

**IN THE INCOME TAX APPELLATE TRIBUNAL "L", BENCH MUMBAI
BEFORE SHRI R.C.SHARMA, AM
&
SHRI AMARJIT SINGH, JM**

**ITA No.5557/Mum/2013
(Assessment Year :2005-06)**

ACIT – 6(1), Mumbai	Vs.	M/s. Aarti Drugs Limited Plot No.109, D 3 rd Floor, Mahendra Industrial Estate, Sion (E), Mumbai – 400 022
PAN/GIR No.		AAACA4410D
Appellant)	..	Respondent)

Revenue by	Shri Rajguru M.V.
Revenue by	Shri Vijay Mehta
Date of Hearing	15/02/2017
Date of Pronouncement	28/02/2017

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by the revenue against the order of CIT(A)-14, Mumbai dated 14/06/2013 for the A.Y.2005-06 in the matter of order passed u/s.143(3) of the IT Act.

2. Rival contentions have been heard and record perused.
3. Facts in brief are that the assessment order in this case was passed on 31.12.2007 and the income of the assessee was assessed at Rs.14,26,04,394/-, as against the returned income of Rs.3,67,04,640/-. The assessee went in appeal before the Ld. CIT(A), who decided various issues raised in appeal as per his order dated 29.05.2009. Against the said appellate order, both, the revenue as well as the assessee went in

appeal before Hon'ble ITAT. Hon'ble ITAT have passed their order on 31.03.2011 and have restored these two issues to the file of CIT(A), for passing a reasoned and speaking order after examining all the submissions of the assessee. Briefly summarized, the issues restored to CIT(A) are as under:

1) Disallowance by the AO of additional depreciation u/s 32(iia) at Rs.36,97,797/-.

2) Disallowance of Expenditure in foreign currency u/s 40(a)(i) amounting to Rs.37,25,108/-

4. In the Assessment order, the AO had disallowed the claim of the assessee of additional depreciation of Rs. 36,97,797/- u/s 32(iia). The assessee had claimed additional depreciation for expansion of two of its plants viz. N-198 and K-40 in the computation as per the provisions of section 32(iia) of the Act. The AO observed that additional depreciation on capacity Expansion was allowable if expansion in capacity as on 31.03.2002. In this case, the AO noted that capacity addition in N.198 and K-40 was less than 10% and therefore he did not allow additional depreciation.

4. In the set aside proceedings, CIT(A) deleted the disallowance of additional depreciation after observing as under:-

3.6 I have considered the above submissions of the Appellant as well as the arguments advanced by the Ld. AR. It is seen from the above submissions as well as the documents furnished before the then CIT(A) that in plant N-198, the appellant manufactures five products namely, TNZ, 2MNI, 2MI, IMI and NIMESU. It is also seen that out of these five products, IMI and

2MNI are interchangeable. Therefore, for a particular month, the plant can manufacture higher quantity of 2MNI, in case, a part of the production process is diverted from IMI to 2MNI. In financial year 2003-04 (i.e. in the preceding year), the Appellant had diverted the manufacturing capacity in IMI for 4 months to manufacture 2MNI. It was submitted by the Appellant that for over 1 MT of production capacity that was diverted from IMI, the installed capacity for the product 2MNI increased by 2 MT. The same was verified from the certificate by the chartered engineer submitted by the Appellant.

3.7 Thus, in financial year 2003-04, although the appellant had produced higher amount of its product 2MNI, by diverting the production capacity of IMI for 4 months, in effect, the production capacity in financial year 2003-04 (for these two products) had remained the same. The appellant has therefore compared the capacities in financial year 2003-04 (i.e. the preceding year) and in financial year 2004-05 (i.e. the current year) in the following manner:

S.No.	Product	Capacity as on 31/03/2004	Capacity as on 31/03/2005
1	2 MNI	160*12=1920 MT	160*12 = 1920 MT
2	IMI	20*12=240 MT	20*12=240 MT
	Total	2160 MT	2160 MT
	TNZ	696 MT	720 MT
	NIMESU	180 MT	420 MT
	Total	3036 MT	3300 MT
	Addition		264 MT
	% Addition		**10.90%

This percentage is worked out by the Appellant with reference to production capacity as on 31.03.2002 [as per the explanation (2) below section 32(iia) where installed capacity has been defined.

3.8 The provisions of section 32(iia) of the Act, as were applicable for the relevant year under consideration were as under:

"(iia) in the case of any new machinery or plant (other than ships and aircrafts), which has been acquired and installed after the 31st day of March, 2002, by an assessee engaged in the business of manufacture or production of any article or thing, a further sum equal to fifteen per cent of the actual cost of such machinery or plant shall be allowed to as deduction under clause

Provided that such further reduction of fifteen per cent shall be allowed to

(A) a new industrial undertaking during any previous year in which such undertaking begins to manufacture or produce any article or thing on or after the 1st day of April, 2002; or

(B) any industrial undertaking existing before the 1st day of April, 2002, during any previous year in which it achieves the substantial expansion by the way of increase in installed capacity by not less than ten per cent:

Provided further that .

Provided also that .

Explanation -- For the purposes of this clause, -

(1) , .

(2) 'installed capacity' means the capacity of production as existing on the 31st day of March, 2002:"

3.9 From the above table, the appellant has computed the percentage increase at 10.90%. Hence it is quite evident that the actual increase of 264 MT in the installed capacity amounts to 10.90% [as compared to that on 31/03/2002, which was 2420 MT, in view of the above explanation defining the installed capacity in section 32(iia)]. Therefore, the appellant's argument that it has achieved capacity expansion of more than 10% in plant N-198 is correct. I therefore agree with the appellant that the AO had wrongly disallowed the claim of the additional depreciation of the appellant in respect of for plant N-19S. The disallowance of the claim of additional depreciation made by the AO in respect of plant N-19S is therefore deleted. The AO is directed accordingly.

5. Against the above order of CIT(A), revenue is in further appeal before us.

6. We have considered rival contentions and carefully gone through the orders of the authorities below and found from record that the assessee is a manufacturer of bulk drugs and there were many variations of the

products being manufactured by it. The various products that were being manufactured were using the same processes with some variation in the manufacturing process. The manufacturing process for these products was also inter-changeable. In respect of the plant N-198, the products manufactured are 2 Methyl Nitro Imidazole (2MNI), Imidazole (IMI), 2 Methyl Imidazole (2MI), Tinidazole (TNZ), Nimesulide (Nim). 2 Methyl Imidazole (2MI) is raw material for 2 Methyl Nitro Imidazole (2MNI) and Imidazole (IMI) and 2MNI are interchangeable. The assessee in financial year 2003-04 had diverted the manufacturing capacity in IMI for 4 months to manufacture 2 MNI. We found that for over 1 MT of production capacity that was diverted from IMI, the installed capacity for the product 2 MNI increased by 2 MT. Accordingly the adjusted capacity in F. Y.2003-04 was 3036 MT.

7. After recording detailed finding at para 3.6 to 3.10, the CIT(A) reached to the conclusion that there is an increase in installed capacity by 10.90% which is worked out on the basis of production capacity as on 31/03/2002, which is in terms of expansion to u/s.32 (ii)(a).

8. On the basis of various facts and figures, we found that assessee has achieved capacity expansion of more than 10% in plant N-198. The finding so recorded by CIT(A) has not been controverted by DR by bringing any positive material on record. Accordingly, we do not find any reason to interfere in the same.

9. With regard to disallowance of expenditure in foreign currency u/s.40a(i) amounting to Rs.37,25,108/- we found that the assessee had

shown foreign currency expenditure under the head "other" which related to advertisement sample charges, professional fees on account of FCCS, freight/ demurrages, subscription of magazine, market survey etc, which as per the assessee was incurred in the normal course of business. The AO observed that the assessee had not deducted TDS under section 40(a)(i) and the claim was also not supported by documentary evidence. He therefore disallowed the claim .

10. By the impugned order CIT(A) deleted the disallowance in respect of payment in the nature of fee for technical service, business income, reimbursement of freight charges and independent personnel services after observing as under:-

4.5 I have considered the submissions filed by the Appellant. The argument of the Appellant that the payments made are such that no TDS is deductible under section 9 of the Income Tax Act, 1961 is not acceptable due to the retrospective amendment of Explanation 1 to Section 9(2) by Finance Act 2010. All the payments made to non-residents irrespective of the fact that the non-resident has not rendered the services in India. Explanation 1 to Section 9(2) is as under:

Explanation- For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and shall be included in the total income of the non-resident, whether or (i) the non-resident has a residence or place of business or business connection in India; or (ii) the non-resident has rendered services in India.

4.6 Now I take up taxability of each payment. The appellant has made 5 payments which are in the nature of 'fees for technical services'. The payments covered in this regard are with respect to processing and agency services; soliciting and other services; and for obtaining Certificate of Suitability (COS). Firstly considering the nature of payment, it is seen that such payments have been made to the non-residents in

Singapore and United Kingdom and the same are in the nature of 'fees for technical services' as per the Act. Referring to the DTAA, the wordings of the relevant Article in DTAA i.e. Article 12 in case of Singapore and Article 13 in case of United Kingdom are as under:

"4. The term "fees for technical services" as used in this Article means payments of any kind to any person in consideration for services of a managerial, technical or consultancy nature (including the provision of such services through technical or other personnel) if such services:

(a) are ancillary and subsidiary to the application or enjoyment of the right, property or information for which a payment described in paragraph 3 is received; or

(b) make available or processes, which enables the person acquiring the services to apply the technology contained therein ; or

(c) consist of the development and transfer of a technical plan or technical design, but excludes any service that does not enable the person acquiring the service to apply the technology contained therein."

4.7 Thus the services should make available technical knowledge, experience, skill, know how or processes. In the instant case the Appellant has contended that services do not make available any technical knowledge, experience, skill, know how or processes as would enable him to carry out on his own, same services which have been rendered by the payee. Hence, the payment does not get covered under Fees for technical services as per the relevant Article of DTAA. The Appellant has also relied on the following case laws where it has been held that if the services rendered do not make available any technical knowledge, experience, skill, know how or processes to the Appellant then the same are not 'fees for technical services'.

- *CIT vs. De Beers India Minerals Pvt Ltd 346 ITR 467 (Kar HC)*
- *DIT vs. Guy Carpenter & Co Ltd 346 ITR 504 (Del HC)*
- *Mckinsey & Co., Inc. (Phillippines) & Ors. 99 ITD 549 (Mum ITAT)*
- *Raymond Limited Vs. Deputy CIT 80 TT J 120 (Mum ITAT)*
- *National Organic Chemical Industries Ltd. 96 TT J 765 (Mum ITAT)*
- *Intertek Testing Services India (P) Ltd., In Re 307 ITR 448 (AAR)*

4.8 I agree with the appellant that the payments made by the appellant are for such services which do not make available any knowledge, experience, skill, knowhow etc. Hence the same are not liable to TDS as per DTAA.

11. We have considered rival contentions and found that assessee has made five payments which are in the nature of fee for technical services. Payment was in the nature of processing and agency services, soliciting and other services and for obtaining certificate of suitability. This payment was made to the non-residents of Singapore and UK and the same are in the nature of technical services. After considering the wordings of relevant Article-12 in DTAA of Singapore and Article-13 incase of DTAA with United Kingdom, the CIT(A) recorded finding to the effect that these survices do not make available any technical knowledge, experience, skill knowhow or processes as would enable the assessee to carry on his own same services which have been rendered by the payee. Thus these payments does not get covered under fee for technical services as per relevant DTAA. After applying various judicial pronouncements as referred at para 4.7, the CIT(A) observed that the payments made by assessee are of such services which do not make available the knowledge, experience, skill etc., Hence, the same are not liable to TDS as per DTAA. The finding so recorded by CIT(A) are as per material on record and which has also not been controverted by DR. Accordingly, we do not find any reason to interfere in the finding so recorded by CIT(A) with regard to the nature of technical services so rendered to the assessee.

13. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open court on this 28/02/2017

**Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER**

**Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER**

Mumbai; Dated 28/02/2017

Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)

ITAT, Mumbai