

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH '1-1' NEW DELHI**

**BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA No. 1161/Del/2018
Assessment Year: 2012-13**

M/s. Gillette Diversified Operations vs. DCIT, Circle – 10(1),
Pvt. Ltd., P & G Plaza, GadinialGracious New Delhi -110002
Road,.ChakalaAndhery(East),
Mumbai – 99.

PAN : AAACG2469C

(Appellant/Assessee)

(Respondent/Revenue)

**ITA No. 1698/Del/2018
Assessment Year: 2012-13**

Addl. CIT, Spcl. Range-4, vs.
New Delhi.

M/s. Gillette Diversified Operations,
Pvt. Ltd., P & G Plaza, GadinialGracious
Road,.ChakalaAndhery(East),
Mumbai – 99.

PAN : AAACG2469C

(Appellant/Revenue)

(Respondent/Assessee)

Revenue by : Sh. Surender Pal, Sr. DR
Assessee by: Sh. R.K. Kapoor, CA

Date of hearing: 03.02.2021

Date of order : 03.02.2021

ORDER

PER K. NARASIMHA CHARY, J.M.

Aggrieved by the order dated 26/12/2017 in appeal No. 15/2016-17/CIT (A) – 44 passed by the learned Commissioner of Income Tax

(Appeals)-44, New Delhi (“Ld. CIT(A)”) in the case of M/s Gillette Diversified Operators Private Limited (“the assessee”), for the assessment year 2012-13, both the assessee and the Revenue are in these appeals.

2. Brief facts of the case as could be culled out from the record are that the assessee is a company engaged in the business of trading of wide range of products for personal care and use. It is engaged in distribution of Oral care products primarily falling under health care segment consisting of toothbrush, toothpaste, dental floss etc.

3. For the assessment year 2012-13, assessee filed the return of income on 5/9/2013 declaring a loss of Rs. 11, 06, 21, 0 88/-. During the financial year 2011-12 relevant for the assessment year 2012-13, the assessee undertook international transactions with its Associated Enterprises (AEs) in the nature of export of trading/finished goods, availing of support services, and the case was referred to Transfer Pricing Officer (Ld. TPO) for determination of arm’s length price; and that all such transaction were held to be at ALP but Ld. TPO observed that audited financials revealed substantial amount of recoverable and proceeded to make an adjustment on account of alleged delay in receiving the amount from AE against sales made to them. Major transactions undertaken by the assessee is the export of finished goods amounting to Rs.84.49 Crores to its AEs for which the assessee had applied TNMM as the most appropriate method (OP/OC). The assessee earned margins under the TNMM method @ 12.79% based on OP/OC and the comparables had earned a margin of 7.61%. All the reported international transactions were accepted at the ALP and no adjustment has been made by the AO/ Ld. TPO in any of the reported international transactions.

4. Ld. TPO vide order dated 29.01.2016 held all the international transactions to be at arm’s length price, but made adjustment of

Rs.80,60,718/- on account of outstanding receivables from AEs beyond alleged standard credit period of 60 days @ interest rate of 12.6% based on base rate of State Bank of India adding appropriate bases points towards credit worthiness and risk assessment. Learned Assessing Officer apart from making ALP addition based on Ld. TPO order also made disallowance of depreciation of Rs.10,03,84,485/- on account of plant & machinery not used allegedly for the purpose of business of the assessee and insurance expenses on these plant & machinery of Rs.8,80,972/-.

5. Aggrieved by the action of the Ld. AO/Ld. TPO assessee preferred appeal before the Ld. CIT(A), and the Ld. CIT(A) vide order dated 26.12.2017 gave partial relief on account of transfer pricing addition of Rs.80,60,718/-, however, allowed complete relief on the disallowance of depreciation of Rs.10,03,84,485/- and insurance expense of Rs.8,80,972/- and deleted the same. Though the Ld. CIT(A) sustained the credit period of 60 days per charging interest on overdue receivables, directed the Ld. TPO to apply interest rate of LIBOR plus 350 bps. By order dated 7/12/2018 passed under section 250/143(3) of the Income Tax Act, 1961 (for short "the Act"), the revised amount of addition after CIT(A) direction is Rs.27,70,071.

6. Assessee challenged the transfer pricing adjustment on account of interest on overdue receivables at LIBOR +350 basic points; whereas Revenue challenging the deletion of the disallowance of depreciation to the tune of Rs. 10, 03, 84, 485/- and the insurance expenses to the tune of Rs. 8, 80, 972/-.

7. Insofar as the adjustment on account of interest on overdue receivables, Ld. AR , at the outset, submitted that this ground of overdue receivables was considered by a coordinate Bench of this Tribunal in assessee's own case for AY 2008-09 to AY 2010-11, and by common order dated 23.08.2018 in ITA No.5675/Del/2015 to 5677/Del/2015 for AY 2008-09 to AY 2010-11 the issue was restored to the file of Ld. AO/Ld. TPO to re-examine with the directions that if the margins under TNMM declared by the assessee and those of comparable takes care of working capital adjustment in view of judgment of Hon'ble Delhi HC in Principal CIT Vs. Kusum Health Care Pvt. Ltd. 2017-TII-28-HC-Delhi TP, then no adjustment on alleged delay in recoverables should be made, and a similar directions was given by for AY 2011-12 also vide its order in ITA No. 1287/Del/217 dated 12.11.2020.

8. Insofar as this submission that this particular issue is covered by the orders of the Tribunal for the earlier assessment years is concerned, there is no denial of the same. In these decisions, the Tribunal placed reliance on the decision of the Hon'ble jurisdictional High Court in the case of Kusum Health Care Pvt. Ltd. (supra), wherein the Hon'ble Apex Court held that,-

The Court is unable to agree with the above submissions. The inclusion in the Explanation to Section 92B of the Act of the expression 'receivables' does not mean that de hors the context every item of 'receivables' appearing in the accounts of an entity, which may have dealings with foreign AEs would automatically be characterized as an international transaction. There may be a delay in collection of monies for supplies made, even beyond the agreed limit, due to a variety of factors which will have to be investigated on a case to case basis. Importantly, the impact this would have on the working capital of the

Assessee will have to be studied. In other words, there has to be a proper inquiry by the Ld. TPO by analyzing the statistics over a period of time to discern a pattern which would indicate that vis-a-vis the receivables for the supplies made to an AE, the arrangement reflects an international transaction intended to benefit the AE in some way.

The Court finds that the entire focus of the AO was on just one AY and the figure of receivables in relation to that AY can hardly reflect a pattern that would justify a Ld. TPO concluding that the figure of receivables beyond 180 days constitutes an international transaction by itself. With the Assessee having already factored in the impact of the receivables on the working capital and thereby on its pricing/profitability vis-a-vis that of its comparables, any further adjustment only on the basis of the outstanding receivables would have distorted the picture and recharacterised the transaction. This was clearly impermissible in law as explained by this Court in CIT Vs. EKL Appliances Ltd. (2012) 345 ITR 241 (Delhi) - 2012-TII-01 -HXC-Del-TP.

9. Ld. AR, however, submitted that this particular issue was raised before CIT(A) in this year; that it was demonstrated before Ld. CIT(A) that ALP margins of the assessee vs. comparable remain higher after the working capital adjustment; that the capital adjusted PLI of the comparable is 6.71% and when compared with assessee's 12.06%, no adjustment for alleged delayed recoverable remain as per judgment of Hon'ble Delhi HC in Kusum Healthcare (supra); that the Ld. CIT(A) has categorically recorded the said fact, but did not dispute such submission and summarily passed order by holding that interest rate need to be applied at LIBOR plus 350 bps by following judgment of Hon'ble Delhi HC in Cotton Naturals.

10. Be that as it may, in ITA No. 5736/Del /2015 for the Asstt. Year: 2010-11 in assessee's own case, the Tribunal observed that,-

6.2 We are of the considered opinion that this aspect will have to be necessarily re-examined by the AO/TPO before any such adjustment is

made. It has also been submitted by the Ld. AR that the impact of the outstanding receivables has been factored in the working capital adjustment. This aspect also requires verification. We also note that the Ld. CIT (A) did not have the benefit of this judgment of the Hon'ble Delhi High Court when he passed the impugned order. Therefore, on an overall view of the facts of the case and respectfully following the ratio of the Hon'ble Delhi High Court in the case of Principal CIT vs. Kusum Health Care Pvt. Ltd (supra) we restore this issue to the file of the AO/TPO for the purpose of re-examining and re-considering the issue in light of the ratio of the judgment of the Hon'ble Delhi

High Court in the case of Principal CIT vs. Kusum Health Care Pvt. Ltd (supra) and pass a speaking order as per law after giving proper opportunity to the assessee. The assessee shall be at liberty to take all/any of the pleas raised before us and shall also be at liberty to file relevant workings/computations.

11. This view is followed by the Tribunal for the assessment year 2011-12 also. It is an admitted fact that the learned Assessing Officer had not consider this issue in the light of the submissions now made by the Ld. AR and the assessment orders for the earlier assessment years, after remained, are pending. It is, therefore, the submission on behalf of the Revenue that it would be just inconvenient for the learned Assessing Officer to take a view on this aspect for this year also in consonance with the directions given by the Tribunal in assessee's own case for the earlier assessment years.

12. In the circumstances, where of the considered opinion that this issue needs to be considered by the learned Assessing Officer in the light of the submissions now made by the Ld. AR in consonance with the view that is to be taken on this aspect for the earlier assessment years also. With this direction, we set aside the issue to the file of the learned Assessing Officer. We accordingly, allowed the grounds of appeal of the assessee for statistical purpose.

13. Insofar as the departmental appeal is concerned, grounds No. 1 and 4 are in general and ground No. 2 and 3 are interrelated. Ground No. 2 is in respect of Non-grant of depreciation on Plant & Machinery Rs.10,03,84,485/-; whereas ground No. 3 is relating to the disallowance of Rs. 8,80,972/- towards insurance premium of machinery and moulds.

14. According to the learned Assessing Officer, Plant & Machinery and Tools & Moulds on which depreciation has been claimed by the assessee are being used by M/s. Rialto Enterprises (P) Ltd. who had manufactured the goods for the assessee company; and that depreciation on these two items is being disallowed year after year in the preceding previous years also. Assessee's case is that the assets are owned by assessee, but these are located at M/s. Rialto Enterprises (P) Ltd. factory in Chennai, which is manufacturing the goods for the assessee. Referring to the Principle Agreement with the M/s. Rialto Enterprises (P) Ltd. dated May 14, 2008 between the assessee and the said manufacturer, the assessee submitted that in case of termination of business agreement, it will have to immediately remove the assets and all other materials and properties of the assessee which is in possession of M/s. Rialto Enterprises (P) Ltd. Various clauses of the Agreement with M/s. Rialto Enterprises (P) Ltd. were referred to as have been noted by the AO in his order. Learned Assessing Officer, however, placing reliance on the decision in the case of Karan Raghav Exports (P) Ltd. v. CIT 196 taxmann 504 (Delhi) come to the conclusion that the assessee is not in the business of giving assets to the

partnership firms and didn't use the assets for the purposes of assessee's business and disallowed the claim of depreciation. Learned Assessing Officer further noticed that the Ld. CIT(A) has allowed relief to the assessee on this issue in A. Y. 2010-11 and A. Y. 2011-12, but the learned Assessing Officer had chosen not to follow these orders of Ld. CIT(A) on the ground that the department had filed appeal against these orders before ITAT, Delhi. Ld. CIT(A), however, by following the earlier order of CIT(A) for AY 2011-12 allowed the relief to the assessee keeping in view the judgments of Hon'ble Supreme Court in the case of ICDS Ltd. v. CIT 350 ITR 527 and CIT v. H. B. Leasing & Finance Ltd. 360 ITR 362 granted relief in the appeal.

15. Ld. AR submitted that this issue also came up for consideration in assessee's own case for the A. Y. 2010-11 before a coordinate Bench of this Tribunal in ITA no. 5736/Del/2015 filed by the Revenue and a coordinate Bench of this Tribunal held in that the issue is squarely covered in favour of the assessee by the judgment of Hon'ble Supreme Court in the case of ICDS Ltd. v. CIT reported in 29 taxmann.com 129 (SC) and Liquidators of Pursa Ltd. v. CIT 25 ITR 265 to come to the conclusion that "used for the purposes of business, profession or vocation" means used for the purpose of enabling the owner to carry on the business and earn profits in the business. The Tribunal, accordingly, held that the assets given to the M/s. Rialto Enterprises (P) Ltd. for producing goods for the business of the assessee are eligible for depreciation and dismissed the appeal of the department filed on this issue. Ld. AR further submitted that the Revenue accepted the same without filing any appeal against the order of the Tribunal on this

aspect, before the Hon'ble High Court.

16. Insofar as the insurance expense is concerned, it is submitted that the Ld. AO for the first time in this assessment year not only disallowed depreciation on the assets owned by the assessee and given to M/s. Rialto Enterprises (P) Ltd. for assessee's business but also disallowed this amount of Rs. 8,80,972/- which the assessee has incurred towards insurance on the assets lying at the manufacturing unit of M/s. Rialto Enterprises (P) Ltd. there is no dispute that the assets are owned by the assessee and therefore assessee had insured these assets and paid the insurance premium. The reasoning given by the AO for making this disallowance is identical as given for disallowing depreciation. Ld. AR submitted that the insurance expense has never been disputed by the Ld. AO in the earlier years and consistently been allowed to the assessee as claimed in the return of income.

17. Per contra, Ld. DR placed reliance on the order of the learned Assessing Officer on this aspect and reiterated the stand taken by the learned Assessing Officer for making this addition. He submitted that all these aspects have not considered by the Ld. CIT(A) for this assessment year.

18. We have gone through the record in the light of the submissions made on either side. There is no denial of the fact that there is no change in facts and circumstances as well as law on this issue from the earlier assessment years and the facts and circumstances remain the same, rule of consistency demands that similar relief as has been allowed to the assessee in A. Y. 2010-11 by the Tribunal has to be

followed and relief has to be granted to the assessee.

19. Even in respect of the insurance expenses, learned Assessing Officer does not dispute the fact of assessee incurring the same and also the fact that in the earlier years it was neither disputed nor disallowed. Since the asset belongs to the assessee, the assessee was justified in claiming the insurance expenses because assets being Plant & Machinery and Moulds and risks of losses, if any, against which insurances had been taken by the assessee is to the account of assessee. We are, therefore, of the considered opinion that the amount paid towards insurance expenses were legally and properly allowable to the assessee as having been incurred wholly and exclusively for the purpose of business of the assessee. Order of the Ld. CIT(A) is, accordingly, upheld and both the grounds of appeal of the Revenue are dismissed.

20. In the result, appeal of the assessee is allowed for statistical purpose and the appeal of the Revenue is dismissed.

Order is pronounced in open court immediately on conclusion of the hearing of the matter over virtual mode, on this the 3rd day of February, 2021.

Sd/-

(ANIL CHATURVEDI)
ACCOUNTANT MEMBER
Dated: 03/02/2021
'aks'

Sd/-

(K. NARASIMHA CHARY)
JUDICIAL MEMBER