

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA**
[Before Shri J. Sudhakar Reddy, Accountant Member & Shri S.S. Godara, Judicial Member]

**I.T.A. No. 2612/Kol/2019
Assessment Year: 2015-16**

M/s. Philips India Limited.....Appellant
[PAN: AABCP 9487 A]

Vs.

ACIT, Circle-12(2), Kolkata.....Respondent

Appearances by:

Sh. Arvind Sonde,
Sh. Ketan K. Baid, AR &
Sh. Paras Shah, AR, appeared on behalf of the Assessee.

Sh. Vijay Shankar, CIT, appeared on behalf of the Revenue.

Date of concluding the hearing : March 12th, 2020
Date of pronouncing the order : July 8th, 2020

ORDER

Per J. Sudhakar Reddy, AM:

This is an appeal filed by the assessee directed against the order of the Assessing Officer passed u/s 143(3) r.w.s. 92CA and 144C of the Income Tax Act, 1961 ('the Act' for short) for AY 2015-16 dated 30.10.2019.

2. We have heard at length Sh. Arvind Sonde, Id. Counsel for the assessee and Sh. Vijay Shankar, Id. CIT(DR) on behalf of the Revenue. On a careful consideration of the facts and circumstances of the case, perusal of the papers on record and case laws cited, we hold as follows.

3. Ground no. 1 is general in nature.

4. Ground no. 2 is on the issue of determination of Arms Length Price for Intra Group Services (IGS) received by the assessee. The DRP has called for a remand report from the TPO and thereafter chose to follow its own order for the AY 2014-15. The directions given by the DRP on the very same issue for the AY 2014-15 are repeated this year and the TPO was directed to follow these directions. At para 10 page 6, the DRP further records that the Department has filed an appeal before the High Court on the

aforesaid issue in some of the earlier years, as the ITAT has not upheld these directions of the DRP.

5. The ITAT for the AY 2014-15 in the assessee's own case in order dated 15.05.2019 at page 14 para 19 held as follows:

"19. As the issue is squarely covered in favour of the assessee by the decision of Co-ordinate Bench in assessee's own case (supra) in I.T.A. No. 863 & 539/ Kol/2016, for A.Y.2011-12, and there is no change in facts and law and the revenue is unable to produce any material to controvert the above said findings of the Co-ordinate Bench. We find no reason to interfere in the order of the division bench and the same is hereby upheld. Therefore, respectfully following the decision of Co-ordinate Bench we allow ground No. 5 raised by the assessee."

6. The ld. DR submitted that this issue may be set aside to the file the Assessing Officer before determining the ALP *de novo*, as such an exercise has not been done. Ld. Counsel for the assessee opposed the same and relied on a number of case laws for the proposition that the ld. DR cannot travel beyond the view taken by the Assessing Officer as confirmed by the DRP. It was further submitted that the ALP was determined at Nil by the TPO and hence remanding the matter back to the TPO would not be in accordance with law. We agree with the submissions of ld. Counsel for the assessee. Year after year, the Tribunal has been adjudicating this issue against the Revenue. Despite such findings, the Assessing Officer, the DRP chose to stick to their stand, on the ground that the issue is before the Hon'ble High Court. Under these circumstances, we reject this request of the ld. DR.

7. Consistent with the view taken therein we uphold the contention of the assessee and allow this ground no. 2 of the assessee.

8. Ground no. 3 is on the issue of determination of ALP of Advertisement, Marketing and Promotion expenses. Similar to ground no. 2, the TPO and DRP chose to repeat their stand despite the issue being adjudicated in favour of the assessee by the ITAT in the earlier assessment years. This fact is recorded at para 2.2.5 and 2.2.6 by the DRP at page 17 of its order which is extracted for ready reference:

"The Hon'ble ITAT Kolkata has decided the issue in favour of assessee in the recent order dated 07.02.2018 (ITA No. 612/Kol/2017) for AY 2012-13, reported in (2018) 90 Taxman.com 357 (Kolkata-Trib.) and order dated 04.04.2018 (ITA No. 2489/Kol/2017) for AY 2013-14. However, the department has filed appeal against the above orders, as also for AY 2009-10 (1141/Kol/2016) and AY 2011-12 (ITA No. 863 & 539/Kol/2016) before the Hon'ble High Court."

9. This Bench of the Tribunal on this issue for the AY 2014-15 and order dated 15.05.2019. At page 12 para 13 on the issue of determination of ALP on Advertisement, Marketing and Promotion expenses held as follows:

"13. As the issue is squarely covered in favour of the assessee by the decision of Co-ordinate Bench in assessee's own case (supra) in I.T.A. No. 2489/Kol/2017 for assessment year 2013-14, and there is no change in facts and law and the revenue is unable to produce any material to controvert the above said findings of the Coordinate Bench. We find no reason to interfere in the said order of the co-ordinate Bench and the same is hereby upheld. Therefore, respectfully following the decision of Co-ordinate Bench we allow ground No. 3 raised by the assessee."

10. Consistent with the view taken therein, we allow this ground of the assessee.

11. Ground no. 4 is on the issue of rule of consistency. The ground reads as follows:

"4.1 The Learned AO, TPO and DRP erred in disallowing the payments made for IT services by the Appellant in the year under appeal without appreciating that the same have been accepted to be at arm's length by the Hon'ble Panel in Appellant's own case for AY 2009-10, AY 2010-11, AY 2012-13 and AY 2013-14 and by the Hon'ble Income Tax Appellate Tribunal in AY 2011-12 (863 & 539/Kol/2016) and AY 2014-15 (ITA No. 2600/Kol/2018).

4.2 The Learned AO, TPO and DRP erred in making transfer pricing adjustment on the alleged excess cost incurred for AMP expenses as brand promotion for AE. The payment for AMP expenses have been accepted as not excessive in the Appellant's own case in preceding years (i.e. for all the assessment years preceding to AY 2010-11 by the AO, TPO and the DRP and the Learned DRP has accepted the AMP expenses to be at arm's length for AY 2010-11 and AY 2011-12. Further, the Hon'ble ITAT has held in Appellant's case for AY 2011-12, AY 2012-13, AY 2013-14 and AY 2014-15 that AMP does not constitute an international transaction."

12. After hearing rival contentions, we have no hesitation in upholding these contentions of the assessee that rule of consistency has to be followed in income tax proceedings as held by the Hon'ble Supreme Court in the case of *Radhasoami Satsang vs. CIT [1992] 193 ITR 321 (SC)*. In the result, this ground is allowed.

13. Ground no. 5 is on the issue of disallowance of lease rent paid in respect of motor cars. This issue is also covered in favour of the assessee by the decision of the Tribunal for all the assessment years running from 2009-10 to 2014-15 at page 18 para 33 of the order of the ITAT dated 15.05.2019 for the AY 2014-15 the Tribunal held as follows:

"33. As the issue is squarely covered in favour of the assessee by the decision of Co-ordinate Bench in assessee's own case (supra) in I.T.A. No. 2489/Kol/2017, for A.Y.2013-14, and there is no change in facts and law and the revenue is unable to produce any material to controvert the above said findings of the Co-ordinate Bench. We find no reason to interfere in the said order of the Co-ordinate Bench and the same is hereby upheld. Therefore, respectfully following the decision of Co-ordinate Bench we allow ground No. 9 raised by the assessee."

14. Consistent with the view taken therein, we allow this ground of the assessee.

15. Ground no. 6 is on the issue of depreciation on moulds. This issue is also covered by the order of the ITAT in his own case for the AY 2014-15 at page 20 para 38 the Tribunal held as follows:

"38. As the issue is squarely covered in favour of the assessee by the decision Co-ordinate Bench in assessee's own case (supra) in I.T.A. No. 2489/Kol/201 for A.Y 2013-14, (where the ITAT restored this matter back to the file of AO f fresh adjudication and the assessee is at liberty to adduce fresh evidences before the AO in support of its contentions) and there is no change in facts and law and the revenue is unable to produce any material to controvert the above said findings the Co-ordinate Bench. We find no reason to interfere in the said order of the C ordinate Bench and the same is hereby upheld. Therefore, respectfully following the decision of Co-ordinate Bench we allow ground No. 9 raised by the assessee for statistical purposes."

16. Consistent with the view taken therein, we set aside this ground of the assessee to the file of the AO for fresh adjudication. The assessee is at liberty to file fresh evidence in support of its claim. Thus, this ground is allowed for statistical purposes.

17. Ground no. 7 is on the issue of non-grant of deduction u/s 80G. After hearing both parties, this issue is set aside to the file of the Assessing Officer for fresh adjudication in accordance with law for verification of the claim of the assessee.

18. Ground number 8 is short deduction of TDS/tax collected at source. The assessee claims that the short grant of credit of ₹10,62,647/-. Both parties agreed that the issue may be restored to the file of the Assessing Officer for fresh verification and disposal. Thus, this ground of the assessee is allowed for statistical purposes.

19. Ground no. 9 and 10 are on the levy of interest u/s 234A and 234B of the Act. These are consequential in nature and are set aside to the file of the Assessing Officer for fresh calculation.

20. Ground no. 11 is on the levy of additional tax on interest on distributable profits as agreed to by both parties. This issue is also set aside to the file of the Assessing Officer for fresh adjudication in accordance with law.

21. The assessee has raised an additional ground of appeal which reads as follows:

"1. The AO / DRP erred in not granting the Appellant deduction of 'education cess on income-tax' and 'secondary and higher education cess on income-tax' while computing the Appellant's total income for the year under consideration."

22. The Id. Counsel for the assessee relied on the judgement of Hon'ble High Court Bombay & Goa Tax Appeal No. 17 of 2003 in the case of *Sesa Goa Ltd. vs. JCIT* [2013] 37

taxmann.com 341 (Bombay) as well as the decision in *ITC Ltd. vs. ACIT [2003] 79 TTJ 14 (Kolkata)* and certain other judgements in support of his contention.

23. The ld. DR relied on the judgement of the Hon'ble Calcutta High Court in the case of *SREI Infrastructure Finance Ltd. vs. DCIT [2016] 72 taxmann.com 239 (Calcutta)*.

24. The Kolkata 'B' Bench of the Tribunal in the case of ITC Ltd. in ITA No. 685/Kol/2014 and ITA No. 1267/Kol/2014 order dated 27.11.2018 had followed the judgement of the Hon'ble Rajasthan High Court in the case of *M/s. Chambal Fertilisers And Chemicals Ltd vs. JCIT in D.B. Income Tax Appeal No. 52/2018* and adjudicated the issue in favour of the assessee. Later, the division Bench of the Tribunal in the case of *SREI Infrastructure Finance Ltd.* has decided the issue against the assessee. The assessee carried the matter to the Hon'ble Calcutta High Court. The Hon'ble Calcutta High Court, despite the decision in the case of the assessee group company *SREI Infrastructure Finance Ltd.* (supra) remanded the issue back to the Tribunal for fresh adjudication. Thus, the Hon'ble Calcutta High Court does not, in our view, lay down the law on this issue.

25. The Hon'ble High Court of Bombay & Goa in the case of *Sesa Goa Ltd.* (supra) analyzed the issue at length after taking into consideration the legislative history. The question was in favour of the assessee.

26. In view of the above discussion, we uphold the contention of the assessee that the education cess and higher education cess is allowable as a deduction. In the result, this ground of the assessee is allowed.

27. Before parting, it is noted that the order is being pronounced after ninety (90) days of hearing. However, taking note of the extraordinary situation in the light of the COVID-19 pandemic and lockdown, the period of lockdown days need to be excluded. For coming to such a conclusion, we rely upon the decision of the Co-ordinate Bench of the Mumbai Tribunal in the case of *DCIT vs. JSW Limited in ITA No. 6264/Mum/2018 & 6103/Mum/2018*, Assessment Year 2013-14, order dated 14th May, 2020.

28. In the result, the appeal of the assessee is allowed in part.

Kolkata, the 8th July, 2020.

Sd/-
[S.S. Godara]
Judicial Member

Sd/-
[J. Sudhakar Reddy]
Accountant Member

Dated: 08.07.2020
Bidhan

Copy of the order forwarded to:

1. ***M/s. Philips India Limited, 3rd Floor, Tower-A, DLF Park, 08 Block AF, Major Arterial Road, New Town (Rajarhat), Kolkata-700 156.***
2. ***ACIT, Circle-12(2), Kolkata.***
3. CIT(A)-
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata. (sent through e-mail)

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches