

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

INCOME TAX APPEAL NO.1873 OF 2013

The Commissioner of Income
Tax-1, Mumbai .. Appellant.
Vs.
M/s. Hindustan Unilever Ltd. .. Respondent.

Mr. Arvind Pinto for the appellant.
Mr. Nishant Thakkar with Mr. Rajesh Poojary i/b Mulla & Mulla &
CBC for the respondent.

**CORAM : M. S. SANKLECHA &
A.K. MENON , JJ.**

DATED : 26TH JULY, 2016

P.C. :

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 10th December, 2012 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2006-07.

2. This appeal raises the following question of law for our consideration :-

“1(a) Whether on facts and in circumstances of the case and in law the Tribunal was right in deleting the addition of Rs.368,79,26,000/- on account of transfer pricing Adjustments ?

1(b) Whether on facts and in circumstances of the case and in law the Tribunal was right in rejecting the contention of the TPO that the non AE

transactions are always undertaken at Arms Length Price, hence, the Arms Length margin of 17.48% needs to be applied to the non A.E. transactions as well, and hence, the computation of Arms Length Price by the TPO rightly falls beyond the safe harbour limit of +/- 5% ?

1(c) Whether on facts and in circumstances of the case and in law the Tribunal was right in holding that bench marking should be done only on the A.E. Transactions and not for the entire turnover ?

2. Whether on facts and in circumstances of the case and in law the Tribunal was right in not allocating the research expenses and interest expenses to various units for calculating allowable deduction under Section 80IB and 80IC of the Act ?

3. Whether on facts and in circumstances of the case and in law the Tribunal was right in not allocating the research expenses and interest expenses for calculating allowable deduction/exemption under Section 10A and 10B of the Act on Pune Tea Export Unit and Khandla Unit ?

4. Whether on facts and in circumstances of the case the Tribunal was right in holding that expenses in respect of payment made by assessee of Rs.4.6 crores made to the suppliers (Maxson Nutritional Food (P) Ltd. (MNFPL) in terms of termination of a contract, were revenue in nature ?

5. Whether on facts and in circumstances of the

case and in law the Tribunal was right in holding that expenses of 4.50 Cr. paid to Prima Health Care Products and Rs.0.25 Cr.paid to MUL Dentpro Pvt. Ltd. in respect of payment made by assessee in terms of termination of a contract, were revenue in nature ?

6. Whether on facts and in circumstances of the case and in law the Tribunal was justified in directing to delete the disallowance of expenditure under Section 40(a)(ia) r.w.s. 194C(2) made by the Assessing Officer on account of short deduction of tax ?”

7. Whether on facts and in circumstances of the case and in law the Tribunal was right in directing to allow the set off of brought forward depreciation losses of amalgamating company for the Assessment Years 1996-97 and 1997-98 i.e. for the period prior to amendment in sub section (2) of Section 32 of the Act w.e.f. 1/4/2002 ?”

3. Regarding question no.1(a), 1(b) and 1(c) :

(a) Mr. Pinto, learned counsel for the revenue states that all the three questions deal with the issue of justifiability of application of Arms Length Price (ALP) only to A.E. transactions and not to all transactions. Mr. Pinto further very fairly states that the issue raised herein with regard to transfer pricing adjustments stand concluded against the revenue and in favour of the respondent - assessee by decisions of this Court in (CIT Vs. M/s. Tara Jewellers

Exports Pvt. Ltd. in Income Tax Appeal No.1814 of 2013 rendered on 5th October, 2015, CIT V. Pedro Araldite Pvt. Ltd. Income Tax Appeal No.1804 of 2013 rendered on 24th November, 2015., CIT V. M/s. Thyssen Krupp Industries Pvt. Ltd. Income Tax Appeal No.2201 of 2013 rendered on 2nd December, 2015; CIT V. M/s. Summit Diamond (India) Pvt. Ltd. Income Tax Appeal No.1647 of 2013 rendered on 11th July, 2016).

(b) In the above view question, nos.1(a), 1(b) and 1(c) being concluded by order of this Court, no substantial questions of law arises. Thus not entertained.

4. Regarding question No.2 and 3 :

(a) We find that the impugned order of the Tribunal allowed the respondent - assessee's appeal before it by following a decision of this Court in *Zandu Pharmaceuticals Works Ltd. V. CIT 350 ITR 366*. The Tribunal while following the principle in this Court's order in *Zandu Pharmaceuticals Works Ltd.* (supra) held that so far as research and interest expenses are concerned, it can only be allowed to the extent it has nexus to the unit claiming the deduction. The grievance of the revenue before us is that the aforesaid decision would have no application to the present facts as it is distinguishable. However, besides stating the above nothing has been pointed out in support of its submission that the *Zandu Pharmaceuticals Works Ltd.* (supra) has no application.

(b) In the above view, as the impugned order of the Tribunal has followed the binding decision of this Court, question nos. 2 and 3 as formulated does not give rise to any substantial question of law. Thus not entertained.

5. Regarding question Nos.4 and 5:

(i) The grievance of the appellant is that payment made to the suppliers for termination of arrangement/contract for supply of sugar candy, tooth paste and shampoos in fact is capital in nature but yet the impugned order allowed the same as revenue under Section 37(1) of the Act.

(ii) The Assessing Officer and the Dispute Resolution Panel (DRP) both took a view that the payment made to the suppliers on termination of the contract was on capital account. For this, the test of enduring benefit was applied i.e. this payment would avoid future losses on account of the continuation of the arrangement.

(iii) The impugned order of the Tribunal reiterates the fact that the respondent - assessee still continues in the business of food, tooth paste and shampoos. It relied upon the principles laid down in decision of the Apex Court in Empire Jute Co. Ltd. Vs. CIT 124 ITR 1, CIT Vs. Madras Auto Service (P) Ltd. 233 ITR 468 and Bikaner Gypsums V. CIT 187 ITR 39 as well as this Court in CIT V. Rajaram Bandekar (1994) 121 CTR 233 to hold that the

aforesaid expenditure for termination/cancellation of the Agreement was in the Revenue field.

(iv) The principles which emerge from the reading of above decisions are :-

(a) the test of the advantage of enduring benefit is not the sole criteria to decide whether an expenditure is capital or revenue. This test would break down if expenditure is in the revenue field - incurred for running the business effectively or removing an obstruction/disadvantage in the revenue field; and

(b) a lump sum payment to get rid of annual revenue expenditure, would also be on revenue account.

(v) On application of the above principles, the Tribunal holds that lumpsum payment made to terminate a contract would be in the revenue account as it results in removal of disability/obstruction in running the business. Besides it also gets rid of annual payment which would have to be allowed as revenue expenditure.

(vi) The Revenue has not pointed out why the above principles as applied by the Tribunal is not correct/justifiable in the present facts. Therefore, in the absence of any contrary narrative being urged before us, it must follow that the view taken by the Tribunal on facts before it that the expenditure was incurred on account of the commercial expediency and same is eligible to deduction under Section 37(1) of the Act, is a possible view.

(vii) Accordingly, the question no.4 and 5 do not give rise to any substantial question of law. Thus not entertained.

6. Regarding question No.7 :

(a) The impugned order of the Tribunal has allowed the respondent - assessee's appeal on the issue of allowing unabsorbed depreciation pertaining to Assessment Year 1996-97 and 1997-98 which was carried forward to be set off in the subject Assessment Year.

(b) The grievance of the Appellant is that in view of the fetter (of eight years) in carrying forward depreciation for Assessment Year 1997-98 upto Assessment Year 2002-03, the set off of the same cannot be allowed in this Assessment year.

(c) We find that the impugned order of the Tribunal while allowing the Assessee - respondents' claim follows the decision of the Gujarat High Court in General Motors India Pvt. Ltd. Vs. DCIT reported in 354 ITR 244 wherein on identical facts it was held that the unabsorbed depreciation for the Assessment Year 1997-98 upto Assessment Year 2001-02 could be allowed to be set off, if it was still unabsorbed on 1st April, 2001. The above decision also placed upon the CBDT circular No.14 of 2001 dated 22nd November, 2001 to hold that any unabsorbed depreciation which is available on 1st day of April, 2001 would be dealt with in accordance with the provisions of Section 32(2) of the Act as amended by the Finance Act of 2001. Moreover, the Circular

No.14 of 2001 issued by the CBDT clarifies that restriction of eight years to carry forward and set off the unabsorbed depreciation has been dispensed with. Consequently, unabsorbed depreciation for the intervening periods between assessment 1997-98 upto 2001-02, if available in the assessment year 2002-03 would be allowable as part of carried forward depreciation from Assessment Year 2002-03 onwards. No decision contrary to the decision of the Gujarat High Court has been shown to us. It is clarified that although the decision of the Gujarat High Court was rendered in context of re-opening notice it has also examined the issue on merits and drew support from the CBDT circular which is beneficial to the assessee to conclude as aforesaid. Nothing has been shown to us to indicate why the decision of the Gujarat High Court in General Motors (India) Ltd. should not be followed in the present facts.

(d) In the above view question no.7 as raised does not give rise to any substantial question of law. Thus not entertained.

7. Appeal admitted on question no.6.

8. Registry is directed to communicate copy of this order to the Tribunal. This would enable the Tribunal to keep papers and proceedings relating to the present appeal available, to be produced when sought for by the Court.

(A.K. MENON,J.)

(M. S. SANKLECHA,J.)