IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G", NEW DELHI

BEFORE SHRI G. D. AGRAWAL, PRESIDENT
AND SHRI AMIT SHUKLA, JUDICIAL MEMBER

I.T.A. No.4399/DEL/2014
Assessment Year:2010-11

DCIT Circle 9(1) New Delhi	v.	SSIPL Retail Ltd. B-1/F4, Mohan Co-operative Indl. Area Main Mathura Road New Delhi
		TAN/PAN:AAACM2005L
(Applicant)		(Respondent)

Applicant by:	Shri Ateeq Ahmed, D.R.		
Respondent by:	Shri B.K. Anand, C.A.		
Date of hearing:	29	08	2017
Date of pronouncement:	14	09	2017

O R D E R

PER AMIT SHUKLA, J.M.:

The aforesaid appeal has been filed by the Revenue against impugned order dated 31/1/2013, passed by the ld. CIT (Appeals)-XII, New Delhi for quantum of assessment passed u/s. 143(3) of the Income Tax Act, 1961 for assessment year 2010-11. The grounds raised by the Revenue in the grounds of appeal are as under:-

1. *The Ld. CIT(A) has erred in law and on facts in deleting the disallowance of Rs.51,70,660/- made by the AO on account of disallowance of Royalty.*
2. *The Ld. CIT(A) has erred in law and on facts in deleting disallowance of Rs.14,92,883/- made by the AO on account of advertisement and promotion expenses.*
3. *The Ld. CIT(A) has erred in law and on facts in deleting the*

addition of Rs.12,675/-being interest payment.

4. *The Ld. CIT(A) has erred in law and on facts in deleting the addition of Rs.75,675/- made by the AO on account of foreign travel expenses.*

5. *The appellant craves to amend, modify, alter, add or forgo any ground(s) of appeal at any time before or during the hearing of this appeal."*

2. At the outset, the ld. Counsel for the assessee submitted that the issues raised in the grounds of appeal are squarely covered by the decision of the Delhi Bench of the Tribunal in the assessee's own case in ITA No.4611/DEL/2011 and 2366/DEL/2013, order dated 30/6/2015.

3. On the other hand, the ld. D.R., strongly relied upon the order of the Assessing Officer.

4. We find that in assessment years 2008-09 and 2009-10, exactly same issues were raised by the Revenue before the Tribunal in ITA No.4611/DEL/2011 and 2366/DEL/2013. The relevant discussion and finding of the Tribunal read as under:-

> *10. Apropos to Ground No. 1 relates to disallowance of Rs.2,44,39,3587- in assessment year 2008-09 & Rs.1,37,28,045/- in assessment year 2009- 10, made by the AO on account of 'Royalty', paid by the assessee to Nike to use the brand name. As per the AO, the said expenditure is of a capital nature and so it was disallowed. It has been pointed out to us that the AO has made the disallowance incomplete disregard to the judgment of the Hon'ble Delhi High Court in assessee's own case that the payment of royalty under the said transferable license is not a capital expenditure. Assessee had filed a copy of the said judgment*

of the Hon'ble Delhi High Court, before the Ld. CIT(A] which was delivered in the matter of CIT-XIII, New Delhi Vs Sierra Industrial Enterprises, i.e, assessee's predecessor in business from whom such license was acquired upon the merger of the company with the assessee. We find that the Ld. CIT(A) has rightly observed that it is settled law that if expenditure brings into existence a capital asset or gives any advantage of enduring nature to an assessee, it can be treated as capital expenditure. Ld. CIT(A) has referred the relevant portion of the judgment of the Hon'ble Jurisdictional High Court in the case of CIT vs. Sierra Industrial Enterprises Pvt. Ltd wherein the Hon'ble High Court vide its judgment dated 14.7.2010 vide para Nos. 6 & 7 has dismissed the Revenue's Appeal on the issue involved, which reads as under:-

> *"6. It is a settled law that if expenditure brings into existence a capital asset or gives any advantage of enduring nature to an assessee, it can be treated as capital expenditure. In the present case, both the CIT(A) and ITAT have concluded that royalty payable was in lieu of use of technical information provided by Nike Company for manufacture of products and for use of trademark Nike. According to CIT (A), royalty payable was related to the sales made during a particular year and accordingly the expenditure was of revenue nature.*
>
> *7. Both the CIT (A) and ITAT have given cogent reasons for arriving at the conclusion that royalty payment was a revenue expenses. Moreover, in our opinion as the assessee ceased to have any right to use technical information and/or trademark upon termination of agreement, there was no advantage of enduring nature derived by the assessee from the said agreement. Consequently, in our opinion, royalty fee is a revenue and not a capital expenditure. Accordingly, the present*

appeal being bereft of merits is dismissed in limine but no order as to costs."

11. *In view of the above, we are of the view that Ld. CIT(A) has rightly deleted the addition of Rs.2,44,39,356/- by following the High Court's order in assessee's own case dated 14.7.2010 as aforesaid and decided the issue in favour of the assessee, which does not need any interference on our part, hence, we uphold the order of the Ld. CIT(A] on this issue and decide the same against the Revenue. In the result, the Ground No. 1 on account of Royalty in both the assessment years i.e. 2008-09 & 2009-10 are dismissed.*

12. *With regard to Ground No. 3 in Asstt. Year 2008-09 and Ground no. 2 in Asstt Year 2009-10 relating to deletion of addition of Rs.4,64,757/- and Rs.29,033/- respectively made by the AO u/s. 40A(2)(b) being interest on loan is concerned, we find that the Ld. CIT(A) took in to consideration the fact that similar disallowance of the interest which the assessee paid @15% where in respect of the very same persons were also made in the preceding assessment year 2007-08 for the same reason that such persons are paid interest @ 15% whereas in the opinion of the AO interest payment ought to have been @ 12%. Ld. CIT(A) while deciding in favour of assessee took note of the fact that that the said persons were not the only parties to whom interest @ 15% were paid by the assessee and therefore it cannot be said that the assessee in any manner tried to pass on benefit to a class of close associates as its cost and deleted the disallowance vide order dated 28/02/2011 in Appeal No. 114/09-10. We find that assessee filed before the Ld. CIT(A] the list of lenders who are covered in the disallowed amount of Rs 4,64,757/- and brought to the notice of the Ld CIT(A) that the lenders were the same very persons referred to in the prior year's assessment. The Ld AR submitted that in the absence of any other reason for disallowance of interest paid to such*

parties, the facts being the same, as in the previous year, the disallowance of interest be deleted as done by the predecessor CIT(A). Ld. CIT(A) has observed that in order to make a disallowance u/s 40A(2)(b) it is necessary that the Assessing Officer should establish that the benefits given to the related parties are more than the fair market value and if the assessee is making payments to other persons @ 15% then there is no special favour which is being given to the related parties and then disallowance is not warranted. Further, the ld CIT(A) has taken note that the Assessing Officer has not been able to establish as to what was the market rate of interest thus, he opines that there is no justification in making a disallowance of Rs.4,64,757/- u/s 40A(2)(b) and ordered it's deletion. Facts as enumerated above could not be controverted by the Ld DR so as to persuade us to taken a different view and we do not find any infirmity in the order of the Ld. CIT(A), hence, we uphold the same and accordingly the ground no. 3 in asstt. Year 2008-09 and ground no. 2 raised in asstt. Year 2009-10 stands dismissed.

13. *With regard to Ground No. 2 in Asstt. Year 2008-09 and Ground no. 3 in Asstt. Year 2009-10 relating to deletion of addition of Rs.9,13,720/- and Rs.13,31,882/- respectively made by the AO on account of advertisement and promotion expenses is concerned, we find that the AO observed that the total expenditure under this head was Rs.92,46,745/-. Out of the total expenses the AO has selected three items, namely, Brand Display charges (Rs.5,68,750/), Conference and Brand Promotion Meetings (Rs.5,28,007/-) and Display Charges and Branding (Rs.25,58,166/-) aggregating to Rs.36,54,923/- and disallowed 25% of this amount treating that these expenses are of an "enduring nature", and the assessee derives enduring benefit there from. The assessee's counsel's contention is that the disallowance made by the AO was arbitrary and the AO has disregarded the nature of*

assessee's business which is manufacture and sale of shoes which is a consumer nondurable product According to him, the assessee undertakes sales are in a competitive brand market where high pitched marketing is required by way of innovative advertising and attractive display of products. According to him, today a NIKE shoe is available in smaller towns too. In such circumstances there can be no enduring benefit because of display boards etc because the retail outlet may change it keeping in mind the competition in the market of the products. According to the Ld AR, even otherwise the AO has not passed a speaking order as to bow she arrived at the figure of 25 per cent of expenditure is not to be allowed.

14. *The Ld CIT(A) took note of the afore said submission and relied on the following case laws to adjudicate the issue in favour of the assessee.*

CIT Vs Adidas India Marketing Pvt. Ltd. 195 ITR Taxman 256 Del

15. *In this case also the AO disallowed the advertisement expenses by holding that by advertising is promoting/building the Brand of the Licensor and thus it is not wholly and exclusively for the benefit of the assessee. The Tribunal deleted the disallowance by holding that it was a commercially accepted practice and incurred on grounds of commercial expediency.*

CIT Vs Indian Alumillium Industries Ltd 80 Taxman 243 Kerala

16. *In this case the Hon'ble High Court has after discussing various landmark decisions on advertisement expenses and as to whether they are capital or revenue and has also held that the companies invite VIPs and celebrities on various launches and campaigns for better publicity and that such expenses are Revenue in nature.*

CIT Vs Salora International Ltd. 308 ITR 199 Del

17. *In this case the AO disallowed one third of the total advertisement expenses of Rs 3.08 crores in AY 2001-02 by holding that they have resulted in enduring benefit The CIT(A) deleted it and the ITAT upheld the decision of the CIT(A). On reference by the Department, the jurisdictional High Court of Delhi dismissed the matter by holding that no question of law arose.*

18. *We find that the Ld CIT(A) rightly relied on the decision in the case law as afore-stated especially the case of Adidas (Supra) to arrive at the impugned decision, which needs no interference, so the decision of the Ld CIT(A) deleting the ad-hoc disallowance is upheld and accordingly the ground no. 2 in Asstt. Year 2008-09 and ground No. 3 raised in Asstt. Year 2009-10 stands dismissed.*

19. *Apropos Ground No. 4 which relates to disallowance of Rs.1,36,686 being 10% of Rs.13,36,866/- made by the AO on account of Foreign Travel Expenses and disallowance for Asstt. Year 2008-09 and of Rs.19,11,530/- made by the AO on account of the same in assessment year 2009-10.We find that the AO has made the ad-hoc disallowance of 10% out of the foreign travel expenses of Rs.13,86,866/- because similar 10% disallowance was made in the Asstt. Year 2005-06. So it was argued by the Ld AR that if an earlier order of assessment in assessee's case is the sole reason for disallowing expenses in a subsequent year, then the according to him AO erred in not following the more recent assessment order for AY 2007-08 where no disallowance out of foreign travel expenses of Rs.15,89,187/- was made appreciating the facts of the case. Ld. AR of the assessee enclosed the details of expenditure on foreign travel incurred by employees of the company and therefore according to him, expenses incurred by them qua the company cannot be said to be of 'personal nature'. Ld. AR of the assessee further submitted that the ad-hoc disallowance of 10% made by AO*

is arbitrary without any basis and it is in complete disregard to the past history of the case and hence be deleted. Ld. CIT(A) in her impugned order had taken in to consideration that the assessee has submitted the list of its employees who had made foreign travels and the purpose is also mentioned hence, according to her no disallowance can be made on estimate basis, therefore, the addition of Rs.1,36,686/- was deleted.

20. In the background of the aforesaid discussions, we find that the AO has made the ad-hoc disallowance simply by stating that there may be personal element involved in the said expenditure which is purely a guess work, when the assessee has submitted the list of employees and the purpose of visit was clearly mentioned in it. In such circumstances the AO could not have made the adhoc disallowance without making out a case to disprove the claim of the assessee that it's employees had gone to foreign country for the purpose of business. Therefore we do not find any infirmity in the order' of the Ld. CIT(A), hence, we uphold the same and accordingly the ground no. 4 in both the asstt years i.e. 2008-09 and 2009-10 stands dismissed.

5. Since similar facts are permeating in this year also, therefore, the finding given by the Tribunal in earlier years will apply *mutatis-mutandis* in this year also. Accordingly, the grounds raised by the Revenue are dismissed.

6. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open Court on 14th September, 2017.

Sd/-	Sd/-
[G.D. AGRAWAL]	**[AMIT SHUKLA]**
PRESIDENT	**JUDICIAL MEMBER**

DATED:14th September, 2017

JJ:

Copy forwarded to:

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4. CIT
5. DR

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