IN THE INCOME TAX APPELLATE TRIBUNAL, 'J' BENCH MUMBAI

BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No.2298/Mum/2014
(**Assessment Year :2004-05**)

Procter & Gamble Hygiene & Healthcare Limited P & G Plaza Cardinal Gracias Road Chakala, Andheri(E) Mumbai-400 009	Vs.	Joint Commissioner of Income Tax (OSD) Range-8(2) Mumbai
PAN/GIR No.AAACP6332M		
(Appellant)	..	**(Respondent)**

Assessee by	Shri Dhanesh Bafna & Shri Yogesh Thar
Revenue by	Shri Asif Karmali
Date of Hearing	**23/11/2023**
Date of Pronouncement	**29/12/2023**

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeal has been filed by the assessee against order dated 06/01/2014 passed by ld. CIT(A)-15, Mumbai in relation to the penalty proceedings u/s.271(1)(c) for the A.Y.2004-05.

2. In the grounds of appeal, the assessee has raised following grounds:-

GROUND I:
The Learned Commissioner of Income Tax (Appeals)-15, Mumbai ("the CIT(A)") erred in upholding penalty levied by the Joint Commissioner of Income Tax Range 8(2), Mumbai ("the A.O.") on account of disallowance made by restricting the claim u/s 80IB from 100% to 30% in respect of Kundaim Unit c alleged ground that it represented merely an extension of an existing unit and not a new unit.

GROUND II:
The CIT(A) erred in upholding the penalty levied by the AO on account of deduction claimed u/s by reducing 90% of the entire other income by way of interest, miscellaneous income, etc.

GROUND III:
The CIT(A) erred in upholding the penalty levied by the AO on account of deduction claimed by reducing the profits determined u/s 801B from the "profits of the business" compute purpose of deduction u/s 80HHC by invoking the provisions of Section 801B(13) r.w.s 801A(9).

GROUND IV:
The CIT(A) erred in upholding the penalty levied by the AO under Section 271(1(c) of the adjustment made by the Transfer Pricing Officer in respect of international transaction. export of finished goods.

3. Besides this, assessee has also raised following additional ground reads as under:-

Additional Ground No. V

On the facts and in the circumstances of the case and in law the Ld. Assessing Officer (the AO) erred in initiating the penalty proceedings without specifying the reason for penalty initiation under section 274 r.w.s. 271(1) (c) of the Act.

The Appellant prays that the notice initiating penalty is ambiguous in the absence of clear mention of the limb under which penalty is

initiated, the notice is therefore invalid, and the penalty is unsustainable hence the penalty proceedings ought to be dropped."

4. The brief facts are that Assessee Company is engaged in marketing, selling, dealing in the business of manufacturing and sale of medicines and various personal and various health-care products. It has filed its return of income on 30/10/2004 declaring total income of Rs.85,98,74,210/-. The assessment u/s.143(3) was completed determining the total income of Rs.126,00,14,174/- vide order dated 27/12/2006 after allowing deduction under Chapter VIA. Though various additions were made by the ld. AO, however, finally, matter had reached upto the stage of the Tribunal wherein most of the issues got settled and few additions / disallowance got confirmed. The gist of the addition made by the ld. AO, disallowance upheld by the ld. CIT (A) and allowed by the Tribunal are enumerated hereunder:-

Particulars from Assessment Order u/s. 143(3)	Quantum of Addition made by AO	ClT(A)'s order in quantum proceedings	Order of Tribunal dated August 25,2023 in quantum proceedings	Order of CIT(A) against the penalty order u/s. 271(l)(c)	Ground before the Hon'ble Tribunal in Penalty appeal
Disallowance of Advertisement expenses on production of television films and commercials holding the same as capital	254,753,254	Disallowance upheld by the CTT(A)	Allowed (Para 4.1-4.9)	Penalty deleted [Para 3.3(i) & (ii)] (Page 23)	-

expenditure amounting to Rs. 2,547.53 Lakhs.					
Disallowance of expenditure incurred on Moulds and Dies considering the same to be capital expenditure amounting to Rs. 19.43 Lakhs without prejudice to the above, C1T(A) erred in restricting the depreciation at the rate applicable to plant & machinery	1,943,935	Disallowance upheld by the CIT(A)	Allowed (Para 5. 1-5,6)	Penalty deleted [Para3.3(iii)&(iv)] (Page 24)	-
Restricting deduction claimed u/s. 80-IB in respect of Vicks Vaporub (Tins) line to 30% as against 100%, alleging that the new line was only an extension of the existing industrial undertaking.	116,395,419	Disallowance upheld by the CIT(A)	Dismissed (Para 6. 1-6. 12)	Penalty upheld [Para3.3(v)-(vii)] (Page 26)	Ground I
Reduction in claim of deduction u/s 80 IB by reducing the		Disallowance upheld by the C1T(A)	Dismissed (Para 9.1 - 9.6)	Penalty deleted [Para3.3(viii)&(ix)] (Page 27)	

profits of the undertakings by disregarding certain incomes amounting to Rs. 331.98 akhs					
Reduction in claim of deduction u/s, 801B by allocating certain head office expenses like salary, depreciation, interest on turnover basis to profits derived from Honda unit and Kundaim unit		Disallowance upheld by the CIT(A)	Allowed (Para 8.1 - 8.7)	Penalty deleted [Para3.3(viii)&(ix)] (Page 27)	-
Disallowance in respect of depreciation tin left behind assets at vicks vaporub unit location at Honda Location amounting to Rs. 9.83 Lakhs	983,147	Disallowance upheld by the CIT(A)	Allowed (Para 7. 1-7.5)	Penalty deleted [Para 3.3(x] (Page 28)	-
Reduction on claim u/s 80HHC by reducing 90% of entire other income by way of interest and miscellaneous income amounting to Rs. 118.40 Lakhs	2,890,433	Disallowance upheld by the CIT(A) to the extent of Rs. 22,55,107	Ground not pressed (Para 10.1)	Penalty upheld [Para 3.3(xi)] (Page 28)	Ground II

Claim of deduction u/s. 80HHC in respect of profits from 80IB units			Allowed (Para ll.l-11.6)	Penalty upheld [Para 3.3(xi)] (Page 28)	Ground III
Transfer pricing adjustment in respect of the international transaction of export of finished goods to the AEs	1,65,00,000	TPO's approach was rejected and accordingly, the addition made by the TPO did not survive. Fresh addition of Rs. 1,67,69,729 was made by the CIT(A)	Ground not pressed (Para 12)	Penalty upheld [Para 3.3(xvi)] (Page 32)	Ground IV
Department's Appeal before the ITAT (on quantum proceedings.					
Disallowance of Foreign Travelling Expenses amounting to Rs.10 Lakhs	1,00,000	Addition deleted by the CIT(A)	Dismissed (Para 14.1-14.6 (Internal page 31-34)	NA	-
Addition on account of MODVAT credit relating to closing stock amounting to Rs.6.10 lakhs and increase in value of stock amounting to Rs.510.84 Lakhs	51,084,214	Addition deleted by the CIT(A)	Remanded back to AO (Para 15.1 – 15.7)(Internal page 34-38)	NA	-

5. Coming to the issue raised in ground No.1 with regard to levy of penalty on account of disallowance made by restricting the claim u/s 80IB in respect of Vicks Vaporub (Tins) Line which was allowed by the ld. AO @ 30% as against the claim of 100% by the assessee.

6. The brief facts are that in the return of income assessee has claimed deduction u/s.80IB in respect of existing Vicks unit at 30% and the new Vicks VapoRub (Tins unit) at 100%. The contention of the assessee was that the new unit was set up in AY 2001-02, which fact has been mentioned in the Form No. 10CCB issued by the auditor for the new unit. However, the ld. AO in the assessment order restricted the claim to 30% on the ground that the new unit is nothing but extension of the existing unit. The same was also upheld by the ld. CIT (A). Before the Tribunal in the quantum proceedings assessee furnished form 10 CCB for the existing unit as well as the new unit and was also submitted that the new unit was set up in 2001-02 and that some plant and machinery was commonly used between the existing and new unit but new unit was made our of new machinery. However, the Tribunal upheld the disallowance after observing as under:-

6.8. We have given thoughtful consideration to the rival submission and perused the material on record. We find that that the Assessee has claimed that Vaporub-10 gm Unit was set up as a new unit during the Financial Year relevant to the Assessment Year 2001-02. However, this position has been disputed by the Revenue.

6.9. On perusal of Audit Report in Form 10CCB filed by the Assessee in support of its claim for deduction at the rate of 100% in respect of Vaporub-10 gm Unit, we find that it has been stated as under

(a) Paragraph 8. Date of Commencement of Operation by the Undertaking: 01/04/2000

(b) Paragraph 18 - (a) Has the industrial undertaking received any machinery or plant on transfer which was previously used for any purpose No, (b) If yes, please specify value of machinery received on transfer: Not Applicable, (c) Total Value of machinery or plant used in the business: INR 2,77,70,116/- and (f) number of workers employed in the manufacturing process: 16

(c) Paragraph 19 Total Sales of the Undertaking: INR 31,23,96,364/-

(d) Paragraph 21 Profits and Gains derived by the undertaking/enterprise from the eligible business: INR 10,81,22,810/-

(e) Deduction under section 801B INR 10,81,22,810/-

We note that while the case set up by the Assessee is that old plant and machinery was used it was less than 20%, Form 10CCB states that the undertaking had not received by way of transfer any plant and machinery previously used.

6.10. On perusal of Depreciation Schedule annexed to the separate Profit and Loss Account and Balance Sheet drawn up for Vaporub-10 gm Unit, we find that the Plant & Machinery as at 01/04/2002 is stated to be INR 2,77,70,115/-. However, the breakup of such machinery or the details thereof have not been furnished by the Assessee during the assessment or the appellate proceedings to controvert the findings by the Assessing Officer that no new unit was set up.

6.11. Thus, there is nothing on record to support contention of the Assessee that old plant and machinery used for setting up of the Vaporub-10 gm Unit was less than 20% of the entire plant and machinery.

6.12. Ld. Authorised Representative for the Assessee had vehemently contended that the Assessing Officer had relied upon the judicial precedents to support the contention that the deduction under Section 801B of the Act would be available (a) even if same product is produced by the new undertaking, (b) the new undertaking is set- up under the same building, and (c) even if the new undertaking in expansion of undertaking, and (d) dehors the new undertaking having common electricity connection, store room and ancillary activities. We note that none of the judicial precedents cited deal with a situation where all the above factors are present at the se wine. In the present case the product manufactured is same, the new undertaking has been set-up in the existing building with common amenities and involving some common equipment. Be that as it may, even if all the other conditions are assumed to be satisfied, the Assessee would not be able to claim deduction under Section 801B of the Act at the rate of 100% since the Assessee has failed to establish that the unit has been set up by transfer of old plant and machinery of less than threshold limit of 20%. While we agree with the Learned Authorised Representative of the Assessee that the threshold limit is to be tested in the year of set-up and the building cost cannot be included in computing the aforesaid threshold limit, there is nothing on record to show that the aforesaid eligibility condition was met in the initial assessment year or the year of set-up. There is nothing on record from which it could be established or inferred that plant & machinery of specified value was deployed/used to set-up Vaporub- 10 gm Unit as claimed by the Assessee. The Assessing Officer had returned a finding that the Assessee had merely bifurcated the written down value of plant and machinery amongst the units on a pro-rata basis and the same has gone uncontroverted during the appellate proceedings. Though, the Vaporub-10 gm Unit is claimed to set-up during the Assessment Year 2001-02, it cannot be said that the claim made by the Assessee has been accepted by the Revenue in any of the preceding years. In absence of the supporting documents/details which support the claim of the Assessee as aforesaid, we are not inclined to accept the contention of the Assessee that deduction under Section 801B of the Act is available for 100% of the profits from Vaporub-10 gm Unit. Accordingly, Ground No. III raised by the Assessee is dismissed.

7. In the course of hearing, we had asked the ld. Counsel to demonstrate that common machinery which is used in the new Vicks unit is less than 20% which has been claimed by the assessee and at the time of original quantum proceedings, same could not be substantiated, the ld. Counsel submitted the workings as given in audit report wherein it has been declared that only 8.33% of the machinery was commonly used, In support, assessee has filed form 10CCB alongwith the financials of Vicks VapoRub - Tins Unit for AY 2004-05 and Form 10CCB along with the financials of Vicks VapoRub Others Unit for AY 2004-05. Apart from that, it has been submitted that various decisions were also cited on different proposition which the Tribunal has observed that assessee has not cited any one decision which is direct proposition. Thus, he submitted that, at the most it is a debatable issue as to whether assessee's right in claiming deduction @100%.

8. The ld. DR on the other hand relied upon the observation and findings of the Tribunal and submitted that assessee has failed to substantiate the claim @100%.

9. The sole reason for the Tribunal upholding the disallowance made by the AO is that assessee has failed to establish that unit which has been set up by transfer of old plant and machinery was less than threshold limit of 30%. Even though, the threshold limit is to be decided in the year of set-up and the building cost, however, before us assessee has stated that it may not be able to substantiate with bills and vouchers but in the audit report for

A.Y.2001-02 had stated that only 8.33% of the machinery was commonly used and mostly it was new plant & machinery. It has been stated that new plant was set up to manufacture 10 gm packing though the product was same but the plant & machinery was entire different. Though the matter has been adversely viewed by the Tribunal on the ground that assessee was not able to establish the transfer of old plant and machinery less than threshold limit of 20% however, assessee's claim was based on audit report certifying the plant and machinery which was set up in A.Y.2001-02 though the bills were not available at the time of assessment proceedings for A.Y.2004-05. Thus, it cannot be claimed that assessee has furnished any inaccurate particulars of income when the claim was based on audit report. Thus, for the purpose of levying penalty u/s.271(1)(c) finding given in quantum proceedings cannot be conclusive for the purpose of penalty proceedings, because the assessee claim was based on auditor's report and the earlier year claim made from the basis of audit report of 10CCB has not been disturbed. Thus, there cannot be case of furnishing of inaccurate particulars and accordingly, penalty levied by the ld. AO is deleted.

10. In so far as levy of penalty on account of deduction claimed u/s.80HHC by reducing the profit determined u/s.80IIB, the assessee's case has been that while calculating deduction u/s.80HHC, 90% of the other income of Rs.11,84,04,966/- which comes to Rs.10,65,64,469/- has been reduced relying upon Annexure 'B' to Form 10CCAC issued by the Auditor. On the other hand, the ld. AO while calculating the deduction

u/s.80HHC reduced 90% of entire other income, instead of 90% of income by way of interest, miscellaneous income etc. of Rs.10,65,64,469/- as computed by the assessee. However, this ground was not pressed before the Tribunal due to small quantum of the amount involved.

11. We find that the deduction claimed by the assessee was based on Auditor's report in Form 10CCAC and only issue is of the other income of Rs.13,604/- which was not considered for deduction by the assessee. This other income was in the form of foreign exchange having direct nexus with its operating business income. Since it is a debatable issue and assessee's claim was based on Auditor's report, therefore, penalty cannot be levied for furnishing of inaccurate particulars of income. Accordingly, the same is deleted.

12. In so far as levy of penalty u/s.80HHC by reducing the profits determined u/s.80IB, the same is decided in favour of the assessee by the Tribunal after observing as under:-

> *"11.6. On perusal of above decision of the Tribunal, we find that identical issues stands decided in favour of the Assessee by the decision ofthe Hon'ble Bombay High Court in the case of Associated Capsules Pvt. Ltd. Vs. DCIT : 332 ITR 42 (Bom). The provisions of Section 80IA(9) of the Act are attracted only in the case where total deduction allowed under Heading C of Chapter VIA of the Act dealing with 'Deductions in respect of certain incomes' exceed the profits of the business. Thus, Section 80IA(9) of the Act curtails the allowance of deduction and not the computation of deduction under any other provisions under Heading C of Chapter VIA of the Act dealing with 'Deductions in respect of certain incomes'. Accordingly, we hold that the reduction of*

the amount of deduction computed under Section 80HHC made by the Assessing Officer cannot be sustained and therefore, the Assessing Officer directed to re-compute the deduction under Section 80HHC of the Act as per the judgment of the Hon'ble Bombay High Court in the case of Associated Capsules Pvt. (supra). Thus, Ground No. VIII raised by the Assessee is allowed.

Thus, penalty levied by the ld. AO on this disallowance is deleted.

13. Now, coming to the levy of penalty in relation to transfer pricing adjustment, the brief facts are that during ring the relevant previous year, the assessee had, inter alia, exported finished goods (predominantly comprising of the product - Vicks Vaporub - Apophatic variant) to its AE, for the AE to market and sell the products in its own market and therefore, qua the said transaction, the assessee acted as a low-risk manufacturer.

14. The assessee also sold a similar product (Vicks Vaporub - Ayurvedic variant) in the domestic market. However, in the domestic market, the assessee was undertaking the marketing and distribution functions and also undertaking significant marketing risks and therefore, was acting as an entrepreneur Further, the formulation of the product (Vicks Vaporub) sold in the domestic market was very different than the product sold in the export market. Since internal method of comparability could not be applied, the assessee benchmarked the aforesaid international transaction of export of finished goods by using external Transactional Net Margin Method (TNMM") as the most appropriate method instead of Internal TNMM.

15. However, the Ld. TPO preferred to use Internal TNMM instead over external TNMM applied by the assessee and benchmarked the transaction by comparing the international transaction of export of Vicks Vaporub with the domestic sales of Vicks Vaporub and ultimately made a TP addition of Rs. 1,65,00,000.

16. The assessee challenged the TP addition before the ld.CIT(A). It was observed by the ld. CIT (A) that the functions, assets and risks qua the exports are different from the sale in domestic market and hence, the ld. CIT(A) held that the export transactions could not be compared with the domestic transaction. Accordingly, the ld. CIT (A) rejected the TPO's approach (basis which penalty was initiated by the Ld. AO). Therefore, the ld. CIT(A) directed the Appellant to provide a comparable set of low-risk manufacturers which was comparable to assessee's international transaction. However, the ld. CIT(A) rejected the assessee's contentions for exclusion of two companies as comparables and also denied working capital adjustment. Consequently, the ld. CIT(A) made a fresh TP addition of Rs.1,67,69,729, which was not the ground on which TPO/AO has made the addition. Though the assessee had challenged the order of the ld. CIT (A) before the Tribunal, however the ground in relation to the TP adjustment was not pressed owing to the smallness of amount.

17. Here, in this case the TP adjustment of Rs.1,65,00,000/- made by the ld. TPO which was the basis on which penalty proceedings were initiated, but same has been deleted by the ld. CIT(A). However, he has made a fresh TP addition by following entirely different methodology. Though earlier the addition made by the TPO was Rs.1,65,00,000/- and now after fresh addition it is Rs.1,67,69,729/- on a different ground altogether. Thus, ld. AO cannot levy penalty in respect of addition or enhancement made by the ld. CIT (A), because when any addition or enhancement is made by the CIT (A), then only CIT (A) can initiate penalty proceedings while making enhancement or can direct the AO to initiate penalty proceedings. Thus levy of penalty by the AO on the addition made by the AO cannot be sustained.

18. In any case, during the course of TP study proceedings, the assessee has disclosed all the relevant facts and duly explained and justified the manner of benchmarking in the TP study report to substantiate that the same was done with due diligence in accordance with the rules. It is not the case of the ld. AO that computation of arm's length was not done in good faith and not with due diligence in terms of Explanation 7 to section 271 (1) (c). Thus, the penalty cannot be levied on TP addition in absence of any overt act by the assessee, which discloses any conscious and material suppression as held by the Delhi High Court in the case of **PCIT vs. Verizon India Pvt. Ltd in ITA No.460/2016.** Thus, on this ground also penalty levied by the ld. AO is directed to be deleted.

19. Since, we have already deleted penalty on merits, addition ground raised by the assessee has become purely academic.

20. In the result, appeal of the assessee is allowed.

Order pronounced on 29th December, 2023.

Sd/-	**Sd/-**
(GAGAN GOYAL)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 29/12/2023
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai