



**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"E" BENCH, MUMBAI**  
**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND**  
**SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

ITA no.2087/Mum./2012  
(Assessment Year : 2009-10)

Sandu Pharmaceuticals Ltd.  
Sandu Nagar, D.K. Sandu Marg  
Chembur, Mumbai 400 071  
PAN – AAACS6291G

..... Appellant

v/s

Asstt. Commissioner of Income Tax  
Circle-10(2), Mumbai

..... Respondent

Assessee by : Shri Hiro Rai  
Revenue by : Shri Ritesh Misra

Date of Hearing – 09.03.2016

Date of Order – 23.03.2016

**ORDER**

**PER SAKTIJIT DEY, J.M.**

Aforesaid appeal of the assessee is directed against the order dated 23<sup>rd</sup> January 2012, passed by the learned Commissioner (Appeals)-22, Mumbai, for the assessment year 2009-10. Assessee has raised following grounds:-

*1. The learned Commissioner (Appeals) was not justified in confirming the disallowance of an amount of Rs. 5,84,55,165/- under section 40a(ia) of the I.T Act. The reasons given in this regard both by the learned Assessing*

*Officer and the learned Commissioner of Income Tax (Appeals) are incorrect, unjustified and unwarranted both factually and legally. The findings and conclusions arrived at both by the learned Assessing Officer and the learned Commissioner of Income Tax (Appeals) are based on assumptions, conjectures and surmises.*

*2. The learned Commissioner (Appeals) was not justified in confirming the disallowance of an amount of Rs. 68,485/- u/s 14A.*

*3. The learned Commissioner (Appeals) was not justified in confirming the levy of interests under section 234B and 234C of the Act. The appellant denies its liability in respect of the same."*

2. At the outset, learned Authorised Representative expressed his intention not to press ground no.2. Hence, this ground is dismissed as not pressed.

3. In ground no.1, assessee has challenged disallowance of an amount of ₹ 5,84,55,165, under section 40(a)(ia) of the Income Tax Act, 1961 (for short "*the Act*").

4. Briefly stated the facts are, assessee company is engaged in the business of manufacturing of ayurvedic medicines. For the year under consideration, assessee filed its return of income on 30<sup>th</sup> September 2010, declaring total income of ₹ 63,41,020. In the course of assessment proceedings, Assessing Officer while verifying the Profit & Loss account noticed that on a sales turnover of ₹ 14,25,82,407,

assessee had given discount of ₹ 7,27,13,406. He, therefore, called upon the assessee to furnish the details of discount given. In response to the query raised, it was submitted by the assessee that the discount was given on the purchases effected by its group concern Sandu Brothers Pt. Ltd. (SBPL). When the Assessing Officer called upon the assessee to justify the discount given, it was submitted by the assessee that the said company which is in the business of Ayurvedic medicines for over 100 years, purchases the entire product of assessee for sale. It was submitted as the assessee does not have to incur expenditure by setting-up a sales and distribution network as its entire product is sold to SBPL, therefore, the assessee offers discount of 51% after taking into account the cost of distribution, marketing and selling the products. The Assessing Officer, however, was of the view that major part of the discount is nothing but marketing expenses and commission. Hence, assessee was required to deduct tax in terms of section 194H of the Act. As the assessee had not deducted any tax at source, he called upon the assessee to explain why disallowance under section 40(a)(ia) should not be made. Though, assessee objected to proposed disallowance by submitting that discount given was part of sale transaction, hence, no disallowance under section 40(a)(ia) should be made but the Assessing Officer referring to the schedule wherein

the expenditure of ₹ 7,27,13,406, was shown under the head discount, commissions and claims opined that the expenditure incurred also includes commission. According to the Assessing Officer the amount of ₹ 16,50,200 debited to Profit & Loss account as carriage outwards shows that SBPL is not the sole selling agent but only rendering marketing services. He, therefore, held that out of the 51% claim towards discount only 10% is on account of trade discount and balance 41% represents marketing expenses and commission on which assessee was liable to deduct tax as per the provisions of the Act. Accordingly, he held that as the assessee has not deducted tax at source on an amount of ₹ 5,84,55,165, same is liable for disallowance under section 40(a)(ia). Being aggrieved of such disallowance, assessee preferred appeal before the learned Commissioner (Appeals) who also confirmed the disallowance by upholding the order of the Assessing Officer.

5. Learned Authorised Representative submitted, the transactions between the assessee and SBPL is on principal-to-principal basis and not as principal agent. Referring to the agreement entered with SBPL, learned Authorised Representative submitted, in view of clause 11 of the agreement, there is no scope to infer that there is a relationship of agency between the parties. Further, referring to clause 10(b), learned

Authorised Representative submitted, as per the said clause, once SBPL accepts the samples, then any loss suffered subsequently, will be borne by SBPL and not by the assessee. According to learned Authorised Representative, this specific term in the agreement demonstrate that once sale is effected after certification by SBPL, it is concluded and the assessee has no right over the goods sold and the ownership vests with SBPL. Learned Authorised Representative submitted, only because in the Profit & Loss account the expenditure has been shown under the head "*Discounts, Commissions and Claim*" cannot lead to the presumption that assessee had paid commissions to SBPL. Learned Authorised Representative referring to the provisions of section 194H, submitted to qualify as commission, two conditions have to be satisfied. Firstly, the person to whom payment was made must be acting on behalf of another person for services rendered and secondly such services rendered must be in course of buying or selling of goods or in relation to any transaction relating to any asset valuable article or thing. He submitted, in the context of the aforesaid definition of commission or brokerage as per section 194H, the assessee has not made payment to a person who is acting on behalf of it for rendering services nor SBPL is rendering services in course of buying or selling of goods of the assessee. He submitted, the transaction between the

assessee and SBPL is a direct sale transaction for a consideration. Learned Authorised Representative submitted, though, the assessee had entered into agreement with SBPL since 1997, the Assessing Officer has never made any disallowance under section 40(a)(ia) either in the preceding assessment year or subsequent assessment years in spite of the fact that method of accountancy remains the same. To impress upon this fact, learned Authorised Representative drew our attention to Profit & Loss account for assessment year 2005-06 and 2006-07 and the assessment orders passed under section 143(3) for these assessment years. Learned Authorised Representative submitted, as the assessee has not paid or credited any amount towards commission or marketing expenses during the relevant year to SBPL, the provisions of section 40(a)(ia) would not apply. He further submitted, the second proviso to section 40(a)(ia) also apply to the fact of the assessee's case and by operation of that provision no disallowance under section 40(a)(ia) can be made. In support of his contention, learned Authorised Representative relied upon a number of decisions submitted in a compilation.

6. Learned Departmental Representative relied upon the observations of the Assessing Officer and learned Commissioner (Appeals).

7. We have considered the submissions of the parties and perused the material available on record. We have also applied our mind to the decisions relied upon. The core issue to be decided is whether the discount allowed by the assessee on the MPR to SBPL is the price for selling of goods or in the nature of commission. Before deciding the issue, it needs reiteration that the assessee sells its entire products to SBPL and allows a discount of 51% on the MRP. This fact is evident from the invoices raised by the assessee copy of which has been submitted in the paper book. It is a fact on record that assessee entered into an agreement with SBPL on 1<sup>st</sup> April 1997, for sale of its products. As per clause 1 of the agreement, assessee is to manufacture and process certain Ayurvedic drugs and formulation by utilising the secret formulation given by SBPL and pack them in bulk or in such other pack as may be stipulated or specified by the SBPL to enable them market the same by buying the said products on its account. Clause-11 of the agreement, stipulates that the sale of goods to SBPL are on principal-to-principal basis and none of the parties to the agreement shall hold oneself as agent of other under any circumstances. It further stipulates that SBPL shall sell the products on its own account only and not as an agent or on behalf of the assessee. Clause-10(a) of the agreement provides that assessee shall

manufacture the goods as per the specification of SBPL and if the products are not in accordance with the standard, SBPL shall have the right to reject the products. However, clause 10(b) provides that once SBPL accepts certain products manufactured by the assessee, any loss suffered by SBPL, subsequently, due to handling, transportation or storage shall be borne by SBPL. Thus, on over all consideration of the agreement between the parties, it becomes clear that once certain goods are sold to SBPL after certification by them, ownership of such goods is transferred from the assessee and vests with SBPL. Thus, once the goods are certified by SBPL and sold to THEM the contract of sale concludes as far as assessee is concerned, as goods cannot be returned back to the assessee. Therefore, examined in the aforesaid perspective, it has to be concluded that it is a transaction of sale between the assessee and SBPL on principal-to-principal basis and there is no agency between them. Further, on a perusal of the invoices raised, it is clear that the assessee has given a discount of 51% on MRP of the goods sold. These evidences clearly demonstrate that there is no relationship of principal and agent between the assessee and SBPL. The Departmental Authorities have failed to demonstrate that SBPL was acting as agent on behalf of the assessee to satisfy the condition of section 194H. It is also relevant to note, though, the

agreement with the SBPL is subsisting from the year 1997 and similar trade discount has been given to SBPL on sale effected over the years, the Department has not made any disallowance either in the preceding assessment years or in the subsequent assessment years. This fact is evident from the assessment orders passed for assessment year 2005-06 and 2006-07 under section 143(3) of the Act, copy of which have been placed on record. That being the case, when the Department is following a consistent view by not treating the discount given to be in the nature of commission over the years under identical facts and circumstances, a different approach cannot be taken in the impugned assessment year. Further, on a perusal of the provisions contained in section 40(a)(ia) of the Act, as was existing at the relevant period, it is seen, it refers to any sum payable to a resident. It is the contention of assessee that during the year assessee has not paid any amount towards commission to SBPL nor any amount is credited. We find merit in the aforesaid submissions of the assessee. As could be seen, the assessee has been selling its product to SBPL and on the MRP, it has given trade discount of 51%. In other words, SBPL pays the sale consideration to the assessee at a discounted price. The assessee neither has made any payment to SBPL nor credited any amount towards commission to its account. Therefore, there being no

sum paid or credited in terms of section 40(a)(ia), no disallowance could be made. The decisions relied upon by the assessee also supports the aforesaid conclusion. Accordingly, as there is no element of commission found embedded in the discount of 51%, in our view, no disallowance under section 40(a)(ia) can be made as the Department has failed to establish principal-agent relationship between the assessee and SBPL. Moreover, the Department accepting a part of the discount, though at 10%, in a way has accepted that there is a sale transaction between the assessee and SBPL. Therefore, on over all consideration of facts and circumstances of the case, we are of the view that transaction between the assessee and SBPL being a direct sale transaction on principal-to-principal basis, provisions of section 194H are not applicable, hence, no disallowance under section 40(a)(ia) of the Act can be made. Accordingly, ground no.1, is allowed.

8. Ground no.3, relates to levy of interests under section 234B and 234C of the Act.

9. This ground being consequential, we direct the Assessing Officer to give consequential effect while re-computing the income of the assessee keeping in view our findings given above and in accordance with the provisions of law.

10. In the result, appeal stands partly allowed.

Order pronounced in the open Court on 23.03.2016

**Sd/-**  
**RAMIT KOCHAR**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SAKTIJIT DEY**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 23.03.2016**

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Pradeep J. Chowdhury*  
*Sr. Private Secretary*

True Copy  
By Order

(Dy./Asstt. Registrar)  
ITAT, Mumbai