

**IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH: 'G' NEW DELHI]**

**BEFORE MS. SUCHITRA KAMBLE, JUDICIAL MEMBER
A N D
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

**I.T.A. No. 4433/Del/2017 (A.Y. 2012-13)
(THROUGH VIDEO CONFERENCING)**

M/s. Yum! Restaurants Marketing Private Limited, 12 th Floor, Tower : D, Global Business Park, M.G.Road, Gurgaon-122002. PAN : AAACY1884D (APPELLANT)	Vs.	Income Tax Officer, Ward : 27 (4), New Delhi. (RESPONDENT)
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Assessee by :	Mr. S. Krishnan, Advocate;
Department by :	Shri Prakash Dubey, Sr.DR;

Date of Hearing	30.06.2021
Date of Pronouncement	05.07.2021

ORDER

PER PRASHANT MAHARISHI, AM :

01. This appeal is filed by the assessee for assessment year 2012-13 against the order of the Ld. Commissioner of Income Tax (Appeals)-15, New Delhi, dated 27.03.2017, raising the following grounds of appeal:-

“ The following grounds of appeal are mutually exclusive of and without prejudice to each another-

General Ground

1. *That on the facts and in law, the impugned order passed by the Ld. Commissioner of Income Tax (Appeals) -15 ('Ld. CIT(A)') confirming the order of the Assessing Officer ('AO') and assessing the total income of the Appellant at Rs. 3,91,94,261 as against NIL returned income, is bad in law.*

Principle of Mutuality

2. *That on the facts and in law, the Ld. CIT(A) has grossly erred in holding that*

the Appellant cannot be classified as a mutual concern and consequently its income would not be exempt from tax.

3. *That on the facts and in law, the Ld. CIT(A) has failed to appreciate that there being complete identity between the contributories and the beneficiaries, the 'principle of mutuality' was applicable and the receipts of the Appellant could not partake the character of taxable income.*

4. *That on the facts and in law, the Ld. CIT(A) erred in concluding that the 'principle of mutuality' could not be applied owing to the fact that YRIPL and Pepsi Foods Ltd. do not benefit from the AMP activities rendered by the Appellant, which finding is contrary to the facts on record.*

5. *That on the facts and in law, the Ld. CIT(A) has grossly erred in not recognising that in the current assessment year the increase in the sales and royalty income of YRIPL bore a direct nexus to the AMP activities carried on by the Appellant, and as such the benefit to YRIPL was clearly established.*

6. *That on the facts and in law, the Ld. CIT(A) has grossly erred in not appreciating that Pepsi Foods Ltd. also benefited from the exclusive right to sell its products granted as per the terms and conditions of the 'Pepsi Beverage Supply Agreement' and as such all conditions relating to the mutuality concept stood satisfied.*

Even receipt is not income

7. *That, without prejudice, on the facts and in law, the Ld. CIT(A) erred in not appreciating that every receipt in the hands of an assessee does not partake the character of income.*

Diversion of Income by Overriding Title

8. *That on the facts and in law, Ld. CIT(A) failed to adjudicate upon ground/issue relating to diversion of income by overriding title.*

9. *Without prejudice to the above, on the facts and in law, the Ld. CIT(A) failed to appreciate that even assuming that the said AMP contribution partakes the character of income, it is diverted for a specific purpose (AMP activities) by virtue of a pre-existing obligation attached to the source of such contribution itself and hence the contribution was not exigible to tax.*

Other Grounds

10. *That the Ld. CIT(A) has erred in following the order of the Hon'ble Income Tax Appellate Tribunal in Appellant's own case for AY 2001-02 despite appreciating that there has been change in facts in the current year.*

11. *That the Ld. CIT(A) has erred in not appreciating the business model of the Appellant and the terms and conditions of the tripartite agreement.*

12. *That on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in upholding the interest levied by the AO under Section 234B of the Act.*

The appellant craves leave to add, amend, alter, or withdraw any of the grounds of appeal before or at the time of hearing of this appeal. "

02. The facts of the case shows that assessee is a Pvt. Ltd. Company engaged in the business of advertisement media and promotional activities exclusively for its holding company Yam! Restaurants (India) Pvt. Ltd. along with his franchisees at regional and national level. Thus, this company was performing a marketing function of the business of 'Pizza Hut', 'KFC; and 'Taco Bell'. The holding company of the assessee thus sells the Pizza and this company markets the Pizza.
03. The company filed its return of income on 28.09.2012 showing the surplus of income over expenditure amounting to Rs. 3,91,94,261/- and same was adjusted against the excess spent of earlier years. Thus, the return of income was 'NIL'. Assessee stated that this income is not chargeable to tax because of the principles of mutuality and because of diversion of income by overriding title. The ld. Assessing Officer dismissed this contention and determined the total income of the assessee at Rs. 3,91,94,260/- by order dated 17th March, 2015 passed under Section 143(3) of the Income Tax Act, 1961 (the Act).
04. Assessee preferred an appeal before the ld. CIT (Appeals) who dismissed the appeal on both the counts.
05. Before us, the ld. AR fairly conceded that both these issues are covered against the assessee by the decision of the co-ordinate bench in assessee's own case for earlier years on the issue "diversion of Income by overriding title" and by the decision of the Hon'ble Supreme Court in assessee's own case on the principle of mutuality. However, he submitted that if the income is to be included then the assessee should be granted the benefit of carry forward of losses to be set off against this income.

06. The Id. DR fairly agreed with the argument of the assessee.
07. We have carefully considered the rival contentions and perused the orders of the lower authorities. The assessee's first claim with respect to the income of the assessee not chargeable to tax because of principles of mutuality has already been decided by the Hon'ble Supreme Court in assessee's own case reported in 424 ITR 630. The Hon'ble Supreme Court dismissed the appeal of the assessee. Thus, the income of the assessee is chargeable to tax and principle of mutuality does not apply. In view of this, ground Nos. 2-7 of the appeal, are dismissed.
08. With respect to ground Nos. 8 & 9 with respect to the income of the assessee not chargeable to tax on the principle of diversion of income by over-riding title, this issue is also covered against the assessee in assessee's case by decision of ITAT for assessment years 2001-02 onwards in some of the years vide order dated 9th September, 2019 wherein the co-ordinate bench dealt with the above ground as per para No. 6 onwards and finally deciding in para No. 41 of that judgement, that there is no applicability of doctrine of diversion of income by over-riding title in this case. Therefore, grounds Nos. 8 & 9 are also covered against the assessee by the decision of the co-ordinate bench in assessee's own case. Thus, these are dismissed.
09. Ground Nos. 10 & 11 are with respect to stating that there is a change in the facts of the case during the year and non-appreciation of the business model. However, no arguments were advanced on both these grounds and, therefore, same are dismissed.
10. Ground No. 12 is with respect to applicability of interest under Section 234-B of the Act, which is consequential in nature and, therefore, same is dismissed.

11. Before parting, considering the request of the ld. AR and also agreement of the ld. DR on the same, we direct the ld. Assessing Officer that when this income of Rs. 3,91,94,260/- is held to be chargeable to tax , assessee is principally entitle for benefit of set off of any carry forward losses of earlier years, if determined in accordance with law. The assessee is directed to produce the relevant details before the ld. Assessing Officer, ld. AO may examine and consider the claim of the assessee, in accordance with law.
12. In the result appeal filed by the assessee is dismissed.

Order pronounced in the open court on : **05/07/2021**

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated : 05/07/2021.

MEHTA

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	05.07.2021
Date on which the typed draft is placed before the dictating Member	05.07.2021
Date on which the typed draft is placed before the Other Member	05.07.2021
Date on which the approved draft comes to the Sr. PS/PS	05.07.2021
Date on which the fair order is placed before the Dictating Member for pronouncement	05.07.2021
Date on which the fair order comes back to the Sr. PS/PS	05.07.2021
Date on which the final order is uploaded on the website of ITAT	05.07.2021
Date on which the file goes to the Bench Clerk	05.07.2021
Date on which the file goes to the Head Clerk	