

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.1869 OF 2013

Advance Power Display Systems Ltd. ... Appellant.
Vs.
Commissioner of Income Tax-8. ... Respondent

Mr.Y. P. Trivedi, Senior Advocate with Mr.Vipul Joshi and Ms.Usha Dalal,
for the Appellant,

Mr.Arvind Pinto, for the Respondent-Revenue.

CORAM : M.S.SANKLECHA &
G.S. KULKARNI, JJ.

DATE : 12th October, 2015.

P.C. :

1. Heard. This appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 8 May 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The Assessment Year involved is Assessment Year 2003-04.

2. The appellant-assessee urges the following questions of law for our consideration:-

“(1) Whether, on the facts and in the circumstances of the case and in law, the Tribunal was justified in confirming the the disallowance of 'Export Promotion

Expenses' being the foreign travelling expenses incurred by the President, Director and the Executive Director on the ground that the said expenses were not incurred wholly and exclusively for the purpose of the business ?

(2) Whether, on the facts and in the circumstances of the case and in law, the Tribunal ought to have restored the issue determining the applicability of all the three comparable relied upon by the appellant- assessee to the Transfer Pricing Officer to determine the applicability of the three comparable to the subject Assessment Year, particularly after having held that merely the comparable relied upon by the appellant- assessee was accepted in the subsequent Assessment Year would not *ispo facto* applies to the subsequent Assessment Year?

3. Regarding Question (1):-

(a) The appellant- assessee is a 100% Export Oriented Unit manufacturing Switch Mode Power Supplies (SMPS) at the instance of its Associated Enterprise (A.E.) namely M/s.Quality Components and Systems PPE. Ltd. (QCS) in terms of the agreement arrived at between the two. In terms of the agreement, the appellant- assessee manufactures /assembles SMPS on demand and specification of its A.E. (QCS) and supplies the entire production to A.E.(QCS) Thereafter, the A.E. (QCS) further sells the SMPS to its customers and the appellant- assessee is not

concerned.

(b) During the subject Assessment Year the appellant-assessee sought a deduction on account of foreign travel expenditure of Rs.85.90 lakhs incurred on its President and Directors for the purpose of marketing and selling its goods. The Assessing Officer held that the President and Directors of the Company had not only travelled to Singapore where the A.E. (QCS) is situated but also to other countries. The travel to Singapore was held to be for the purpose of business and the expenses of Rs.5 lakhs incurred on visit to Singapore was allowed as business expenditure while the balance amount of Rs.80.95 lakhs was disallowed by Assessment Order dated 22 March 2006.

(c) On appeal, the Commissioner of Income Tax (Appeals) (CIT(A)) concurred with the view of the Assessing Officer held that the Assessee had responsibility of only to supply and sell its SMPS to its sole customer i.e. A.E. (QCS). Thus by order dated 19 July 2011 the CIT(A) upheld the order of the Assessing Officer.

(d) Being aggrieved, the appellant-assessee carried the issue of travel expenditure in appeal to the Tribunal. Before the Tribunal, the assessee contended that the travel expenses incurred in respect of the

travel of its President and Directors to foreign countries were to have meeting and discussion with the buyers of its finished products. The Tribunal by the impugned order dated 8 May 2013 upheld the order dated 19 July 2011 of the CIT(A) to the extent of the claim made in respect of foreign travel expenditure. The impugned order holds that the appellant-assessee was only obliged to supply the SMPS to its A.E.(QCS) in accordance with its specifications. The impugned order on facts held that the expenditure incurred for travel to meet the buyer of the finished products could only be allowed to the extent the appellant-assessee met its foreign buyer A.E.(QCS) at Singapore. Thus, the expenses of travel to other destination was disallowed. In these circumstances, the impugned order of the Tribunal dismissed the appellant-assessee's appeal.

(e) Mr.Trivedi, learned Senior Counsel appearing for the appellant relies upon the terms of the agreement which have been reproduced in the impugned order. In particular to point out that the appellant-assessee is required to travel abroad so as to carry out joint inspection of the raw material to be supplied by the raw material supplier at the instance of the A.E. (QCS) to the appellant-assessee. In the above view, it is the submission of the appellant that the aforesaid expenses were wholly and exclusively incurred for the purpose of business of the

appellant-assessee and, therefore, ought to be allowed. It was further submitted that the method and manner of doing its business cannot be dictated upon by the Revenue. Therefore, the expenses which are commercially expedient in the view of the assessee ought to be allowed under Section 37(1) of the Act. In support reliance is placed upon the decision of the Supreme Court in the case “**Sassoon J.David and Co.PLtd. Vs. Commissioner of Income Tax, Bombay, (118 ITR 263(SC))**” and the decision of this court in the case “**Commissioner of Income Tax Vs. Sales Magnesite (Pvt.) Ltd., (214 ITR 1 (Bom.))**”. It is also further pointed out by the learned Counsel for the appellant that for the subsequent years i.e. 2005-06 to 2011-12, these expenses have been allowed. However, for the Assessment Year 2002-03 and 2004-05, the Tribunal has set aside the matter for consideration of the Assessing Officer and it is still pending decision. In further support, it is submitted that the Board's Circular also requires the Revenue to adopt a broad approach in allowing the expenses incurred by a businessman as a deduction.

(f) We find that the Authorities under the Act have disallowed the expenses incurred by the appellant-assessee on travel to countries other than Singapore. This in view of the fact that on examination of record and of the agreement, it is clear that the appellant-assessee

company's work is more in the nature of job-worker manufacturer that is to convert raw material to finish product at the instance of its A.E.(QCS) on the basis of the raw material and specifications made available to it. The contention placed before us is that the appellant-assessee is required to meet its raw material suppliers as is evident from the clauses of the agreement for the purpose of joint inspection of the raw materials alongwith its A.E. (QCS). However, we find that before the authorities including the Tribunal the deduction was sought on the aforesaid travel expenses only on the ground that these expenses have been incurred for the purpose of meeting its foreign buyers. Undisputedly, it has only one buyer who is situated at Singapore. No one cannot dispute the proposition that it is for the assessee concerned to decide as to what expenses is necessary for its business and it is not for the Assessing officer to disallow the expenses which the assessee feels is necessary for its business. In the present facts, the case of the assessee before the Tribunal is that those expenses are necessary to meet the foreign buyers. In this view of the matter, the view taken by the Authorities under the Act to restrict the expenses of travel only to Singapore visit where the foreign buyer of the appellant is situated, cannot be said to be perverse. It is a possible view. The fact that the assessee's expenses on travel have been allowed for subsequent years or have been set aside by the Tribunal in the

earlier Assessment Years or subsequent Assessment Years, would not by itself govern the issue. It all depend upon the claim made for deduction and the contention of the assessee with regard to what was that expenditure incurred in that particular year.

(g) In view of the above, question no.1 does not give rise to any substantial question of law. Hence, not admitted.

4. Appeal is admitted on substantial question of law no.2.

5. At the request of learned Counsel for both the sides, question No.2 is taken up for final disposal as the scope of dispute before us is very narrow and would not take time.

6. The undisputed facts are that to determine the arm's length price (ALP), the appellant-assessee had, before the CIT(A) forwarded three more comparables. The basis of the appellant seeking to have the three comparables also examined was that the same had been considered as comparables for the subsequent Assessment Years. The CIT(A) called for a remand report from the Transfer Pricing Officer (TPO) as the TPO had no occasion to examine the issue. The remand report sought was whether the three comparables which have been referred to him, have

been used as comparables to determine ALP in the subsequent Assessment Years. The TPO by remand report informed the CIT(A) that the three comparables had been used to determine the ALP in the subject Assessment Years. On the basis of the remand report, the CIT(A) considered three further comparables being relied upon by the appellant-assessee to determine ALP of the appellant's product and by order dated 19 July 2011 arrived at a margin of 5.42 %.

7. Being aggrieved, the Revenue carried the order dated 19 July 2011 of CIT(A) in appeal to the Tribunal. The Tribunal by the impugned order accepted the Revenue's contention that merely because the comparables have been accepted for the subsequent assessment year would not ipso facto lead to same comparables being applied to the subject assessment year. On merits, the Tribunal by the impugned order rejected all the three comparables. The first comparable was rejected on the ground that it is a loss making unit, second comparable was rejected on the ground that it had extraordinary income in the subject Assessment Year and hence, not comparable; and the third comparable was rejected on the ground that the product was different. Thus, the impugned order of the Tribunal allowed the revenue's appeal before it.

8. We find that the three comparables which were relied upon by the appellant-assessee before the CIT(A) had not been examined by CIT(A) on merits of its applicability for the subject Assessment Year nor did the TPO, as same was not put before it for the subject Assessment Year. No fault can be found with the order of the Tribunal to the extent it holds that merely because a comparable has been used in the subsequent assessment year for determining the ALP, it would not ipso facto apply to determine the ALP in the subsequent Assessment Year. However, after having held so, it would have been appropriate for the Tribunal to restore the issue to TPO to consider applicability of three comparables to determine the ALP in respect of the subject Assessment Year. This is particularly so as in the absence of same being examined by the original authority or by the CIT(A) after having called for remand report on its applicability from the TPO, would certainly cause prejudice to the assessee. This would be on account of right of appeal on factual aspect being lost. In this view of the matter, we are of view that it would be appropriate in the facts and circumstances of the case that the issue be restored to TPO to determine whether or not the three comparables -companies which have admittedly have been accepted as comparables for subsequent Assessment year can be considered as comparables for the subject assessment year. If the answer is in the affirmative by the TPO,

then necessary adjustment would be needed to be done so as to make an appropriate comparison between the sale made by the appellant-assessee to its A.E. and the independent sales made of three comparables, alongwith the four comparables already on record.

9. Accordingly, question no.2 is answered in the affirmative i.e. in favour of the appellant-assessee and against the Revenue.

10. The appeal is disposed of in the above terms. No order as to costs.

(G.S.KULKARNI, J.)

(M.S.SANKLECHA, J.)