(2016) 08 BOM CK 0039

BOMBAY HIGH COURT

Case No: Income Tax Appeal No. 272 of 2014.

The Commissioner of Income Tax-6 - Appellant @HASH M/s. Merck Ltd., — APPELLANT

Vs

RESPONDENT

Date of Decision: Aug. 8, 2016

Acts Referred:

- Income Tax Act, 1961 - Section 260A

Citation: (2016) 290 CurTR 226 : (2016) 389 ITR 70

Hon'ble Judges: M.S. Sanklecha and A.K. Menon, JJ.

Bench: Division Bench

Advocate: Mr. Suresh Kumar with Ms. Samiksha Kanani, Advocates, for the Appellant; Ms. A. Vissanji with Mr. S.J. Mehta, Advocates, for the Respondent

Final Decision: Dismissed

Judgement

1. This Appeal under Section 260-A of the Income Tax Act, 1961(the Act), challenges the order dated 19th July, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order dated 19th July, 2013 relates to the Assessment Year 2003-04.

2. Although numerous questions have been raised in the memo of appeal, Mr. Suresh Kumar, learned Counsel appearing for the Revenue urges only the following three questions of law for our consideration:

"(a) Whether on the facts and in the circumstance of the case and in law, the Tribunal was justified in concluding that the transactions of import of pigments and fees for technical knowhow were at arm''s length?.

(b) Whether on the facts and in the circumstance of the case and in law, the Tribunal was justified in concluding that write back of loss, arising on revaluation, credited in

the P & Rs. A/c is eligible for deduction under section 80HHC?

(c) Whether on the facts and in the circumstance of the case and in law, the Tribunal was justified in allowing double deduction under Section 80IB and 80HHC of the Income Tax Act without appreciating that as per provision of Section 80IB (13)/80IA(9) the expression "shall in no case exceed the profits and gains of such eligible business of undertaking or enterprise" starts with conjunction ''AND'' and this expression is in addition to the expression "deduction to the extent of "SUCH" [as per provision of Section 80-IA(9) & 80-B(13)] profits and gains shall not be allowed under any other provisions of this Chapter?".

3. Re: Question (a):-

The aforesaid question raises two issues with regard to Arms Length Price (ALP) in respect of import of pigment and import of technical knowhow/consultancy by the Respondent-Assessee from its Associated Enterprises (AE). We shall consider each of them separately.

(I) Pigments :-

(a) The impugned order of the Tribunal held that no Transfer Pricing Adjustment is required to arrive at the ALP in respect of import of pigment. This, inter alia, on the basis that the consideration paid for import of pigments to its AE was less than the normal consideration as evidenced by imposition of antidumping duty on its import of pigment under the Customs Tariff Act, 1975. This anti-dumping duty, the impugned order holds though imposed by order dated 30th November, 2004 was a result of enquiry from period 1st April, 2002 to 30th September, 2003 and thus relevant to determine the ALP.

(b) The only grievance of the Revenue urged before us in respect of the ALP of the imported pigments is that it did not deal with the e-mail dated 27th August, 2002 submitted by the Assessee. This e-mail, according to the Revenue evidences the fact that the Assessee was deliberately following a predatory pricing policy in India with a view to finish local competition. This according to the Revenue will establish that the import of pigments is at a price lessor then ALP. Therefore, the question ought to be admitted for consideration.

(c) We are unable to understand the grievance of the Revenue. Chapter X of the Act provides for computation of income arising from an International Transaction on the basis of the ALP in respect of transactions between AEs. Section 92(3) of the Act, which is part of Chapter X of the Act provides that the Transfer Pricing provisions will not apply where it results in reduction of income chargeable to tax. The result of accepting the Revenue''s contention that the import of pigments is at a price lower than the ALP, would increase the import price of pigments, resulting in a reduction in income chargeable to tax. This is not permitted. Therefore, the reliance upon the e-mail dated 27th August, 2002 submitted by the Assessee establishes a pricing

policy with a view to finish local competition, does not in any manner have any impact on determining the ALP on import of pigment. The finding arrived at by the Tribunal on the basis of imposition of anti- dumping duty by the Customs is not challenged before us. The finding of the Tribunal that no adjustment is called for in the price paid by the Assessee for import of pigments for its AE''s is a finding of fact which is not shown to be perverse and/or arbitrary.

(d) In the above view, question as formulated in respect of import of pigment does not give rise to any substantial question of law. Hence, not entertained.

(II) Technical knowhow/ Consultancy Fee :-

(a) The Respondent-Assessee had entered into an agreement with its AE to provide technical knowhow/ consultancy in 12 fields as indicated therein for a consideration of Rs.1.57 Crores. During the subject Assessment Year, the Respondent-Assessee availed services of its AE during the subject Assessment Year only in three out of twelve fields listed in the agreement. The TPO, therefore, proceeded to hold that the entire consideration of Rs.1.57 Crores is attributable to the three technical services which the Respondent Assessee availed of and held that no consideration was payable in respect of nine services provided for in the agreement. Thus the entire payment of Rs.1.57 Crores was attributable only to the three services availed out of the twelve listed out in the Agreement. It further held that only Rs.40 lakhs could be considered as ALP attributable to three services and made adjustment of Rs.1.17 Crores resulting in its addition to the taxable income. In appeal, the CIT(A) upheld addition of Rs.1.17 Crores made and taxable income consequent to the adjustment made on the account of technical knowhow/ consultancy agreement.

(b) On further appeal, the impugned order of the Tribunal upheld the submission of Respondent-Assessee that in terms of the Agreement, the AE was obliged to provide technical assistance in the 12 areas listed in the Agreement. There was no obligation upon the Respondent-Assessee to obtain technical assistance in all the 12 areas listed in the Agreement . The Respondent-Assessee could ask for assistance in the areas required and the AE was obliged to give it. It is for the availability of the assistance in all twelve areas that the consideration was paid. Thus, no adjustment was required. It further held that the entire Transfer Price Adjustment was done by the Revenue without having been applied any of the methods prescribed under Section 92C of the Act to determine at the ALP.Consequently, the determination of ALP done by the Assessing Officer/ TPO could not be justified. It further recorded the fact that no transfer pricing exercise was done by the Assessing Officer /TPO to determine the value of the services received by the Respondent-Assessee in respect of the three services which it had availed of from its AE before holding that the ALP in this case is Rs. 40 lakhs. This was became no exercise to bench mark it with comparable cases was done. Therefore, the consideration payable for the services availed of by the Respondent- Assessee to determine the ALP was not carried out. In the above view, the Tribunal allowed Respondent-Assessee''s appeal on the above

issue.

(c) The grievance of the Revenue before us is that services only in three areas had been availed of by the Respondent-Assessee from its AE out of the twelve areas listed in the Agreement. Therefore, the consideration paid to the AE is only attributable to the services received/availed.

(d) The finding of the Tribunal that the TPO has not applied any of the method prescribed under Section 92C of the Act to determine the ALP in respect of fees for technical knowhow/consultancy fee paid by the Respondent-Assessee to its AE is not disputed before us. Further, the finding of the Tribunal that even in respect of three fields where Respondent-Assessee had availed the services, no exercise to bench mark the same with similar transactions entered into between independent parties was carried out before holding that the ALP in the three areas availed is Rs.40 lakhs, is not disputed. The finding of the Tribunal that the agreement for technical knowhow / consultancy was in respect of all the twelve services and Respondent-Assessee could avail of all or any one of these twelve areas listed out in the agreement as and when the need arose. We find the Agreement is similar to a retainer agreement. Consequently, the finding of the Assessing Officer attributing nil value to nine of the services listed in the agreement which were not availed of by the Respondent-Assessee in the present facts was not justified. Moreover, not adopting one of the mandatorily prescribed methods to determine the ALP in respect of fees of technical services payable by the Respondent-Assessee to its AE, makes the entire Transfer Pricing Agreement unsustainable in law.

(e) In view of the above, the finding of fact arrived at by the Tribunal that Rs.1.57 Crores paid by it to its AE is in respect of its right to avail and the obligation of the AE to provide technical assistance in any of the twelve services listed out in the technical knowhow agreement entered into between Respondent-Assessee with its AE is not shown to be perverse. The view taken by the Tribunal in the present facts is a possible view.

(f) Accordingly, question as framed for our consideration, does not give rise to any substantial question of law. Thus, not entertained.

4. Re: Question (b):-

(a) The Respondent-Assessee had an the earlier previous year, revalued its assets which resulted in a loss. However, in the previous year relevant to the subject Assessment Year, the amount debited on account of re-valuation to the Profit & Loss Account in the earlier year, was reversed. Consequently, on reversal, the amount was credited to the Profit & Loss Account of the Respondent-Assessee in the previous year relevant to the Assessment Year. The Assessing Officer assessed the amount credited on account of re-valuation of assets as a part of the business income of the Respondent-Assessee. Further, while computing the deduction under Section 80HHC of the Act, the Assessing Officer treated the amount credited to the

Profit & Loss Account on account of re-valuation as falling under Explanation(baa) to Section 80HHC of the Act. Thus by Assessment Order dated 27th March, 2006, 90% of the amount credited to the Profit & Loss Account on account of revaluation was reduced while computing deduction available under 80HHC of the Act.

(b) Being aggrieved, the Respondent-Assessee preferred an appeal to CIT(A). On appeal, the CIT(A) dismissed the Respondent-Assessee''s appeal and upheld the order of the Assessing Officer. On further appeal, the Tribunal by the impugned order noted that the amount credited to the Profit & Loss Account on account of re-valuation did not arise out of any receipt. Further, it held that Explanation (baa) to Section 80HHC of the Act applies only to receipt by way of brokerage, commission, interest, rent charges or any other receipt of a similar nature included in the profits. The amount credited on account of re-valuation of the assets though included in the business income does not fall in the nature of receipts spelled out in Explanation (baa) to Section 80HHC of the Act nor is it a receipt of similar nature. In the above view, the impugned order held that Explanation (baa) to Section 80HHC of the Act cannot be invoked in the case of the amount credited to the Profit & Loss Account on account of re-valuation of the assets. Resultantly, holding that the Respondent-Assessee is entitled to the deduction under Section 80HHC of the Act without reduction of the amount credited to the Profit & Loss Account on re-valuation of assets.

(c) No specific grievance in respect of the above finding of the Tribunal is urged on behalf of the Revenue. We find that the finding recorded by the impugned order of the Tribunal are self- evident on a plain reading of Explanation (baa) to Section 80HHC of the Act.

(d) In the above view, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.

5. Re: Question (c):-

(a) We find that the impugned order of the Tribunal has allowed concurrent deduction under Sections 80HHC and 80IB of the Act. This by following the decision of this Court in **Associated Capsules P. Ltd., v. Deputy Commissioner of Income Tax (2011) 332 ITR 42**.

(b) Mr. Suresh Kumar, learned Counsel appearing for the Revenue does not dispute the fact that this issue is covered by the decision of this Court in Associated Capsules (P) Ltd., (supra). However, he invites our attention to the decision of the Apex Court in **Assistant Commissioner of Income Tax, Bangalore v. Micro Labs Ltd., 380 ITR 1(SC)** - wherein an identical issue as arising in this question has been referred by the Apex Court to a Larger Bench. The decision of the Larger Bench is still awaited. Thus, he requests that this question be admitted for consideration. We see no reason to admit the present question. This for the reasons as the issue stands concluded by the decision of a Co-ordinate bench of this Court in the Associated Capsules P.

Ltd.,(supra) which is binding upon us, as it has not been stayed.

(c) In the above view, the question of law (c) as formulated for our consideration, does not give rise to any substantial question of law. Thus, not entertained.

6. Accordingly, Appeal dismissed. No order as to costs.