आयकर अपीलीय अधिकरण "G" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री एस रिफ़ौर रहमान, लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, VP AND SRI S RIFAUR RAHMAN, AM

आयकर अपील सं./ ITA No. 5413/Mum/2016

(निर्धारण वर्ष / Assessment Years 1996-97)

Unilever India Export Limited (Formerly- Indexport Limited) Unilever House, B.D. Savant Marg, Chakala, Andheri (East) Mumbai 400 099	बनाम/ Vs.	The Dy. Commissioner of Income Tax, Circle 1(3)(2), Mumbai -400 020
(अपीलार्थी / Appellant)		(प्रत्यर्थी/ Respondent)
स्थायी लेखा सं./PAN No. AAACI0991D		

अपीलार्थी की ओर से/ Appellant by	:	Shri Percy Pardiwalla, AR
प्रत्यर्थी की ओर से/ Respondent by	:	Shri Prabhat Kumar Gupta, Dr

सुनवाई की तारीख / Date of hearing:	26.04.2021
घोषणा की तारीख / Date of pronouncement:	10.05.2021

आदेश / O R D E R

महावीर सिंह, उपाध्यक्ष के द्वारा /

PER MAHAVIR SINGH, VP:

This appeal of assessee is arising out of the order of the Commissioner of Income Tax (Appeals)]-2, Mumbai, [in short CIT(A)], in appeal No. CIT(A)-2/IT/598/2009-10 dated 02.05.2016. The assessment was framed by the Dy. Commissioner of Income Tax (in short ACIT/ ITO/

AO), OSD 1(1), Mumbai for the A.Y. 1996-97 vide order dated Nil under section 254 of the Income-tax Act, 1961 (hereinafter 'the Act').

2. The only issue in this appeal of assessee is against the order of CIT(A) in holding the payment of ₹ 9.13 crores made to Lakme Exports Ltd. and ₹ 1.820 crores to Lakme Exports Ltd. as capital in nature as against the claim made by the assessee as revenue in nature. For this, assessee has raised the following 6 grounds:-

> *"1. The Learned CIT(A) erred in Law and on facts in holding that the payment of Rs. 9,13,00,000 made to Lakme Ltd and Rs. 1,82,00,000 made to Lakme Exports Ltd. under agreement dated 27.3.96 are not deductible as revenue expenditure.*
>
> *2. The Learned CIT(A) erred in holding that the payment made to Lakme Ltd and Lakme Exports Ltd. under the agreement dated 27.3.96 constitute capital expenditure.*
>
> *3. He failed to appreciate that the agreement with Lakme Ltd and Lakme Exports Ltd. merely seek to align the marketing operation of the appellant for a period of 10 years.*

> *4. He further failed to appreciate that Lakme Ltd and Lakme Exports Ltd. have not given up their right to manufacture, produce or process the articles covered by the agreement.*
>
> *5. He failed to appreciate that Lakme Ltd and Lakme Exports Ltd. have not given up their source of Income.*
>
> *6. He also failed to appreciate and ought to have held that by virtue of the agreement with Lakme Ltd. and Lakme Exports Ltd. the appellant has not acquired any capital asset or a right."*

3. The original assessment was framed by DCIT, special Range-31, Mumbai under section 143(3) of the Act vide order dated 15.09.1998 for the relevant assessment year 1996-97. Against this original assessment order, the assessee preferred the appeal before CIT(A) and CIT(A), Mumbai decided the appeal vide order dated 09.07.1999. The assessee preferred an appeal before ITAT against this order. The ITAT in ITA No. 4333/Mum/1999 vide order dated 22.08.2006 set aside this issue to the file of the Assessing Officer with certain directions. The Assessing Officer in set aside assessment proceedings passed order giving effect to the ITAT's order dated Nil passing practically ex-parte order. Against this order of the Assessing Officer, the assessee preferred the appeal before

CIT(A). The CIT(A) in appeal No. CIT(A)-2/IT/598/2009-10 vide dated 02.05.2016 decided the issue against the assessee, and now assessee is in appeal before Tribunal.

4. We noted that the AO did not accepted assessee's submission and disallowed the non compete fee paid as per the above referred agreement to Lakme Ltd. and Lakme Export Ltd. holding the same as capital expenditure. He failed to appreciate that the amount of Rs.10.95 crores paid to Lakme Ltd and Lakme Exports Ltd is not for acquiring any capital asset, it is a payment made whereby Lakme Ltd and Lakme Exports Ltd have agreed to sell the specified products to HLL group/Joint venture company for a period of 10 years instead of marketing and selling these products themselves. The arrangement is in the nature of alignment of marketing activities undertaken with a purpose of increasing the company's profitability. Lakme Ltd and Lakme Exports Ltd have not given up their source of income. Therefore, the amount paid to Lakme Ltd and Lakme Exports Ltd is an expenditure incurred wholly and exclusively for business purposes and is deductible under sec. 37(1) of the Act. The matter went upto Tribunal, the Tribunal after taking cognizance of the facts that the Lakme Ltd. and Lakme Exports Ltd. had not given up right to manufacture of the products and that the assessee has not acquired any capital assets remanded the matter back to AO to take into consideration relevant facts such as whether the arrangement has resulted in reduction into the advertisement and other cost or whether the arrangement has favourably affected the price strategy or sales of the company, to determine if the advantage in the revenue field

and not in the Capital field and accordingly allow the expense. The relevant directions of the Tribunal reads as under:-

> *"10. There is no dispute about the legal position laid down by the Hon'ble Supreme Court in the case of Empire Jute Co. Ltd. (Supra) and Coal Shipment Pvt. Ltd. (supra) relied on by the learned Counsel for the assessee as well as directed on by the Revenue. The basic question is whether advantage obtained by the assessee is in capital field or revenue field. The question can be answered only by referring to the relevant materials on record. The learned Counsel has argued that the arrangement between the parties would reduce the cost of assessee but nothing has been brought on record to substantiate the same. The cost incurred by the assessee prior to and after the agreement has to examined and the onus being on the assessee, it is the duty of the assessee to place such material on record. There is no reference to any material to substantiate the same. Further, it is seen from the terms of the agreement that Lakme Cos. had given up the marketing of restricted*

products but it is not clear as to how such product would be sold which are manufactured by Lakme Group. Is there any agreement between the parties? Whether the assessee would-be entitled. to commission on the sales of goods manufactured by Lakme. If yes, it is to be seen whether the assessee has acquired any source of income. Further, it is not clear who would incur the expenses for promoting the restricted product manufactured by Lakme and what would happen to infrastructure which Lakme had set up for marketing in the past. Whether such infrastructure could be utilized by the assessee group. It was explained by assessee before Assessing officer in its letter dated 20th August 1998 that competition had adversely affected the price strategy but nothing has been shown on as to how the price strategy affected favourably after the agreement. We have mentioned only some of the points which need examination before coming to any conclusion. The assessee must prove by leading evidence that advantage was in the filed of revenue as the onus is on it in view of the Supreme Court judgment in

> *the case of Calcutta Agency 19 ITR 191. In the absence of any evidence, it is not possible for us to adjudicate the important issue arising from the appeal. Accordingly, we set aside the order of CIT(A) on this issue and restore the matter to the file of Assessing Officer for fresh adjudication. The assessee shall be at liberty to place all materials/evidences before the tax authorities to substantiate its claim. The Assessing Officer would also be at liberty to make its own enquiry in this regard. After considering the entire material brought on record, the Assessing Officer shall decide whether advantage is in the field of revenue or capital. "*

5. Now before us, the learned Counsel for the assessee Shri Percy Pardiwala stated the facts that the assessee was engaged in the business of manufacturing, marketing and trading of personal products. The marketing for Personal Products which was Company's main business activity, had become very competitive due to the entry of many international manufacturers of personal products either directly or in joint venture with other Indian companies. In order to maintain the volume and grow in such a competitive market, the company had to spend a lot of money on advertisement of its products. Normally such

aggressive competition also affects adversely the pricing strategy of these products. Both these factors put a severe strain on profitability. In view of the above, the company decided to enter into a Strategic Alliance with Lakme Ltd and Lakme Exports Ltd, the major players also engaged in manufacture and sale of personal products. The Company together with Hindustan Unilever Ltd (formerly Hindustan Lever Ltd.) and Lever India Exports Ltd (hereinafter referred to as HUL Group) entered into an agreement with Lakme Ltd and Lakme Exports Ltd. Under the agreement, Lakme Ltd and Lakme Exports Ltd. have agreed not to engage in the direct marketing/ selling/distribution of the products manufactured by them in the retail market for a period of 10 years. For this, the assessee has paid Rs. 9,13,00,000 to Lakme Ltd. and Rs. 1,82,00,000 to Lakme Exports Ltd.

6. He explained that during the course of original assessment proceeding, the assessee was called upon to justify the deductibility of these payments. The assessee vide its letter dated 20.8.1998 submitted that; Lakme Ltd and Lakme Exports Ltd have not given up their basic right to manufacture/produce the said products for subsequent sale/marketing. However, they were required to sell such products through a Joint Venture company where both Lakme Ltd. and Hindustan Lever Ltd. had equal stake. In this arrangement, existence of synergies in the marketing operations between Lakme group and HLL group has resulted in ensuring profitability for both the group companies. Further, the said alliance is valid merely for a period of 10 years. The outcome of the above referred agreement was that for a consideration of Rs.30

crores paid by the HLL Group (with included the assessee). Lakme Ltd and Lakme Exports Ltd had agreed to continue to manufacture the specified products for being sold in the market through HLL Group/Lakme Lever Ltd who would be responsible for marketing and distribution of these specified products. As clarified above, Lakme Ltd and Lakme Exports Ltd have-not given up their right to manufacture/produce the specified products. The benefit which the Companies in the HIL Group would derive in such an arrangement would be in the area of marketing their own product range without facing unfair competition as it would be in a position to decide the appropriate marketing strategy like introduction/launch of new products, positioning of products, release of advertisements, pricing of product and ability to provide a wide range of products etc, in a manner which would complement the marketing of its own products so as to ensure profitability & growth in business.

7. In the order giving effect proceeding, the DCIT, vide letter dated 4.8.2009 had asked for certain information to be filed in connection with set aside grounds by the Hon'ble ITAT. The assessee requested DCIT to grant adjournment in the matter as the assessee were busy in tax audit and the return of income filing of Hindustan Unilever Limited and its subsidiary companies (including the assessee company). The assessee did not receive any communication after that from the DCIT till December 2009. Further, since the matter is 15 year old, a request was made to allow time and fix the hearing in the month of January 2010. However, the DCIT passed the ex-parte order without giving sufficient

opportunity of being heard by the assessee company. Such order passed by him is against the principal of natural justice and bad in law.

8. It was contended, on merits, in view of the above given facts that all the facts were before the AO and even during set aside assessment proceedings. He contended that the non compete fee paid to Lakme Ltd. and Lakrne Export Ltd. is fully allowable as revenue expenditure under sec 37(1) of the Act. For this, the assessee pointed out and the relevant points are as under:-

a) Lakme Ltd. and Lakme Exports Ltd, had agreed to market, distribute, sell their products through the assessee and its associates merely for a period of 10 years.

b) Lakme Ltd. and Lakme Exports Ltd. had not given up their basic right to manufacture, produce, process the specified articles.

C) Lakme Ltd. and Lakme Exports Ltd. had not given up their source of income.

d) The assessee did not acquire any capital assets or a right under the agreement.

9. The learned Counsel for the assessee further narrated from the facts of the case, that before CIT(A) the complete detail in respect to the directions of Hon'ble ITAT, provided certain clarification and details to substantiate that this arrangement helped the company in reducing cost, promotion expenses and achieve higher profitability. The Assessee drew our attention to written submissions filed, wherein assessee has filed a

table showing the year wise advertisements and promotion expenses incurred by the assessee and also the table showing the sales of personal products of the HLL Group for the calendar year 1995 to the year 2000. The relevant tables are as under: -

Uniliver India Exports Ltd.

Calendar Years	Total A & P	A & P as % Sales
1995	5,934	26%
1996	6,468	33%
1997	5,923	28%
1998	4,362	26%
1999	3,750	21%
2000	2,229	15%

HLL Group (HLL, Indexport and LIEL)

Calendar Years	Personal Products Sales (In Lakhs)	Increase in sales in %
1995	62,493	38%
1996	86,542	30%
1997	112,805	54%
1998	173,257	54%
1999	199,445	15%
2000	205,446	3%

10. From the above tables, the learned Counsel explained that in the year 1995 the advertisement and promotion expenses cost was around 26% of the sales which due to intense competition increased to 33% in 1996. However, post arrangement the advertisement and promotion post have come down gradually to 15% of the sales in the year 1999. This clearly shows that due to intense competition assessee's profitability was under stress due to higher advertisement and promotion expenses

but after entering into strategic alliance, the assessee was able to control the marketing activities in a manner clearly beneficial to the assessee. He further explained that from the above table and charts, it is clear that the personal product sales of HLL Group due to strategic alliance, whereby Lakme and Lakme Exports Ltd. Were required to sale the products through HLL Group, gave HLL Group full visibility for the new product launched, market availability for trapping etc. This resulted into a higher sales year on year, more particularly in the personal product category for the HLL Group. This clearly shows that the assessee to safeguard the business interest and to ensure the excessive competition did not result in erosion of its profitability has entered into aforesaid arrangement with other HLL Group companies. Hence, the expenditure incurred on this strategic alliance to safeguard assessee's business interest is in the revenue field and not in the capital field.

11. On the other hand, the learned CIT DR heavily relied on the order of the CIT(A) and stated that the statistics given by the assessee company with regard to advertisement and promotional expenses have not been uniformaly reducing the expenses and also considering the sales increased, which is not study in the calendar years 1995 to 2000.

12. We have also considered the decision of Hon'ble Supreme Court in the case of Empire Jute Company Ltd. Vs. CIT (1980) 124 ITR 1 (SC), wherein, Hon'ble Supreme Court has observed as under:-

> *"There may be cases where expenditure, even if incurred for obtaining advantage of*

enduring benefit, may, none-the-less, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assesse's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit is therefore not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case."

13. Further we have gone through the case laws of Hon'ble Supreme Court in the case of Kettlewell Bullen & Co. Ltd. Vs. CIT (1964) 53 ITR 261 (SC), wherein it is held as under:-

> *"On an analysis of these cases which fall on two sides of the dividing line, a satisfactory measure of consistency in principle is disclosed. Where on a consideration of the - circumstances, payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of his business, nor deprive him of what in substance is his source of income, termination of the ,contract being a normal incident of the business, and such cancellation leaves him free to carry on his trade (freed from the contract terminated the receipt is revenue: Where by the cancellation of an agency the trading structure of the assessee is impaired, or such cancellation results in loss ,of what may be regarded as the source of the assessee's income, the payment made to compensate for cancellation of the agency agreement is normally a capital receipt."*

14. After considering the enter submissions as discussed above, we are of the view that the assessee entering into strategic alliance was able to control the marketing activities in a manner clearly beneficial to the assessee and hence, according to us the expenses incurred are in the nature of Revenue. We allow the claim of the assessee and this appeal of the assessee is allowed.

15. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 10.05.2021

Sd/-	Sd/-
(एस रिफ़ौर रहमान/ S RIFAUR RAHMAN)	(महावीर सिंह /MAHAVIR SINGH)
(लेखा सदस्य / ACCOUNTANT MEMBER)	(उपाध्यक्ष / VICE PRESIDENT)

मुंबई, दिनांक/ Mumbai, Dated: 10.05.2021

सुदीप सरकार, व. निजी सचिव/ *Sudip Sarkar, Sr.PS*

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**