

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH: KOLKATA
[Before Shri P. M. Jagtap, AM & Shri K. Narasimha Chary, JM]

I.T.A No. 775/Kol/2015
Assessment Year: 2009-10

Britannia Industries Ltd.
(PAN: AABCB2066P)
(Appellant)

Vs. Deputy Commissioner of Income-tax
Circle-7(1), Kolkata.
(Respondent)

Date of hearing: 20.09.2016

Date of pronouncement: 28.10.2016

For the Appellant: Shri D. S. Damle, FCA

For the Respondent: Shri R. S. Biswas, CIT

ORDER

Per Shri K. Narasimha Chary, JM:

This appeal by assessee is arising out of revision order of CIT, Kolkata-3 passed u/s. 263 of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) vide No. CIT-3/Kol/263/2014-15/6652-54 dated 27/30.03.2015. Assessment was framed by JCIT, Range-7, Kolkata u/s. 143(3) of Act for AY 2009-10 vide his order dated 26.03.2013.

2. Brief facts of the case are that the assessee company i.e. Britannia Industries Ltd. is a leading manufacturer of bakery products. In the year 1997, it launched a new biscuit in the glucose segment under the name and style of ‘TIGER’ and it became popular within a short time. The assessee obtained trade mark in India in the brand name and logo of ‘TIGER’ in the FY 1997-98. One M/s. Group Danone, a French Multinational group with its subsidiaries M/s. Generale Biscuit, French and M/s. Danone Asia pte. Ltd., (in short Group Danone) Singapore were also engaged in the business of dairy products, bakery and confectionery products, bottled water etc. In 1989, M/s. Generale Biscuit, which is a subsidiary of Group Danone applied for trade mark registration of ‘TIGER’ logo and brand in the confectionery and bakery products at Singapore and got it registered in 2003 in the name of Generale Biscuits. However, even from 2000 onwards, Group Danone began using ‘TIGER’ logo at Indonesia, Pakistan, Malaysia and Egypt without the knowledge of the assessee. While the matter stood thus, in the year 2005, the assessee thought of expanding its business in Southeast and Middle East Asia as such, they have applied for registration of ‘TIGER’ brand. At that time they came to know that Group Danone is registered ‘TIGER’

brand in Singapore. Being aggrieved by such an act of Group Danone, the assessee filed a suit against Generale Biscuits and Danone Singapore Pte. Ltd. subsidiaries of Group Danone, in the High Court of Republic of Singapore and requested the court to pass an injunction or preventing them from using the 'TIGER' brand. Assessee also prayed for cancellation of aforesaid registered trade mark. During the pendency of such litigation before the Courts of Singapore and Malaysia, Group Danone approached the assessee with a proposal of settlement. Discussions and deliberations resulted in a settlement dated 14.04.2009 reached between the parties whereunder Group Danone agreed to pay 3.5 million Euro (equivalent to Rs.22.79 cr.) received by the assessee on 20.04.2009.

3. The assessee claimed this amount as capital receipt in its return of income and pleaded that income as not chargeable to tax in India since it is in the nature of casual, windfall and voluntary, and at any rate it has not arisen out of any regular business activity. However, the AO did not agree with the assessee but he took the view that since the assessee filed a suit against the infringement of the 'TIGER' logo and in the process of settlement thereof received a payment as such, such payment could directly be attached to capital asset owned by the assessee and the assessee has given up its right to claim damages and Group Danone also transferred the right in trade mark 'TIGER' logo back to the assessee. On this premise, the AO held that there is transfer of capital asset within the meaning of section 2(47) read with the provisions of section 45 of the Act and the payment is taxable under the head capital gains.

4. While the matter stood thus, the CIT invoked section 263 of the Act and by way of his order dated 27.03.2015 he directed the AO to revise his assessment order holding that the AO wrongly assumed the facts as transfer of capital asset which is incorrect inasmuch as the assessee never had any trade mark right in Southeast Asia and transfer of capital asset does not arise. According to the CIT, the agreement that was entered into between the assessee and M/s. Group Danone is in the nature of non-compete agreement, not to launch the biscuit products under the trade mark 'TIGER' in Singapore and Malaysia and the amount that was received by the assessee was towards loss of profits on account of the assessee company's inability to launch its products in Singapore and Malaysia. According to the CIT, it is only because the assessee withdrew its right to expand business in

Singapore and Malaysia, and consequently incurred loss of future profit, which they could have otherwise arranged, the compensation was paid. According to him, for all practical purposes such payment was business income. In his order passed u/s. 263 of the Act, the Ld. CIT observed that the omission of the AO to take notice of this vital factual aspect and then to apply the law made the assessment order erroneous and prejudicial to the interest of revenue as such, he is justified to order the AO for fresh assessment after examining all the aspects of the facts and law applicable thereto.

5. Aggrieved by this order of Ld. CIT, assessee is now in appeal before us on the following grounds:

“1) For that on the facts and in the circumstances of the case, the CIT erred in revising the order u/s 143(3) dated 26.03.2013 passed by the Jt.CIT, Range-7 for the AY 2009-10 even though the assessment order was not erroneous causing prejudice to the interest of the Revenue and in that view of the matter the order of the CIT u/s 263 dated 27.03.2015 be cancelled.

2) For that on the facts and in the circumstances of the case, the CIT erred in setting aside the assessment and directing the AO to pass a fresh order of assessment even though in the show cause notice the assessment order was considered as erroneous only for a specific issue and in that view of the matter it was beyond CIT's jurisdiction to set aside the entire assessment; directing the AO to pass an order afresh.

3) For that on the facts and in the circumstances of the case, the CIT erroneously invoked his revisionary jurisdiction in exercise of supervisory powers even though in the assessment order the AO had examined at length the issue of taxability of the sum of Rs.22.79 crs which the assessee received under the Settlement Agreement and thereafter the AO having adopted one of the permissible course in law; the CIT was legally unjustified in invoking revisionary jurisdiction u/ s 263 of the Act.

4) For that on the facts and in the circumstances of the case, the CIT based on erroneous inferences; held that the compensation received by the assessee from Group Danone was chargeable as business income and not "capital gains" and in that view of the matter erred in setting aside the assessment vi] s 263 of the Act.

5) For that on the facts and in the circumstances of the case, the order of assessment which was erroneous but prejudicial to the interest of the assessee the CIT was not justified in invoking the revisionary jurisdiction u/s 263 of the Act and thereby setting aside the entire assessment.

6) For that on the facts and in the circumstances of the case, the CIT erred in setting aside the assessment on the grounds which were different from the grounds set out in the show cause notice and in that view of the matter the order u/s 263 suffered from infirmities and deserves to be cancelled.

7) For that on the facts and in the circumstances of the case, the order passed by the CIT u/s 263 dated 27.03.2015 be cancelled.”

6. It is the argument of the Ld. AR that from the facts of the case at least three perspectives are forthcoming viz., perspective of capital receipt propounded by the assessee, perspective of capital gain by the AO and the perspective of business income proposed by the CIT. Ld. AR submitted that the AO made in depth enquiry during the assessment proceeding on the aspect of the chargeability of this particular income of Rs.22.79 cr. and after considering so many aspects expressed one of the probable views that income is chargeable under the head capital gains and such proceedings are pending before the Id. CIT(A). According to him, when more than one view is possible and the AO has taken one of such possible view, it is not open for the CIT to invoke jurisdiction u/s. 263 of the Act only to superimpose his opinion on an otherwise legal opinion of the AO which was also quite probable having regard to the facts and circumstances of the case. Mere erroneous order or orders prejudicial to the interest of revenue alone are not sufficient to empower the CIT to invoke the provisions of section 263 of the Act inasmuch as such orders have to be invoked only when the AO has taken an apparent improbable view with relation to the facts and circumstances surrounding the case. For these reasons, he prayed to quash the order of CIT passed u/s. 263 of the Act.

7. Per contra, the argument of Ld. DR is that in this matter when the assessee does not have any trade mark at all in Singapore and Malaysia, transfer of such trade mark does not arise at all and to that extent the view taken by the AO is patently wrong, apparent on the face of record as such, the Ld. CIT is justified in invoking the provisions of section 263 of the Act. According to him, in this matter the AO failed in his duty to complete the assessment with proper enquiry and diligence. Arguing so, the Ld. DR heavily relied on the order of CIT.

8. In these facts and circumstances of the case the point that arises for our consideration is whether the CIT is justified in directing the AO to do fresh assessment after examining all the aspects of facts and law by invoking the provisions of section 263 of the Act.

9. We have heard rival submissions and carefully examined the record in the light of the submissions made by both the sides. Learned CIT in his order observed that the agreement that was entered into between the assessee and M/s. Group Danone is in the nature of non-compete agreement, not to launch the biscuit products under the trade mark 'TIGER' in

Singapore and Malaysia and the amount that was received by the assessee was towards loss of profits on account of the assessee company's inability to launch its products in Singapore and Malaysia, it is only because the assessee withdrew its right to expand business in Singapore and Malaysia, and consequently incurred loss of future profit, which they could have otherwise arranged, the compensation was paid. In his attempt to refute these observations of learned CIT, Ld. AR brought to our notice the terms of settlement dated 14.04.2009 between the assessee and Group Danone SA. Under clause 5 and 6 of this agreement both the parties agreed to resolve the dispute on the terms set out in schedule 2 thereof and the parties thereafter will not bring any claims against each other in this respect. Vide clause 7 (b) and (c) thereof, the parties agreed that the assessee agreed that they shall not have any objection for the other party investing or participating by any means in any entity in India engaged in any activity whatsoever but not limited to the same field as any business of BIL etc., and if any time thereafter any notice was served by Group Danone and affiliates on the assessee requiring any certification or confirmation, within three weeks thereof the assessee will issue such certification of confirmation. Clauses 4 and 11 of schedule 2, the terms of agreement thereof read as follows:

"4. For the avoidance of doubt the release and payment referred to above:

(a) is without any admission by Danone, its Affiliates or the Danone Individuals that the Claims made in the IP Proceedings or raised in the IP Disputes are valid;

(b) is without prejudice to the rights of the Kraft Parties in respect of the intellectual property registered in the name of Generale Biscuit and the other intellectual property which is the subject of the IP Proceedings;

(c) does not release any Claim by BIL against the Kraft Parties or their Affiliates except as set out in paragraph 1(c) above (the Kraft Damages Claims);

(d) (in respect of the period commencing 1 December 2007), is without prejudice to BIL's right to

(i) continue and/or initiate any proceedings in any court in respect of infringements of its intellectual property rights against the Kraft Parties or their Affiliates other than the Kraft Damages Claims (including claims for an injunction or other remedies requiring the Kraft Parties to cease such infringements or to claim damages for such infringements); and

(ii) continue the IP Proceedings (other than in respect of the Kraft Damages Claims) and proceedings before the Trade Marks Registry in Malaysia and to bring proceedings against the Kraft Parties or their Affiliates in other countries including in Indonesia, Pakistan and Egypt; but

(e) does extend to any former officer or employee of Generale Biscuit or Kraft Foods Pte. Ltd. who was or is an officer or employee of Danone or any of their Affiliates."

11. *Notwithstanding any possible application of the provisions of paragraph 10 above,*

(a) BIL and its Affiliates may use the BIL Tiger Logo in any country and Danone and its Affiliates will not take any steps to prevent the registration or use thereof.

(b) BIL and its Affiliates shall be permitted to use the word "tiger" or any mnemonic depicting a tiger without restriction anywhere in the world and Danone and its Affiliates will not take any steps to prevent the registration or use thereof, provided that save as provided in (a) above, neither BIL nor its Affiliates are hereby permitted to use any logo or mark similar to or likely to be confused with any Danone mark or logo."

10. A reading of the above agreement and the terms set out in schedule 2 indicates that at any point of time the Group Danone neither conceded the claims made by the assessee nor admitted to have infringed the trade mark rights of the assessee. At the same time, the assessee did not surrender or part with any part of their rights in respect of the trade mark either in brand name or in logo in favour of either Danone or its affiliates. On the other hand, the settlement was reached neither of the parties relinquishing their claims put forth before the adjudicatory forums. In other words, neither Danone admitted to have committed any breach of trade mark of the assessee nor the assessee agreed to forego any of its rights in respect of the brand name and logo of 'TIGER'.

11. Taking strength from this factual position, Learned AR submitted it cannot be stated that either of the parties has given any concession to the other in consideration of which such payment was made by Danone to the assessee and only as a consideration for the assessee to give up their right to sue the Danone paid this amount. He further submitted that when the matter was argued before the Assessing Officer basing on facts and law, the Assessing Officer considered all these factors and has reached a view that the income in dispute is chargeable under the head "Capital Gains". Placing reliance on a decision of a Coordinate bench of Hyderabad Tribunal in *Orient Blackswan (P) Ltd. Vs. ACIT (2016) 71 Taxmann.com 319* wherein under similar circumstances the question arose as to whether the compensation received under compromise in respect of putting an end to litigation and neither of the party precluded from using the trade mark then such a compensation cannot be treated as business income, he submitted that the view taken by the CIT also is equally lopsided.

12. Now coming to the proceedings before the Assessing Officer, we find from the Paper book that Page No. 46 thereof is the letter dated 05.12.2012 where under the AO sought some information from the assessee and such information includes the following question also:

“What is the nature of capital receipt towards the settlement of litigation of Rs.22.79 cr. during the financial year? Also furnish the details, names and addresses of the parties with whom such transactions were made.”

13. To this query the assessee submitted an elaborate reply which is incorporated in page nos. 50 to 62 of the paper book. In this reply, the assessee set-forth the background of the matter vide Page nos. 50 to 53, reasons for their request to treat it as capital receipt in page nos. 54 to 55, the reasons for their objection to treat it as business income in page nos. 56 to 58 and the reasons not to consider the same as capital gain in page no. 59 to 62. AO in his order vide page nos. 7 to 10 elaborately discussed the contentions raised by the assessee and while brushing aside their submissions in respect of the capital receipt and business income AO preferred to take the view that such an amount is to be taxed under the head capital gain. It could be seen from the submissions of the assessee before the AO, the assessee placed reliance on so many decisions in respect of their contentions to object the treatment of the amount either as business income or as capital gain. Having considered all these facts and also the law laid down in such decisions, the AO consciously reached a conclusion that the income is to be treated as capital gain but not as either capital receipt or business income. This is one of the probable views that could have validly be taken. By no stretch of imagination could it be said that the AO mechanically passed this order taking the view that the income has to be charged as capital gain. The AO made enquiries, called for details of such income and having considered the submissions of the assessee in respect of all the three probable views i.e. capital receipt, business income and capital gain, the AO for the reasons recorded in his order at page nos. 7 to 10, came to the conclusion that the income in dispute has to be charged as capital gain but not as capital receipt or business income. In this factual context, we are called upon to examine the question whether the CIT is justified in terming the order of AO as erroneous and without proper enquiry or on wrong assumption of the facts.

14. Since at this stage we are not concerned with the legality or otherwise of the order of the Assessing Officer, we are not inclined to delve deeper into that aspect canvassed by the learned AR basing on the following citations:

- 1) *DCIT Vs. M/s. Azimganj Estates Pvt. Ltd. in ITA No. 735/Kol/2012 dated 05.09.2014*
- 2) *authority For Advance Rulings (Income-Tax), New Delhi, Lead counsel of Qualified Settlement Fund (QSF) reported in (2016) 65 Taxmann.com 197*
- 3) *Aberdeen Claims Administration Inc. reported in 381 ITR 55 (AAR)*
- 4) *Satyam Food Specialities P. Ltd. Vs. DCIT 57 Taxmann.com 194 (Jaipur).*

Suffice for us to say that it is only the facts and circumstances of the case that shall decide which one of the three views amongst capital receipt, capital gain or business income is correct and the AO has elaborately considered all these three aspects before reaching one of the probable view that this particular income of the assessee has to be charged under the head capital gains but not otherwise.

15. In JMC Projects (India) Ltd. Vs. Pr. CIT, central (2016) 67 Taxmann.com 258 (Gujarat), Hon'ble Gujarat High Court held that the power u/s. 263 of the Act cannot be exercised when though addition has been made on the footing or the premise which are not to the satisfaction of the Commissioner to make additions on better premise with better reasoning or on different application of legal principles.

16. For these reasons, we are of the firm conclusion that the Assessment Order is not the result of non application of mind or wrong assumption of facts or without any proper enquiry. And it, therefore, follows that assumption of jurisdiction u/s. 263 of the Act by the Ld. CIT is unwarranted and the order cannot be sustained. We, therefore, quash the same. Appeal of assessee is allowed.

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

Order is pronounced in the open court on 28.10.2016.

Sd/-

(P. M. Jagtap)
Accountant Member

Sd/-

(K. Narasimha Chary)
Judicial Member

Dated : 28th October, 2016

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. APPELLANT – Britannia Industries Ltd., 5/1A, Hungerford Street,
Kolkata-700 017
2. Respondent –DCIT, Circle-7(1), Kolkata.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy,

By order,

Asstt. Registrar.