

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHE 'I-1', NEW DELHI**

**Before Sh. Bhavnesh Saini, Judicial Member
And
Sh. N. S. Saini, Accountant Member**

**ITA No. 8006/Del/2018 : Asstt. Year : 2014-15
&
SA No. 969/Del/2018
(in ITA No. 8006/Del/2018 : Asstt. Year : 2014-15)**

M/s Goodyear India Ltd., Mathura Road, Ballabgarh, Faridabad, Haryana-121001	Vs	JCIT, Special Range-4, New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAACG3511H		

**Assessee by : Sh. Ajay Vohra, Sr. Adv. &
Sh. Abhishek Agarwal, Adv.
Revenue by : Sh. Sanjay I. Bara, CIT DR &
Sh. Sandeep Kr. Mishra, Sr. DR**

Date of Hearing :25.02.2019	Date of Pronouncement : 26.02.2019
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ORDER

Per N. S. Saini, Accountant Member:

This is an appeal filed by the assessee against the order of Assessing Officer dated 29.10.2014 u/s 143(3)/144C(5) of the Income Tax Act, 1961.

2. At the time of hearing, the Id. Counsel for the assessee submitted that ground nos. 1 to 1.2 are general in nature, therefore, these grounds of appeal of the assessee are dismissed.

3. Ground nos. 2 to 2.4 of the appeal are directed against the order of the AO holding that no recognizable benefit was passed on the appellant and therefore, there was no rationale for paying Rs.12,14,96,000/- for trademark to the associated enterprises.

4. The Id. Counsel for the assessee submitted that the issue is covered in favour of the appellant by the order of the Delhi Bench of the Tribunal in the appellant's own case for assessment years 2007-08, 2008-09 & 2009-10 in ITA Nos. 5650/Del/2011, 6240/Del/2012 and 916/Del/2014, order dated 29.04.2016. He further submitted that the decision was followed by Tribunal in appellant's own case for the assessment years 2010-11, 2011-12 and 2012-13 in ITA Nos. 1516/Del/2015, 1004/Del/2016 and 1706/Del/2017, order dated 22.01.2018.

5. He submitted that the DRP at page no. 2 para 3 has stated as under:

"3. The DRP has considered the submission of assessee and finds this is a legacy issue and has been the subject matter of adjudication by this Panel in several earlier years including AY 2013-14. It is to be noted that the issue was decided by the Hon'ble ITAT in favour of assessee for AY 2007-08 to 2009-10 vide order dated 29.04.2016 (2016) 70 taxmann.com 67 (Delhi-Trib), and for AY 2010-11 and 2011-12 vide order dated 22.01.2018. Revenue's appeal before the Hon'ble Delhi High Court (against ITAT's order dated 29.04.2016) has been admitted in ITA No. 77 to 79/2017 vide order dated 13.02.2017. We have examined the facts carefully in the light of taxpayer's submissions and find that there is no change in the factual matrix or business mode. Thus, following the principle of consistency, we have no hesitation in

following the decision of the DRP for 2012-13 and we confirm the AO's order on this issue. Assessee's objection is rejected."

6. He submitted that a reading of the above order of the DRP shows that as the revenue has not accepted the order of the Tribunal in earlier years and has filed appeal there against in the Hon'ble Delhi High Court, therefore, they are not following the order of the Tribunal. Hence, he submitted that the appeal of the assessee on this ground should be allowed by following the earlier order of the Tribunal.

7. The DR also agreed with the submission of the AR of the assessee.

8. After considering the rival submissions and perusing the materials available on the record, we find that the revenue has brought no material on record to show that the operation of the order of the Tribunal passed in the assessment years 2007-08, 2008-09 & 2009-10 and 2010-11, 2011-12 & 2012-13 has been stayed by the Hon'ble High Court. That being so, the facts being identical, respectfully following the precedent, we set aside the order of the AO and allow this ground of appeal of the assessee.

9. Ground nos. 3 to 3.2 are directed against the order of the AO in making ad-hoc disallowance of Rs.3,80,70,000/- being 30% of the total expenditure of Rs.12,69,00,000/- incurred by the assessee on advertisement and publicity.

10. The Id. Counsel for the assessee submitted that the issue was covered in favour of the appellant by order of Delhi Bench of the Tribunal in appellant's own case for the assessment

years 2007-08, 2008-09 & 2009-10 in ITA Nos. 5650/Del/2011, 6240/Del/2012 and 916/Del/2014, order dated 29.04.2016. He further submitted that this order was followed by the Delhi Bench of the Tribunal in appellant's own case for the assessment years 2010-11, 2011-12 and 2012-13 in ITA Nos. 1516/Del/2015, 1004/Del/2016 and 1706/Del/2017, order dated 22.01.2018. Hence, he submitted that following the same, the addition made should be deleted.

11. The DR agreed with the submission of the AR of the assessee.

12. We have heard the rival submissions and perused the orders of the lower authorities and materials available on the record. The undisputed facts of the case are that during the financial year 2014-15, the assessee company incurred a sum of Rs.12,69,00,000/- towards advertising and sales promotion. The AO required the assessee to show cause as to why the expenditure incurred on advertisement should not be disallowed being in the nature of brand building activity. In reply to the show cause notice, the assessee submitted that any disallowance on account of advertisement and sales promotion expenses holding the same to be incurred for brand building for the entities owing brand shall not be sustainable in law. It was further submitted that the expenses were incurred for advertisement/marketing support activities etc. and are incidental to carrying on the business and were incurred by the assessee regularly for promotion/quality control and its product. The expenses incurred are to enable and increase efficiency in business and therefore, was revenue in nature and

deductible u/s 37 of the Act. The expenses are solely incurred for the benefit of the assessee and not its foreign affiliate. Any benefit flowing to the foreign affiliate out of the said expenditure is purely incidental. Thus, the expenditure incurred on advertisement is wholly and exclusively for the business of the assessee. The Assessing Officer disallowed the same on the ground that the brand (marketing intangibles) is not owned by the assessee, such expenditure is incurred for the benefits of the enterprise who owns the brand name. The issue was examined in detail in earlier assessment years and 30% of advertisement and sales promotion expenses were disallowed which has also been upheld by the DRP. Accordingly, he made the disallowance of 30% of the expenses and made an addition of Rs.3,80,70,000/- to the income of the assessee.

13. On appeal, the DRP confirmed the same.

14. Both the parties have agreed that the issue is covered by the order of the Tribunal in the earlier assessment years 2007-08, 2008-09 & 2009-10 vide order dated 29.04.2016 wherein it was held as under:

"61. The Id. AR of the assessee submitted before us that against the total increase in advertisement and sales promotion expense of Rs. 4,87,14,000, the assessing officer accepted only Rs. 4,20,43,000 and disallowed 50% of the difference of Rs.33,08,500 i.e. (Rs.4,87,14,000-4,20,43,000) on the basis of his conjecture and surmises.

62.The Id. AR of the assessee further made following written submission:

"It was submitted that in a fast growing and very tough competitive business environment, the appellant had to spend a good amount on advertisement and marketing activities to show its presence in the market and sustain in business. Also, for the initiative of Branded Retail Stores, the appellant had spent nearly Rs. 2,27,35,000 during the year and an amount of Rs.1,93,08,000 was spent towards launching and introducing the new product range called "Excellence" for passenger cars. This two expenses alone totaled to Rs. 4,20,43,000 out of total increase in expenditure of Rs. 4,87,14,000.

Further, it was submitted that with the increase in advertisement and sales promotion expense, the company has demonstrated sales growth of nearly 28% as compared to financial year 2005-06. The gross sale in year 2005-06 was Rs. 751.74 crores, which has grown to Rs. 958.11 crores in 2006-07. It would be appreciated that despite having low spending on advertisement and marketing expenditure, the appellant has maintained substantial growth in terms of sales and sustained in this competitive business.

In terms of section 37(1) of the Act, deduction is admissible for expenditure incurred wholly and exclusively for purposes of business. Expenditure justified by business considerations and incurred out of commercial expediency is allowable deduction.

It was also submitted that since the aforesaid expenditure of advertisement and brand promotion has undergone a benchmarking analysis under the Transfer Pricing regulations and an arm's length price thereof has been determined, there could not be any further disallowance of the said payment under section 37(1) of the Act, holding the same to be not an expenditure incurred wholly and exclusively for the purpose of the business of the appellant. Reliance

is placed on the decision of the Hon'ble Delhi Bench of the Tribunal in the case of Whirlpool of India Ltd. vs. DCIT (ITA No. 426/D/13), wherein, it is held as under:

"16.....Once the total amount of AMP expenses is processed through the provisions of Chapter X of the Act with the aim of making TP adjustment towards AMP expenses incurred for the foreign AE, or in other words such expenses as are not incurred for the assessee's business, there can be no scope for again reverting to section 37(1) qua such amount to make addition by considering the same expenditure as having not been incurred 'wholly and exclusively' for the purposes of assessee's business. If the amount of AMP expenses is disallowed by processing under both the sections, that is 37 and 92, it will result in double addition to the extent of the original amount incurred for the promotion of the brand of the foreign AE de hors the mark-up. In view of the foregoing discussion, we are of the considered view that the AO was not justified in observing alternatively that a sum of Rs.180 crore and odd is not allowable as per section 37(1) of the Act. We, therefore, vacate the alternative finding given by the AO for disallowance."

63.Ld. CIT-DR placed reliance on the order of the assessing officer and DRP.

64.We have heard the rival contentions in the light of the material produced and precedent relied upon. We have already held that the advertisement expenditure incurred by the assessee is incurred wholly for the purpose of its business and profession and ought to be allowed deduction in entirety. Further, the assessing officer has clearly made an ad-hoc disallowance of advertisement expenditure incurred by the assessee, which is not permissible under the law. We are of the considered view that AO was not

justified in making such ad-hoc disallowances and therefore, direct the assessing officer to delete the adjustment on this account."

15. Facts being identical respectfully following the precedent, we vacate the disallowance of Rs.3,80,70,000/- and allow this ground of appeal of the assessee.

16. Ground no. 4 of the appeal is directed against the order of the Assessing Officer disallowing Rs.26,79,798/- on account of delay in deposit of employee's contribution towards Provident Fund u/s 36(1)(va) of the Act.

17. The brief facts of the case are that the Assessing officer observed that from a perusal of form 3CD tax audit report, it is seen that there was delay in depositing the employee's contribution towards Provident Fund during the year. As per the form 3CD, the total amount delayed deposit of employees' contribution towards Provident Fund are of Rs.26,79,798/-. In reply to the show cause notice, the assessee submitted that the amount was paid before due date of filing of return of income u/s 139(1) of the Act and hence, no disallowance u/s 36(1)(va) of the Act should be made.

18. The Assessing Officer, however did not accept the explanation of the assessee and held that as per para 5 of CBDT Circular No. 22/2015 dated 17.12.2015, the Board has clarified that the such claim of deduction are governed by Section 36(1)(va) of the Act. Therefore, he held that accordingly the claim for deduction regarding the employee's contribution deposited after the due date as per ESI rules has to be seen within the provisions of Section 36(1)(va) of the Act

and since the assessee has defaulted, accordingly, an amount of Rs.26,79,798/- is added to the income of the assessee.

19. On appeal, the DRP confirmed the order of the AO.

20. At the time of hearing, the Id. Counsel for the assessee submitted that the issue has been decided against the assessee and in favour of the revenue by the Hon'ble Delhi High court in the case of CIT Vs M/s Bharat Hotels Ltd. in ITA No. 271/2005, order dated 06.09.2018.

21. We find that the Hon'ble Delhi High Court has held as under:

"8. Having regard to the specific provisions of the Employees' Provident Funds Act and ESI Act as well as the concerned notifications which granted a grace period of 5 days (which appears to have been late withdrawn recently on 08.01.2016), we are of the opinion that the ITAT's decision in this case was not correct. The assessee undoubtedly was entitled to claim the benefit and properly treat such amounts as having been duly deposited, which were in fact deposited within the period prescribed (i.e. 15 + 5 days in the case of EPF and 21 days + any other grace period in terms of the extent notification). As far as the amounts constituting deductions from employees' salaries towards their contributions, which were made beyond such stipulated period, obviously the assessee was not entitled to claim the deduction from its returns."

22. In view of the above, we find no error in the order of the Assessing Officer. Accordingly, the same is confirmed and the grounds of appeal of the assessee are dismissed.

23. Ground No. 5 of the appeal of the assessee, the grievance of the assessee is that the Assessing Officer erred in levying interest u/s 234A and 234B of the Act.

24. The brief facts of the case are that the Assessing Officer charge interest u/s 234A of the Act of Rs.16,18,896/-.

25. The AR of the assessee submitted that the return of income was filed by the assessee on 29.11.2014 which was within the statutory time limit provided in Section 139(1) of the Act. Hence, no interest was leviable of Rs.16,18,896/- u/s 234A of the Act and therefore, the same should be deleted.

26. The DR has not controverted the submissions of the AR of the assessee.

27. We find that it is not in dispute that the return of income was filed by the assessee on 29.11.2014 as evident from the assessment order passed by the AO. It is also not in dispute that the due date for filing the return of income was 30.11.2014. Section 234A of the Act provides that where a return of income for any assessment year under sub-section (1) of Section 139 of the Act is furnished after the due date ending on the date of furnishing of return then assessee shall be liable to pay simple interest @1% for every month or part of a month comprised in the period commencing on the date immediately following the due date. Thus, it is not in dispute that the return of income was filed by the assessee within the due date prescribed in sub-section (1) to Section 139 of the Act and therefore, no interest u/s 234A of the Act was leviable on the assessee. Hence, we set aside the order of the

Assessing Officer and delete the interest of Rs.16,39,000/- levied u/s 234A of the Act and allow this ground of appeal of the assessee.

28. As regards the charging of interest u/s 234B of the Act, the Id. AR of the assessee submitted that it was consequential. Therefore, this ground of appeal of the assessee is dismissed.

29. As we have decided the appeal of the assessee itself, therefore, Stay Petition filed by the assessee has become infructuous and therefore, it is dismissed.

30. In the result, the appeal of the assessee is partly allowed and the Stay Petition of the assessee is dismissed.

(Order Pronounced in the Open Court on 26/02/2019)

Sd/-
(Bhavnes Saini)
Judicial Member

Sd/-
(N. S. Saini)
Accountant Member

Dated: 26/02/2019

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR