2023:DHC:7810-DB

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

% ***Decision delivered on: 26.09.2023***

\+ **ITA 555/2023**

PR. COMMISSIONER OF INCOME TAX-12 ..... Appellant
Through: Mr Sanjay Kumar, Sr. Standing Counsel with Ms Easha and Ms Hemlata, Advs.

versus

M/S NEW DELHI TYRE HOUSE ..... Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA
[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

CM No.49924/2023 ***[Application filed on behalf of the appellant seeking condonation of delay of 116 days in filing the appeal]***

1. This is an application moved on behalf of the appellant/revenue seeking condonation of delay in filing the appeal.

1.1 According to the appellant/revenue, there is a delay of 116 days in filing the appeal.

2. Having regard to the period of delay, we are inclined to condone the delay in filing the appeal.

3. Accordingly, the prayer made in the application is allowed.

4. The application is disposed of, in the aforesaid terms.

ITA 555/2023

5. This appeal concerns Assessment Year (AY) 2013-14.

6. *Via* the instant appeal, the appellant/revenue seeks to assail the order dated 22.11.2022 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].

7. The record shows that the Assessing Officer (AO) had made the following two additions to the declared income of the respondent/assessee:

(i) First, money received under Marketing Assistance Programme [hereinafter referred to as "MAP"] executed between the respondent/assessee and an entity going by the name Exxonmobile Lubricants Pvt. Ltd. [hereinafter referred to as "Exxon"].

(ii) Second, the disallowance of expenses which were treated as having been incurred on personal account.

8. Insofar as the first of the two additions is concerned, the amount added by the AO was Rs.3,95,86,272/-. As regards the other addition, the amount added was Rs. 1,16,573/-.

9. This appeal is confined to the addition made on account of money received by respondent/assessee against the MAP agreements.

10. We may note that record also discloses that the total amount received by the respondent/assessee in the aforementioned year against MAP agreement was Rs. 5,99,00,000/-.

11. Since the MAP agreement required the respondent/assessee to spend money in his capacity as the distributor of "Exxon" towards marketing, it had spent, against the amount received, Rs.2,03,13,728/-.

12. Thus, the AO decided to add the difference between the two figures i.e., Rs.3,95,86,272/- to the income of the respondent/assessee.

13. The record disclosed that this aspect has arisen in previous AYs as well. The appeal adverts to AYs 2011-12 & 2012-13.

14. Mr Sanjay Kumar, who appears on behalf of the appellant/revenue, informs us that the Tribunal's decision on the said AYs was against the appellant/revenue and in favour of the respondent/assessee. It is, however, pointed out by Mr Kumar that appeals to this court were not preferred in the said AYs on account of the tax impact being below the prescribed threshold limit.

15. During the course of the arguments, Mr Kumar has fairly placed before us the order dated 04.10.2018 passed by the Tribunal in the two cross-appeals preferred before it i.e., 3986/Del/2015 preferred by the revenue and ITA No. 2421/Del/2015 preferred by respondent/assessee.

16. A perusal of a hardcopy of the said order reveals that in AYs 2009-10 and 2010-11, the AO had framed an assessment order under Section 143(3) of the Income Act, 1961 [in short, "Act"] without making any addition with regard to money received by the respondent/assessee against the MAP agreements. Furthermore, in the very same order, the Tribunal has made *inter alia*, the following observations:

> *"…Clause 4 of the Agreement provides that:*
> *"Distributor (the assessee) shall amortize or repay MAP payment in accordance with the Second Schedule." Clause 6 of the Agreement, which is relevant for our purpose, reads as under:*
>
> > ***"6. Right to demand immediate payment EMPL may at its option demand immediate payment of an amount equal to the Unamorized Balance multiplied by the Amortization Rate, upon the happening of one or more of the following events:***
> > ***(a) If Distributor ceases to trade;***
> > ***(b) EMLPL terminates the Distributor Agreement***

for any reason;
(c) If EMLPL decides in its sole and unfettered discretion not to renew the Distributor Agreement for any reason;
(d) If Distributor breaches this Agreement or the Distributor Agreement, and in respect of a breach capable of being remedied, fails to remedy such breach within 7 days of written notice from EMLPL;
(e) If Distributor becomes bankrupt or insolvent, or is unable to pay its debts as they fall due, or enters into any arrangement or composition with its creditors, or has a winding up petition presented against it, or a receiver, receiver/manger or liquidator is appointed, either voluntarily or compulsorily, other than for the purposes of reconstruction; or
(f) If Distributor does not purchase the Annual Target Volume during a Contract year."

5. As per the above clause, Exxonmobil Lubricants Pvt. Ltd., has a right to demand immediate payment if the conditions given hereinabove are violated. First Schedule to the Agreement provides that the effective date of MAP agreement is 01.06.2010 and the maturity date is 31.05.2011. Similarly, there is next Agreement for RS. 21.25 lac, whose effective date is 1st July, 2010 and maturity dates of other two Agreements are concerned. Total amount under these four Agreements comes to RS. 1,91,65,000/-, which pertains to part of the year under consideration and the remaining part to the subsequent year. ***The assessee, in turn, is passing over the amount of incentive given under the MAP Agreement to the sub-distributors at the time of their lifting the goods,*** *which payment, during the year, totaled at Rs. 1.29 crore and odd. The remaining amount of Rs.62.03 lac will be adjusted payment to be made in the subsequent year by the sub-distributors at the time of their further purchase.* ***It is relevant to note that the MAP payment received by the assessee comes with certain conditionalities, such as, the assessee has to provide bank guarantee and there is an obligation to lift the stocks. In case the assessee does not succeed in lifting the stock etc., the proportionate part would not be available to it for onward payment to sub-contractors****. The assessee has been consistently following this practice of accounting the amounts under MAP Agreement and the same has been accepted in the assessments completed u/s 143(3) for two immediately preceding assessment years, namely, 2009-10*

and 2010-11. The ld. CIT(A) has recorded a categorical finding to this effect in para 1.6 of the impugned order, which has not been controverted by the ld. DR. In the absence of any factual difference in the manner of receipt, disbursement of accounting of the marketing assistance payment received under the MAP Agreements I the preceding year vis-à-vis the year under consideration, we are satisfied that the ld. CIT(A) rightly appreciated the facts and was justified in deciding this issue in favour of the assessee. We, therefore, uphold the same".

[Emphasis is ours]

17. It is not disputed by Mr Kumar that the provisions of the MAP agreement have not undergone any change. The clauses referred to in the order dated 04.10.2018 continue to obtain.

18. A perusal of the clauses would show, as noted by the Tribunal, even for AY 2011-12, that the amount received by the respondent/assessee in his capacity as a distributor was passed on to sub-contractors as and when they lifted the goods in issue.

19. Clause 6 of the MAP agreement, as extracted hereinabove, would show that the amount received under the MAP agreement by the respondent/assessee was conditional and was liable to be returned to Exxon in certain situations, as indicated in sub-clauses (a) to (f) of clause 6.

20. It is also surprising that the AO chose to treat only the difference between the amounts received and spent, as income. In our view. if the amount received was income of the respondent/assessee, then the entire amount i.e., Rs. 5,99,00,000 should have been treated as income.

21. To be noted, the AO has noted that the aforementioned amount is treated as gross receipt of the respondent/assessee. The AO, by treating Rs.5,99,00,000/- as the gross receipts has, in a sense, indicated that the amount did not bear the attribute of income.

22. Therefore, for the reasons given hereinabove, in our view, no substantial question of law arises for consideration.

23. The appeal is, accordingly, closed.

24. Parties will act based on the digitally signed copy of the order.

(RAJIV SHAKDHER)
JUDGE

(GIRISH KATHPALIA)
JUDGE

SEPTEMBER 26, 2023/RY

Click here to check corrigendum, if any