

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'C' BENCH
MUMBAI**

**BEFORE: SHRI VIKAS AWASTHY, JUDICIAL MEMBER
&
SHRI M.BALAGANESH, ACCOUNTANT MEMBER**

**ITA No.2777/Mum/2018
(Assessment Year :2009-10)**

ACIT CIR. 7(3)(1) Room No.12, Ground Floor Aayakar Bhavan M.K.Road, Churchgate Mumbai - 20	Vs.	M/s. Parenteral Drugs (India) Ltd., 340, 3 rd Floor, Laxmi Plaza, Laxmi Industrial Estate New Link Road, Andheri(W) Mumbai – 400 058
PAN/GIR No.AACP2820L		
(Appellant)	..	(Respondent)

Assessee by	Shri Satish Modi
Revenue by	Shri Ravinder Sindhu
Date of Hearing	20/09/2022
Date of Pronouncement	30/09/2022

आदेश / O R D E R

PER M. BALAGANESH (A.M.):

This appeal in ITA No.2777/Mum/2018 for A.Y.2009-10 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-14, Mumbai in appeal No.CIT(A)-14/IT-25/17-18 dated 31/01/2018 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) r.w.s.147 of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 24/12/2016 by the Id. Asst. Commissioner of Income Tax (OSD)-7, Mumbai (hereinafter referred to as Id. AO).

2. The Revenue has raised the following grounds before us.

1. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in allowing excess depreciation claimed by the assessee amounting to Rs. 2,76,50,141/-, without appreciating the fact that the information has been received from the Investigation Wing and the inference are based on actual findings and evidence gathered during the course of survey action."*

2. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in appreciating the fact that the assessee has failed to discharge its onus to furnish the evidences in support of its claim to negate the finding of the Investigation Wing and the Assessing Officer of M/s Anitas Exports Pvt. Ltd.."*

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

3. We have heard rival submissions and perused the materials available on record. It is pertinent to mention that the Id. DR on earlier occasion i.e. on 25/05/2022 sought adjournment on the ground that the Revenue would like to file revised grounds of appeal. On his request the case was adjourned to 21/07/2022. On 21/07/2022 similar request was made by the Id. DR and the case was adjourned to 19/09/2022. On 19/09/2022 also the Revenue sought adjournment stating the same reason. Final opportunity was granted to the Revenue to file the revised ground of appeal and the case was adjourned to 20/09/2022. On 20/09/2022, the Revenue had not filed revised grounds of appeal. Hence, we deem it fit to dispose of this appeal based on the original grounds of appeal filed by the Revenue before us which has been duly authorised by the Principal Commissioner of Income Tax, as sufficient opportunities had been given to the Revenue for filing revised grounds of appeal. It is pertinent to note that the Revenue had never submitted before us with cogent evidences as to on what ground original grounds filed are required

to be revised. Hence, there is no point in giving further time to the Revenue in this regard. Accordingly, we proceed to dispose of this appeal based on the original grounds of appeal preferred by the Revenue which has been duly authorised by the Principal Commissioner of Income Tax as stated supra.

3.1. The assessee is a limited company engaged in the business of manufacturing pharmaceuticals like I.V. Fluids, tablets, capsules and water for injection. The return of income for the A.Y.2009-10 was electronically filed by the assessee company on 29/09/2009 declaring total income of Rs.5,66,72,400/-. The original assessment was completed u/s.143(3) of the Act on 29/12/2011 determining total income of the assessee at Rs.5,94,76,720/-. Later re-assessment was framed u/s.143(3) r.w.s. 147 of the Act on 26/03/2016 determining total income of the assessee at Rs.137,61,75,450/- by making addition u/s.68 of the Act on account of share premium in the sum of Rs.131,66,98,733/-. Again yet another notice was issued u/s.148 of the Act on 30/03/2016 on the basis of information received from ITO 9(1)(1) Mumbai on 28/03/2016 wherein it revealed that as per survey report from the Investigation Wing, M/s. Anitas Exports Pvt. Ltd., had sold FFS machines to assessee herein in A.Yrs.2008-09,2009-10,2010-11 and 2011-12 at an exorbitant profit ratio and was claiming deduction u/s.80IC of the Act. Based on this, the assessment of the assessee was again reopened after obtaining necessary administrative approval u/s.151 of the Act. The assessee during the course of re-assessment proceedings apart from final computation of total income, tax audit report, also filed ledger account of M/s. Anitas Exports Pvt. Ltd., and extracts of FFS Machine purchases. The Id. AO in page 3 of his order observed that as per the information provided by the ITO 9(1)(1) Mumbai, during the previous relevant A.Y.2009-10, M/s. Anitas

Exports Pvt. Ltd., had sold FFS Machines to Parenteral Drugs (India) Ltd., (assessee herein) for a consideration of Rs.20 Crores which is inflated, whereas the sale value determined by the department is Rs.12,09,99,594/- . Thus, it was concluded by the present AO that assessee had claimed excess depreciation @15% of inflated value of Rs.7,90,00,406/- (Rs.20,00,00,000 – Rs.12,09,99,594) which comes to Rs.1,18,50,060/- and additional depreciation @20% of Rs.7,90,00,406/- i.e. 1,58,00,081/- on these inflated purchases of FFS Machines. Accordingly, the Id. AO disallowed the excess depreciation of Rs.2,76,50,141/- in the second re-assessment proceedings. The assessee furnished the entire list of machineries purchased from M/s. Anitas Exports Pvt. Ltd., which is a sister concern of the assessee. It was submitted that the said machines were duly put to use for the purpose of business of the assessee and depreciation and additional depreciation claim thereon. The arm's length pricing of FFS Machines acquired by the assessee was established by the detailed TEV study reports of D.K. Jain and Co., and MITCON. These documents were furnished before the Id. AO vide letter dated 02/12/2016. The assessee also provided external comparables between two independent parties to justify the pricing of acquisition of machineries made by it from M/s. Anitas Exports Pvt. Ltd.

3.2. Before the Id. CIT(A), the assessee reiterated the aforesaid arguments and also submitted that in order to claim depreciation u/s 32 of the Act, the assessee should satisfy the following conditions:-

- a) Asset must be owned by the assessee;
- b) It must be used for the purpose of business;
- c) It should be used during the relevant previous year.

3.3. It was also submitted that the actual cost of assessee on which depreciation may be claimed is defined u/s.43(1) of the Act. The actual cost of the assessee for the purpose of FFS Machines from M/s. Anitas Exports Pvt. Ltd., was Rs.20,00,00,000/-. Hence, that becomes the cost of acquisition to the assessee on which depreciation would be eligible. It was submitted that the Id. AO had blindly relied on the contentions of the Id. AO of M/s. Anitas Exports Pvt. Ltd., without any independent application of mind from his side and without bringing any comparable cases on record to prove that the cost of acquisition of the assessee is inflated. It was submitted that the main basis for the Id. AO disbelieving the cost of acquisition of assets is that M/s. Anitas Exports Pvt. Ltd., had claimed deduction u/s.80IC of the Act on the profit derived from sale of machines to assessee on one hand and on the other hand, assessee is claiming depreciation at that acquired price. According to Id. AO of M/s. Anitas Exports Pvt. Ltd, sale price of FFS machines is inflated, hence on that inflated consideration, the seller is claiming benefit u/s.80IC of the Act and the payer i.e. assessee herein is claiming excess depreciation.

3.4. In the instant case, to support the pricing of cost of acquisition of the assessee, the assessee had relied upon TEV study report of D.K.Jain and Co., who is an independent technical expert appointed by State Bank of India and which report has been furnished to the Revenue in the past and has been consistently accepted by the Id. AO of M/s. Anitas Exports Pvt. Ltd., in the past. The assessee also placed on record the transaction of sale of FFS machines by Goa Formulations dated 15/02/2013 as a CUP i.e. External Comparable by an independent third party to establish that the sale price of the FFS machines purchased by it complies with the provisions of the Act in the matter of arm's length price thereon. The assessee also placed on record the fact that M/s. Anitas Exports Pvt. Ltd.,

sold FFS machines to Goa Formulations Ltd., which is a third party. Within a year of sale, the entire plant and machinery at Goa Formulations Ltd., including FFS machines bought from M/s. Anitas Exports Pvt. Ltd., were sold under a slump sale agreement dated 15/02/2013 to M/s. Fresenius Kabi India Pvt. Ltd., global leader in the business of IV Fluids at the very same price that they were acquired, which provides yet another proof of the bonafides and genuineness of the sale price of the machines sold by M/s. Anitas Exports Pvt. Ltd., to the assessee. The said slump sale agreement also was enclosed before the Id. AO.

3.5. The Id. CIT(A) observed that as per the provisions of Section 43(1) of the Act, the actual cost means the actual cost of assets to the assessee reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority. In the case of the assessee, even if the cost of machinery is presumed to be inflated due to collusion, there is no allegation that any portion of the cost has been met directly or indirectly by any other person or authority. Therefore, the Id. CIT(A) concluded that no adjustment can be made to the actual cost of FFS machines to the assessee. The Id. CIT(A) also observed that there is no other provisions in the Act which provided for adjustment to the actual cost of machinery except Section 92C which is not applicable for the year under consideration. The Id. CIT(A) also observed that the provisions of Section 80(IA)10 of the Act would be applicable only in the hands of M/s. Anitas Exports Pvt. Ltd., for computation of eligible profits thereon. Hence, there is absolutely no case for disallowing the corresponding depreciation in the hands of the assessee herein. The Id. CIT(A) also placed reliance on the co-ordinate Bench decision of Mumbai Tribunal in the case of ACIT vs. Karma Energy Ltd., 33 taxmann.com 580 wherein similar issue arose with regard to price paid for acquisition of wind mill.

The Id. CIT(A) also observed that this case has been further affirmed by the Hon'ble Jurisdictional High Court reported in 57 taxmann.com 235. Accordingly, the disallowance made on account of depreciation and additional depreciation was deleted by the Id. CIT(A).

3.6. The Id. DR before us vehemently argued that the arrangement between assessee and M/s. Anitas Exports Pvt. Ltd., for acquisition of FFS machines was a sham transaction. He reiterated the finding of the Id. AO vehemently that both assessee as well as its sister concern were claiming benefits which results in tax avoidance.

3.7. From the aforesaid observations of the Id. CIT(A), we find that the Id. CIT(A) had duly applied the provisions of Section 43(1) of the Act which defines actual cost. We find that the Id. CIT(A) had categorically observed that Rs.20,00,00,000/- is the actual cost of acquisition of FFS Machines for the assessee paid to M/s. Anitas Exports Pvt. Ltd. This factual finding and the application of provisions of Section 43(1) of the Act has not been challenged by the Revenue before us. Hence, there is absolutely no merit in the grounds raised by the Revenue before us. In any case, the issue in dispute is squarely covered by the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Karma Energy Ltd., 57 taxmann.com 235 (Bom) which has been relied upon by the Id. CIT(A). For the sake of convenience, the relevant operative portion of the said order is reproduced hereunder:-

11. The Tribunal considered the previous findings of certain group companies of Weizmann being involved and on inquiry, it was found that the commission/fees paid by NEG Micon was not received by the assessee. M/s. Samrat Spinner and M/s. Kakatiya Industries had paid Rs.115 lacs and Rs.303 lacs to M/s. Suhami Traders (presently known as Suhami Power & Finance Corporation), whose address is the same as that of the present assessee. According to the Assessing Officer, the commission paid by NEG

Micon to Suhani was thus received by a Weizmann group company. Therefore, the excess money paid for the windmills was routed back to Weizmann Group, while the assessee, also a Weizmann group company claimed 100% depreciation. The collusion between NEG Micon and Weizmann group it is alleged was in order to deprive the Revenue.

12. A comparative chart has been prepared of the transactions entered into by the Respondent as well as Precot Mills Ltd. claiming difference in prices of windmills pegged at about Rs.98 lacs. However, comparison with companies like Rajasthan State Power Corporation Ltd. reveals that the price is easily justifiable given the difference in specifications. It is necessary to mention that in the course of the comparison provided between the price paid by Weizmann and Savita Chemicals Ltd. and the assessee, it revealed that Savita Chemicals purchased similar windmills at price of Rs. 405.00 lacs as against Rs. 360.64 lacs in the case of the assessee. The performance, specifications and type of requirements were very similar in these cases.

13. Accordingly, the Tribunal considered the statement of comparable cases made by the assessee and concluded that the payment made by the assessee was certainly not inflated. The Tribunal considered the fact that setting up of windmills was a specialized task and came to the conclusion that the Assessing Officer had no evidence on record to establish that the price of windmills paid by the assessee was not the actual price or that the price was inflated. The Tribunal found that the Assessing Officer had proceeded on the basis of a presumption that the cost of each windmill is inflated by Rs.1 crore and it had not been proved by documentary evidence that such money came back to the assessee from the concern to whom commission was paid, namely M/s. Suhani Traders.

14. Mr. Mistri highlighted the fact that although the receipt of commission by Weizmann group company is alleged, there is no merit whatsoever in the contention that could justify disallowance of the depreciation claim. The Tribunal found that there is no excessive payment. The Assessing Officer has not disputed the fact that the assessee paid lease rent of Rs.5,51,788/- to Weizmann group Ltd. on account of the windmills taken on lease and the contention of the Assessing Officer that lease rents were unreasonable was not based on any cogent material but only based on assumption and presumption. In fact, the lease rents were fixed in accordance with the formula provided by Indian Renewable Energy Development, a Government of India Company which provided support to Electricity Project.

15. The Tribunal found that the Commissioner of Income Tax (Appeals) was justified in holding that there is nothing on record to prove the excessive amount of lease rent was paid. The said issue is identical in all appeals and the appeals came to be rejected while upholding the orders of the Commissioner of Income Tax (Appeals). The appeals filed for the year 2002-03 and 2005-06 were also dismissed. The cross objections filed by the assessee for the year 2002-03 were also rejected.

3.8. The Id. AR placed on record the re-assessment order framed in the hands of M/s. Anitas Exports Pvt. Ltd., u/s.143(3) r.w.s. 147 of the Act on 28/03/2016 for A.Y.2009-10 wherein the sale value of FFS machines to assessee herein has been restricted to Rs.12,09,99,594/- as against Rs.20,00,00,000/- reported by M/s. Anitas Exports Pvt. Ltd., and consequently reducing the claim of deduction u/s.80IC of the Act thereon. The Id. AR made a statement from the Bar that the appeal against this re-assessment order framed in the hands of M/s. Anitas Exports Pvt. Ltd., for A.Y. 2009-10 is pending before the Id. CIT(A) which fact is also on record in the order sheet notings dated 25/05/2022. Hence, the decision taken by the Assessing Officer of Anitas Exports Pvt. Ltd., itself has not attained finality, then how the said order could be relied upon in the hands of the assessee acquirer for disallowing the depreciation.

3.9. In view of the aforesaid observation, we hold that the Id. CIT(A) had correctly addressed the issue in dispute in favour of the assessee and we do not find any infirmity thereon. Accordingly, the grounds raised by the Revenue are dismissed.

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

Order pronounced on 30/09/2022 by way of proper mentioning in the notice board.

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 30/09/2022
KARUNA, sr.ps

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Sr. Private Secretary / Asstt. Registrar)
ITAT, Mumbai