IN THE INCOME TAX APPELLATE TRIBUNAL "G", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM
&
SHRI PAWAN SINGH, JM

ITA No.1723/Mum/2009
(**Assessment Year : 2003-04**)
&
ITA No.1564/Mum/2011
(**Assessment Year :2002-2003**)

M/s. Godrej & Boyce Mfg. Co.Ltd., Pirojshah Nagar Vikhroli, Mumbai – 400 079	Vs.	DCIT – 10(2), Mumbai – 400 020
PAN/GIR No.		**AAACG1395D**
Appellant)	..	**Respondent**)

Assessee by	Shri P.J.Pardiwala with Shri Nitesh Joshi
Revenue by	Ms. Vidisha Kalra
Date of Hearing	**29/09/2016**
Date of Pronouncement	**21/12/2016**

आदेश / O R D E R

***PER R.C.SHARMA (A.M)*:**

These are the appeals filed by the assessee against the order of CIT(A) for the assessment year 2002-2003 & 2003-04 in the matter of order passed u/s. 143(3) r.w.s.147 of the IT Act.

2. In ITA No.1723/Mum/2009 for the A.Y.2003-04, following grounds have been taken by assessee.

> *1.0. The Assessing Officer erred in issuing notice u/s 148 and assuming jurisdiction u/s 147 of the Act merely due to change of opinion and learned Commissioner (Appeals) erred in upholding the validity of reassessment notice and proceedings.*
>
> *2.0. The Assessing Officer erred in disallowing and learned Commissioner (Appeals) erred in confirming the disallowance of commission of Rs. 63,53,636/- paid for export of goods under the Oil for Food Programme.*

3.0 The Assessing Officer erred in exceeding his jurisdiction by making additions/disallowance of certain items while computing "book profit" for MAT, which are unconnected with the specific issues for which reassessment was initiated.

4.0 The Assessing Officer erred in holding and learned Commissioner (Appeals) erred in confirming that goodwill written off aggregating to Rs.25,75,00,000/, determined diminution in value of investments in units of US-64 aggregating to Rs.64,31,000/- and expenses incurred on amalgamation aggregating to Rs.23,13,346/-, debited to the audited Profit and Loss Account ought to be added back for ascertaining the "book profit" for computing MAT."

3. In ITA No.1564/Mum/2011 for the assessment year 2002-03, following grounds have been taken by assessee.

1.0 The Assessing Officer erred in issuing notice u/s. 148 and assuming jurisdiction u/s 147 of the Act merely due to change of opinion and learned Commissioner (Appeals) erred in upholding the validity of reassessment notice and proceedings.

1.1 The Assessing Officer erred in law and on facts in issuing notice u/s.148 of the Act based on objections raised by the Audit Department and learned Commissioner (Appeals) erred in law in not adjudicating the issue raised before him.

1.2 The Assessing Officer erred in law and on facts in issuing notice u/s.148 of the Act dated 30th March, 2007 while erstwhile notice issued u/s. 148 of the Act dated 27th October, 2006 was pending disposal and the learned Commissioner (Appeals) erred in law in not adjudicating this issue raised before him.

1.3 The Assessing Officer erred in law and on facts in not disposing off the notice issued u/s. 154 of the Act proposing to rectify certain mistakes but issuing notice u/s. 148 of the Act for the same reasons covered in terms of said notice issued u/s. 154 of the Act and the Commissioner of Income Tax (Appeals) erred in law in not adjudicating this issue raised before him.

2.0 The Assessing Officer erred in disallowing and learned Commissioner (Appeals) erred in confirming the disallowance of commission of Rs.22,41,794/- paid for export of goods under the Oil for Food Programme.

3.0 The Assessing Officer erred in disallowing and the learned Commissioner (Appeals) erred in confirming the disallowance of interest paid of Rs.74,25,000/- on borrowed funds, utilized for construction of buildings and residential quarters."

4. Rival contentions have been heard and record perused.

5. For the assessment year 2003-04, assessment was reopened on the plea that assessee has paid commission in connection with the export transaction and the Central Board of Direct Taxes directed to make inquiries about the transactions entered into by the Indian companies with Iraq under the "Oil for Food Programme" of United Nations. It is also informed that the assessee company is one of the entities who has entered into transaction with Iraq under "Oil for Food Programme". Accordingly, inquiries have been made with the assessee company calling information u/s.133(6) of the I.T Act, 1961.

6. The AO held that "the *assessee company has entered into transactions with Iraq under "Oil for Food Programme" and also have paid commission on these sales. In view of Volcker's Committee Report, I have reasons to believe that the commission paid to persons was illicit payments to Iraq and therefore, not allowable as expenditure. I have therefore reason to believe that the income to the extent of Rs.22,41,854/- being commission paid and allowed as expenditure, has escaped assessment for A.Y.2002-03. I am satisfied that this is a fit case to reopen the assessment u/s.147 of the I.T. Act 1961 for A.Y.2003-04 by issue of notice u/s.148 of the I.T.Act, 1961."*

7. At the outset learned AR placed on record the order of the Coordinate Bench in case of M/s. Exim Trade Links (I) Pvt. Ltd., ITA No.4266/Mum/2009 dated 08/03/2016 wherein reopening of assessment of similar ground was annulled. We had carefully gone through the order of the Tribunal wherein Tribunal observed as under:-

> *5. We have considered the rival submissions and perused the materials on records and orders of authorities below. We find that the CBDT on the basis of Volckar committee report sent a memorandum to the AO intimating the list of companies involved in the paying kickbacks to Iraqi Government during supplies made under "Oil for Food Programme and the AO recorded reasons u/s 148(2) of the Act for re-opening the assessment which are extracted below:-*
> *"As per office memorandum of CBDT F.No.414/117/2005-IT(Inv) dated 18.11.2005, the assessee company had executed two contracts with government of Iraq under the Oil for Food Programme. In the process of executing the contract , kickbacks in the form of inland transportation fee and after sales services fee were paid by the company. ASSF which were generally 10% kickback requirement on humanitarian contract was provided in the contract as a basis to inflate the prices.*
> *The list of Indian companies received alongwith the aforesaid memorandum of CBDT provide following information wherein illegal payments were made to the government of Iraq by inflating the cost of goods supplied as per the contract.*

Contact fee	*Contract disbursed*	*Levied ASSF*	*Paid ASSF*	*Inland Transportation*
1956683 USD	*2236233 US$*	*19847 1 US$*	*177593 US$*	*84100US$*

> *It is also apparent from note 9© of the accounts that the assessee had following foreign exchange earnings in the relevant assessment years:-*

AY	*Foreign Exh. Earnings*
2002-03	*9,10,88,263*
2003-04	*85,50,829*
2004-05	*14,92,798*

> *From the above it is apparent that the assessee company made illegal payment in the shape of ASSF and Inland Transportation Fee , contract fee etc by inflating the cost of goods supplied to the Government of Iraq and accordingly by reasons of doing so by the assessee , income attributable to the extent of illegal commission incurred has escaped assessment within the meaning of section 147 of the Act and this gives me reasons to believe that income chargeable to tax has escaped assessment "*

> *6. As is seen from the above reasons recorded by the AO that same were recorded on the basis of CBDT Memorandum that some companies including assessee were involved in giving kickbacks to Iraqi Government in the supplies made by these companies in Oil for Food Programme. We note that the AO had mechanically recorded the reasons on the basis of CBDT information without even verifying the fact whether the assessee charged such expenses in the profit and loss account as stated in the memorandum . The ld AR argued that no ASFF was incurred and charged to the profit and loss account and also no inland transportation of 84100US$ were incurred and charged to the profit and loss account but Rs. 14,29,604/- were incurred and charged to the profit and loss account as transportation charges overseas paid to ALIA Jordan in Jordan for which proper bills, vouchers and bank advice are available. We are of the considered view that in the light of the facts as stated above the re-opening of assessment cannot be justified by the AO by just mechanically recording the reasons without any application of mind. We therefore annul and quash the reassessment proceedings and also the consequent order of assessment passed u/s 143(3) /147 of the Act by allowing the appeal of the assessee on technical ground and even on merit the escapement of income cannot attributed to the assessee and therefore the re-opening the assessment under proviso is also wrong and liable to be annulled. The AO is directed accordingly.*

8. As the reopening in the assessment year 2003-04 was on the same reasoning, following the decision of the Co-ordinate Bench as discussed above, we annul the reopening so made by the AO.

9. On merit, we also found that Co-ordinate Bench in case of Metro Exporters Pvt. Ltd., in ITA No.2026/Mum/2008 vide order dated 08/06/2016 has deleted the similar disallowance made on account of commission payment after observing as under:-

> *7. Ground No.5 raised in the present appeal is in respect of commission of export to Iraq. AR of assessee argued that this ground of appeal is also covered in favour of assessee by the order Hon'ble Calcutta High Court in CIT vs. Rajrani Export (AIT 2013-75- High Court) and Co-ordinate Bench of ITAT, Mumbai in NSIL Exports Ltd. vs. DCIT [2014] 44.taxman.com. 246, and Air Pac Exports Vs. ACIT (152 ITD 634), Mumbai. On the other hand, ld. DR for the revenue argued that this ground of appeal is covered against the assessee by the order of ITAT Mumbai vide ITA No. 7285 to 7286/M/2007 in case titled as M/s Cipla. Vs. DCIT. We have considered the rival contention of AR as well as DR of the parties and gone through the order passed by the Hon'ble Calcutta High Court and various Tribunals on the issue of payment of commission to Government of Iraq. The Hon'ble Calcutta High Court while dealing with the Grounds of appeal raised by Revenue held as under:*

"The commission on export activity had been fully disclosed in all correspondences and an activity in relation to export, the commission was paid through banking channel of RBI approval and it was paid pursuant to an agreement approved by Government of India and UN. The payment of commission was for business consideration and there was apparently no illegality in making payment of commission. Besides this, nothing has brought on record to show that the transactions relating to payment of commission are non-genuine or are excessive and unreasonable. The Volker Commission report had discussed about the utilization of money by the recipient of the commission in parting some of the fund so received as commission with the Government of Iraq and such parting of commission with the Government of Iraq was objected to by the Volker Commission report which was a pact between the Iraq Government and the UN wherein, as it appears, neither the appellant company is involved nor Government of India is involved."

Further, the Co-ordinate Bench of ITAT in NSIL Export Ltd. Vs. DCIT [2014] 44.taxmann.com 246- Mum while dealing with similar Ground of appeal held as under: "Therefore, until and unless it is otherwise proved that the payment was an illicit payment to the Saddam Hussain regime and not to the parties it cannot be concluded that the said payments are not made for the purpose of business of the assessee. The explanation to section 37 cannot be invoked merely on the basis of some doubt about expenditure whether made infraction of law. There should be a direct and cogent evidence to show that the payment made by the assessee is contrary to law. The Authorities below failed to bring anything on record to establish that the payments in question were illegally made by the assessee to the Iraqi Authorities. On the contrary, the assessee has produced the evidence of payment to the agent who is not connected to the Iraqi authorities. Therefore, in the absence of specific finding that the payments were made to the Iraqi Authorities, it cannot be held as illegal payment infraction of law. Even if the assessee fail to prove beyond doubt that the payments in question inconsonance to the service rendered by the agent the same cannot be held as illegal in the absence of any evidence to prove that the assessee intended to pay the amount illegally through agent."

Similar view was taken by Co-ordinate Bench of Mumbai Tribunal in Air Pac Exports V/s ACIT [152 ITD 634]-Mum in ITA No. 2981 to 2983/M/2012 for AY-2001-02 to 2002-03 vide order dated 11.06.2014. We have also gone through the order of Co-ordinate Bench of this Tribunal in M/s Cipla Ltd. Vs. DCIT vide order dated 27.09.2009, relied by Ld. DR for Revenue, wherein this Tribunal has taken a contrary view. We have noticed that the order passed in M/s Cipla Ltd. was differentiated by coordinate bench of this Tribunal in NSIL Exports Ltd. (supra) holding that, Cipla was involved in illicit payment made to Iraq Government as per Volker Committee Report holding as under:

"35. It is seen that the revenue authorities as well as the DR placed heavy reliance on the decision of Cipla Ltd. vs. ACIT, ITA No. 7284 to 7286/Mum/2007, wherein the coordinate Bench at Mumbai, came to the conclusion that, Cipla was involved in illicit payment made to Iraq Government, as per Volcker Report. It has been held by the coordinate Bench in Para 7.1 that the assessee has not denied payment of ASSF. In

> *para 3 of the order, the order mentions about the payments towards ASSF and on which basis, the cases were reopened.*
> *36. However, in the instant case, the facts are different. The dispute is with regard to payment made to Dalala & Company, from where, the alleged illicit payment may have been paid. In such a situation, when the facts themselves are at variance, the decision of Cipla (supra) cannot be relied upon. This argument of the department has to be rejected."*
> *8. Hence, keeping in view the above discussion and the legal position, and keeping in view the order of Calcutta High Court (supra), this Ground of appeal is covered in favour of assessee. Hence, this Ground of appeal is allowed in favour of assessee.*

10. In the assessment year 2002-03, assessment was reopened on 26/10/2006 u/s.147 on the reasoning of payment of commission in respect of transactions entered with Iraq under "Oil for Food Programme".

11. However, AO further mentioned that fresh proceedings u/s.147 was initiated on 30/03/2007 on the plea that assessee company has debited an amount of Rs.72.24 lakhs on account of interest capitalized in the accounts. As per AO, assessee had borrowed funds from HDFC towards financing the construction of building and residential quarters and capitalized the interest portion before the assets are put to use. However, in computing the income of the year decided not to claim depreciation on the interest capitalized but claimed it as deduction.

12. AO further observed that general accounting principle says that all the expenditure incurred in bringing the asset to working condition has to be capitalized including interest on loan taken for acquiring assets. By the impugned order CIT(A) confirmed the action of AO.

13. We have considered rival contentions and found that so far as addition on account of payment of commission in respect of transactions entered under "Oil for Food Programme" of the United Nations are concerned, the same is covered in favour of assessee as discussed in the

year 2003-04. Following the same reasoning we delete the addition made on account of commission payment.

14. The issue with regard to applicability of proviso inserted in Section 36(1)(iii) by the Finance Act 2003 is concerned, the same is effective from assessment year 2004-05 as per verdict of Hon'ble Supreme Cout in case of Core Health and Care Ltd., 298 ITR 94.

15. So far as disallowing the claim of interest on funds borrowed for financing construction of building and residential quarters is concerned, we find that the proviso inserted in Section 36(1)(iii) by the Finance Act 2003 was effective from assessment year 2004-05. However, the assessment year under consideration is 2002-03, therefore, no disallowance can be made for such interest payment. As an abundant caution, we direct the AO to verify if the interest payment has been added in the cost of construction, no depreciation is to be allowed thereon. We direct accordingly.

16. In the result appeal of the assessee for the assessment year 2003-04 is allowed whereas appeal of the assessee for the assessment year 2002-03 is allowed in part, in terms indicated hereinabove.

Order pronounced in the open court on this 21/12/2016

Sd/-	**Sd/-**
(PAWAN SINGH)	**(R.C.SHARMA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 21/12/2016
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.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai