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

+ **ITA 674/2023**

PRINCIPAL COMMISSIONER OF INCOME
TAX DELHI 7

..... Appellant

Through: Mr Sunil Agarwal, Senior Standing
Counsel with Mr Shivansh B. Pandya
and Mr Utkarsh Tiwari, Advocates.

versus

M/S TIMEX GROUP INDIA LTD.

..... Respondent

Through: Counsel (appearance not given).

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE GIRISH KATHPALIA

ORDER

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01.12.2023

[Physical Hearing/Hybrid Hearing (as per request)]

CM APPL. 61978/2023

1. Allowed, subject to just exceptions.

ITA 674/2023

2. This appeal concerns Assessment Year (AY) 2010-11.

3. *Via* the instant appeal, the appellant/revenue seeks to assail the order dated 27.03.2023 passed by the Income Tax Appellate Tribunal [in short "Tribunal"].

4. Mr Sunil Aggarwal, learned senior standing counsel who appears on behalf of the appellant/revenue, says that the only issue which arises for consideration is: whether the adjustment made by the Transfer Pricing Officer (TPO), concerning Advertising, Marketing and Promotion (AMP



expenses) by applying the Bright Line Test was sustainable.

4.1 It is, however, not disputed by Mr Sunil Agarwal that in Assessment Year (AY) 2008-09, the Tribunal *via* order dated 16.11.2021 has ruled in favour of the respondent/assessee.

5. As a matter of fact, the order impugned in the instant appeal, to which we have made a reference above, extracts the relevant parts of the Tribunal's order dated 16.11.2021. For convenience, a part of the order dated 16.11.2021 which is embedded in the impugned order and concerns the respondent/assessee is extracted hereafter:

“7. It is not in dispute that the case of the assessee has been that the primacy engagement of the assessee is in manufacturing operations and the AMP expenditure incurred by it is to the benefit of its operations in India. In the case of the assessee, Tribunal took into consideration the submissions made by the Ld. DR that the matter relating to the international transaction involving AMP expenses is pending before the Apex Court and addition of the Hon'ble Apex Court would be binding upon all the authorities and therefore, while returning a finding that the assessee is a full-fledged manufacturer and the entire AMP expenses were incurred by it to enhance its sale in India and not for promoting the brand of its AE and for creating intangibles for its AE, the alleged excessive AMP expenditure does not fall in the category of international transaction and therefore the adjustment made by the Revenue on account of incurrence of AMP expenses is not sustainable in law, set aside the orders of the authorities below and restored the matter to the file of the learned Assessing Officer to act in accordance with the Findings of the Hon'ble Apex Court to be given in the pending matters.”

6. A perusal of the aforesaid extract would show that the Tribunal ruled in AY 2008-09 that the excessive AMP expenditure did not fall in the category of an international transaction and, therefore, the adjustment made *qua* the same was unsustainable in the eyes of law. This conclusion was based on a finding of fact that the respondent/assessee was primarily engaged in manufacturing operations and that AMP expenditure had been



incurred to benefit its own operation, and not for promoting an associated enterprise (AE).

7. We may note that the Tribunal also disapproved the TPO's approach of applying the Bright Line Test in benchmarking the AMP expenses. This view was based on a judgment rendered by a coordinate bench of this court in *Sony Ericsson India Pvt. Ltd. V. CIT* (2015) 374 ITR 118 (Del.) and *Maruti Suzuki India Ltd. v. CIT* (2016) 381 ITR 117.

8. The Tribunal also highlighted the fact that before ascertaining the arms' length price on an international transaction concerning AMP expenditure, the appellant/revenue would have to discharge the onus that an international transaction had occurred between the assessee and the associated enterprise. This view was also founded on the decision of the coordinate benches of this court rendered in *Bausch & Lomb Eye Care (India) Pvt. Ltd. viz Additional CIT* (2016) 351 ITR 227 (Del.) and *Honda Siel Power Products Ltd. v. Dy. CIT* (2016) 237 Taxman 304.

8.1 Mr Sunil Aggarwal, learned senior standing counsel, has not been able to demonstrate that the position which obtained in the period in issue i.e., AY 2010-11, was any different from that which obtained in AY 2008-09, both in terms of facts and in law.

9. We may, however, note that the Tribunal both in the period in issue i.e., AYs 2010-11, and in 2008-09, has remitted the matter to the file of the Assessing Officer (AO).

10. We are also informed that the appellant/revenue has lodged an appeal against the decision rendered by this court in *Sony Ericsson*.

10.1. Therefore, this appeal is closed as according to us, a substantial question of law arises for consideration by this court.



11. It is, however, made clear that if the appellant/revenue were to succeed in the pending SLP preferred *qua Sony Ericsson*, then it would have liberty to revive the instant appeal.

12. The Registry will, therefore, dispatch a copy of the order passed today to the respondent/assessee *via* all modes.

CM APPL. 61977/2023 [*Application filed on behalf of the appellant seeking condonation of delay of 42 days in filing the appeal*]

13. In view of the order passed above, the application for condonation of delay has been rendered infructuous.

RAJIV SHAKDHER, J.

GIRISH KATHPALIA, J.

DECEMBER 01, 2023

MS

Click here to check corrigendum, if any