



IN THE INCOME TAX APPELLATE TRIBUNAL
"H" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI N.K. PRADHAN, ACCOUNTANT MEMBER

ITA no.4179/Mum./2013
(Assessment Year : 1985-86)

Hindustan Unilever Ltd.
(Formerly Hindustan Lever Ltd.)
Unilever House, B.D. Sawant Marg
Chakala, Mumbai 400 099
PAN - AAACH1004N

..... Appellant

v/s

Dy. Commissioner of Income Tax
Special Range-2, Mumbai

..... Respondent

Assessee by : Shri Percy Pardiwala a/w
Ms. Jasmine Amalsadwala
Revenue by : Shri M.C. Omi Ningshen

Date of Hearing - 30.01.2018

Date of Order - 26.02.2018

ORDER

PER SAKTIJIT DEY, J.M.

Aforesaid appeal at the instance of the assessee is directed against the order dated 15th March 2013, passed by the learned Commissioner (Appeals)-4, Mumbai, for the assessment year 1985-86.

2. The only disputed issue in the present appeal relates to addition of an amount of ₹ 2,56,39,000, claimed as deduction by the assessee on account of payment of service charges.

3. Brief facts are, the assessee company filed its return of income for the impugned assessment year on 22nd November 1985, declaring total income of ₹ 36,64,31,940. While completing the assessment under section 143(3) originally vide order dated 31st December 1984, the Assessing Officer made various additions / disallowances, inter-alia, on account of disallowance of purchase of 738 MTs of split palm kernel fatty acid from Golden Tobacco Co. Ltd. and payment of bogus service charges of ₹ 2,56,39,000, towards purchase of split palm kernel fatty acid. Being aggrieved of the additions / disallowance made by the Assessing Officer, assessee preferred appeal before the first appellate authority.

4. The learned Commissioner (Appeals) after considering the submissions of the assessee, deleted some of the additions made by the Assessing Officer while restoring some of the issues for fresh consideration of the Assessing Officer. As regards the issue of purchase of split palm kernel fatty acid and payment of service charges, the learned Commissioner (Appeals) restored the issue to the Assessing Officer to examine all the details furnished by the assessee. He also directed the Assessing Officer to examine Golden Tobacco Co. Ltd., and allow the assessee adequate opportunity to cross-examine the witnesses whose statements were relied upon by the Assessing Officer while making the additions in the original assessment. In

pursuance to the aforesaid direction of the learned Commissioner (Appeals), the Assessing Officer took up the assessment proceeding afresh and called for necessary information / details from the assessee with regard to the disputed issues. After considering the submissions of the assessee and examining the evidences on record, the Assessing Officer accepted the purchases of palm kernel fatty acid effected by the assessee as genuine. However, so far as payment of service charges to various parties towards payment of palm kernel fatty acid is concerned, the Assessing Officer disallowed the payment on the reasoning that the assessee failed to furnish conclusive evidence to establish that services were actually rendered, to justify the payment of service charges. The Assessing Officer observed, the payment claimed to have been made by the assessee were not incurred wholly and exclusively for the purpose of business and were motivated by extra commercial consideration. Accordingly, he disallowed payment of service charges of ₹ 2,56,39,000. Being aggrieved of such disallowance assessee preferred appeal before the first appellate authority.

5. The learned Commissioner (Appeals) after considering the submissions of the assessee found them to be without any merit. He agreed with the Assessing Officer that the assessee has not furnished any evidence to establish that services were rendered by the parties to whom service charges were paid. He observed, even the assessee was

unable to show whether any such services were required or necessary. The learned Commissioner (Appeals) observed, when the parties to whom service charges were paid are into totally different kind of business activity and not equipped for rendering services in respect of goods / commodities in which they are not dealing where is the necessity of paying service charges. The learned Commissioner (Appeals) observed, the assessee failed to establish the fact that there was any compulsion on the assessee to enter into a contract for purchase of oil along with contract for service charges. He also observed that the assessee failed to establish with conclusive evidence that due to shortage of soap making oil in Indian market and non-availability of local substitute at cheaper rate assessee had to buy imported oil. Thus, on the aforesaid basis, the learned Commissioner (Appeals) ultimately upheld the disallowance made by the A.O.

6. Learned Authorised Representative drawing our attention to the observations of the first appellate authority while restoring the issue relating to purchase of oil and payment of service charges to the Assessing Officer submitted that the learned Commissioner (Appeals) had specifically directed the Assessing Officer to examine all the evidences furnished by the assessee and further to allow the assessee to cross-examine the witnesses whose statements were relied upon. He submitted, while completing the impugned assessment the

Assessing Officer has failed to comply to the directions of the learned Commissioner (Appeals) as no opportunity was allowed to the assessee to cross-examine the witnesses whose statements were relied upon to conclude that the payment of service charges are not for the purpose of business. Learned Authorised Representative submitted, the necessity and requirement of purchasing the split palm kernel fatty acid (palm oil) was explained in detail both before the Assessing Officer and the first appellate authority. He submitted, during the year 1983-84, the Government has imposed ban on import of tallow which was used by soap manufacture for manufacturing of soaps. Due to ban on import of tallow there was increase in demand of oils / fatty acids. Since, production of indigenous oil was not adequate to meet the demand there was substantial increase in oil price. The coconut oil price moved up from ₹ 20,000 PMT in June 1983 to about ₹ 37,500 PMT in June 1984. It was submitted, as there were import restrictions Indian traders having import license started importing soap oil / fatty acid against their license and started selling directly or through agents to soap manufacturers. He submitted, due to the prevailing market conditions and considering the fact that the traders having import license have cornered the imported oil / fatty acid which were available at a cheaper rate they decided to sell the oil to soap manufacturers at their own terms. Therefore, the soap manufacturers

had no option but to accept the terms offered by the sellers reason being, total cost of imported oil was less than the price of their local substitutes and secondly, in the absence of such oil manufacturing activity could not have been carried out. He submitted, in the contract entered with the importers of oil, therefore, included payment of service charges to the intermediaries. He submitted, since even after payment of service charges the total cost of imported oil was lower than the price payable for substitute oil available locally, the manufacturers found the imported oils to be commercially viable, hence, went ahead with the deal by paying service charges. The learned Authorised Representative submitted, the payment of service charges was not on stand alone basis by the assessee. He submitted, all other soap manufacturers in the country also had to buy imported oil / fatty acid on payment of service charges. In this context, he drew our attention to the invoices raised to indicate the prevailing market rate of palm kernel fatty acid even after payment of service charge. Learned Authorised Representative submitted, in the course of assessment proceeding the assessee had furnished the contracts with the parties from whom the assessee purchased palm kernel fatty acid / oil and also furnished confirmation not only from the concerned seller but also from the intermediaries to whom service charges were paid. The learned Authorised Representative submitted, when the Assessing

Officer has accepted the purchase of palm kernel fatty acid effected by the assessee to be genuine, there is no reason why the payment of service charges should be disallowed as they were part of the same contract. In this context, the learned Authorised Representative drew our attention to the sample copies of contract entered with the parties to whom service charges were paid. He submitted, the perusal of the contract clearly reveal that the services in fact were rendered by the concerned parties. To impress upon the fact that service charges were paid towards services actually rendered by the intermediaries learned Authorised Representative relied upon various documentary evidences such as contract with the intermediaries, confirmations issued by the parties receiving service charges, debit notes. Learned Authorised Representative submitted, during the relevant period due to acute shortage of imported oil / fatty acid, there was market practice of paying service charges and which was paid by all manufacturers. Learned Authorised Representative submitted, when the assessee incurs certain expenditures for the purpose of its business, the department cannot question the necessity of incurring such expenditures. In this regard, he relied upon the decision of the Hon'ble Supreme Court in *Sasson J. David and Co. P. Ltd. v/s CIT*, [1979] 118 ITR 261 (SC). The learned Authorised Representative submitted, considering the fact that the assessee would not have been able to

carry on its manufacturing activity in the absence of the imported fatty acids / oil, the Departmental Authorities have wrongly concluded that payment of service charges was not for business purpose. He submitted, when the assessee did not have the import license for purchase of fatty acid / oil and has to depend upon other traders / suppliers who had the license to import, the assessee had no other option but to depend upon them for supply of oil to continue its manufacturing activity. That being the case, the decision taken by the assessee as a prudent businessman cannot be called into question. More so, when the Assessing Officer has accepted the sales of fatty acids / oil to be genuine. Learned Authorised Representative submitted, in spite of specific directions of the learned Commissioner (Appeals), the Assessing Officer did not allow cross-examine of the witness whose statements were relied upon to make the disallowance of service charges. Therefore, he submitted, the addition made on the basis of statements without allowing the assessee to cross-examine invalidates the assessment order, therefore, the addition has to be deleted. In support of his contention, the learned Authorised Representative relied upon the following decisions:-

- i) *Mather & Platt (India) Ltd. v/s CIT, [1987] 168 ITR 493;*
- ii) *CIT v/s Contimeters Electricals Pvt. Ltd., [2010] 2 taxmann.com 302; and*
- iii) *CIT v/s Printers House Pvt. Ltd., [2010] 188 taxman 70 (Del.).*

7. Learned Departmental Representative strongly relying upon the observations of the Assessing Officer and the learned Commissioner (Appeals) submitted that neither during the original assessment proceeding nor during the set aside proceedings, the assessee produced any conclusive evidence to establish the fact that services were rendered by the concerned parties to whom service charges were paid. He submitted, when is no role was played by the intermediaries in the import of oil and their sale to the assessee, there is no necessity of paying service charges. Learned Departmental Representative submitted, the payment claimed as deduction can only be allowed if it is incurred exclusively and wholly for the purpose of business. He submitted, when the assessee has purchased the fatty acid / oil directly from the parties where is the necessity to pay service charges to intermediaries in the absence of any service rendered. He submitted, the assessee having failed to establish the necessity and business expediency of paying the service charges the deduction claimed was rightly disallowed.

8. We have heard rival submissions and perused material on record. We have also applied our mind to the decisions relied upon. Before proceeding to decide the disputed issue relating to allowability or otherwise of the service charges paid to different persons on purchase of oil it is necessary to deal with certain factual aspects which in our

opinion are relevant for deciding the issue in dispute. Undisputedly, in the relevant assessment year, the assessee had claimed deduction on account of purchase of imported palm kernel fatty acid and payment of service charges relating to such purchase totalling to ₹ 4.81 crore. The purchase of palm kernel fatty acid was claimed to have been made from various parties including Golden Tobacco Co. Ltd. In the course of the original assessment proceeding, the Assessing Officer on the basis of material gathered in survey conducted in the case of Golden Tobacco Co. Ltd., as well as on the assessee and relying upon statements recorded from third parties concluded that purchase of palm oil claimed to have been made from Golden Tobacco Co. Ltd. was not genuine. Accordingly, he disallowed the purchases of 738 MTs of palm kernel fatty acid worth ₹ 90,73,809 and 287.840 MTs worth ₹ 74,59,508 as bogus. While doing so, he also disallowed service charges amounting to ₹ 2,56,39,000 claimed to have been paid to third parties towards services rendered for purchase of imported palm kernel fatty acid. In the proceedings before the first appellate authority the assessee contested the disallowance / addition made by the Assessing Officer on account of purchase of palm kernel fatty acid and payment of service charges. The learned Commissioner (Appeals) after considering the submissions of the assessee having found that certain vital information filed before him could not be produced during

the assessment proceeding restored back the issue to the Assessing Officer for deciding afresh after examining all the details furnished by the assessee. Further, the learned Commissioner (Appeals) directed the Assessing Officer to examine Golden Tobacco Co. Ltd. and allow the assessee to cross-examine the witnesses whose statements were relied upon to make the disallowance / addition. It is relevant to observe in the assessment proceeding, conducted in pursuance to direction of the first appellate authority, the Assessing Officer has accepted the purchases of 738 MTs and 287.840 MTs of palm kernel fatty acid to be genuine, hence, deleted the additions of ₹ 90,73,809 and ₹ 74,59,508 made in the original assessment order though of-course he raised some doubt with regard to the authenticity of assessee's claim that the material was purchased from Golden Tobacco Co. Ltd. However, the Assessing Officer disallowed payment of service charges amounting to ₹ 2,56,39,000 more or less on the basis of reasoning of the Assessing Officer while making similar disallowance in the original assessment order. While doing so, the Assessing Officer has stated that the assessee could not produce any evidence to establish the fact that services were actually rendered by the concerned parties and secondly, the assessee was unable to prove that such expenditures were wholly and exclusively for the purpose of business. The learned Commissioner (Appeals) also sustained the

disallowance on service charges by accepting the reasoning of the Assessing Officer.

Thus, in the aforesaid factual back-drop it has to be examined whether the service charges paid by the assessee were incurred wholly and exclusively for the purpose of business, hence, were allowable expenditure. It is evident from the factual discussion made earlier that assessee's claim that purchase of imported palm kernel fatty acid through traders holding import license was made due to shortage of locally available substitute at a higher price is correct. The aforesaid fact has not been disputed by the Department. The Department has also not disputed the fact that the price paid by the assessee for purchase of imported palm kernel fatty acid is at arm's length. The only dispute is with regard to rendering of services by the parties to whom service charges were paid. In this context, it is relevant to examine sample copies of contracts entered into by the assessee towards payment of service charges copies of which have been enclosed in the paper book. A perusal of the contract entered with Golden Tobacco Co. Ltd., a copy of which is at Page-80 of the paper book indicates that the concerned party was not only involved in facilitating the purchase of imported palm kernel fatty acid to the assessee but as per the terms of the contract Golden Tobacco Co. Ltd. was required to supervise the delivery of consignment on arrival,

arrange to have storage tanks and pipeline cleaned to the satisfaction of the surveyor. In case, the material is to be transported by tank lorry Golden Tobacco Co. Ltd. was required to ensure that the tank lorries are placed on time and perfect for transportation. The terms of the contract further stipulated that in case of any loss in transit it will be borne by Golden Tobacco Co. Ltd. The contract also requires Golden Tobacco Co. Ltd. to arrange proper sampling and analysis of the samples, pumping into the tanks of the assessee and subsequent sealing of tanks. Thus, for providing aforesaid services Golden Tobacco Co. Ltd. was to be paid service charges @ ₹ 1,500 inclusive of all the expenses. The terms and conditions of contract entered with to the other parties with whom the assessee paid service charges are also in similar line. It is also noticed that in the course of assessment proceeding, the assessee has furnished confirmations from the concerned parties regarding rendering of service and payment of service charges. Further, from the confirmation issued by General Food Ltd. who according to Assessing Officer actually supplied palm kernel fatty acid to the assessee, it is noticed that Golden Tobacco Co. Ltd. was involved to complete the transaction. Further, from the letter dated 28th May 1984 of Golden Tobacco Co. Ltd. a copy of which is at Page-332 of the paper book it is observed that Golden Tobacco Co. Ltd., not only offered to sell 4,000 MT of kernel fatty acid but also

offered to provide service relating to berthing of ship, custom clearance, unloading of materials and ensure quality of the product to be supplied. Golden Tobacco Co. Ltd. also assured the assessee in taking responsibility for performance of the contract by the seller and also to remain responsible to pay damages in the case of any default or actual loss suffered by Hindustan Liver Ltd. Thus, from the aforesaid facts, it is evident that Golden Tobacco Co. Ltd. was not only involved in ensuring supply of imported palm kernel fatty acid to the assessee but also of related services till delivery of fatty acid to the assessee. The condition imposed under the contract making Golden Tobacco Co. Ltd. liable to pay damages in case of loss of goods clearly establishes the fact of rendering of service by Golden Tobacco Co. Ltd. It is also necessary to note that the assessee has brought material before the Departmental Authorities to demonstrate that payment of service charges to intermediaries towards purchase of imported palm kernel fatty acid was not restricted to the assessee alone but other reputed manufacturers in India also paid such service charges to intermediaries for procuring imported palm kernel fatty acid which are commercially viable than locally available substitute. In this context, it is necessary to observe that vide letter dated 10th October 1991, the assessee submitted documentary evidences before the Assessing Officer to demonstrate that other soap manufacturers were also paying

similar service charges on purchase of imported oils. In fact, the purchase order in case of Godrej Soaps Ltd. enclosed at Page-314 and 315 of the paper book demonstrate that payment of service charges on import of palm kernel fatty acid is a market practice prevailing at the relevant point of time. Notably, neither the Assessing Officer nor the learned Commissioner (Appeals) have offered any comment on the documentary evidences submitted by the assessee. Moreover, when the purchases have been accepted as genuine, the payment of service charges cannot be disallowed by raising the bogey of business expediency or lack of evidence to show rendering of services. When the assessee has submitted documentary evidences to establish that the payment of service charges were in terms with contractual obligation and parties to the contract have also confirmed payment of service charges, such evidence cannot be ignored on flimsy ground. As far as the business expediency relating to payment of such service charges is concerned, it has to be seen from the perspective of the businessman. The Assessing Officer certainly cannot step into the shoes of the businessman to decide whether such expenditure was for the purpose of business or not. When the material on record suggest that there is scarcity of certain raw material in domestic market and as a practice soap industries were purchasing imported palm kernel fatty acid through traders having import license and further when as per the

market norm such purchases have to be arranged through intermediaries it cannot be said that the payment of service charges was not wholly and exclusively for the purpose of assessee's business. One more aspect which requires deliberation is, as observed by us earlier, in the original assessment proceeding, the Assessing Officer while disallowing the purchase of palm kernel fatty acid and payment of service charges has relied upon statements of the third parties. While restoring the issue to the Assessing Officer the learned Commissioner (Appeals) has specifically directed the Assessing Officer to allow the assessee to cross-examine the witnesses whose statements were relied upon by the Assessing Officer. It is manifest, in the fresh assessment proceeding, the Assessing Officer has not permitted the assessee to cross-examine the witnesses whose statements were relied upon by the Assessing Officer in the original assessment proceeding. Though, in the fresh assessment proceeding, the Assessing Officer has again placed heavy reliance upon the observations of the Assessing Officer in the original assessment made on the basis of statement recorded from third parties, in spite of the specific directions of the learned Commissioner (Appeals), the Assessing Officer has not permitted the assessee to cross-examine the witnesses whose statements were relied upon. Therefore, there is violation of rules of natural justice. However, considering the fact that

assessment year involved is 1985–86 it will be a futile exercise in again restoring the issue to the Assessing Officer for allowing assessee to cross examine witnesses, we were not in favour of doing so and proceeded to decide the issue on merits. It needs to be observed, from the details furnished by the assessee towards payment of service charges it is seen that Golden Tobacco Co. Ltd. was not only involved as an intermediary arranging supply of palm kernel fatty acid to the assessee through other importers but it has itself directly effected sales to the assessee. Notably, in respect of palm kernel fatty acid directly supplied by the Golden Tobacco Co. Ltd. to the assessee service charges have been paid to two intermediaries viz. PPL Plastics Ltd. and Raigarh Papers Ltd. amounting to ₹ 12.50 lakh and ₹ 5.59 lakh respectively. Thus, when Golden Tobacco Co. Ltd. itself is providing all ancillary and incidental services to the assessee in procuring palm kernel fatty acid through other importers, in case of direct supply of such material by Golden Tobacco Co. Ltd. Why service charges have to be paid to other intermediaries is not understood. When the Golden Tobacco Co. Ltd. itself is capable of providing such service, there is no necessity of paying service charges to others. Therefore, in our view, in case of direct supply of goods by Golden Tobacco Co. Ltd., the payment of service charges to other parties acting as intermediaries is not in the business interest of the

assessee. Therefore, service charges paid of ₹ 12.50 lakh and ₹ 5.59 lakh, totalling to ₹ 18.09 lakh, to PPL Plastics Ltd. and Raigarh Papers Ltd. should not be allowed as deduction. Therefore, we direct the Assessing Officer to allow the balance amount of service charges paid as deduction to the assessee. Ground raised is partly allowed.

9. In the result, assessee's appeal is partly allowed.

Order pronounced in the open Court on 26.02.2018

Sd/-
N.K. PRADHAN
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 26.02.2018

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

(Asstt. Registrar/Sr.P.S)
ITAT, Mumbai