

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

BEFORE SHRI G.S. PANNU, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.6034/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2009-10)

ACIT, Cir, 6(3)(2), R. No. 522, 5 th Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.	बनाम/ Vs.	M/s. Khandelwal Laboratories Pvt. Ltd., 79/78, Lal Path, Chinchpokli, Mumbai- 400033.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACK4225E		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Revenue by:	Shri Ram Tiwari (Sr. AR)	
Assessee by:	Shri Dhaval Shah	

सुनवाई की तारीख / Date of Hearing: 09.05.2018
घोषणा की तारीख /Date of Pronouncement: 03.08.2018

आदेश / ORDER

PER AMARJIT SINGH, JM:

The revenue has filed the present appeal against the order dated 20.07.2016 passed by the Commissioner of Income Tax (Appeals) -12, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y.2009-10.

2. The revenue has raised the following grounds: -

"1. *The learned CIT(A) has grossly erred on the facts and in the circumstances of the case to allow relief to the assessee by relying upon the order of the ITAT dated 23.06.2016, in the appeal filed by the assessee against the*

- order of the CIT u/s. 263 of the Act in A.Ys. 2009-10 & 2010-11, wherein ITAT has considered the facts discussed by the AC in the consequential assessment order passed by the AO u/s. 143(3) r.w.s. 263 of the Act, which order was not subject matter of appeal before the ITAT."

2. "The learned CIT(A) has grossly erred on the facts and in the circumstances of the case to allow relief to the assessee by relying upon the order of the ITAT dated 23.06.2016, in the appeal filed by The assessee against the order of the CIT u/s. 263 of the Act in A.Ys, 2009-10 & 2010-11, wherein the ITAT has allowed the assessee not to press the issues relating to delayed payment of PF, ESI and computation of book profit u/s. 115JB of the Act and dismissed the contention of the assessee relating to the same, when the same was not subject matter of any addition in the order passed by the CIT u/s. 263 of the Act, inter-alia meaning ITAT upheld the finding of the CIT that the assessment order was erroneous and prejudicial to the interest of the revenue."

3. "The learned CIT(A) has grossly erred on the facts and in the circumstances of the case to allow relief to the assessee by relying upon The order of the ITAT dated 23.06.3016, in the appeal filed by the assessee against the order of the CIT u/s.263 of the Act in A.Ys. 2009-10 & 2010-11, wherein the ITAT has partly allowed the appeal of the assessee in the order passed u/s. 263 of the Act, which, inter-alia, means ground of appeal Nos. 1 & 2 taken by the assessee was disposed of as dismissed, hence the directions of the CTT in the overpassed u/s. 263 of the Act, was proper and valid.

Without prejudice to ground of appeal Nos. 7 to 3, following grounds are taken in addition to the above.

4. "The Learned CIT(A) has erred on facts and circumstances of the case in deleting the addition of Rs, 19,42,671/- on account the STT Expenses for

- disallowance u/s. 14A vis-a vis Rule 8D of the Income Tax Act, 1961".

5. The Learned CIT(A) has erred on facts and circumstances of the case in deleting the addition of Rs. 1,86,72,34S/- on account Clinical Support Expenses".

6 "The Learned CIT(A) has erred on facts and circumstances of the case in deleting the addition of

Rs.27,79,291/- on Employees contribution to Provident Fund which were paid before due date filing the Income Tax Return ^a.

7 *"The Learned CIT(A) has erred on facts and circumstances of the case in deleting the addition of Rs 1,15,88,77,800/- on Sale of Brands".*

8. *"The Learned CIT(A) has erred on facts and circumstances of the case in deleting the addition of Rs 2,66,97,281/- on account set off of the brought forward long term capital losses".*

9. *"The Learned CIT(A) has erred on facts and circumstances of the case deleting the addition of Rs 38,94,48,000/- and 2,44,39,308/- on Sec. 94(7) and 94(8) on Sale of shares/mutual Fund."*

10. The Ld. CIT(A) has erred on facts and circumstances of the case in deleting the addition of Rs,2,00,83,931/- on interest expenses u/s 14A r.w.r 8D."

11. The appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside to the file of the AO or confirm the order of the AO.

12. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary.

A copy of the order of the CIT(A) was received on 11.08.2016 and the last date for filing of appeal is 10.10.2016."

3. The brief facts of the case are that the assessee filed its return of income on 29.09.2009 declaring total income to the tune of Rs.61,68,77,909/-. The return was processed u/s 143(1) of the Act. Thereafter, the case was selected for scrutiny and the assessment was completed u/s 143(3) of the Act on 23.12.2011 by assessing the income to the tune of Rs.61,76,43,550/-. Thereafter, order u/s 263 of the I.T. Act, 1961 was passed and the matter was set aside to the file of the AO. Thereafter, the necessary notices were issued and after the receipt of the

reply and certain disallowance. The income of the assessee was assessed to the tune of Rs.1,17,10,64,980/- and book profit u/s 115JB of the Act was assessed to the tune of Rs.67,97,69,164/-. Feeling aggrieved, the assessee has filed an appeal before the CIT(A) who allowed the claim of the assessee, therefore, the revenue has filed the present appeal before us.

ISSUE NOS. 1 TO 10:-

4. We have heard the argument advanced by the Ld. Representative of the parties and perused the record. We noticed that the issue no. 1 to 10 have been decided by CIT(A) on the basis of the decision of the Hon'ble ITAT in the assessee's own case in ITA. No. 2765 & 2702/M/2014 dated 23.06.2016 for the A.Y.2009-10 & 2010-11 and has also directed the AO to complete the assessment in view of the finding of the Hon'ble ITAT in ITA. No. 2765 & 2702/M/2014 dated 23.06.2016. It is also argued that the issue no.6 has been covered by the decision of the Hon'ble Jurisdictional High Court in the case of CIT Vs Ghatge Patil Transports Ltd. (368 ITR 749) and in the case DCIT Vs,. Hindustan Organics Chemicals Ltd,(363 ITR1) and in the case of Ghatgeatil Transporters Ltd. (368 ITR 749) I. Accordingly, all the issues have duly been covered by the above mentioned cases and accordingly the CIT(A) has decided the matter of controversy between the parties. For the sake of convincing we reproduced the order of the CIT(A) on record.:-

“6. Ground No. appeal no. 1 is not pressed and is therefore not adjudicated upon.

7. Ground of appeal no. 2

The disallowance of Rs.19,42,671/- for STT has been made by the AO During the course of hearing attention was invited to the Hon'ble Mumbai ITAT order dt. 23.06.2016 passed in appellant's case relation to appeal against order u/s 263 of the I.T. Act for A.y.

2009-10 and A.Y.2010-11 has opined as under in para no. 19 at page 10 of its order dt. 23.06.2016 as under:-

19. From the record we found that the AO has disallowed a sum of Rs.7,65,641/- u/s 143(3) order as per Rule 8D u/s 14A. the STT paid of Rs.19,42,671/- is against the derivative (F&O) transactions and purchase and sale of shares- the break up is as under:-

F & O	Rs.4,63,247
Sale & Purchase of shares	Rs.14,79,424/-
Total	Rs.19,42,671/-

Profit on sale of F&O transactions is amounting to Rs, 22,62,70,6057 - which is shewn as a taxable income. Therefore, the STT paid on the derivative transactions is allowable as an expenditure w.e.f A.Y. 2009-10 as amended by the Finance Act, 2008. The STT paid on sale of shares of L&T, the company has made a loss on these shares at Rs 14,3 7,81.95G/- which was offset with the capital gains. Therefore, if the same is to be considered for 14A disallowance, then it is to be reduced from the computation of the capital gain being direct expenditure for earning the capital gains, therefore disallowance under this section is not prejudicial to the interest of revenue being no tax effect. Accordingly, there is no justification for the direction issued by CIT for disallowance of STT u/s.14A. Therefore, respectfully following the same since the said disallowance is deleted by Hon'ble ITAT Ground of Appeal no.2 is allowed.

8. Ground of Appeal No.3

Disallowance of Rs.1,36,72,344/- has been made of clinical support expenses. During the course of hearing attention was invited to the Hon'ble Mumbai ITAT order dt.23.6.2016 passed in appellant's case relation to appeal against order u/s,263of the LT. Act for A.Y. 2009-10 and A.Y. 2010-11 in ITA No.2765 and 2702/Mum/2014, It is seen that the Hon'ble ITAT has opined as under in Para No.2S & 29 at Page 14 of its order dt23.6.2016 as under :-

"With regard to the claim of clinical support expenses, from the details filed before CIT, we found that these expenses are incurred while launching the new product in the market and also for existing product for obtaining the feedback from the marker and to get in touch with the doctors of all India to assemble the data base demographically, territorially, etc. It is normal feature for any pharmaceutical company to obtain the data, feedback from the

medical fraternity and it is a necessary expenditure for the company to maintain the business relationship with the customer in turn with the medical fraternity. The circular of Medical Council of India as referred by the CIT speaks about the gift, travel facility- hospital, money granted however none of these facilities are given by assessee. in fact, whatever the separate expenditure is incurred by the assessee was in relation together the data making aware of the product of the company and remaining in the market. From the order, of CIT we observe that nowhere the CIT has pointed out as to how the treatment given by assessee was erroneous, i.e. not as per law and as a result of which prejudice was caused to revenue. The CIT has merely asked the AO. look into the matter without pointing out any mistake or prejudice caused to revenue. He has simply directed the AO without satisfying himself to verify whether the bifurcation made by assessee was with a view to reduce tax or not. From the record he found that the details with regard to clinical support expenses were verified by the A.O. in the original assessment proceedings. Since the A.O. was satisfied with the details furnished by assessee vide letter dt1512,2011, no addition was made by the A.O. on account of clinical support expenses.

29. With regard to the explanation to 5.37(1) of the Act, the CIT has nowhere pointed out as to how the same explanation will be applicable to the assessee. In so far the direction issued to disallow the said payment on the basis of Circular Mo.5/2012 (RNo.225/142/2012-IT All) dt.01.08.2012 issued by the Income Tax department, Government of India after considering the guidelines issued by the Medical council of India as per Explanation to S.37 of the Act, we found that this very issue was considered by a co-ordinate Bench of this Hon'ble Tribunal in the case of Syncom Formulations (I) Ltd, Vs. DCIT in ITA Nos.6429 & 642S/Mum/2012 or A.Yrs. 2010-11 and 2011-12 dt23.12.2015 and it was held that the said circular has applicable from A.Y, 2013-14 only. The relevant A.Yrs, under consideration are Yrs, 2009-10 & 2010-11. Accordingly, the circular is not applicable to the years under consideration which has been made applicable only from A.Y. 2013-14 only, thus there is no merit in CIT's direction for disallowing clinical support expenses."

Since the Hon'ble ITAT has directed that the issue is to be decided afresh by the A.O, respectfully following the same the disallowance of Rs.86,72,344/- is deleted. Therefore, Ground of Appeal No.3 is allowed,

3. Ground of Appeal No.4

A.O, is directed to allow the same in the light of Hon'ble Jurisdictional High Court in the case of CIT Vs Ghatge Patil Transports Ltd. (368 ITR 749) and in the case DCIT Vs., Hindustan Organics Chemicals Ltd,(363 ITR1), In the case of Ghatgeatil Transporters Ltd. (368 ITR 749) I Hon'ble Court held as under :-

"Section 43B of the Income Tax Act, 1961 - Business disallowance - Certain deductions to be allowed only on actual payment (Employees' contribution) - whether both employees' and employer's contributions are covered under amendment to section 43B and judgment of Supreme court in CIT Vs. Alom Extrusions Ltd. [2D09]319 ITR 306/185 Taxman 416 - Held, yes - Whether thus Tribunal was right in holding that payments thereof are subject to benefits of section and hence, deduction was allowable - Held, yes (Para 16) [in favour of assessee] the case of Hindustan Organic Chemicals Ltd.(366 ITR 1) Hon'ble Court as under:-

"I Section 43B of the Income Tax Act, 1961 - business disallowance - Certain deductions to be allowed only on actual payment-[P^F] - A,Y. 2006-07- whether amendment to section 43B which came into force with effect from 1.4.2004 would apply in instant case Held, yes therefore Tribunal was hilly justified in deleting addition made on account of delayed payment of provident fund of employees contribution - Held Yes Para 9 in favour of assessee]

The A.O. was duty bound to follow the order of jurisdictional High Court in view of the clear finding given by the CIT and as such there was no issue of disallowance of the Provident fund which was paid before the due date of filing of return of income. Therefore, Ground of Appeal No.4 is allowed.

10. Ground of Appeal No. 5

During the course of hearing attention was invited to the Hon'ble Mumbai ITAT order dt.23.6.2016 passed in appellant's case relation to appeal against order

u/s,263 of the IT, Act for A.Y, 2009-10 and A,Y. 2010-11 in ITA No.2765 and 27Q2/Mum/2QH. It is seen that the Hon'bfc ITAT has opined in Para No.14, Para 23, Para 24, Para 25, Para 26 & Para 27 and opined in Para 27 of its order dt 23,6,2016 as under >

"27. In view of the above, we do not found any infirmity for offering the tax on sale of brands as LTCG, there is no merit in CITs observation for treating the same as business income. We direct accordingly

Therefore, Ground of Appeal No.5 is allowed as per the ITAT's direction. The A.O is directed to treat the sum of Rs. 1,13,97,77,8007- as capital gain.

11. Ground of Appeal No.6

The A.O. is directed to allow the carry forward losses of Ks.2,66,97,281 /- for A,Yrs. 2003-04 and 2004-05, as per the Provisions of the Act. Therefore, Ground of Appeal No,5 is partly allowed.

12. Grounds of Appeal No.7 & 8

The Hon'ble ITAT in order dt.23,6,2015 vide para 34-36 has allowed the set-off of the short term capital loss of Rs.38,94,48,0007- and Rs.2,44,3 9.308/- and therefore the issue is required to be allowed in view of the Hon'ble Tribunal order. Therefore, Grounds of Appeal No.7 & 8 are allowed.

13. Ground of Appeal No 9

Hon'ble ITAT in order dt.23.6.2015 vide para 20-22 has directed the A.O, appeal effect to Hon'ble ITAT order. A.O. is directed to give appeal effect order. Ground of Appeal No.9 is allowed."

5. On appraisal of the above said finding, we are of the view that the CIT(A) has decided the matter of controversy in view of the decision in ITA. No. 2765 & 2702/M/2014 dated 23.06.2016. and the issue no.6 on the basis of decision of Hon'ble Jurisdictional High Court in the case of CIT Vs Ghatge Patil Transports Ltd. (368 ITR 749) and in the case DCIT Vs., Hindustan Organics Chemicals Ltd,(363 ITR1) and in the case of Ghatgeatil Transporters Ltd. (368 ITR 749) I. The issues are squarely covered by the said decision. Nothing is required to be adjudicated. Accordingly, these issues are being decided in favour of the assessee against the revenue.

6. In the result, the appeal filed by the **revenue is hereby ordered to be dismissed.**

Order pronounced in the open court on 03.08.2018.

Sd/-
(G. S. PANNU)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 03.08.2018

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आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**