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

% **DECIDED ON: 30.05.2014**

+ ITA 242/2014
CM APPL.9613 & 9614/2014

MARUTI INSURANCE DISTRIBUTION SERVICES LTD

..... Appellant

Through: Mr. Ajay Vohra with Ms. Kavita Jha and
Mr. Vaibhav Kulkarni, Advocates.

versus

COMMISSIONER OF INCOME TAX

..... Respondent

Through: Mr. Sanjeev Sabharwal, Sr. Standing
Counsel with Mr. Ruchir Bhatia, Jr. Standing
Counsel.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE V.KAMESWAR RAO

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

Admit.

1. Issue notice. Mr. Sanjeev Sabharwal, Sr. Standing Counsel accepts notice. With consent, the matter was taken up for hearing.
2. The following question of law arises for consideration: -

“Did the Tribunal fall into error in upholding the disallowance to the tune of Rs.89,98,913/- made on account of remuneration to dealers.”
3. The brief facts necessary to decide the case are that the assessee is engaged, *inter alia*, in the business of corporate insurance agency; it



conducts business through extensive Maruti dealers' networks consisting of over 300 sales outlets and 400 dealer workshops spread throughout the country. It is a 100% owned subsidiary of Maruti Suzuki India Ltd, and has a business arrangement with National Insurance Co. Ltd as its licensed corporate insurance agent. It filed a return for AY 2006-07 declaring an income of Rs.2,66,26,206/-. The AO issued notice under Section 143 (2) and the assessee filed its reply. The AO held that the assessee had debited Rs. 8,99,89,136/- as commission paid to Maruti dealers, on a total sum of Rs. 6,29,92,395/-. This amounted to 70% of the total receipts of insurance commission. For the preceding years, (A) 2005-06, 2004-05 and 2003-04) the payments made to Maruti dealers were 70%, 79% and 93.66%. The AO restricted the commission to 60% and thus disallowed Rs.89,98,913/-. The assessee's appeal challenging this addition succeeded. The revenue preferred an appeal. The ITAT in its order dated 30-11-2009 (in ITA 2866/Del/09) allowed the appeal, reasoning that the revenue's argument that commission payable during the initial years, after setting up of business might have been warranted, whereas for the AY 2006-07 a decline in such commission could be justified. The matter was remitted for reconsideration to the AO to decide the matter afresh.

4. The assessee had applied under Section 254 (2) seeking rectification of the ITAT's order dated 30.11.2009, which was eventually allowed on 14.1.2011. The Revenue filed a Writ Petition - W.P.(C) 106/2012 – which was considered by this Court and allowed by judgment and order dated 4.9.2012. This Court was of the



opinion that the conspectus of circumstances in the case did not warrant the ITAT's exercise of jurisdiction for rectification under Section 254 (2). The assessee sought review of that judgment but without avail. In the circumstances, the assessee appealed to this Court in respect of the main order of the Tribunal dated 30.11.2009.

5. It is contended that the Commissioner (Appeals), in his findings, had examined the entire records including the fact that for the previous period, i.e., AY 2005-06, the CIT had considered and noticed that the percentage of commissions shared with dealers had been in the range of 93.67%, 79% and 70.09%. It was contended that the Tribunal itself noticed order of 9.10.2009 and upheld the CIT (A)'s factual findings in 2005-06 in the following terms: -

“7. The learned counsel for the assessee, on the other hand, placed reliance on Tribunal's order dated 9.10.2009 in the assessee's own case for A.Y.2005-06 in ITA no.1590 & 1924/Del/09 (copy of order has been filed), wherein the findings recorded by the learned CIT (A) had not been controverted on behalf of the department and the appeal filed by the department was dismissed.

8. We have heard the parties and have perused the material on record. The learned CIT (A) has followed his order in assessee's own case for immediately preceding assessment year, i.e., A.Y. 2005-06, observing, inter alia, that the expenditure had not been found to be capital or personal in nature or bogus; that the remuneration paid by the assessee to its dealers and its percentage to the commission received, g.p./n.p. rate for the preceding 3 years indicating that over the years the assessee had paid lesser percentage of remuneration vis a vis receipt of commission; that the AO was not justified to restrict the amount of remuneration paid from 70.09% to 60% ; that the assessee had deducted the TDS shown to the dealers



and the required details of these dealers had been provided to the AO and the AO had disallowed part of the remuneration without making any inquires.

9. However, we find substance in the submission of the department that in the initial years, in view of the setting up of the outlets the payment of the remuneration was same and that being so over the years under consideration, a drastic decline in the payment of remuneration was warranted. This has no where been controverted on behalf of the assessee. AS such, as agreed to by the parties, the matter needs to be remitted to the file of the AO, to be examined and decided afresh in accordance with law, after affording adequate opportunity of being heard to the assessee. The AO shall deal and decide the issue independent of the comparison with the remuneration paid in the earlier years with that of the year under consideration. We order accordingly.”

Arguing against the Tribunal’s findings (that the disallowance in this case made by the AO beyond 60% was unjustified), learned counsel submitted that the sole discretion as regards the amount of commission to be given, parted or shared, (being a commercial decision) lies exclusively within the domain of enterprise, i.e., the assessee. So long as the AO is satisfied whether the amounts were actually paid and the expenses incurred were genuine, he cannot question the reasonableness of the amount, on the basis of the percentage being high or excessive.

6. Learned counsel for the Revenue urged that apart from the agreement, which broadly contained the condition with respect to the commission sharing, there is no material on the record to indicate that assessee had, in fact, agreed on year to year basis for differing rates of



commission. Emphasizing that since the assessee and its dealers were party to a written agreement, the business on this condition, argues the Revenue, is significant. Learned counsel also submitted that AO itself possesses the jurisdiction to determine reasonableness of the extent of commission, in the sense that commercial expediency under Section 37 (1) is to be read along with power conferred under Section 40A (2), which requires the factoring of fair market value of similar deductions/expenses.

7. This Court has considered the submissions. Whether the parties were required to reduce the rates of commission for each year in to writing, in the opinion of the Court, is not an aspect which could have been gone into by the AO. The way parties entering into a voluntary commercial transaction spell out their relationship, is a matter of contract, which except by statutory supervision, the AO cannot go into, at least under Section 37 (1), given that the exclusive domain of deciding whether the expenditure is warranted, is that of the assessee. The decision is entirely a business related one. If the matter is viewed from this perspective, the fact that the commission was 90% in the first year and reduced to some extent in the latter years *ipso facto* is not a consideration for the AO to have concluded that, it necessarily had to be reduced to 60% for the fourth year, i.e., 2006-07; no support in terms of the contract or expressed provision of law or rules has been cited in support of the AO's determination in this regard. This Court is also satisfied that TDS payments were made in respect of the dealership commission parted or shared by the assessee, as is evident from the records.



8. In view of the above findings, this Court is of the opinion that the question of law is to be answered in favour of the assessee and against the Revenue. The appeal is accordingly allowed.

S. RAVINDRA BHAT
(JUDGE)

V.KAMESWAR RAO
(JUDGE)

MAY 30, 2014
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