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ITAT/16/2020
IA No.GA/2/2022 (Old No.GA/689/2020)

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

PRINCIPAL COMMISSIONER OF
INCOME TAX-4, KOLKATA

-Versus-

M/S. ORGANON (INDIA) PVT.LTD.

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 13th March, 2023

Appearance :
Ms. Smita Das De, Adv.
...for the appellant.

Mr. Paras S. Salva, Sr. Adv.
Mr. Pratik Poddar, Adv.
Mr. A. K. Dey, Adv.
...for the respondent..

The Court : This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the 'Act' for brevity) is directed against the order dated 12th October, 2018 passed by the Income Tax Appellate Tribunal, "C" Bench, Kolkata (the Tribunal) in ITA Nos. 633 & 2459/Kol/2017 for the assessment years 2012-13 and 2013-14.

The revenue has raised the following substantial question of law for consideration:

(i) *Whether the ITAT erred in law in deleting the addition of Rs.7,07,55,565/- of AY 2012-13 and Rs.15,60,70,670/- for AY 2013-14 made upward adjustment on account of ALP of marketing intangible created by the assessee for the associate enterprises ?*

We have heard Ms. Smita Das De, learned standing counsel for the appellant/revenue and Mr. Paras S. Salva, learned senior counsel assisted by Mr. Pratik Poddar and Mr. A. K. Dey, learned advocates for the respondent/assessee.

The Dispute Resolution Panel (DRP) had affirmed the decision taken by the Transfer Pricing Officer (TPO) in determining the arm's length price for Advertisement, Marketing and Promotions (AMP) expenditure treating the same as an international transaction and the directions were issued under Section 144C(5) of the Income Tax Act, 1961 dated 8th December, 2016. Even before the DRP, the appellant had taken a preliminary objection stating that the transaction was not an international transaction and the question of determination of arm's length price on AMP expenditure does not arise. Apart from the preliminary objection, objections were raised on the merits of the matter nevertheless the DRP issued directions which ultimately led the assessment order which was questioned before the Tribunal. Before the learned Tribunal, the Department contended that the assessee is only a distribution

company and not a manufacturing company and, therefore, the decision relied on by the assessee of the High Court of Delhi in the case of *Maruti Suzuki India Ltd. vs. CIT* reported in 381 ITR 117 (Del.) will not apply to the case of the assessee. The Tribunal proceeded to examine the facts and found that the assessee company outsources its entire production requirements to toll manufacturers/contract manufacturers on a licence basis. The assessee procures the raw materials and gets it converted from the third party toll manufacturers. The financial statements of the assessee were examined by the Tribunal wherein the details regarding the manufacturing and the consumption of raw materials, sales of finished goods, inventory of finished goods etc. were shown. Further, the Tribunal found that from the said financials produced by the assessee, it was seen that the products manufactured by the assessee are either of its own or through contract manufacturers and they are subjected to levy of Central Excise Duty which has been collected from the assessee company. Therefore, on facts, the Tribunal held that the revenue has taken an incorrect stand that the assessee is not a manufacturer at all and only a distributor simplicitor. Taking note of this factual position, the contention raised by the revenue before the Tribunal was rejected. The learned Tribunal referred to the decision of its co-ordinate bench in the case of *Philips India Ltd. vs. ACIT* in ITA No.2489/Kol/2017 dated

4th April, 2018 for assessment year 2013-14. The facts of the said case were more or less identical and the Tribunal apart from recording a factual finding that the assessee is a manufacturer, also placed reliance on the co-ordinate bench decision in the case of *Philips India* which had attained finality. Thus, we are of the view that in the absence of any material produced before this Court or before the Tribunal to dislodge this factual finding, the order of the Tribunal cannot be interfered nor can it be termed as perverse.

Further, the Tribunal not stopping with the said issue, proceeded to examine the contention of the revenue that the assessee's name is 'Organon (India) Pvt. Ltd.' and that the word "Organon" is not an Indian word. It is the name of the Associate Enterprise (AE). The Tribunal, in our view, rightly held that the usage of the word "Organon" as the name of the assessee in India is immaterial and what would be material is the products manufactured by the assessee and not the company which manufactures. That apart, the Tribunal also rightly held that mere usage of foreign word does not make it automatic to fall within the ambit of an international transaction. To support its conclusion the Tribunal referred to an example in the case of a product called 'Savlon'. The finding rendered by the Tribunal cannot be faulted. The Tribunal, thereafter proceeded to examine as to whether the assessee was promoting any of the brands of AE in India. After examining the facts,

the Tribunal found that the revenue had only assumed that the assessee had promoted the brand of the AE by incurring AMP expenditure in India thereby warranting any compensation. On facts, it was found that the assessee had not paid any royalty or trade-mark fee to its Associated Enterprises and had been benefited by the excess premium return in the same price of goods. Furthermore, the Tribunal found that AMP expenditure is duly factored into the said pricing fixed by the Associated Enterprises. Furthermore, the Tribunal found that the international transactions with the Associated Enterprises of purchase of raw materials, purchase of finished goods, sale of finished goods and recovery of expenses have been duly accepted to be at arm's length.

The next aspect dealt with by the Tribunal was regarding the selling expenses which were sought to be included as part of AMP expenditure by the TPO and the DRP. The Tribunal after thoroughly examining the factual position found that these expenses are purely related to products of the assessee and not for any brand. Further, it found that the total expenditure towards AMP and selling expenditure had duly bifurcated the same by identifying at the time of incurrence itself, whether the said expenditure constitutes AMP expenditure or selling expenditure. This bifurcation of expenditure was ignored by the revenue and this has been

rightly pointed out by the learned Tribunal in the impugned order.

Thus, we are fully satisfied that the Tribunal, on facts, was convinced with the case of the assessee and granted relief and in the absence of any perversity in the order passed by the learned Tribunal, we find no grounds to interfere with the same.

Accordingly, the appeal(ITAT/16/2020) filed by the revenue is dismissed and the substantial question of law is answered against the revenue.

The application for stay being IA No.GA/2/2022 (Old No.GA/689/2020) is closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

As./K.Banerjee/S.Pal/S.Kumar