HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 2463 OF 2013

M/s. Royal Star Jewellery Pvt. Ltd. ... Appellant

Vs

1. The Asstt. Commissioner of Income -tax & Ors. ... Respondents

Mr. Deepak Tralshawala with Mr. Vishnu S. Hadade for the Appellant.

Mr. Arvind Pinto for the Respondents.

CORAM : S.C. DHARMADHIKARI & B.P. COLABAWALLA, JJ.

MONDAY, 30TH JANUARY, 2017

P.C. :

1 The assessee is in appeal against the order passed by the Tribunal for assessment year 2008-09.

2 On 17th July, 2013, the Tribunal delivered the impugned order in the appeal which was directed against the order dated 21st September, 2012, of the Assessing Officer passed in pursuance of the direction dated 30th July, 2012 of the Dispute

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Resolution Panel ("DRP" for short).

3 We are concerned in this case with the questions of law termed as substantial and formulated at pages 5 and 6 of the appeal.

4 Essentially the argument centered around Question No.V which reads as under :

> "Q.V On the facts and circumstances of the case and in law, whether the Income-tax Appellate Tribunal was right in upholding the order of the Respondent A.O. in rejecting claim of the appellant of abnormal expenses of Rs.2,06,11,944/-?"

5 It is contended by the learned counsel appearing for the assessee-appellant that the Tribunal has, on facts and in the circumstances of the case so also in law, completely erred in rejecting the claim of abnormal expenses of Rs.2,06,11,944/-.

6 The argument is that the Tribunal could not have

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called upon the assessee and as is apparent from a reading of paragraph 8.3 of the impugned order, to furnish capacity utilization figures of comparables. It is in the absence of such material that the assessee's claim of adjustment on account of low capacity utilization has been rejected.

7 The argument is that the approach is erroneous on facts and in law simply because the assessee could not have been called upon to produce these materials. In the case of the assessee itself, the records were produced and the argument was that in case of a jewellery manufacturing unit, which is the assessee's business, this low capacity utilization has to be considered and in that regard, reliance is placed on the judgment of the Punjab & Haryana High Court in the case of *Knorr-Bremse India Pvt. Ltd. vs. Commissioner of Income-tax* reported in *(2016) 380 ITR 307*.

8 Reliance is also placed on the order of the Tribunal and it is stated that it is delivered in similar circumstances [IT Appeal 8109 (Mumbai) of 2011 and Cross Objection No.228 of 2012 decided on 7th May, 2014].

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9 On this point, we have carefully perused the observations and conclusions of the Assessing Officer. What we have noted is that the Tribunal was considering the correctness of the approach of the Assessing Officer. In the present case the assessee was manufacturing as also trading in diamonds and jewellery articles. The assessee raised objections against the transfer pricing adjustment proposed by the Transfer Pricing Officer before the DRP. The assessee objected to rejection of the claim of the assessee of abnormal expenses in relation to the manufacturing segment as well as selection of certain comparables by the Transfer Pricing Officer. The DRP observed that the claim of the assessee of lower capacity utilization lacked sound financial analysis and, therefore, the claim of abnormal expenses was rejected.

10 It is this very ground which was projected before the Tribunal and in dealing with that, the Tribunal found that the claim of the assessee is of adjustment on account of the low capacity utilization. The assessee sought adjustment of Rs.2,06,11,944/-. The argument was that this is on account of

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abnormal expenses due to low capacity utilization and after excluding such expenses, it was submitted that the margin of the assessee was much higher. This claim was rejected and the Tribunal considered it again. It observed that this is a relative feature and, therefore, unless the capacity utilization figures of comparables are known, it is not possible to make adjustment in the case of the assesee. The assessee has not placed on record material relating to capacity utilization comparables. It is also difficult to standardize capacity in the case of jewellery manufacturing which involves several items with a wide variation in the consumption of time and labour in manufacture of these products.

11 The correctness of this is put in issue by relying upon the Division Bench judgment of the Punjab & Haryana High Court. That judgment was delivered in Cross Appeals. That judgment pertained to assessment year 2007-08. The Assessing Officer made a reference to the Transfer Pricing Officer for determining the arm's length price of certain international transactions entered into by that assessee with its associate enterprises. The appeal was admitted and the adjustment was with relation to

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professional consultancy and management fee for support services. The further questions were raised, but what was noticed was that the assessee was a wholly owned subsidiary. It carried on business, *inter alia*, of manufacturing air break sets for passenger cars and wagon coaches, shock absorbers for passenger cars and locomotives and other activities. The business of the assessee was segregated into two parts, namely, manufacture and distribution. There were various international transactions with the aforesaid associate enterprises, but there was a transfer pricing report which adopted the transaction net margin method considering it to be the most appropriate method for the purpose of benchmarking its activities under the manufacturing and distribution segments separately. The details of all these activities are set out and then what has been argued is that the item No.3 of the table is of Professional Consultancy. That was a case where a team of experienced professionals visited the assessee's vendors and performed various activities in respect of standardization and improvement of the process at the vendor's site. Thus, they carried out the work to improve the quality. The assessee furnished the details of the work performed by professionals and the details, according to the assessee, was

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enough for the purposes of making the adjustments.

12 Thus, this is a case where there was no absence of materials, but whether the materials supplied were sufficient and adequate for the purpose of making the adjustments or otherwise. To our mind, this case is completely distinct from the case at hand. Here, the assessee projects that the activities performed and carried out by it by themselves must be taken as a benchmark or as a standardized practice. There is no need to make any comparison or draw any comparables. The Tribunal found that unless the standardization in the jewellery manufacturing units is established and by bringing in the necessary materials, the assessee's consumption by itself and without anything more cannot be accepted. Therefore, we do not think that the Punjab & Haryana decision would be of any assistance.

13 Similarly in the case of the Tribunal's order, what we have found is that the assessee was a joint venture and with a Switzerland based unit. It was engaged in the business of manufacturing of diamonds and precious stones studded

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jewellery. The return of income was filed and declaring a loss. The transfer pricing study report was submitted and the Assessing Officer noticed that the assessee has entered into various international transactions with its associate enterprises, including export of studded jewellery. He, therefore, made the reference and the Transfer Pricing Officer determined the arm's length price. As far as the capacity utilization is concerned, there is an explanation offered by the assessee that it was operating at 50% of its actual capacity during the year under consideration and, therefore, its operating profit margin was lower as compared to all comparables selected. Thus, there were comparables and on record. It is in relation to the comparables performance that the Transfer Pricing Officer was, by taking that as a benchmark, applying the same to the assessee before the Tribunal. The assessee was a relatively new unit having put in only two years after its existence and, therefore, could not achieve the optimum capacity. That is why it urged that it was operating at 50% of its actual capacity. Thus, materials were already on record and there was no dispute about it. It is in these circumstances that the Tribunal found fault with the approach of the authorities in taking the comparables as the benchmark and applying them to a

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relatively new unit. Therefore, to our mind, even this Tribunal's order cannot assist the assessee in the facts and circumstances of our case.

14 As a result of the above discussion, we do not find that the approach of the Tribunal in considering the issue of adjustment can be termed in any way as perverse or vitiated by any error of law apparent on the face of the record. To our mind, all the factual findings and in the impugned order, therefore, do not raise any substantial questions of law. The appeal is, therefore, dismissed.

B.P. COLABAWALLA, J. ***S.C. DHARMADHIKARI, J.***

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