided for arriving at this opinion.

7. In this regard, the CIT(A) held as follows,

> *"7.9. The contention of the TPO is not backed by any cogent reason but is based on conjectures and surmises which will not stand the test of judicial scrutiny. A comparable cannot be excluded merely on the ground that it shows a very high rate of royalty. The TPO has not discussed if there are any material facts like nature of entity, business model, terms of agreement, geographical area etc. pertaining to Columbia Laboratories Inc. and Premier Consumer Products Inc., which render them incomparable to the appellant. As stated above, he has merely rejected them on the ground that the rate of payment for royalty is very high. In view of the same the contention of the appellant is not acceptable. This principle has been upheld by the Hon'ble Delhi High Court in the case of Chrys Capital Investment Advisors India Private Limited ITA No. 417/2014 which lays down the fundamental ratio that a comparable should not be rejected simply on the ground that is margin is extremely high (or low) in relative comparison to the date pertaining to its peers.*
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> *7.10. In view of the above discussion and in view of the facts and the circumstances of the case, the ground of appeal 1-6 are decided in favour of the appellant. The AO/TPO is directed to delete the addition made on account of transfer pricing adjustment for transaction related to royalty."*

8. The ITAT concurred with the aforesaid finding of the CIT(A) and in

this regard held as follows:-

> "*It is specifically observed by the CIT(A) that the rejection of the two comparables by the TPO, are based on conjectures and surmises. It is pertinent to note that the filters used by the TPO does not indicate that the high rates in respect of determination of ALP of royalty is one of the criteria of the rejection while confronting the assessee. The ratio laid down by the Hon'ble High Court in the case of Chrys Capital Investment (supra) is applicable in the present case. Hence there is no need to interfere with the findings of the CIT(A). The appeal of the Revenue is dismissed.*"

9. A perusal of the above order reveals that the ITAT and CIT (A), both fact finding authorities have concurrently held that the rejection of the two comparables by the TPO is based on conjectures and surmises and thus, deleted the addition made on account of transfer pricing adjustment for transaction related to royalty. Learned Counsel for the appellant concedes that if the rejected two comparables are taken into consideration, the payment made by the assessee to its AEs towards royalty would be at arm's length and no adjustment would be merited. He also concedes that the said two comparables comply with all the filters prescribed by the TPO. In this view of the matter, we therefore find that the reliance placed by CIT(A) and ITAT on the judgment of this Court in *Chrys Capital Investment* (supra), was correct. The relevant portion of the said judgment reads as follows,

> *"44. In light of the above findings, this Court concludes as follows:*
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> *(a) <u>The mere fact that an entity makes high/extremely high profits/losses does not, ipso facto, lead to its exclusion from the list of comparables for the purposes of determination of ALP.</u> In such circumstances, an enquiry under Rule 10B(3) ought*

to be carried out, to determine as to whether the material differences between the assessee and the said entity can be eliminated. Unless such differences cannot be eliminated, the entity should be included as a comparable.

……………………." (Emphasis Supplied)

10. In this view of the matter, no substantial questions of law arise for consideration and accordingly, the appeal is dismissed.

MANMEET PRITAM SINGH ARORA, J

MANMOHAN, J

SEPTEMBER 08, 2022
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