

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

**BEFORE: SHRI G.S. PANNU, HON'BLE PRESIDENT
&
SHRI AMIT SHUKLA, JUDICIAL MEMBER**

**ITA No.1381/Mum/2014
(Assessment Year :2009-10)**

M/s. Ciba India Ltd.(Through their successor BASF India Limited) Vibgyar Towers Unit No.101, 1 st Floor Block, C-62 Bandra Kurla Complex Bandra (E) Mumbai – 400 051	Vs.	The Deputy Commissioner of Income Tax (OSD) Range-8(1) Mumbai Aayakar Bhavan M.K.Road, Mumbai – 400 020
PAN/GIR No.AAACC4147P		
(Appellant)	..	(Respondent)

Assessee by	Shri Madhur Agrawal a/s. Shri Ninad Patade
Revenue by	Ms. Samruddhi Hande
Date of Hearing	25/01/2023
Date of Pronouncement	19/04/2023

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeal has been filed by the assessee against final assessment order dated 24/12/2013, passed u/s. 143(3) r.w.s. 144C (13) in pursuance of directions given by the ld. DRP dated 28/10/2013 for the A.Y. 2009-10.

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

“Each of the following grounds is without prejudice and independent of each other,

1) Based on the facts and circumstances of the case and in law, the Ld AO while passing the order under section 143(3) r.w.s 144C(13) dated 24 December, 2013 in pursuant to the directions of the Dispute Resolution Panel-1 (hereinafter referred to as the DRP) dated 28 October 2013 erred in upholding the disallowance of Rs 65 made under section 14A of the Act on the ground that these represent expenses attributable to earning dividend income of Rs 72,96,498 which does not form part of total income.

2) Based on the facts and circumstances of the case and in law, the Ld AO erred in upholding an addition of Rs 4,59,794 made under section 40(a)(ia) of the Act to the total income in respect of claim made on payment basis in respect of expenses disallowed in the assessment year 2008-09

3) Based on the facts and circumstances of the case and in law, the Ld AO erred in making an addition of Rs. 4,59,372 under section 40(a)(ia) of the Act as being proportionate amount on which tax was deducted at lower rate
4) Based on the facts and circumstances of the case and in law, the Ld AO erred in upholding the disallowance of Rs. 59,23,783 made under section 43B of the Act, in respect of claim made on payment basis

5) Based on the facts and circumstances the case and in law the Ld AO while passing the order under section 143(3) r.w.s 144C(13) dated 24 December, 2013, in pursuant to the directions of the DRP erred in determining the arm's length price for payment of ERP implementation cost at Nil instead of Rs. 1,81,34,579, and thereby made an adjustment of Rs. 1,81,34,579.

6) The AO erred in charging interest under section 234D of the Act of Rs. 1,66,64,271 as against Rs.13,02,596 chargeable

7) The AO erred in granting interest under section 244A of the Act of Rs. 28,25,734 as against Rs. 34,98,527 receivable by the appellant. The AO erred in granting interest under section 244A of the Act upto date of the order as against date of receipt of the refund order.

The respondents crave leave to add, to amend alter, vary, omit or substitute the above ground of cross objection or add a new ground or grounds at any time before or at the time of hearing, as they may be advised.”

2. At the outset, ld. Counsel submitted that all the issues involved are squarely covered by the decision of the Tribunal in assessee's own case for the A.Y.2007-08 in ITA No.759/Mum/2012; and for 2008-09 in ITA No.4210/Mum/2014.

3. In so far as ground No.1 relating to disallowance u/s.14A of Rs.65,36,637/-, the brief facts are that assessee has earned dividend income of Rs.72,96,498/- which was claimed as exempt. However, the assessee has not apportioned any expenses for the purpose of disallowance u/s.14A. The ld. AO accordingly determined the disallowance of Rs.65,36,637/- in accordance with rule 8D. We find that this issue has come up for consideration before the Tribunal in A.Y.2008-09, wherein the Tribunal has held that in so far as interest expenditure is concerned as worked out under Rule 8D(2)(ii), since assessee had sufficient interest free funds, therefore, no interest disallowance should be made. Secondly, only those investments

should be considered for the purpose of calculating the disallowance under Rule 8D(2)(iii) which has yielded exempt income during the year. The relevant observation and finding of the Tribunal in this regard reads as under:-

“12. We have considered rival submissions and perused the material on record. As regards the disallowance of interest expenditure under rule 8D(2)(ii), the contention of the learned Counsel for the assessee is twofold. Firstly, no interest disallowance should be made when the assessee has surplus interest free fund available with it. Secondly, only those investments which have yielded exempt income during the year should be considered for disallowance under rule 8D(2)(iii). On a perusal of impugned order of learned Commissioner (Appeals), we find that the assessee had made a submission that as against the interest free surplus funds available of ₹ 281,90,44,000, investment stood at ₹ 150,85,55,000. Thus, from the aforesaid submission, it is evident that the assessee had sufficient interest free fund available with it to take care of the investment. Therefore, as per the settled legal principles, no disallowance of interest expenditure can be made under rule 8D(2)(ii). Hence, the disallowance made under rule 8D(2)(ii) has to be deleted. As regards disallowance of administrative expenditure under rule 8D(2)(iii), we direct the Assessing Officer to compute such disallowance by taking into account only those investments which have yielded dividend income during the year. In this regard, the Assessing Officer is directed to verify the correctness of disallowance computed by the assessee at ₹ 3,91,961.79. This ground is disposed off accordingly.”

4. Thus, following the aforesaid finding and observation of the Tribunal, we direct the ld. AO to delete the disallowance of expenditure under Rule 8D(2) as the assessee had surplus funds far exceeding the investments made. As far as disallowance of

interest expenditure under Rule 8D(2)(iii), we also direct the ld. AO to compute the disallowance by taking into account those investments which have yielded dividend income during the year. Accordingly, ground No.1 is partly allowed for statistical purposes.

5. In so far as the issue raised in ground No.2 relating to addition of Rs.4,59,794/-, the same has not been pressed and therefore, the same is dismissed as not pressed.

6. Coming to the addition of Rs.4,59,372/- made u/s.40(a)(ia) as raised vide ground No.3, the ld. AO has disallowed the expenditure on the ground that assessee deducted tax at lower rate. We find that this issue has been considered in assessee's case on similar ground in A.Y.2007-08 wherein the Tribunal has observed and held as under:-

"5. The next ground pertains to making addition of Rs.63,28,864/- u/s 40(a)(ia) of the Act being proportionate amount on which tax was deducted at lower rate. The ld. counsel for the assessee contended that for short deduction, no disallowance is to be made for which he place reliance upon the decision from Hon'ble Kolkata High Court in CT vs S.K. Tekriwal (2014) 361 ITR 432 (Cal.) and the decision of the Tribunal in DCIT vs Chanda Bhoy and Jassobhoi (2012) 17 taxmanc.om 158 (Mum.). This factual matrix was not controverted by the ld. DR.

5.1. We have considered the rival submissions and perused the material available on record. We find that so far as, the issue of short deduction of TDS is concerned, the ld. DRP has discussed this issue at page-13, para-8.1 onwards of the order. The assessee deducted tax at source at lower rate than required

under the provisions of the Act. The ld. Assessing Officer did not accept the explanation of the assessee, thus, he allowed the claimed deduction of expenses to the extent of TDS made and disallowed the expenses corresponding to default in making the TDS. We find that this issue has been examined by the Mumbai Bench of the Tribunal in (2012) 17 taxman.com 158 (Mum.), wherein, it was held that the provisions of section 40(a)(ia) can be invoked only in the event of non-deduction of tax at source but not lessor deduction of tax at source. Identical view was taken by Hon'ble Kolkata High Court in the case of S.K. Tekerwal (supra) order dated 03/12/2012. In the absence of any contrary decision brought to our notice, we allow this ground of the assessee."

6.1. Accordingly, in view of the aforesaid decisions of the Tribunal, we hold that no disallowance u/s.40(a)(ia) can be made on account of tax deducted at lower rate.

7. Coming to the disallowance of Rs.59,23,783/- made u/s.43B of the Act as raised vide ground No.4, the brief facts are that assessee company has claimed sum of Rs.59,23,783/- on account of leave encashment paid prior to the due date of filing of return of income. The ld. AO following the similar disallowance made in A.Y.2007-08 has made the disallowance holding that assessee could not substantiate its claim.

7.1. In A.Y.2007-08 this issue was set aside the issue to the file of the ld. AO to decide afresh. In A.Y.2008-09 also this issue has been restored back for fresh adjudication and accordingly, in this year also on similar lines matter is restored back to the file of the ld. AO.

8. Lastly, coming to the issue of ALP adjustment for payment of ERP implementation cost at Nil and thereby adjusting the payment of Rs.1,81,34,579/-, as has been admitted by the parties that, similar issue has been discussed and decided in assessee's own case for A.Y.2008-09. The assessee is engaged in the business of manufacturing and trading of a wide range of specialty chemicals which are sold both in the domestic and export markets. During the year one of the international transactions has been with regard to payment of ERP implementation cost of Rs.1,81,34,579/- to its AE. The assessee has entered into ERP systems cost sharing agreement with Ciba, Basel for replacing the existing fragmented system by way of implementation of single new ERP system. It is in the form of payment as intra-group services and the ld. TPO noted that similar adjustment on account of SAP implementation was made in A.Y.2008-09. The reasons of the ld. TPO have been summarised by him in the following manner:-

"1. The taxpayer already paid for SAP implementation in the earlier years

*2. The taxpayer did not produce any evidence regarding the payment made for the SAP implementation by the AE and how it would be quantified at an arm's length condition. **As seen by the TPO, SAP implementation in an independent company with similar number of user licenses costs less than the amount paid by the taxpayer in the earlier years.***

3. As per the agreement of the taxpayer with the AE regarding the SAP services, the taxpayer is obliged to pay only those costs that are incurred for providing SAP implementation services.

But, the taxpayer already paid for these services during the earlier years i.e. FY 2005-06 and FY 2006-07

4. The taxpayer could not produce the details and quantum of expenditure spent by the AE in rendering services to the taxpayer in connection with SAP services even though he was asked specifically

5. Just by describing various services, it will not suffice to justify the price charged in intra group services. The taxpayer is only describing various services rendered by the taxpayer, but did not give the actual amount spent in respect of these services; as such dealing between two independent parties would invariably boil down to the actual expenditure incurred in connection with such services and mark-up thereon.

6. First of all, the taxpayer has to prove that the services are rendered. The taxpayer did not prove substantially. The second aspect of intra group services is the quantification of such services in terms of actual expenditure incurred and commensurate benefits derived there from. This aspect is also not proved by the taxpayer. Even if we assume that the above services are incurred, the quantum of such services would not be to the extent of Rs. 13.26 crores. Moreover, when an expenditure is incurred for the benefit of the group as a whole, no charging of such expenditure is required as such expenditure is not incurred in connection with any individual member of the group and the benefit of such expenditure would be available to all the members of the group.

7. The taxpayer has not shown how such services would be valued by an independent entity dealing in similar circumstances. As discussed above, it is seen that independent companies spent less than Rs 4.5 crores on SAP implementation for similar number of user licenses and this amount for SAP implementation was already paid in the earlier years.

8. The taxpayer's SAP Service charges is nothing but siphoning off profits from India With minimum incidence of tax as the taxpayer has paid only 10%, when compared to the tax rate of 40% (30% tax + 10% dividend tax) if the same was shown as profits and remitted as dividend.

9. The imports from AEs constitute substantial portion of consumption of raw material / purchases indicating that the AEs are already compensated enough in the form of purchase price and also compensated for the value addition in India by way of royalty paid based on the technology received from AE.

10. The taxpayer did not prove the arm's length nature of SAP Service charges paid to Ciba Inc, USA.

8.1. We find that this issue has been dealt and decided by the Tribunal in the following manner:-

“7. We have considered rival submissions in the light of the decisions relied upon and perused the material on record. On a perusal of the order passed by the Transfer Pricing Officer, we find that in the course of the proceedings, the assessee had furnished the agreement entered with the AE for implementation of SAP ERP system as well as various other documentary evidences including the debit note raised by the AE towards allocation of cost. It is also a fact that the AE has entered into similar agreement with 51 other group entities towards cost allocation for implementing SAP ERP system. Therefore, the cost charged to other AEs in the group is certainly available with the assessee as CUP for comparing the transaction with the AE. It is also a fact that ERP implementation has started from preceding years and spanned over a period of four years. The payment made by the assessee towards implementation of SAP ERP system in the preceding assessment years has been accepted by the Transfer Pricing Officer to be at arm's length. It is also

evident from the order of the Transfer Pricing Officer, he has not disputed the fact that the AE has implemented SAP ERP system for assessee's business in India. That being the case, the cost paid by the assessee for implementation of SAP ERP system without any mark-up cannot be treated as nil by applying the benefit test. It is for the assessee to decide whether a particular system or investment would be beneficial to him or not. The Transfer Pricing Officer certainly cannot step into the shoes of the assessee or the Assessing Officer to evaluate the business expediency of a cost incurred for business purpose and the benefit derived. His job is to determine the arm's length price by adopting any one of the prescribed methods. In the facts of the present case, though, the Transfer Pricing Officer has stated that he has adopted CUP method for determining the arm's length price, however, in reality, he has determined the arm's length price at nil on purely ad-hoc basis by stating that the assessee has not derived any benefit. Moreover, the allegations of the Transfer Pricing Officer and learned Commissioner (Appeals) that the assessee has failed to furnish supporting evidence to establish its claim is found to be baseless as the assessee has furnished sufficient documentary evidences not only to prove the implementation of SAP ERP system but also the benefit derived by it from such system. Moreover, when the Transfer Pricing Officer has accepted the payment made towards SAP ERP implementation in the earlier years, there is no reason to deny the same in the current year by determining the arm's length price at nil. In any case of the matter, it is a fact on record that the assessee has implemented the SAP ERP system and is utilizing it for its business purpose. The Transfer Pricing Officer has also stated that SAP ERP system is a necessary tool for carrying out business works. That being the case, the determination of arm's length price at nil, that too, on ad-hoc basis is unsustainable. Accordingly, we have no hesitation in deleting the addition made on account of transfer pricing adjustment. This ground is allowed."

8.2. Thus, following the earlier year judicial precedence and since similar reason given by the Id. TPO has been examined and has been rejected and the TP adjustment has been deleted. Therefore, in this year on similar reason given by the Tribunal, the addition on account of TP adjustment on the payment of ERP addition cost is deleted. Accordingly, this ground is allowed.

9. In so far as ground with regard to interest u/s.234D and granting interest u/s.244A, the same has been stated to be secondary ground and therefore, is not adjudicated upon.

10. Assessee has also raised an additional ground stating that assessment has been passed on non-existing person has not been pressed. Therefore, same is not adjudicated. Accordingly, the appeal of the assessee is partly allowed.

11. In the result, appeal of the assessee is partly allowed.

Order pronounced on 19th April 2023

(G.S. PANNU)
PRESIDENT

(AMIT SHUKLA)
JUDICIAL MEMBER

Mumbai; Dated 19/04/2023
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