

IN THE INCOME TAX APPELLATE TRIBUNAL
NAGPUR BENCH, NAGPUR

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER AND
SHRI K.M. ROY, ACCOUNTANT, MEMBER

ITA no.116/Nag./2018
(Assessment Year : 2008-09)

ITA no.117/Nag./2018
(Assessment Year : 2009-10)

ITA no.118/Nag./2018
(Assessment Year : 2013-14)

Zim Laboratories Ltd.
Ground Floor, Sadodaya Gyan
Nelson Square, Opp. NADT
Nagpur 440 013 PAN – AAACZ0200E

..... Appellant

v/s

Asstt. Commissioner of Income Tax
Central Circle-2(1), Nagpur

..... Respondent

ITA no.130/Nag./2018
(Assessment Year : 2012-13)

Dy. Commissioner of Income Tax
Central Circle-2(1), Nagpur

..... Appellant

v/s

Zim Laboratories Ltd.
Ground Floor, Sadodaya Gyan
Nelson Square, Opp. NADT
Nagpur 440 013 PAN – AAACZ0200E

..... Respondent

C.O. no.15/Nag./2018
(Arising out of ITA no.130/Nag./2018)
(Assessment Year : 2012-13)

Zim Laboratories Ltd.
Ground Floor, Sadodaya Gyan
Nelson Square, Opp. NADT
Nagpur 440 013 PAN – AAACZ0200E

..... Cross Objector
(Original Respondent)

v/s

Dy. Commissioner of Income Tax
Central Circle-2(1), Nagpur

..... Respondent
(Original Appellant)

Assessee by : Shri Rajesh Loya
Revenue by : Shri Sandipkumar Salunke

Date of Hearing – 21/01/2024

Date of Order – 23/01/2025

ORDER

PER V. DURGA RAO, J.M.

Assessee's appeals for A.Y. 2008-09 and 2009-10; Revenue's appeal for A.Y. 2012-13 & assessee's cross appeal for A.Y. 2012-13 and assessee's appeal for A.Y. 2013-14 are against the impugned orders of even date 28/03/2018, passed by the learned Commissioner of Income Tax (Appeals)-3, Nagpur.

2. Insofar as assessee's appeals for A.Y. 2008-09, 2009-10, 2013-14 and assessee's cross objection for the A.Y. 2012-13 are concerned, when these cases were called for hearing, the learned Counsel for the assessee submitted that he did not wish to press these appeals & cross objection and be permitted to withdraw the same to which the learned Departmental Representative has not raised any objection. Consequently, we deem it fit and appropriate to dismiss these appeals and cross objection by the assessee as withdrawn.

3. In the result, appeals by the assessee for A.Y. 2008-09, 2009-10, 2013-14 and assessee's cross objection for the A.Y. 2012-13 are dismissed as withdrawn.

4. As far as Revenue's appeal being ITA no.130/Nag./2018, for A.Y. 2012-13 is concerned, the Revenue has raised following grounds:-

"1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 1,56,63,908/ made by the AO being excess commission paid to sister concerns without going into the merits of the case.

2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of depreciation of Rs. 14,33,776/- on air handling system purchased from M/s Real Traders being bogus purchases of capital goods without going into the merits of the case.

3. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that during assessment u/s 153 A r.w.s. 143(3), it was not open to the AO to make additions without existence of any incriminating documents found and seized during the search u/s 132(1) overlooking the crucial fact that the original return filed by the assessee was only processed u/s 143(1) and no scrutiny assessment was made earlier.

4. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that the scope of section 153 A is limited assessing only search related income, thereby denying Revenue the opportunity of taxing other escaped income that comes to the notice of the AO?

5. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in limiting the scope of section 153A only to undisclosed income when as per the section, the AO has to assess or re-assess the total income of the six assessment years?

6. On the facts and circumstances of the case and in law, the Ld. CIT(A) failed to appreciate that the word 'incriminating' is neither used in section 153 A nor defined in the statute and therefore, deletion of addition on this account is not in consonance of law?

7. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the addition of Rs. 1,56,63,908/ made by the AO being excess commission paid to sister concerns without appreciating the fact that the assessee had failed to submit documentary evidence of the services rendered by the parties to whom commission was paid.

8. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of depreciation of Rs. 14,33,776/- made by the AO being bogus purchases of capital goods without appreciating the fact that the party was not traceable and the assessee could produce the party with documentary evidence to substantiate the genuineness of the purchases.

9. Any other question to be raised at the time of appeal.

10. It is humbly prayed that the Order of CIT (A) be set aside and Order of the Assessing Officer be restored."

5. On appeal, insofar as addition of ₹ 1,56,63,908, made by the Assessing Officer being excess commission paid to sister concerns is concerned, the learned CIT(A) dealt with the issue in detail vide Para-4.2.2 to 4.2.5, and deleted this addition by observing as follows:-

"4.2.2 I have gone through the assessment order, the grounds of appeal, submission made by the appellant and the case laws relied upon by the appellant. The disallowance of commission expenses has been made by the AO holding that the commission paid by the appellant is excessive and also appears to be a modus operandi adopted by the appellant for dilution of income. The appellant filed written submission and vehemently contended that as the appellant is engaged in the manufacturing of pharmaceutical products, it requires the services of marketing of its products and since the company does not have any dedicated marketing department, it engages commission agents for marketing of the products. In support of the Commission expenses claimed, the appellant produced before me the ledger account of commission expenses, the ledger account of agents, the party-wise details of commission, the sample copies of debit notes raised by the agents and the relevant bank accounts showing the payments made to the agents. The AR also brought my attention to the fact that the agents have charged service tax on commission and the appellant has also deducted TDS on the payments of commission made. As regards to the commission of Rs. 1,46,69,991/- paid to Saif Health Remedies Pvt. Ltd., Rs. 6,36,49,548/- paid to Unijules Life Sciences Pvt. Ltd., the ledger account in books of appellant together-with the ledger account in books of impugned agents was furnished alongwith the return of income and audited financial statements of such agents. It was contended by the AR that the agents have also duly recorded the commission as its income and has paid tax on same. This fact has been confirmed by the AO from the books of agents. The appellant also submitted that tax audit u/s. 44AB has been done and the auditors have not pointed out that the sales commission or any part of it is in excessive or unreasonable or not allowed to be claimed as a business deduction. Further during the course of search proceedings, it appears to be no evidence/incriminating material found which showed that the commission paid was bogus/excessive.

4.2.3 I have perused in detail the assessment order, submission made by the appellant, the documents brought on record and the case laws relied upon by the appellant and I find substantial force in the arguments of the appellant. I find that the appellant has furnished all the required documentary evidences in support of the claim of commission expenses like the ledger account of commission expense, the ledger account of the impugned agents, the party-wise details of commission, the sample copies of debit notes raised by the agents and the relevant bank accounts showing the payments made to the agent. On perusal of the debit notes issued by agents, I find that the details of sales facilitated by them and the percent of commission thereon are clearly mentioned. The agents have also charged service tax thereon. The ledger account as per the agents' books further deducted by the appellant and the

payments have been made to agents through banking channels. The bank statement extracts have been produced and verified during hearing. The AO has also confirmed the transaction of commission payment from the books of the commission agents as he was the AO of the above-mentioned parties as well. Thus, I have no hesitation to hold that the commission paid by the appellant to the impugned concerns viz: Unijules Life Sciences Pvt. Ltd. and Saif Health Remedies Pvt. Ltd. is fully explained and supported by evidence and is an allowable business expenditure rightly claimed by the appellant. The AO has not pointed out the reasons for dissatisfaction of the explanation offered by the appellant during the assessment proceedings. Though the AO agrees that commission and incentive is an inevitable part in appellant's line of business, the reasons and the parameters to hold the commission excessive or for the purpose of dilution of income has not been brought on record. Even the search on the appellant did not unearth any bogus claim. In these circumstances as no defect has been pointed out in respect of the evidence of commission payment or the books of accounts, the ad-hoc disallowance was not permissible and consequently, the said addition of Rs. 1,56,63,908/- cannot be upheld.

4.2.4 It is pertinent to note that the assessment has been made u/s.153A after a search was conducted in the premises of the appellant company. Nowhere has the AO mentioned any incriminating documents which were seized from the appellant during search and on basis of which the impugned commission expenses has been disallowed. From the perusal of assessment order, I find that the AO has merely mentioned in the assessment order (Para 4.1) that from the profit and loss account of the appellant, it is found that commission of 16,02,62,332/ has been paid including Commission of Rs. 1,46,69,991/ paid to Saif Health Remedies Pvt. Ltd. and Rs. 6,36,49,548/ paid to Unijules Life Sciences Pvt. Ltd. Thus, the AO has only relied upon the audited Profit & Loss account and books of accounts of appellant to hold that the payment of commission is not justified. There is no mention about any specific infirmity in the audited Vinancial statements or the books of accounts. Thus, in the case before me, I Find that the AO has disallowed the commission only on basis of surmises. In view of the fact that the appellant has furnished all the documentary evidences including account confirmations and reconciliation statement and produced entries in the audited books of accounts in support of the impugned commission, I am of the considered opinion that the onus cast upon the appellant has been duly discharged by it. The action of the AO in making the impugned addition is based on conjectures and surmises. It is not the case of the AO that any concrete evidence has been found by him during search and post search proceedings to hold such a commission as unreasonable or bogus. Such an ad-hoc and selective addition by AO is untenable more-so in case of detailed search action of subsequent post search proceedings being already done on appellant. Further I find that the assessment in appellant's case for A.Y. 2009-10 and A.Y. 2010-11 was completed u/s 143(3) of the I.T. Act and under similar circumstances claim of commission payment was allowed. Further no incriminating evidence has been found during the course of search.

4.2.5 Considering the totality of facts and circumstances in case of the appellant, I am of the considered view that addition made by the AO at Rs. 1,56,63,908/ on account of disallowance of commission expenses is unjustified and unsustainable. The AO is accordingly directed to delete the addition of

Rs.1,56,63,908/-. This ground of appeal is accordingly allowed.”

6. With regard to disallowance of depreciation of ₹ 14,33,776, on air handling system purchased from M/s Real Traders, is concerned, the learned CIT(A) dealt with the issue vide Para-4.3.2 to 4.3.4, vide impugned order, wherein the learned CIT(A) allowed the depreciation by holding as under:-

"4.3.2 I have gone through the assessment order, the grounds of appeal and submission made by the appellant. The AO had issued a notice appellant enquiring about the details of purchase of asset of 2,45,309/- from party, M/s. Real Traders. After verification of the chnents furnished, the AO disallowed depreciation of Rs. 14,33,776/- staling that the said purchase of asset is bogus and that the party is a hawala dealer as per sales tax records. Further the AO has also mentioned about the various statements recorded of the party and connected persons in the post search proceedings. The AO also concluded that the party, Real Traders did not respond to notices u/s. 133(6) and has been declared as a hawala dealer as per Sales Tax records. Hence, he held that the purchase of Air Handling Unit from them is bogus thereby disallowing depreciation of Rs. 14,33,776/- claimed on the machinery.

4.3.3 On the other hand, the appellant vehemently objected to the action of the AO in holding the party, Real Traders as a hawala dealer and disallowing the depreciation claimed on assets (Air Handling Unit) purchased from them. The appellant produced the copy of submission dated 2-3-2016 before me wherein facts and documents regarding the existence and genuineness of M/s. Real Traders and machine purchased from them were enclosed. The appellant explained that the Air Handling Units have been assembled, erected and fabricated at the site itself by the contractor on turnkey basis. The appellant also produced various documentary evidences like ledger account of Real Traders, copies of bills and delivery challans issued by them and copy of purchase order issued by the appellant in support of the fact that the Air Handling Equipment was purchased from them. The appellant brought my attention all the information like name, address, VAT tin number mentioned in the bills and delivery memos. The appellant stated that none of the statements recorded and none of the evidences and information received from Sales Tax Department was provided to the appellant for cross-examination. The appellant also explained that in the post-survey enquiries, the said details with respect to Real Traders were furnished before the DDI wing and nothing objectionable and no infirmity was pointed out by the DDI wing. As of Inegards to the statement of Shri Lalit Jain, the appellant vehemently argued the same was not recorded in case of assessee but was rather recorded during the course of proceedings of a third person, Darmendra Singh. The appellant has submitted that in any of the statements relied upon by the AO, no one has stated that the transaction of purchase of Air Handling Unit by the appellant is a non-genuine or bogus transaction. The appellant has submitted that no addition can be made to appellant's income only on basis of suspicion. The appellant thus contended that the purchase of asset from Real Traders was genuine and supported by the Tax Invoices, Delivery Memos and purchase

order. The entries were duly recorded in books of appellant and the payments have been made through banking channels. Thus, the appellant submitted that the action of the AO in disregarding all the documentary evidences furnished by the appellant and relying on evidences collected at the back of appellant without giving an opportunity to appellant to cross-examine, is highly unjustified and illegal. The appellant has relied upon various judicial pronouncements in support of its submission which have been elaborated in para 4.3.1 of this order.

4.3.4 I have carefully considered the submission of the appellant, facts of case, various documentary evidences submitted and the supporting case laws. The air handling equipment was purchased in the F.Y.2010-11 i.e. A.Y.2011-12 and the similar Ground was taken by the appellant in that Assessment year. While adjudicating the issue I have already held the appellant has established the existence of the party and has provided various documentary evidences with regard to the same. Further the claim of the appellant regarding installation of the plant and machinery in the factory premises is not disputed as there was no finding as a result of search that such air handling equipment was not in the existence in the factory premises on the day of search. Considering the facts of the case, and the documents available on record I have already held that the depreciation claimed by the appellant cannot be disallowed. In such circumstances and facts of the case the addition of Rs. 14,33,776/- is deleted. The Ground of appeal is accordingly allowed."

7. Before us, the learned Departmental Representative assailing the impugned order passed by the learned CIT(A) submitted that the learned CIT(A) was not at all justified in deleting the additions made by the Assessing Officer. He thus prayed that the impugned order be reversed.

8. The learned Counsel for the assessee supported the order passed by the learned CIT(A) and justified the conclusion drawn by the learned CIT(A) and thus prayed that the impugned order passed by the learned CIT(A) be upheld by dismissing the grounds raised by the Revenue.

9. We have heard the rival contention of both the parties, perused material placed on record and duly considered the facts of the case in the light of settled legal position and the case laws relied upon by the assessee. On going through the impugned order passed by the learned CIT(A) on both the issues under consideration, we find that the findings of the learned CIT(A)

on both the issues are self-explanatory and a well-reasoned order and consequent upon such findings of the learned CIT(A), we find no scope to tinker with the impugned order on both the issues. Accordingly, the order passed by the learned CIT(A) is upheld by dismissing all the grounds raised by the Revenue.

10. In the result, appeal filed by the Revenue is dismissed.

11. To sum up, appeals and cross objection by the assessee as well as appeal by the Revenue are dismissed.

Order pronounced in the open Court on 23/01/2025

Sd/-
K.M. ROY
ACCOUNTANT MEMBER

Sd/-
V. DURGA RAO
JUDICIAL MEMBER

NAGPUR, DATED: 23/01/2025

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The PCIT / CIT (Judicial);*
- (4) *The DR, ITAT, Nagpur; and*
- (5) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Sr. Private Secretary
ITAT, Nagpur