IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER

ITA No.1007/Bang/2014
Assessment year : 2009-10

The Deputy Commissioner of Income Tax, Circle 11(4), Bangalore.	Vs.	M/s. Herbalife International India Pvt. Ltd., No.14, Vaswani Wilshire, Commissariat Road, Bangalore – 560 025. **PAN:** AAACH 8025R
APPELLANT		RESPONDENT

CO No.116/Bang/2015 [in ITA No.1007/Bang/2014]
Assessment year : 2009-10

M/s. Herbalife International India Pvt. Ltd., Bangalore – 560 025. **PAN:** AAACH 8025R	Vs.	The Deputy Commissioner of Income Tax, Circle 11(4), Bangalore.
APPELLANT		RESPONDENT

Revenue by	:	Ms. Neera Malhotra, CIT(DR)
Assessee by	:	Shri Chavali Narayan, CA

Date of hearing	:	06.04.2016
Date of Pronouncement	:	12.04.2016

O R D E R

Per Vijay Pal Rao, Judicial Member

This appeal by the Revenue and CO by the assessee are directed against the order dated 3.3.2014 of the CIT(Appeals)I, Bangalore for the assessment year 2009-10.

2. The Revenue has raised the following grounds:-

> "1. The order of the CIT (Appeals), revenue, is opposed to law and the facts and circumstances of the case.
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> 2. The CIT(A) erred in directing the AO to delete the disallowance of royalty appreciating the fact that the ITAT decision in the assessee's own case relied upon by him has not been accepted by the department and appeal has been filed before the Hon'ble High Court which is still pending.
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> 3. The CIT(A) erred in holding that sub clause (iv) of clause (b) of section 40A(2) is not attracted in the present case without appreciating that Sec 40A(2)(b)(iv) clearly covers the payments made to such other companies having substantial interest in the business or profession of the assessee and as the holding company to which the administrative fees is paid is a member of the assessee company and the provisions of Sec 40A(2)(b)(iv) clearly apply.
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> 4. The CIT(A) erred in not appreciating that the assessee company has made an attempt to evade payment of Dividend Distribution tax in India by disguising the payment as administrative fees.
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> 5. For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the CIT(A) be reversed and that of the Assessing Officer be restored."

> 6 . The appellant craves leave to add, to alter, to amend or delete any of the grounds that may be urged at the time of hearing of the appeal."

3. Ground No.1 is general in nature and does not require any specific adjudication.

4. Ground No.2 is regarding adhoc disallowance of royalty by treating the same as capital in nature.

5. We have heard the ld. DR as well as ld. AR and considered the relevant material on record. At the outset, we note that an identical issue was considered and decided by this Tribunal in assessee's own case for the AY 2008-09 vide order dated 9.10.2015 in ITA No.1679/Bang/2012 in paras 7 & 8 as under:-

> "7. We have considered the rival submissions as well as the relevant material on record. At the outset, we note that an identical issue has been considered and decided by this Tribunal in assessee's own case for assessment year 1999-00, 2000-01 and 2004-05. The findings of the Tribunal for the assessment year 2004-05 have been upheld by the Hon'ble jurisdictional High Court vide its decision *dated 28/10/2014 in ITA 3/2009.* The substantial question of law admitted by the Hon'ble High Court for its consideration is reproduced in para.2 of the said decision as under:
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> > "Whether the Appellate Authorities were correct in holding that royalty payments made for transfer of technical know how for manufacturing process in engineering input scientific and practical information and formula research data design and manufacturing procedure know how raw material data expertise specifications for designing and manufacturing etc to

Herbalife International Incorporate cannot be treated as capital in nature to the extent of 25% as held by the Apex Court in 232 ITC 359?"

Thus it is clear that the issue involved is identical and while deciding the said substantial question of law, the Hon'ble High Court has held in para.5 to 9 as under:

"5. We have heard the learned counsel for the parties.

6. Clause 6.2 of the License and the Technical assistance agreement reads as under:

6.2: Ownership of Materials: Licensee expressly acknowledges and agrees that, except as specifically provided in this Agreement, at no time shall it acquire or retain, or appropriate for its own use, any right, title or interest in or to any Technical Information. All files, lists, records, documents, drawings and specifications which incorporate or refer to all or a portion of the Technical Information shall remain the sole property of Licensor. Such materials shall be promptly returned (a) upon Licensor's reasonable request, or (b) upon termination of this Agreement, whichever is earlier.

7. Similarly Clause 7.1, 7.2 and 7.3 reads as under:

7.1: Term and Renewal. The term of this Agreement shall commence on the effective date hereof and shall remain in effect until December 31, 2000, unless terminated earlier in accordance with Section 7.2 or 7.3 below. The Agreement shall automatically be renewed on the same terms and conditions for periods of one year, unless Licensee or Licensor has been notified otherwise not later than 90 days before the

7.2: Termination. Either party may terminate this Agreement, with or without cause, upon 90 days prior written notice given to the other party.

This Agreement may be terminated by Licensor at any time by written notice of termination, effective on the date such notice is received, after the occurrence of any of the following events:

(a) Any breach of Licensee's obligations under Articles VI or VII of this Agreement;

(b) Upon the insolvency or bankruptcy of Licensee, the inability of License to pay its debts as they fall due or upon the appointment of a trustee or receiver or the equivalent for Licensee, or upon the institution of proceedings under the laws of the Territory relating to the dissolution, liquidation, winding up, bankruptcy, insolvency or the relief of creditors, if such proceedings are not terminated or discharged within thirty days; or

(c) Upon a substantial change of management or ownership of Licensee or upon the acquisition of direct or indirect control of Licensee by any person which manufactures or markets products competing or likely to compete with the Products.

7.3: Cure Period If either party shall commit any breach or be in default of its duties and obligations under this Agreement, other than those set forth in Section 7.2(a), the non-breaching party shall give to the breaching party written notice of such breach or default and shall request that such breach or default be cured. If the breaching party shall fall to cure such breach or default within thirty days of the date of the notice of breach or default, the non-breaching party may terminate this Agreement immediately by gluing written notice of termination to the breaching party.

8. These two provisions have not been looked into by any of the authorities. The said provisions disclose that the agreement entered into between the parties provides for renewal automatically. Clause 6.2 makes it abundantly clear that no proprietary interest shall be transferred to the assessee in respect of the files, lists, records, documents, drawings, specifications and other technical information which was furnished to the assessee by the licensor. Under these circumstances, it cannot be said that the assessee got any enduring benefit in the said agreement which is a condition precedent for treating the payment as capital expenditure. Therefore, rightly the order passed by the Assessing Authority is set aside by the Appellate Authority and held the entire amount as revenue expenditure.

9. In that view of the matter, we do not see any merit in the appeal. Accordingly, substantial questions of law is answered in favour of the assessee and against the revenue. Accordingly, the appeal is dismissed."

> 8. It is pertinent to note that for the year under consideration, royalty paid by the assessee was under the same agreement as it was paid for the assessment year 2004-05. The Hon'ble High Court has decided this issue after considering the relevant clauses of the agreement and therefore, the issue of payment of royalty is now covered by the decision of the Hon'ble High Court in the assessee's own case. Respectfully following the decision of the Hon'ble jurisdictional High Court, we allow the claim of the assessee and the addition made by the AO on this account is deleted."

3. It was pointed out by the ld. AR of the assessee that royalty for the year under consideration has been paid by the assessee under the agreement having same terms and conditions, however, the only different is that the royalty for the period from Apr. 2008 to Dec. 2008 was paid to Herbalife International Inc. (HII) and for Jan. 2009 to Mar. 2009 to Herbalife Luxembourg. The services under both the agreements were identical i.e., for licensing of the licensor's technical information including the method of manufacturing and improvements with respect to the product and technical assistance services. The ld. AR has pointed out that the AO has not disputed this fact that terms & conditions of the earlier agreement as well as the subsequent agreement for payment of royalty from Jan. to Mar. 2009 are identical and therefore in view of the finding of the Tribunal for the A.Y. 2008-09, this issue is covered in favour of assessee.

2. We find that the AO has disallowed 25% of the royalty paid by the assessee to HII as well as Herbalife Luxembourg by following the orders for the AYs 2006-07 and 2007-08. Therefore, the AO himself has not found

any change in the terms & conditions in the agreement for the earlier assessment year and as well as for the year under consideration. In view of the fact that the terms & conditions of the agreement under which the royalty paid by the assessee during the year are identical to that of the earlier year, we are of the view that the issue is now covered by the decision of this Tribunal for the A.Y. 2008-09 as well as judgment of the jurisdictional High Court. Accordingly, we do not find any error in the impugned order of CIT(Appeals), qua decision.

3. Ground Nos.3 & 4 are regarding disallowance of administrative fees.

4. We have heard the ld. DR and the ld. AR as well as considered the material on record. At the outset, we note that an identical issue was considered by this Tribunal in assessee's own case for the AY 2008-09 vide order *(supra)* in paras 10.4 to 10.6 as under:-

> "10.4 We have considered the rival submissions as well as the relevant material on record. This transaction of payment of administrative service fee has been declared by the assessee as international transaction and is also subjected to TP provisions of sec.92CA, however, the AO made an alternative addition by invoking the provisions of sec.40A(2) of the Act. The AO allowed only 2% of the turnover amounting to Rs.1,02,62,530/- and the balance of Rs.4,81,97,802/- has been disallowed under section 40A(2) of the Act. There is no dispute that the transaction has been reported by the assessee as international transaction which was also accepted by the AO and the TPO as an international transaction. Thus, once a particular transaction is admitted as international transaction then the same falls in the ambit of the provisions of X chapter of the Act which are specific provisions to deal with such transactions between the assessee and its AE. Therefore, once the transaction is undisputedly

subject matter of Chapter X of the IT Act, then the other general provisions of the Act cannot be applied simultaneously. The AO, having considered the transaction being international transaction and making a reference to the TPO for determination of the ALP cannot go back to the provisions of sec.40A(2) for determining the reasonableness of the price paid by the assessee. Our attention was invited by the learned authorised representative of the assessee that for the assessment year 2001-02 to 2002-03 the payment in question was subjected to MAP and only 25% is charged to tax. Therefore, it was accepted by the department that the services were rendered by the AE to the assessee in India. We further note that the AO has not conducted any inquiry or investigation to find out the excessiveness of the payment made by the assessee to its AE.

10.5 The co-ordinate bench of this Tribunal in the case of *M/s.Cisco Systems Capital (India) Pvt. Ltd., in ITA 1558/Bang/12* = ***2014-TII-234-ITAT-BANG-TP*** held in para.11 as under:

> "11. Having heard both the parties and having considered the rival contentions and also the material on record, we find that the assessee has filed before us on 14-7-2014, the break-up of the expenditure as per profit and loss account during the financial year 2007-08. From the said details, it is seen that the services rendered by Cisco India to the assessee are in the nature of Financial and Accounting services, legal and tax related issues information system and related issues, Treasury services, Asset Management/residual value analysis, credit analysis and deal execution. The AO has not doubted the rendering of services by Cisco India to the assessee but has restricted the allowable expenditure to 5% of the operating expenses which means that he has only doubted the reasonableness of the quantum of payment. But to invoke the provisions of sec.40A(2) of the Act, as rightly pointed out by the learned counsel for the assessee, the AO cannot make an ad hoc disallowance u/s 40A of the Act but has to determine the expenses which are excessive and unreasonable. The AO, in the case before us, has failed to point out any particular expenditure which according to him, is excessive or unreasonable but has made an ad hoc disallowance which is not sustainable. Further, as rightly pointed out by the learned counsel for the assessee, disallowance u/s 40A(2) can be made only if the alleged

> excessive and unreasonable payment is made to any person enumerated under clause (b) of sub-sec.(2) of sec.40A of the Act. In the case before us, the AO has not brought out anything on record to show that Cisco India Ltd., falls in any of the categories of persons enumerated under clause (b) of sub-section (2) of sec.40A of the Act. The recipient of the payment i.e. Cisco India, definitely does not fall under any of the categories of persons under clause (b) of sub-sec.(2) of sec.40A. The AO has not carried out any exercise to bring on record that Cisco India has got substantial interest in the business or profession of the assessee or that it falls in any of the categories of persons. In view of the same, we are of the opinion that the disallowance u/s 40A(2)(b) of the Act is not called for.
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> 11.1 As regards the alternative contention of the learned counsel for the assessee that the transaction between the assessee and Cisco India Ltd., being an international transaction, the same has already been referred to the TPO for determination of the ALP and therefore it cannot be considered for disallowance u/s 40A of the Act, since we have already held that the provisions of sec.40A are not attracted, we do not see the need to adjudicate this contention of the assessee."

10.6 In the case in hand, when the AO has not conducted any inquiry or brought out any material on record to prove that payment made by the assessee is excessive and unreasonable making an adhoc disallowance by invoking the provisions of sec.40A(2) of the Act is not justified. Accordingly by following the decision of the co-ordinate bench of the Tribunal as well as in view of the facts and circumstances of the case as discussed above, we set aside the orders of the authorities below qua this issue and delete the addition made under section 40A(2) of the Act."

4. We find that an identical disallowance has been made by the AO for the year under consideration, therefore, in view of the findings of this

Tribunal for the AY 2008-09, we do not find any error or illegality in the impugned order of the CIT(Appeals), qua decision.

5. In the Cross Objection, the assessee has not raised any independent ground, but it is only in support of the impugned order of the CIT(Appeals). In view of our finding in the appeal of Revenue, the Cross Objection becomes infructuous and accordingly dismissed.

6. In the result, the appeal of Revenue as well as Cross Objection of assessee are dismissed.

Pronounced in the open court on this 12th day of April, 2016.

Sd/-	Sd/-
(INTURI RAMA RAO) Accountant Member	(VIJAY PAL RAO) Judicial Member

Bangalore,
Dated, the 12th April, 2016.
/D S/

Copy to:
1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore. 6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.