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

*Date of decision: 21<sup>st</sup> November, 2012*

+ ITA 644/2012

CIT

..... Appellant

Through: Mr. Sanjeev Sabharwal, Sr. Standing  
Counsel with Mr. Puneet Gupta, Jr.  
Standing Counsel.

versus

NESTLE INDIA LTD

..... Respondent

Through: Mr. Ajay Vohra with Mr. Somnath  
Shukla, Advocates.

**CORAM:**

**MR. JUSTICE S. RAVINDRA BHAT**

**MR. JUSTICE R.V. EASWAR**

**S. RAVINDRA BHAT, J: (OPEN COURT)**

The Revenue claims to be aggrieved by the impugned judgment of the Tribunal in ITA No.4477/Del/2010. The question of law urged on its behalf is: -

*“Whether the Tribunal fell into error in deleting ₹33.82 crores being 40% of the license royalty paid by the assessee to the owner of the brand and trademark i.e. Societe Des Products Nestle S.A. Switzerland?”*

2. The relevant facts are that for the concerned assessment year, the Transfer Pricing Officer (TPO) after a detailed analysis of the materials produced before him, concluded that no price adjustment was necessary. However, in the course of the order he stated as follows: -



*“On the other hand, the question of reimbursement of expenses incurred on advertisement is examined. There is a strong nexus between brand building/ sales promotion and the benefits arriving to the overseas entity in terms of royalty. However, there is no international transaction as per the assessee under this head. Based on this analysis even though royalty payment can be questioned but the problem of method as discussed above arises.*

*Therefore, in the absence of data on royalty per se to suit any of the method, the arm's length price of the international transaction of payment of royalty cannot be determined in the present circumstances. However, this should not be construed to mean that the payment of royalty and advertisement and sales promotion expenses are reasonable. Their reasonableness can be examined by the Assessing officer under other provisions of the Income Tax Act.*

*On perusal of the observations made by the TPO, it is evident that the assessee is helping the parent company to enhance the brand value in India and it is attributable to the marketing efforts by the assessee's. The OECD guidelines also propound that the actual conduct of the parties over a period of years should be given significant weight in evaluating the return attributable to market activities. As such, it is evident that license fee paid by the assessee cannot be completely attributed to have been expended wholly and exclusively for the purpose of business.”*

3. Apparently, taking cue from TPO's observation the Assessing Officer, in the regular assessment made, in the course of consideration of the assessee's returns had disallowed the sum of ₹33.82 crores being 40% of the general license as not incurred wholly and exclusively for the purpose of business and that the royalty was excessive in the circumstances of the case so as to attract proportionate disallowance of 40%. The CIT (Appeals) directed the deletion of the disallowance in its entirety, after



analyzing the facts and circumstances. The Revenue's appeal was dismissed by ITAT. The relevant part of the impugned order containing the discussion in this regard is reproduced below: -

*“4. We have considered the facts of the case and submissions made before us. It is an admitted fact that the question posed by the revenue stands squarely covered by earlier decisions of the Tribunal and the High Court. However, at the insistence of the ld. CIT, DR that the matter requires fresh look in view of further developments in law, we have traced the detailed history and mentioned the cases relied upon by him. We find that the decision of Hon'ble Delhi High Court in the case of Maruti Suzuki India Ltd. (supra) does not advance the case of the revenue as it has been brought to a knought by the decision of the Hon'ble Supreme Court, which has directed the Transfer Pricing Officer to independently make the valuation without being influenced by the decision of the High Court. Looking to the earlier decisions in this case, which we are bound to follow, it is held that the ld. CIT (Appeals) rightly deleted the addition of ₹33.82 crore by relying on earlier orders of the Tribunal.”*

4. This Court notices that the Tribunal placed reliance upon the decision, of the assessee itself, of this Court i.e. *CIT v. Nestle India Ltd.*, (2011) 337 ITR 103 (Del.) pertaining to assessment year 2005-06 where an almost identical question had arisen. This Court had taken note of a similar approach – as noticed by the Tribunal in the impugned order and observed as follows: -

*“5. As the facts and circumstances during the year under consideration are in pari-materia and a view has already been taken by the coordinate Bench in this matter, whose order is having binding precedent, respectfully following the same, this ground of Revenue's appeal stands dismissed.”*

5. This Court is also unpersuaded by the Revenue that the subsequent amendment by way of insertion of an Explanation by Finance Act, 2012 w. e. f. 01.04.2002, makes a difference. As observed earlier, the Transfer Pricing Officer after detailed analysis



and examination of the material on record concluded that pricing adjustment was unnecessary; therefore, the application of this amendment, made later, to the facts of this case especially in a context in which they have arisen, is academic.

6. This Court sees no reason to differ with the view taken by it in *Nestle India Ltd. (surpa)*. No substantial question of law arises, in these circumstances the appeal is dismissed.

**S. RAVINDRA BHAT, J**

**R.V.EASWAR, J**

**NOVEMBER 20, 2012**

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