

Mary Kay Cosmetics Pvt. Ltd., Gurgaon vs Dcit, Circle-16(1), New Delhi on 24 May, 2019

ITA No. 7333/D/2018
ASSESSMENT YEAR 2009-10

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E' NEW DELHI

BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No.7333/Del/2018
Assessment Year: 2009-10

Mary Kay Cosmetics Pvt. Ltd., 837 & 838, Sector 38, Opposite HUDA Market, Gurgaon, Haryana-122001	Dy.Commissioner of Income Tax, vs Circle 16(1), New Delhi.
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Appellant

Respondent

Assessee by : Shri K.M. Gupta, Adv.
Department by: Ms Rinku Singh, Sr. DR

Date of hearing : 28.02.2019
Date of pronouncement : 24.05.2019

ORDER

PER SUDHANSHU SRIVASTAVA, JM :

This appeal has been preferred by the assessee against the order of the Ld. Commissioner Of Income Tax (Appeals)-33, New Delhi {CIT (A) } vide dated 17.08.2018 for Assessment year 2009- 10 wherein vide the impugned order, the Ld. First Appellate Authority has upheld the imposition of penalty amounting to Rs. 69,50,435/- imposed u/s 271(1)(c) of the Income Tax Act, 1961 (hereinafter called 'the Act').

ASSESSMENT YEAR 2009-10 2.0 The brief facts of the case are that the assessee company is a wholly owned subsidiary of Mary Kay Inc., USA and was incorporated in November 2006. The assessee company is engaged in the business of marketing and distribution of Mary Kay products in India. The return of income for the year under consideration was filed at a loss of Rs. 9,81,15,974/-. The income of the assessee was assessed at a loss of Rs. 5,64,18,900/- after making a total addition of Rs. 4,16,97,074/- on account of Advertisement and Marketing Promotion (AMP) expenses after making reference to the Transfer Pricing Officer. Penalty proceedings u/s 271(1)(c) of the Act were

also initiated on this addition. The assessee preferred an appeal against the quantum addition before the Ld. Commissioner of Income Tax (A) who allowed partial relief to the assessee by excluding selling and distribution expenses and modifying the comparables selected by the Assessing Officer. The additions made by the Assessing Officer were reduced to Rs. 2,04,48,472/- by the Ld. CIT (A). The assessee appealed further before the ITAT the appeal was not pressed and the same was dismissed by the ITAT. Subsequently, the Assessing Officer passed an order u/s 271(1)(c) of the Act levying penalty of Rs. 69,50,435/- on account of the Transfer ASSESSMENT YEAR 2009-10 Pricing addition as confirmed by the Ld. Commissioner of Income Tax (A). The assessee's appeal against the penalty was confirmed by the Ld. Commissioner of Income Tax (A) and now the assessee is before this Tribunal and has raised the following grounds of appeal:-

"1. On the fact, in law and in circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) ['CIT(A)'] erred in upholding the action of the Ld. Assessing Officer ('AO') in imposing the penalty u/s 271(1)(c) of the Income-tax Act, 1961 ('Act') for concealment of income by the Appellant.

2. On the fact, in law and in circumstances of the case, Ld. CIT(A) erred by not appreciating the fact that the notice dated December 31, 2011 issued by the Ld. AO under section 274 read with section 271(1)(c) of the Act did not specify whether the penalty proceedings are being initiated on account of concealment of income, or furnishing of inaccurate particulars by the Appellant.

3. On the fact, in law and in circumstances of the case Ld. CIT(A) erred in upholding penalty under section 271(1)(c) of the Act read with Explanation 1 without appreciating that, being a Transfer Pricing addition under section 92C of the Act, the Explanation 1 to Section 271(1)(c) had no implication, as such this issue is governed by the conditions prescribed under Explanation 7 to section 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as "the Act").

4. On the fact, in law and in circumstances of the case Ld. CIT(A) erred by disregarding the order of the Hon'ble High Court of Delhi in Appellant's own case for AY 2010-11 wherein Advertisement and Sales Promotion expenses were held not to be a separate and independent international transaction."

ASSESSMENT YEAR 2009-10 3.0 The Ld. Authorised Representative (AR) submitted that the penalty has been imposed on the addition pertaining to advertisement, marketing and promotion expenses which was a transfer pricing adjustment and the Hon'ble Delhi High Court in subsequent assessment year 2010-11 in assessee's own case in ITA No. 1010/2018, vide order dated 18.09.2018, has held that AMP expenses should not be treated as a separate and independent international transaction and should be regarded as a function performed by the assessee engaged in marketing and distribution. It was submitted that this being the dicta of the Hon'ble High Court in assessee's own case, no penalty is leviable in this case. The Ld. AR also submitted that advertisement and marketing promotion expenditure is not an international transaction as has been held by the Hon'ble Delhi High Court in Maruti Suzuki India Limited in ITA Nos. 110/2014 and 710/2015.

Further reliance for this proposition was placed on another order of the Hon'ble High Court of Delhi in the case of Bausch & Lomb Eyecare (India) Pvt. Ltd. in ITA No. 643/2014. 3.1.0 The Ld. AR also submitted that no specific charge was specified in the show cause notice issued u/s 271(1)(c) read with section 274 of the Act dated December 30, 2011. Hence, the ASSESSMENT YEAR 2009-10 penalty so levied is illegal and liable to be deleted. In this regard, reliance was placed on the following judgements:

- CIT vs Manjunatha Cotton & Ginning Factory (359 ITR 565) (Karnataka) • HPCL Mittal Energy Ltd. vs. ACIT (IT Appeal Nos. 510, 554 TO 556 (ASR.) OF 2014) • CIT vs. SSA'S Emerald Meadows (Special Leave To Appeal (C) No. 11485 of 2016) 3.2.0 It was further submitted by the Ld. AR that the penalty has been imposed in relation to the addition made under Chapter-X of the Act. Thus, Explanation 1 to Section 271(1)(c) of the Act, cannot be invoked. On the contrary, the Explanation 7 to Section 271(1)(c) of the Act was applicable. It was submitted that the assessee had submitted all the requisite details in respect of its all international transactions. In this regard, reliance was placed on the following judgements:

- DCIT vs. RBS Equities India Ltd. [2011] 133 ITD 77 (Mum.

- Trib.) ASSESSMENT YEAR 2009-10 • ACIT vs. Boston Scientific India (P.) Ltd. [2016] 177 TTJ 729 (Delhi - Trib.) • Halcrow Consulting India (P) Ltd. [2018] 194 TTJ 329 (Delhi - Trib.) 3.3.0 The Ld. AR also submitted that the adjustment made on account of Advertisement and Marketing Promotion (AMP) expense being an International Transaction under provisions of transfer pricing is a debatable issue or mere difference of opinion and, therefore, penalty u/s 271(1)(c) of the Act cannot be levied on a debatable issue. In this regard, reliance was placed on the following judgements:

- CIT vs. Reliance Petroproducts Pvt. Ltd. (230 CTR 320) (SC) • Haier Appliances (I) Pvt. Ltd. vs. DCIT (ITA nos. 3549 & 3571 (DELHI) of 2010 & 507 (DELHI) of 2011)

4.0 In response, the Ld. Sr. Departmental Representative (DR) submitted that the charge for initiating the penalty has not been specified is incorrect inasmuch as on page 74 of the assessment order, penalty u/s 271(1)(c) of the Act was specifically initiated for furnishing inaccurate particulars of income. It was submitted that there ASSESSMENT YEAR 2009-10 was application of mind by the Assessing Officer and, therefore, mere non-striking of the irrelevant portion of the notice u/s 274 of the Act cannot be taken as an error which would vitiate the entire proceedings. It was also submitted that this issue of the defect in notice was never raised by the assessee either during the course of penalty proceedings or even before the Ld. First Appellate Authority and, therefore, the same had caused no prejudice to the assessee as the assessee clearly understood as to what was the purport and import of the notice issued u/s 274 of the Act. The Ld. Sr. DR also filed written submissions in support of her contentions and list of judicial precedents on which she has vehemently relied on and which have been placed on record. 4.1 It was also submitted that even though the Hon'ble Delhi High Court for assessment year 2010-11 in assessee's own case might have held that the AMP

expenses should not be treated as a separate independent international transaction, under the Income Tax Act, assessment years are independent of each other and it might be possible that the facts in that year would be different from the year under consideration and, therefore, the same analogy cannot be applied to delete the penalty in this year.

ASSESSMENT YEAR 2009-10 5.0 We have heard the rival submissions and have perused the material available on record. A perusal of the assessment order shows that the transfer pricing adjustment has been made with respect to the AMP expenditure by applying the Bright Line Test. The assessee had raised objections before the Assessing Officer to the effect that Bright Line Test could not be applied in the case of the assessee. We also note that now there are numerous judicial precedents in which the Hon'ble Courts have disapproved and rejected the Bright Line method. In the case of Ericsson Mobile Communications India (P) Ltd. vs. CIT-2 reported in (2015) 374 ITR 118 (Del), the Hon'ble Delhi High Court has specifically disapproved and rejected the Bright Line method. Although, the assessee did not press its appeal in the quantum proceedings before the ITAT, the same does not lead to the inference that the assessee had accepted the Bright Line method and the consequent transfer pricing adjustments in the year under consideration. It is also a fact on record that the assessee company has discontinued its business operations. Further, a perusal of the assessment orders for this year and for assessment year 2010-11 shows that AMP expenses have been treated as international transaction on the same reasoning and by applying ASSESSMENT YEAR 2009-10 the Bright Line method. The department also could not point out any distinguishing facts between Assessment Year 2009-10 and 2010-11. Further, we also note that the Hon'ble Delhi High Court in assessee's own case for assessment year 2010-11 has dismissed the department's appeal and has held that there were no good grounds and reasons to treat advertisement and sales expenses as a separate and independent international transaction in the case of the assessee. The Hon'ble High Court held that the revenue had erred in not treating this activity as a function performed by the assessee who was engaged in marketing and distribution. Undisputedly, the assessee is engaged in marketing and distribution of Mary Kay products in India and the observation of the Hon'ble Delhi High Court in assessment year 2010-11 in assessee's own case would apply mutatis mutandis in this year also. Once it is held that AMP expenditure is not an international transaction, the transfer pricing adjustment would have no feet to stand. Even though in the year under consideration, the assessee has accepted the addition in this regard in the quantum proceedings, the fact remains that such addition was not sustainable in view of the observation of the Hon'ble Delhi High Court in assessee's own ASSESSMENT YEAR 2009-10 case that the AMP expenditure was not to be considered as a separate international transaction. Be as it may, respectfully following the judgment of the Hon'ble Delhi High Court in the assessee's own case for assessment year 2010-11 on identical facts, we hold that the AMP expenditure could not have been treated as a separate international transaction and, therefore, the penalty imposed on such transfer pricing adjustment is not sustainable. Therefore, without going into the legal question of the validity of the notice issued u/s 274 of the Act, we hold that since the impugned transaction could not be considered as a separate and independent international transaction, the penalty should not have been imposed. Accordingly, we aside the order of the Ld. Commissioner of Income Tax (A) on the issue and direct the Assessing Officer to delete the penalty. 6.0 In the result, the appeal of the assessee stands allowed.

Order pronounced in the open court on 24.05.2019.

Sd/-

(G.D. AGRAWAL)
VICE PRESIDENT

Sd/-

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 24th MAY, 2019
'GS'

ASSESSMENT YEAR 2009-10

Copy forwarded to: -

- 1) Appellant
- 2) Respondent
- 3) CIT(A)
- 4) CIT
- 5) DR

By Order

ASSTT. REGISTRAR

Date of dictation

Date on which the typed draft is placed before the dictating Member Date on which the typed draft is placed before the Other Member Date on which the approved draft comes to the Sr.PS/PS Date on which the fair order is placed before the Dictating Member for pronouncement Date on which the fair order comes back to the Sr.PS/PS Date on which the final order is uploaded on the website of ITAT Date on which the file goes to the Bench Clerk Date on which the file goes to the Head Clerk The date on which the file goes to the Assistant Registrar for signature on the order Date of dispatch of the Order