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

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI SAKTIJIT DEY, JM

I.T.A. No.6850/Mum/2017
(Assessment Year: 2013-14)

Samsonite South Asia P. Ltd. 402, Akruti Star MIDC, Andheri (E), Mumbai-400 093	Vs.	ACIT, Cir 11(1)(2) R. No.1, Through Ask Centre on Ground Floor, Aayakar Bhavan, Mumbai-400 020
PAN/GIR No. AAACS 8598 L		
(**Appellant**)	:	(**Respondent**)

Appellant by	:	Dr. K. Shivram
Respondent by	:	Shri Jayant Kumar

Date of Hearing	:	11.07.2018
Date of Pronouncement	:	31.08.2018

O R D E R

Per Shamim Yahya, A. M.:

This appeal by the assessee is directed against the order by the Dispute Resolution Panel – 2, Mumbai dated 14.09.2017 and pertains to the assessment year 2013-14.

2. The grounds of appeal raised by the assessee reads as under:

> 1. The Dispute Resolution Panel (DRP) has erred in confirming the Transfer Pricing adjustment of Rs. 2,26,00,272/- proposed by the Transfer Pricing Officer ('TPO') with respect to international transactions entered into by the appellant
> 1.1 The TPO and the Hon'ble DRP erred in disregarding the fact that the word "Taxes" in the License of technical know-how, patents, trademark and trade name agreement between appellant and Samsonite IP Holdings Sari ("Samsonite IP") must be read in entirety with the other portions of the said paragraph and not to be read in isolation. The term "taxes" used in the Agreement refers only to withholding tax and under no imagination could have included Service tax for

provision of royalty, which was introduced a year after the Agreement was entered.

1.2 The TPO and the Hon'ble DRP erred in disregarding the fact that the liability to pay service tax is casted upon the appellant as per Reverse charge mechanism vide Notification 30/2012 under empowerment of section 68(2) of Finance Act 1994.

1.3 TPO and the Hon'ble DRP erred in not giving cognisance to the doctrine of "consistency" and thereby disregarding the fact that the in past TPO has not held any adverse observation on service tax being collected by appellant.

1.4 Without prejudice to other grounds of appeal, the TPO and consequently the Hon'ble DRP erred in fact and in law in disregarding the fact that the commercial expediency of entering into contract cannot be challenged when the transaction of payment of royalty was at arm's length. The payment of service tax on the royalty paid by appellant to Samsonite IP is not an international transaction within the meaning of section 92B and is outside the scope of transfer pricing. The Hon'ble DRP ought to have appreciated the findings of Hon'ble ITAT order in the case of Johnson & Johnson Limited vs. Commissioner of Income tax-LTU (ITA No. 83/Mum/2011) wherein it was held that reimbursement of sendee tax is not an international transaction.

1.5 The Hon'ble DRP erred in disregarding the clarification on agreement for license of technical know-how, patents, trademark and trade with Samsonite IP ("the agreement") dated 07 November 1995. In the clarification, the term "taxes" in clause 3.8 of the agreement is replaced with term "Income-tax" which clearly indicates that only income taxes shall be borne by the Samsonite IP. Further a new clause 3.8.2. has been inserted in addendum to agreement which clarifies that the service tax shall be borne by the licensee i.e. the appellant.

1.6 The Ld. AO/Ld. TPO and consequently the Hon'ble DRP ought to have considered the general principle of law in relation to the Contract Act, that when parties attach the same meaning to the terms used in their agreement, the interpretation of the agreement should be in accord with that meaning even if a third party might interpret the language differently.

2. The Assessing Officer has erred in proposing the adhoc disallowance (net) of Rs.10,27,14,493/- with respect to advertisement and sales promotion expenses on the ground that the same is capital in nature and has resulted in creation of an intangible asset (brand value) owned by a third party.

3. From the above grounds of appeal, two issues that are arising are as under:

(1) Whether “tax” in the agreement included service tax.

(2) Whether adhoc disallowance of advertisement and sale promotion expenditure is sustainable

Apropos issue no. 1 :

4. Samsonite South Asia Private Limited ("Samsonite India") is engaged in the business of manufacture, import and sale of luggage and travel accessories under the brand name of "Samsonite" and "American Tourister".

During the financial year end 31 March 2013, the assessee had entered into certain international transactions with its AEs. The said transactions were duly reported by the assessee hi Form 3CEB u/s 92E of the Act, which was filed along with the return of income for the AY 2013-14. The company also maintained a detailed Transfer Pricing Documentation as required under Section 92D of the Income-tax Act, 1961 ("the Act") read with Rule 10D of the Income-tax Rules, 1962 ("the Rule").

In the draft order, all the transactions were held to be at arm's length price except the royalty transaction in context of reimbursement of service tax in which the TPO/AO made an upward adjustment of Rs. 3,42,02,6767-.

In regard to payment of royalty, the assessee submitted that Samsonite IP Holdings Sari ("Samsonite IP") has entered into a royalty arrangement with Samsonite India, whereby, Samsonite IP has granted Samsonite India license to use certain trademarks, trade name, patents and technical know-how related to manufacturing, marketing, distributing and selling of licensed products.

The assessee benchmark the royalty transaction using Comparable Uncontrolled Price (CUP) method as the most appropriate method.

Samsonite Group entity has also licensed IP to independent third parties and earned royalty income thereon. Further, in some instances, Samsonite Group entity has

also entered into an arrangement with third party license owners wherein similar IP rights have been availed. The royalty charged/paid to independent third parties is considered as comparable uncontrolled price for the application of Internal CUP method.

The Royalty fees paid by Samsonite India to Samsomte IP was considered to be at arm's length price based on below analysis:

Sr. No	International Transaction	Name of the Associated Enterprise	Transfer Pricing Method	SSAPL		
				Total Value of Transaction [INK]	Royalty (%)	Arm's Length Price/ Rate
1	Payment of royalty fees	Samsonite IP	Comparable Uncontrolled Price Method ("CUP Method")	276,720,683	5.00%	5.00%

The TPO has considered service tax on payment of the royalty as an international ransaction u/s 92B of the Income Tax Act, 1961 and made an upward transfer pricing adjustment of INR 3,42,02,676 on account of reimbursement of royalty paid on service tax by Samsonite IP to Samsonite India.

The TPO has observed that the word "Taxes" used in the agreement also indirect taxes and the same shall be borne by the Samsomte IP. Hence., Samsonite IP shall reimburse the service tax on royalty paid by Samsonite India on their behalf.

The TPO has rejected the assessee's contention that the ultimate liability of service is of Service recipient i.e. Samsonite India under reverse charge mechanism (RCM).

5. Upon the assessee’s objection, the Dispute Resolution Panel gave the following direction:

7.2 We have gone through the various case laws and the legal position which emerges from these directions is that if the taxes are borne by AE, the same should be included in the valuation of transaction. We have gone through the agreement "License of Technical Know-how, Patents, Trademark and Trade Name" dated 7th November, 1995 between Samsonite Corporation ("Samsonite") and the assessee, clause 3.8 reads as under :-

> "3.8 Taxes lawfully levied by governmental bodies within the territory on payments due to Samsonite hereunder shall be borne hy Samsonite. However, on Samsonite's behalf, Licensee shall try to obtain any reduction of the rate of withholding which is applicable under any law or double taxation treaty. "

7.3 Before us, assessee submitted that the word "taxes" used in the license of technical know-how, patents, trademark and trade name agreement between assessee and Samsonite IP Holdings Sari ("Samsonite IP'V'AE") must be read in entirety with the other portions of the said paragraph and not to be read in isolation. The term "taxes" used in the Agreement refers only to withholding tax and the same could not have included Service tax for provision of royalty, which was introduced a year after the Agreement was entered.

7.4 However, we are of the opinion that the language of para 3.8 is quite exhaustive and it covers all the taxes levied by Govt. Bodies. Therefore, we do not agree with this contention of assessee.

7.5 The assessee also argued that in view of Hon'ble IT AT order in the case of Johnson & Johnson Limited vs. Commissioner of Income-tax-LTU (I.T.A.No.83/Mum/2011) wherein it is held that reimbursement of service tax is not an international transaction u/s,92B of the Income-tax Act, 1961 as it has not taken place between two associated enterprises. However, we respectfully disagree with the finding of Hon'ble ITAT. We are of the opinion that if a transaction includes taxes, levies, cess etc. then, they will form part of the international transaction.

7.6 Assessee is the recipient of services, who is required to pay Service-tax in reverse -charge mechanism. The assessee also argued before us that it is entitled for CENVAT credit in relation to services tax paid by assessee as per existing law of Service-tax. . The assessee also argued that as receiver of services, it is the liability of assessee company to bear service tax. The assessee also argued that service tax is an indirect tax and the cost is ultimately recovered from the service recipient. Therefore, the ultimate cost in the form of service tax is to be borne by the assessee (service recipient) and not the AE (service provider).

7.7 The assessee also claimed before us that if it recovers the service tax from service provider (AE) and also claims CENVAT credit then, it would result in unjust enrichment which is prohibited by Jaw.

7.7 We have gone through the facts of the case and it was seen that as against service tax paid of Rs.3,42,02,676/-, the assessee availed CENVAT credit of Rs. 1,16,02,404/-. This shows that the balance amount of Rs.2,26,00,272/- can be

recovered from AE (service provider) without triggering the unjust enrichment provisions.

7.8 In view of the above discussion, we are of the opinion that service tax to the extent recoverable from AE would form part of the transaction. As the assessee has claimed the credit of CENVAT, the balance amount of Rs.2,26,00,272/- is held to be includible in the royalty. In the result, the AO is directed to restrict the addition to Rs.2,26,00,272/-.

6. Against the above order, the assessee is in appeal before us.

7. We have heard both the counsel and perused the records. From the above order of the ld. DRP it transpires that the ld. DRP had noted that the ITAT in the case of *Johnson & Johnson Limited* (supra) had already held that the reimbursement of service tax is not an international transaction u/s.92B of the Income-tax Act, 1961 as it has not taken place between two associated enterprises. However, without giving any reason whatsoever or referring to any contrary decision whatsoever, the ld. DRP held that it disagrees with the finding of ITAT. It has also noted the assessee's submission that the assessee is the recipient of services, who is required to pay Service-tax in reverse -charge mechanism. It has noted the assessee's argument that it is entitled for CENVAT credit in relation to services tax paid by assessee as per existing law of Service-tax. The assessee also argued that as receiver of services, it was the liability of assessee company to bear service tax. It was also noted that the assessee has argued that service tax is an indirect tax and the cost is ultimately recovered from the service recipient. It had also noted the assessee's submission that if it recovers the service tax from service provider (AE) and also claims CENVAT credit then, it would result in unjust enrichment which is prohibited by law. However, the DRP noted that the assessee has availed CENVAT credit of Rs.1,16,02,404/- against the service tax paid of Rs.3,42,02,676/-. Hence, the ld. DRP held

that the balance amount of Rs.2,26,00,272/- can be recovered from AE (service provider). In this regard we note that as referred by ld. DRP the ITAT has decided such issue in favour of the assessee in the case of *Johnson & Johnson Ltd.* [2014] 150 ITD 377 (Mumbai - Trib.).

8. We further note that the Revenue has filed an appeal before the Hon'ble jurisdictional High Court in the case of *Commissioner of Income-tax, (Large Tax Payer Unit) v. Johnson & Johnson Ltd*. [2017] 80 taxmann.com 269 (Bombay) in which Q. No. G was as to whether on facts and in the facts and circumstances of the case and in law the tribunal was justified in holding the addition on account of service tax paid by the assessee on brand usage royalty. The Hon'ble High Court has admitted the appeal on substantial question of law on this issue. However, it is not the case that in the said order, the decision of the ITAT has reversed. In this view of the matter, we follow the co-ordinate Bench decision and direct that the addition in this regard is liable to be deleted.

Apropos issue No. 2:

9. On this issue, the A.O.'s adhoc disallowance out of adjustment of sales promotion expenditure on capital expenditure was upheld by the Dispute Resolution Panel by following observations:

> 9.1 The DRP has considered the submissions made by the Assessee and the contentions of the AO. The AO is justified in making a disallowance on a portion of the Advertising, Marketing and Promotions expenses incurred for the purpose of the business of its parent company. It is observed that the visibility and impact through every advertisement displayed has not led to the promotion of any particular product as such but has effectively contributed to the promotion of the overall brand of "Samsonite" and its products in general.

> 9.2 The AO has also made a detailed discussion on this issue and arrived at a conclusion that these expenses have contributed to the creation of intangible rights in the form of brand rights, assignable over a period of time, the expenditure incurred in this regard therefore, it is held to be capital in nature inviting disallowance as against the claim of the assessee company as revenue expenditure. It is however emphasized that the assessee company is allowed to claim depreciation on such expenditure proposed to be capitalized as the nature of the asset created by way of these expenses is in the nature of brand rights and other intangible rights falling within the block of intangible assets allowable for depreciation.
> 9.3 Similar view was upheld by DRP in A.Y.2012-13.
> 9.4 The DRP upholds the contention of the AO on disallowance of a portion of Advertising, Marketing and Promotion expenses and treating it as intangible asset. Consequentially, we also direct the AO to give an opportunity to the Assessee to compute the depreciation on the intangible asset and pass an order thereafter.

10. Against this direction, the assessee has filed objection before us.

11. We have heard both the counsel and perused the records. We find that the ITAT in assessee's own case for assessment year 2012-13 has held as under:

> 24. Up on careful consideration, we note that assessee has incurred expenditure on advertisement and sales promotion. The assessing officer & DRP have held on an adhoc basis that a certain portion out of the above is aimed at brand building and the same is to be held as capital expenditure and the assessee can be granted depreciation their upon. When this is considered in light of the fact that the brand doesn't belong to the assessee and it is not the case of the revenue that assessee has incurred expenditure aimed at benefiting the associated enterprise this addition is clearly not sustainable. When the brand doesn't belong to the assessee there is no question of incurring expenditure over building of brand and assessee creating any intangible rights assignable over a number of years.
> 25. Moreover, it is implicit in the order of the revenue that these are deferred revenue expenditure for the purpose of the business of the assessee as they are allowing depreciation their upon. Further, there is no question of disallowance of the same as it is also settled law that in taxation laws there is no concept of deferred revenue expenditure. The case laws referred by the learned Counsel of the assessee duly indicate that expenditure incurred by the assessee company to maintain its corporate image which resulted in increased sales of the product is to be allowed as revenue expenditure. We find that these case laws are duly applicable to the facts of the present case.

26. Hence in the background of aforesaid discussion and precedents, we set aside the orders of the authorities below which allocated ad hoc percentage out of advertisement and sales promotion as depreciable capital expenditure. We hold that the entire expenditure is a revenue expenditure allowable as such.

12. Following the above precedent, we set aside the direction of the DRP in this regard and decide the issue in favour of the assessee.

13. In the result, the assessee's appeal is allowed.

Order pronounced in the open court on 31.08.2018

Sd/- Sd/-

(Saktijit Dey)
Judicial Member

(Shamim Yahya)
Accountant Member

Mumbai; Dated : 31.08.2018
Roshani, Sr. PS

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai