

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER
AND
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA NO.5201/MUM/2011(A.Y. 2005-06)

ACIT, CIR.6(3),
Room No.522, 5th Floor,
Aaykar Bhavan, M.K.Road,
Mumbai 400 020 Appellant

Vs.

M/s. Mylan Pharmaceutical Pvt. Ltd.
(Formerly Mylan India Pvt. Ltd.)
7th Floor, Shivsagar Estate,
"A" Dr.Annie Besant Road, Worli,
Mumbai 400 018
PAN: AABCM 9323J Respondent

ITA NO.5064/MUM/2011(A.Y.2005-06)

ITA NO.5065/MUM/2011(A.Y.2006-07)

ITA NO.3307/MUM/2013(A.Y.2008-09)

M/s. Mylan Pharmaceutical Pvt. Ltd.
(Formerly Mylan India Pvt. Ltd.)
7th Floor, Shivsagar Estate,
"A" Dr.Annie Besant Road, Worli,
Mumbai 400 018 Appellant

Vs.

ACIT, CIR.6(3),
Room No.522, 5th Floor,
Aaykar Bhavan, M.K.Road,
Mumbai 400 020 Respondent

Revenue by : Shri S.K.Jain
Assessee by : Ms. Chandni Shah

Date of hearing : 17/09/2019
Date of pronouncement : 17/10/2019

ORDER

PER VIKAS AWASTHY, JM:

These bunch of four appeals comprising of one appeal by the Revenue and three appeals by the assessee involve similar issues, therefore, these appeals are taken up together for adjudication and are being disposed of by this common order.

ITA Nos. 5201/Mum/2011(by Revenue) & 5064/Mum/2011(by assessee), A.Y.2005-06.

2. These cross appeals by the Revenue and assessee are directed against the order of CIT(A)-12 Mumbai dated 10/02/2011 for assessment year 2005-06.

3. Ms. Chandni Shah appearing on behalf of the assessee submitted at the outset that appeal of the Revenue is liable to be dismissed on account of low tax effect in the light of recent CBDT Circular No.17/2019 dated 08/08/2019.

4. Shri S.K.Jain representing the Department fairly admitted that the only issue raised by the Department is on account of depreciation on Effluent Treatment Plant, the tax effect involved in this appeal is less than Rs.50 lakhs.

5. We have heard both sides. The Revenue in its appeal has assailed the findings of CIT(A) in allowing relief in respect of depreciation on Effluent Treatment Plant Rs.55,51,132/-. The Ld. Authorized Representative has filed calculation of tax effect involved in the appeal.

As per the working furnished by the Id. Authorized Representative of the assessee, the tax effect involved in this appeal is Rs.22,44,284/- including surcharge and education cess. Undisputedly, the tax effect involved in the appeal is less than the monetary limit prescribed by the recent CBDT Circular No. 17/2019, dated 08-08-2019 for filing of appeals before the Tribunal by the Department. The CBDT vide circular dated 08-08-2019 (supra) has amended Para 3 of Circular No. 3 of 2018 dated 11-07-2018 thereby enhancing monetary limit of tax effect from Rs.20 Lakhs to Rs.50 Lakhs for filing of appeals by the Department before the Tribunal. Thus, without going into merit of the issues raised in the appeal, in view of recent CBDT Circular (supra) the present appeal by the Revenue is dismissed on account of low tax effect.

6. Before parting, we clarify here that the Revenue shall be at liberty to approach the Tribunal for restoration of appeal, with the requisite material to show that the appeal is protected by the exceptions prescribed in Para 10 of the Circular dated 11-07-2018 and its amendment dated 20/08/2018.

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

7. Now, we shall take the appeal by the assessee for assessment year 2005-06. The assessee in this appeal has raised following ground/additional grounds of appeal:-

GROUND-1:

"1. On the facts and circumstances of the case and in law the Learned Commissioner of Income-tax (Appeals)-12 [the CIT(A)] erred in confirming the action of the Asst. Commissioner of Income Tax, Circle 6(3), Mumbai (the ACIT) in treating licence

received under Served from India Scheme amounting to Rs. 95,60,000/- as revenue receipt.

2. The Appellant prays that the said addition of Rs. 95,60,000/- be deleted since the same is capital in nature.

GROUND II:

1. On the facts and circumstances of the case and in law the CIT (A) erred in treating expenditure incurred towards repairs and maintenance amounting to Rs. 7,53,197/- as capital in nature,

2. The Appellant prays to treat the said repairs and maintenance charges as revenue in nature.

GROUND III:

The Appellant craves leave to add to, amend and/ or alter all or any of the above grounds of appeal."

Additional Grounds of Appeal:-

"3. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) ("the CIT(A)) erred in confirming the action of the Assessing Officer ("the AO") in treating the entire license granted amounting to Rs. 95,60,000/- as taxable in year under consideration, without appreciating the fact that this amount has not been utilised during the year.

Therefore , it is prayed that even if license granted under "Served from India Scheme" is treated as revenue receipt and not capital receipt, than only the amount utilised during the year ought to be taxed."

8. The Ld. Authorized Representative of the assessee submitted that she is not pressing Ground No.1 of the appeal.

8.1 In respect of Ground No.2, the Ld. Authorized Representative submitted that the authorities below have made addition of Rs.7,53,197/- holding the expenditure incurred by the assessee on repairs and maintenance of ceiling as capital expenditure. The Ld. Authorized Representative of the assessee submitted that assessee had incurred expenditure of Rs.4,20,747/- in replacement of tiles of the laboratory. No new asset had come into existence nor any enduring benefit has been

derived by the assessee . The expenditure was incurred exclusively on maintenance of the laboratory. The Id.Authorized Representative of the assessee submitted that assessee had also incurred expenditure of Rs.3,32,450/- on refurbishment and relocation of existing equipment to new location. The expenditure was incurred merely for relocation of existing equipment and no new asset had come into existence. Therefore, the expenditure cannot be held on account of capital account.

8.2 In respect of additional ground of appeal, the Ld. Authorized Representative submitted that assessee was granted licence for import to the tune of Rs.95,60,000/-. The assessee in the P&L Account had credited the amount of Rs.81,96,366/- i.e. to the extent of benefit claimed in respect of advance licence. The Assessing Officer in assessment proceedings made addition of the difference i.e. Rs.13,63,634/- (Rs.95,60,000 - Rs.81,96,366). The Id.Authorized Representative of the assessee submitted that Hon'ble Apex Court in the case of CIT vs. Excel Industries Ltd.,358 ITR 295(SC) has held that the benefit under advance licence or Duty Entitlement Pass Book scheme represent only hypothetical income, which cannot be brought to tax by applying section 28(iv) of the Act. Thus, in the light of the above judgment, only to the extent of benefit derived by the assessee on advance licence during the period relevant to the assessment year under appeal can be brought to tax. The Id.Authorized Representative of the assessee stated that the assessee has already offered the amount to tax to the extent benefit was derived in the assessment year under appeal and the remaining amount to the extent of benefit derived by the assessee was offered to tax in the next assessment year.

8.3 The Id. Authorized Representative of the assessee further contended that the additional ground raised in the appeal emanates from facts already available on record and the Assessing Officer has dealt with this issue in the assessment order, hence, the additional ground raised in the appeal should be admitted.

9. On the other hand the Id. Departmental Representative controverting the submissions made by Id. Authorized Representative of the assessee in respect of Ground No. II submitted that assessee never brought to the notice of Assessing Officer that the new tiles were for the replacement of the existing tiles. The Id. Departmental Representative vehemently supported the findings of the authorities below in holding the expenditure on replacement of tiles as capital expenditure.

9.1 In respect of additional ground raised in the appeal, the Id. Departmental Representative submitted that the benefit from advance licence has accrued to the assessee in the year of issuance of such licence, since, assessee is following mercantile system of accounting, the entire amount of advance licence should have been offered to tax in the year of issue of licence.

10. We have heard the submissions made by the rival sides and have perused the orders of authorities below. The Id. Authorized Representative of the assessee stated at the bar that she is not pressing Ground No. 1 of the appeal. In view of the statement made by Id. Authorized Representative of the assessee, the ground No. 1 of the appeal is dismissed as not pressed.

11. In Ground No.II of the appeal, the assessee has assailed findings of authorities below in treating the expenditure on repairs and maintenance and relocation of asset as capital expenditure. The contention of the assessee is that the expenditure of Rs.4,20,747/- has been incurred on repairs and maintenance of the laboratory by way of replacement of tiles. We observe that in proceedings before the CIT(A), the assessee had categorically submitted that the expenditure was incurred on replacement of perforated ceiling tiles in the laboratory. It is apparent from records that the expenditure was incurred on maintenance of the laboratory caused due to normal wear and tear. No new asset has come into existence, thus, we are of the considered view that the expenditure was in the nature of repairs and maintenance and not on capital account.

11.1 Further, the assessee has claimed expenditure on relocation of existing equipment to new Effluent Treatment Plant under the head 'repairs and maintenance'. The Revenue disallowed aforesaid expenditure on the premise that assessee would have got enduring benefit by relocation of the equipment and hence, the expenditure is capital in nature. We do not concur with the findings of the authorities below. It is not disputed by the Revenue that the equipment was already in existence. No new plant or machinery was purchased by the assessee. The relocation of the existing equipment by any stretch of imagination cannot result in creation of any new asset. At best it could have resulted in efficient running of the plant and machinery. Thus, the expenditure on relocation of existing equipment is revenue in nature. In the result, Ground No.II raised by the assessee is allowed.

12. Ground No.III of the appeal is general in nature and hence, require no adjudication.

13. The assessee has raised additional ground of appeal in treating the entire advance licence amount of Rs.95,60,000/- as taxable in the assessment under appeal. The assessee has utilized licence to the tune of Rs.81,96,366/- and has offered the same to tax. The assessee has utilized the remaining amount in the next assessment year. The Id.Authorized Representative of the assessee stated at the bar that in the next assessment year assessee has offered to tax the amount to the extent licence benefit has been utilized in the period relevant to succeeding assessment year. The Hon'ble Apex Court in the case of CIT vs. Excel Industries Ltd.(supra) had an occasion to deal with the issue of taxability of benefit obtained by the assessee through advance licence. The question for adjudication before the Hon'ble Apex Court was:

“ 2. The question tor consideration in all these appeals is whether the benefit of an entitlement to make duty free imports of raw materials obtained by the assessee through advance licences and duty entitlement pass book issued against export obligations is income in the year in which the exports are made or in the year in which the duty free imports are made”.

14. The Hon'ble Court answered the question in favour of the assessee after considering the decisions rendered in the cases of CIT vs Shoorji Vallabhdas & Co.,46 ITR 144(SC), Morvi Industries Ltd. 82 ITR 835(SC) and the provisions of section 28(iv) of the Act the Hon'ble Court observed as under:-

“20. It follows from these decisions that income accrues when it becomes due but it must also be accompanied by a corresponding liability of the other party to pay the amount. Only then can it be said that for the purposes of taxability that the income is no! hypothetical and it has really accrued to the assessee.

21. In so far as the present case is concerned, even if it is assumed that the assessee was entitled to the benefits under the advance licences as well as under the duty entitlement pass book, there was no corresponding liability on the customs authorities to pass on the benefit of duty free imports to the assessee until the goods are actually imported and made available for clearance. The benefits represent, at best, a hypothetical income which may or may not materialise and its money value is therefore not the income of the assessee.

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27. Applying the three tests laid down by various decisions of this Court, namely, whether the income accrued to the assessee is real or hypothetical; whether there is a corresponding liability of the other party to pass on the benefits of duty free import to the assessee even without any imports having been made; and the probability or improbability of realization of the benefits by the assessee considered from a realistic and practical point of view (the assessee may not have made imports), it is quite clear that in fact no real income but only hypothetical income had accrued to the assessee and Section 28(iv) of the Act would be inapplicable to the facts and circumstances of the case. Essentially, the Assessing Officer is required to be pragmatic and not pedantic”.

Thus in view of the law laid down by the Hon'ble Apex Court, it is unambiguously clear that it is only to the extent that assessee has derived benefits from the licence during the impugned assessment year and the amount is chargeable to tax.

15. The Id. Authorized Representative of the assessee has stated at the bar that in the subsequent assessment year assessee has offered to tax the amount to the extent benefit is derived under the licence. Hence, the Revenue is not deprived of tax on the benefit derived by assessee from advance licence. Thus, in view of the facts of the case and the decision of Hon'ble Apex Court, we find merit in the contentions of the assessee. Accordingly, the additional ground raised by the assessee in the appeal is allowed.

16. In the result, appeal of the assessee is partly allowed in the terms aforesaid.

ITA No.5065/Mum/2011, A.Y.2006-07:

17. The assessee in appeal has raised two grounds and an additional ground of appeal. The Id.Authorized Representative of the assessee submitted that he is not pressing Ground No.1 of the appeal. Accordingly, the same is dismissed as such.

18. The Ground of appeal No.2 is general in nature, hence, requires no adjudication.

19. The additional ground of appeal is similar to the additional grounds of appeal raised in assessment year 2005-06. The Id.Authorized Representative of the assessee submitted that during the financial year 2005-06 assessee had received licence under Served from India Scheme for Rs.1,06,98,450/-. During the financial year 2005-06, assessee derived benefit of Rs.64,97,737/- and offered the same to tax. However, the Assessing Officer in assessment proceedings made an addition of the remaining amount i.e. Rs.42,00,713/- (Rs.1,06,98,450 - Rs.64,97,737). The facts in the assessment year under consideration are identical to the facts in assessment year 2005-06.

20. The Id. Departmental Representative fairly admitted that the additions made by the Assessing Officer in assessment year 2006-07 are for the similar reasons as were made in assessment year 2005-06.

21. Both sides heard. The issue raised by the assessee in additional ground of appeal is identical to the one we have already adjudicated while deciding the appeal of the assessee in assessment year 2005-06. The

detailed findings given by us therein shall apply *mutatis mutandis* in the facts of present appeal as well. Accordingly, the additional ground of appeal raised by the assessee in assessment year 2006-07 is allowed in similar terms.

22. In the result, appeal of the assessee is partly allowed.

ITA NO.3307/MUM/2013,A.Y.2008-09:

23. The Id. Authorized Representative of the assessee submitted that the assessee in this appeal has raised five grounds. The assessee is not pressing Ground No.1.

23.1 The ground no.2 of the appeal is in respect of addition made on account of benefit derived from the licence. The assessee was issued licence under the scheme for the benefit of Rs.1,86,35,364/-. During the financial year 2007-08 assessee could not use the licence and hence 'nil' amount was offered to tax in respect of licence benefit. The Assessing Officer made addition of the entire amount. The Id. Authorized Representative of the assessee submitted that the submissions made in assessment year 2005-06 equally apply to the assessment year under appeal. The Id. Authorized Representative submitted that Ground No.3 of the appeal is an alternate claim and in case the Ground No.2 is accepted, Ground No.3 would become infructuous.

24. The Id. Departmental Representative submitted that the facts in the assessment year 2008-09 qua Ground No.2 are similar to additional ground raised in assessment year 2005-06 and 2006-07.

25. Both sides heard. The Id. Authorized Representative of the assessee has stated at the bar that she is not pressing Ground No.1 of the appeal, therefore, the same is dismissed as not pressed.

26. The ground No.2 of the appeal is with respect to addition made on account of licence amount Rs.1,886,35,364/-. Undisputedly, the assessee has not utilized licence for import during the period relevant to the assessment year under appeal and hence, the assessee has not offered any income from import of capital goods in respect of the licence in the year under appeal. We have considered this issue and adjudicated the same in detail in assessment year 2005-06. The findings given by us would apply *mutatis mutandis* to assessment year 2008-09 as well. For the detailed reasons given in assessment year 2005-06, ground No.2 of the present appeal is allowed.

27. In Ground No.3 of the appeal the assessee has raised an alternate claim in respect of licence amount. Since, we have allowed Ground No.2 of the appeal, the alternate claim made by the assessee in Ground No.3 has become infructuous and the same is dismissed as infructuous.

28. In Ground No.4 assessee has assailed charging of interest under section 220(2) of the Act. The charging of interest is consequential and mandatory, hence, Ground No.4 is dismissed.

29. The ground No.5 of the appeal is general in nature and hence, requires no adjudication.

30. In the result, appeal of the assessee is partly allowed.

31. **To sum up, the appeal of the Revenue is dismissed and appeals of the assessee for assessment year 2005-06, 2006-07 and 2008-09 are partly allowed.**

Order pronounced in the open court on Thursday the 17th day of October 2019.

Sd/-
(RAJESH KUMAR)
ACCOUNTANT MEMBER

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Mumbai, Dated 17/10/2019

Vm, Sr. PS(O/S)

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai