IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'E' : NEW DELHI)

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No.5003/Del/2017
(ASSESSMENT YEAR : 2012-13)

ITA No.5004/Del/2017
(ASSESSMENT YEAR : 2013-14)

M/s. Moet Hennessy India Pvt. Ltd., 1903, 19th Floor, India Bulls Finance Centre, Senapati Bapat Marg, Elphinstone Road, Mumbai – 400 013.	vs.	ACIT, Special Range 6, New Delhi.
(PAN : AACCM4079L)		
(APPELLANT)		(RESPONDENT)

ASSESSEE BY : Shri Sumit Mangal, Advocate
Shri Saksham Singhal, CA
REVENUE BY : Ms. Pramita M. Biswas, CIT DR

Date of Hearing : 10.04.2019
Date of Order : 24.04.2019

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

Since common questions of facts and law have been raised in the aforesaid appeals, the same are being disposed off by way of composite order to avoid repetition of discussion.

2. The Appellant, M/s. Moet Hennessy India Pvt. Ltd. (hereinafter referred to as the 'assessee') by filing the present

appeals sought to set aside the impugned orders dated 02.06.2017 & 21.06.2017 passed by the Commissioner of Income-tax (Appeals)-6, New Delhi, qua the assessment years 2012-13 & 2013-14 respectively on the grounds inter alia that :-

"ITA NO.5003/DEL/2014 (AY 2012-13

1. The order passed by the Learned Commissioner of Income Tax (Appeals)-6 ("Ld. CIT(A)") under Section 250 of the Act is bad in law and on the facts and circumstances of the case.

2. The Ld. CIT(A) has erred in law and on the facts and circumstances of the case by holding that the expenses incurred by appellant on advertisement and sales promotion were in the nature of capital expense and thereby disallowing the said expenses.

3. The Ld. CIT(A) has erred in law and on the facts and circumstances of the case by not following the principle of consistency, despite there being no change in facts."

"ITA NO.5004/DEL/2014 (AY 2013-14

1. The order passed by the Learned Commissioner of Income Tax (Appeals)-6 ("Ld. CIT(A)") under Section 250 of the Act is bad in law and on the facts and circumstances of the case.

2. The Ld. CIT(A) has erred in law and on the facts and circumstances of the case by holding that the expenses incurred by appellant on advertisement and sales promotion were in the nature of capital expense and thereby disallowing the said expenses.

3. The Ld. CIT(A) has erred in law and on the facts and circumstances of the case by holding that the road access charges incurred by appellant were in the nature of capital expense and thereby disallowing the said expenses.

4. The Ld. CIT(A) has erred in law and on the facts and circumstances of the case by holding that the expenses incurred by appellant on bank guarantee charges paid to banks were liable for tax deduction and thereby disallowing said expenses due to alleged failure to deduct tax.

5. The Ld. CIT(A) has erred in law and on the facts and circumstances of the case by not following the principle of consistency, despite there being no change in facts.

6. The above grounds of appeals are independent and without prejudice to one another."

3. Briefly stated the facts necessary for adjudication of the controversy at hand are : The assessee is into the business of bulk import of wines and spirits from group companies and distribution of the same. Initially, the case was referred to the Transfer Pricing Officer for computation of Arm's Length Price (ALP) qua international transactions, but the ld. TPO has not drawn any adverse inference in respect of ALP of international transactions for AY 2012-13 as well as AY 2013-14.

4. Assessee debited an amount of Rs.12,33,64,847/- and Rs.14,69,15,576/- in profit & loss account on account of advertisement & sales promotion expenses for AYs 2012-13 & 2013-14 respectively. Aforesaid expenses have been treated as revenue in nature by the assessee. However, declining the contentions raised by the assessee, AO treated the advertisement & sales promotion expenses as capital in nature on the ground that the same have been incurred to propagate the brand name of the assessee in the market having enduring benefit to the assessee.

5. In AY 2013-14, AO made addition of Rs.67,01,490/- debited by the assessee in the P&L account on account of road access

construction charges on the ground that the assessee has not filed any written submissions to prove the fact that the same are revenue in nature. AO also made addition of Rs.9,81,336/- debited by the assessee in P&L account on account of bank guarantee commission on the ground that the assessee has not debited TDS on these expenses by disallowing the same under section 40A (ia) of the Income-tax Act, 1961 (for short 'the Act').

6. Assessee carried the matter by way of appeals before the ld. CIT (A) who has confirmed the assessment orders by partly allowing the appeals. Feeling aggrieved, the assessee has come up before the Tribunal by way of filing the present appeals qua AYs 2012-13 & 2013-14.

7. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

GROUND NO.1 IN
ITA NO.5003/DEL/2014 (AY 2012-13)
ITA NO.5004/DEL/2014 (AY 2013-14)

8. Ground No.1 in ITA NO.5003/Del/2014 (AY 2012-13) and ITA No.5004/Del/2014 (AY 2013-14) need no findings being general in nature.

GROUND NO.2 IN
ITA NO.5003/DEL/2014 (AY 2012-13)
ITA NO.5004/DEL/2014 (AY 2013-14)

9. Undisputedly, assessee has debited an amount of Rs.12,33,64,847/- and Rs.14,69,15,576/- in profit & loss account on account of Advertisement & Sales Promotion (AMP) expenses for AYs 2012-13 & 2013-14 respectively and treated the expenses as revenue in nature. It is not in dispute that assessee is an importer and distributor of wine and spirits in India and bearing routine risk. It is also not in dispute that in AY 2009-10, first time AMP expenses incurred by the assessee were brought to tax by the Revenue under transfer pricing provisions by making ALP adjustment of Rs.6,64,70,841/- which have been deleted by the ***coordinate Bench of the Tribunal vide order dated 23.08.2018 in ITA No.1906/Del/2014***, available at pages 123 to 131 of the paper book.

10. Now, the AO as well as ld. CIT (A) has held the nature of expenses incurred by the assessee on account of AMP expenses being capital in nature on the ground that these expenses are giving long lasting benefit to the assessee of enduring nature and brought the same to tax.

11. Challenging the impugned order passed by the ld. CIT (A), ld. AR for the assessee contended inter alia that the assessee being

importer and distributor of wine and spirits in India is bearing entrepreneurial risk and has just incurred the advertisement and sale promotion expenses in order to boost its sales; that the expenses are generally in the nature of gifts, display at retail outlets, distribution of point of sale material (POSM), rent of warehouse used to store POSM, custom duty charged on POSM, discount schemes, PR agency fees, salary of marketing staff, market visit expenses of the marketing staff, expenses incurred on events etc. and has brought on record the detail list of expenses as Annexure 'A' annexed with the synopsis; that these expenditure does not pass on enduring and long term benefit to the assessee and as such cannot be treated as capital in nature and relied upon the decisions of Hon'ble Delhi High Court in ***Monto Motors Ltd. – (2012) 19 taxmann.com 57 (Delhi and Jubliant Foodworks (P.) Ltd. (2014) 52 taxmann.com 215 (Delhi)***.

12. However, on the other hand, ld. DR for the Revenue relied upon assessment order as well as order passed by the ld. CIT (A) and contended that since the assessee is into import and distribution of premium products in India and it establishes the brand image, it certainly has long lasting enduring benefits, so AMP expenses resulting in better sales of the assessee company having long lasting benefits.

13. In the backdrop of the aforesaid facts and circumstances of the case, arguments addressed by ld. ARs of the parties of the appeals and orders passed by the Revenue authorities, the sole question arises for determination in this case is :-

> ***"as to whether advertisement and sales promotion expenses incurred by the assessee being an importer and distributor of wine and spirits in India in the forms of gifts, display at retail outlets, discount schemes, custom duty charged on POSM, etc. are revenue in nature as contended by the assessee?"***

14. Identical issue has been decided by the Hon'ble High Court of Delhi in case of ***Monto Motors Ltd.*** (supra) by returning following findings :-

> ***"4. In view of the factual matrix which is available on record and as the Assessing Officer has not dealt with the factual matrix in detail we are not inclined to admit the present appeal. The advertisement expenses as per the findings of both the CIT (Appeals) and the Tribunal were not of capital nature. Advertisement expenses when incurred to increase sales of products are usually treated as a revenue expenditure, since the memory of purchasers or customers is short. Advertisement are issued from time to time and the expenditure is incurred periodically, so that the customers remain attracted and do not forget the product and its qualities. The advertisements published/displayed may not be of relevance or significance after lapse of time in a highly competitive market, wherein the products of different companies compete and are available in abundance. Advertisements and sales promotion are conducted to increase sale and their impact is limited and felt for a short duration. No permanent character or advantage is achieved and is palpable, unless special or specific factors are brought on record. Expenses for advertising consumer products generally are a part of the process of profit earning and not in the nature of capital outlay. The expenses in the present case were not incurred once and for all, but were a periodical expenses which had to be incurred continuously in view of the nature of the business. It was an on-going expense. Given the factual matrix, it is difficult to hold that the expenses were incurred for setting the profit earning machinery in motion or not for earning profits."***

15. Similarly, again Hon'ble High Court of Delhi in case of ***Jubliant Foodworks (P.) Ltd.*** (supra) decided the identical issue in favour of the assessee by following the decision of ***Monto Motors Ltd.*** (supra).

16. When we examine the facts and circumstances of the case in the light of the ratio of ***Monto Motors Ltd.*** (supra), it is proved on record that the assessee has incurred periodical expenses on account of advertisement and sales promotion which is to increase the sales of products in order to remind the customer from time to time so that they do not forget the products and its qualities. Hon'ble High Court has held that when the advertisement expenses are incurred to increase the sale of the products, the same are treated as revenue expenditure because the memory of purchasers or customers is short-lived. So, in the instant case, the Revenue has not brought on record any material to prove that advertisement and sales promotion expenses have created long lasting benefits to the assessee, because advertisement and sales promotion are generally made in order to increase the sales and their impact is limited and felt for a short duration by the customers.

17. Hon'ble Supreme Court in ***Empire Jute Co. Ltd. (1`980) 3 taxman 69 (SC)*** held that, *"no test is paramount or conclusive to*

distinguish between capital and revenue expenditure", however held that :-

> ***"When an expenditure is made not only once and for all, but with a view to bringing into existence an asset or an advantage (or the enduring benefit of a trade, there is very good reason (in the absence of special circumstances leading to an opposite conclusion) (or treating such an expenditure as properly attributable not to revenue but to capital.***
>
> ***This test, as the parenthetical clause shows, must yield where there are special circumstances leading to a contrary conclusion and, as pointed out by Lord Radcliffe in CIT v. Nchanga Consolidated Copper Mines Ltd. [1965158 ITR 241 (PC), it would be misleading to suppose that, in all cases, securing a benefit for the business would be prima facie capital expenditure "so long as the benefit is not so transitory as to have no endurance at all". There may be cases where expenditure, even if incurred for obtaining advantage of enduring benefit, may, nonetheless, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a. commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched the expenditure would be on revenue account even though the advantage may endure for an indefinite future. The test of enduring benefit is, therefore, not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case."***

18. Hon'ble Gujarat High Court in case cited as ***DCIT vs. Core Healthcare Ltd. (2009) 308 ITR 263 (Gujarat)*** has held that, *"even brand promotion expenses are revenue in nature, hence deductible u/s 37 (1) of the Act because such expenditure do not create any intangible interest and merely because of the fact that*

expenditure may bring some benefit of enduring nature to the assessee, that factor alone is not sufficient to treat the expenditure as capital expenditure. So, the advertisement expenses even to create the brand image is allowable as a revenue expenditure."

19. So, in this case, assessee has undisputedly incurred advertisement and sales promotion expenses periodically, and not at once just to refresh the product and quality to be sold in the memory of its customers. So, it cannot be held to be in the nature of enduring benefit for a trader.

20. So, we are of the considered view that following the ratio laid down by Hon'ble Supreme Court and Hon'ble High Courts, discussed in the preceding paras, advertisement and sales promotion expenses have been incurred by the assessee just to enhance its sales and profit and cannot be treated as capital in nature. Consequently, advertisement and sales promotion expenses debited by the assessee to the tune of Rs.12,33,64,847/- & Rs.14,69,15,576/- for AYs 2012-13 & 2013-14 are ordered to be treated as revenue in nature and addition made/confirmed by the ld. AO/CIT (A) on this score is ordered to be deleted. Hence, ground no.2 of ITA No.5003/Del/2014 (AY 2012-13) and ITA No.5004/Del/2014 (AY 2013-14) is determined in favour of the assessee.

GROUND NO.3 IN
ITA No.5004/Del/2014 (AY 2013-14)

21. Assessee claimed to have made certain payments for road improvement, widening and construction charges in order to facilitate easy movements of vehicles on the road which has been treated as expenses of capital nature on the ground that assessee has not filed any evidence; that road access construction charges will not give any enduring benefit to the assessee. Ld. AR for the assessee fairly conceded that he has not brought on record the complete facts in order to treat these expenses as revenue in nature. In view of the matter, this issue is remanded back to the AO to decide afresh after providing an opportunity of being heard to the assessee, hence ground no.3 of ITA No.5004/Del/2014 (AY 2013-14) is determined in favour of the assessee for statistical purposes.

GROUND NO.4 IN
ITA No.5004/Del/2014 (AY 2013-14)

22. AO by invoking the provisions contained u/s 40A (ia) and Notification No.56/2012 dated 31.12.2012 issued by the CBDT disallowed an amount of Rs.9,81,336/- debited by the assessee in P&L account on account of bank guarantee commission.

23. Undisputedly, the assessee has made certain payments to scheduled banks qua bank guarantee provided by the banks on

which TDS was not deducted. The ld. CIT (A) while relying upon the Notification NO.56/2012 dated 31.12.2012 allowed part relief to the assessee for the bank guarantee commission paid post-issuance of the Notification.

24. When we examine the assessment order AO as well as CIT (A) have accepted the proposition put forth by the assessee that bank guarantee commission does not cover under the definition of "interest", hence section 194A is not applicable to such payment. It is also settled principle of law that in case of bank guarantee commission, section 194H of the Act, where principal agent relationship are not there, is also not applicable. Reliance in this regard is placed on the decision rendered by the coordinate Bench of the Tribunal in ***Kotak Securities Ltd. vs. DCIT – (2012) 18 taxmann.com 48 (Mum.)***.

25. Now, it is to be seen as to whether bank guarantee commission paid by the assessee can be disallowed by following the Notification No.56/2012 dated 31.12.2012. For ready perusal, aforesaid Notification is extracted as under :-

"NOTIFICATION NO. SO 3069(E) [NO.56/2012 (F. NO.27

SECTION 197A OF THE INCOME-TAX ACT, 1961 - DEDUCTION OF TAX AT SOURCE - NO DEDUCTION IN CERTAIN CASES - SPECIFIED PAYMENT UNDER SECTION 197A(1F) NOTIFICATION NO. SO 3069(E) [NO.56/2012 (F. NO. 275/53/2012-IT(B)), DATED 31-12-2012

[SUPERSEDED BY NOTIFICATION NO. SO 2143(E) (N0.47/2016 (F.NO.275/53/2012-IT(B), DATED 17-6-2016]
In exercise of the powers conferred by sub-section (IF) of section 197A of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby notifies that no deduction of tax under Chapter XVII of the said Act shall be made on the payments of the nature specified below, in case such payment is made by a person to a bank listed in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934), excluding a foreign bank, name :-

(i) bank guarantee commission;
(ii) cash management service charges;
(iii) depository charges on maintenance of DE MAT accounts;
(iv) charges for warehousing services for commodities;
(v) underwriting service charges;
(vi) clearing charges (MICR charges);
(vii) credit card or debit card commission for transaction between the merchant establishment and acquirer bank.

2. This notification shall come into force from the 1st day of January, 2013."

26. Bare perusal of the Notification in the instant case goes to prove that this Notification is clarificatory in nature. Applicability of the aforesaid Notification to a period prior to the period of its issue has been examined by ***Hon'ble Delhi High Court in case of Pr.CIT vs. Make My Trip India Pvt. Ltd. ITA 136/2019*** by returning following findings :-

> ***"11. The above notification was referred to in the order of the CIT (A) but not discussed. The assessee is right in contending that by virtue of the above notification no TDS is deductible from payments made towards "credit card or debit card commission for transaction between the merchant establishment and acquirer bank". This applies to the changes paid to the banks for providing payment gateway in the case on hand."***

27. Furthermore, as per Second Proviso to section 40A (ia) of the Act, disallowance cannot be made because bank guarantee commission paid by the assessee to scheduled banks has been duly

included in the total income of the banks as they are tax resident of India and they have duly paid the tax on such guarantee commission. So, under Second Proviso to section 40A (ia), no disallowance can be made. So, disallowance of Rs.9,81,336/- made by the AO and restricted by the ld. CIT (A) to Rs.7,92,680/- is not sustainable in the eyes of law, hence ordered to be deleted. Hence, ground no.4 of ITA No.5004/Del/2014 (AY 2013-14) is determined in favour of the assessee.

GROUND NO.3 IN
ITA NO.5003/DEL/2014 (AY 2012-13)
and
GROUND NO.5 & 6 IN
ITA NO.5004/DEL/2014 (AY 2013-14)

28. Ground No.3 in ITA NO.5003/Del/2014 (AY 2012-13) and Grounds No.5 & 6 in ITA No.5004/Del/2014 (AY 2013-14) need no findings being general in nature.

29. Resultantly, the appeal in ITA No.5003/Del/2014 (AY 2012-13) is allowed and the appeal in ITA No.5004/Del/2014 (AY 2013-14) is allowed for statistical purposes

Order pronounced in open court on this 24th day of April, 2019.

Sd/-	**sd/-**
(R.K. PANDA)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 24th day of April, 2019/TS

Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT (A)-6, New Delhi.
5.CIT(ITAT), New Delhi.

AR, ITAT
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