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

+ ITA 487/2022

PR. COMMISSIONER OF INCOME TAX-7, DELHI Appellant

Through: Mr.Puneet Rai, Sr.Standing Counsel
for the Revenue.

versus

XEROX INDIA LTD. Respondent

Through: Mr.Nageshwer Rao, Advocate.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

ORDER

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25.11.2022

C.M.No.50944/2022

Keeping in view the averments in the application, the delay in re-filing the present appeal is condoned.

Accordingly, the application stands disposed of.

ITA No.487/2022

Present income tax appeal has been filed challenging the order dated 5th August, 2020 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No.2060/Del./2015 for the Assessment Year 2010-11.

Learned counsel for the appellant states that the ITAT has erred in relying upon the decision of this Court in the case involving similar issues and consequently holding that the Arms Length Price (ALP) of the



transaction involving Advertising, Marketing and Promotion (AMP) expenses is not sustainable in the eyes of the law, ignoring the fact that the said orders have been challenged by the department before the Supreme Court and have not yet attained finality. He states that the ITAT has erred in treating Bright Line Test method for AMP adjustment as unsustainable when the matter is *sub-judice* and is pending with the Supreme Court.

This Court in *Bausch & Lomb Eyecare (India) Pvt. Ltd. vs Addl. CIT [2015 SCC Online Del 14382]*, *Sony Ericsson Mobile Communications India Pvt. Ltd. vs. CIT (2015) 55 taxmann.com 240 (Delhi)* and *Maruti Suzuki India Ltd. vs. CIT (2015) 64 taxmann.com 150 (Delhi)* has held that merely because there is an incidental benefit to the foreign AE would not mean that AMP expenses have been incurred by the assessee for promoting the brand of the foreign AE. The Court further held that provisions of Chapter X cannot be invoked in cases wherein the existence of an international transaction is unable to be shown. The relevant extract of the judgement in *Bausch & Lomb Eyecare (India) Pvt. Ltd. (supra)* is reproduced herein below:

“64. In the absence of any machinery provision, bringing an imagined transaction to tax is not possible. The decisions in CIT v. B.C. Srinivasa Setty (1981) 128 ITR 294 (SC) and PNB Finance Ltd. v. CIT (2008) 307 ITR 75 (SC) make this position explicit. Therefore, where the existence of an international transaction involving AMP expense with an ascertainable price is unable to be shown to exist, even if such price is nil, Chapter X provisions cannot be invoked to undertake a TP adjustment exercise.

65. As already mentioned, merely because there is an incidental benefit to the foreign AE, it cannot be said that the AMP expenses incurred by the Indian entity was for promoting the brand of the foreign AE. As mentioned in Sassoon J David



(supra) “the fact that somebody other than the Assessee is also benefitted by the expenditure should not come in the way of an expenditure being allowed by way of a deduction under Section 10(2)(xv) of the Act (Indian Income Tax Act, 1922) if it satisfies otherwise the tests laid down by the law”.

66. On the issue of the intra group services, the Assessee is justified in contending that the re-characterization of its transaction involving its AE for the two years which have been fully disclosed in the TP Study on the basis of it not being for commercial expediency of the Assessee is clearly beyond the powers of the TPO and contrary to the legal position explained in *EKL Appliances (supra)*.

67. For the aforementioned reasons the Court is satisfied that the Revenue has not been able to show the existence of an international transaction involving AMP expenses between the Assessee and its AE, B&L, USA. Question (ii) is accordingly answered in favour of the Assessee and against the Revenue.”

(emphasis supplied)

Though the judgments of this Court in *Sony Ericsson Mobile Communication (supra)* & *Bausch & Lomb Eyecare India P. Ltd. (supra)* have been challenged and are pending adjudication before the Supreme Court being SLP No.31688/2015, yet there is no stay of the said judgments till date.

Consequently, in view of the judgments passed by the Supreme Court in *Kunhayammed and Others vs. State of Kerala and Another, (2000) 6 SCC 359* and *Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras (1992) 3 SCC 1*, the present appeal is covered by the judgment passed by the learned predecessor Division Bench in *Sony Ericsson Mobile Communication (supra)* & *Bausch & Lomb Eye Care India P. Ltd. (supra)*.



Accordingly, no substantial question of law arises for consideration in the present appeal and the same is dismissed. However, it is clarified that the order passed in the present appeal shall abide by the final decision of the Supreme Court in the aforesaid SLP No.31688/2015.

MANMOHAN, J

MANMEET PRITAM SINGH ARORA, J

NOVEMBER 25, 2022
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