IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE – VIRTUAL COURT

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI S. S. VISWANETHRA RAVI, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.156/PUN/2022
निर्धारण वर्ष / Assessment Year: 2017-18

M/s. Adler Mediequip Pvt. Ltd., Podium Floor Tower-4, World Trade Center, S. No.1, Pune- 411014. PAN : AADCA0618C	Vs.	DCIT, Central Circle-1(1), Pune.
Appellant		Respondent

Assessee by	:	Shri M. P. Lohia
Revenue by	:	Shri Deepak Garg
Date of hearing	:	12.05.2022
Date of pronouncement	:	21.06.2022

आदेश / ORDER

PER INTURI RAMA RAO, AM:

This is an appeal filed by the assessee directed against the final assessment order dated 04.01.2022 passed u/s 143(3) r.w.s. 144C(13) r.w.s. 144B of the Income Tax Act, 1961 ('the Act') for the assessment year 2017-18.

2. The appellant raised the following grounds of appeal :-

"Based on the facts and circumstances of the case, Adler Mediequip Private Limited (hereinafter referred to as 'the Assessee' or 'AMPL') respectfully craves leave to prefer an appeal against the final order dated 04 January 2022 (received on 04 January 2022) passed by the National Faceless Assessment Centre, Delhi (hereinafter referred to as the 'AO') under section 143(3) read with section 144C(13) read with

section 144B of the Income-tax Act, 1961 ('the Act') in pursuance of the directions issued by Dispute Resolution Panel-3 (DRP), Mumbai dated 23 December 2021 under section 144C(5) of the Act on the following grounds:

General

1. *On the facts and in the circumstances of the case and in law, the AO, based on directions of DRP, has erred in assessing total income of the Assessee at Rs 2,14,38,066 as against returned loss of Rs 7,82,44,744.*

Disallowance of non-compete fee

2. *On the facts and in the circumstances of the case and in law, the AO, based on directions of DRP, has erred in holding that the deduction in respect of non-compete fees amounting to Rs 8,26,31,590 claimed by the assessee is not allowable as revenue expenditure, on the grounds that the same is capital in nature.*

3. *On the facts and in the circumstances of the case and in law, the AO, based on directions of DRP, has failed to appreciate that the entries in books of accounts are not determinative for allowing the claim of deduction of an expense, and the same needs to be examined as per the provisions contained in the Act.*

4. *Without prejudice to the above, based on the facts of the case and in law, the learned AO has erred in not allowing depreciation on non-compete fees as per the provisions of section 32 of the Act.*

Set off of brought forward losses

5. *On the facts and in the circumstances of the case and in law, the AO has erred in not setting off carry forward losses of earlier year against the assessed income.*

Charge of Interest

6. *On the facts and in the circumstances of the case and in law, the AO has erred in charging interest under section 234B of the Act.*

7. *On the facts and in the circumstances of the case and in law, the AO has erred in charging interest under section 234D of the Act.*

Initiation of penalty proceedings

8. *On the facts and in the circumstances of the case and in law, the AO has erred in initiating penalty under Section 271(1)(c) of the Act in respect of disallowances / additions.*

The above grounds of appeal are mutually exclusive and without prejudice to one another. The Assessee craves leave to add/ alter/ amend/ delete/ withdraw any or all of the grounds at or before the hearing of the appeal so as to enable the Income tax Appellate Tribunal to decide the appeal according to law."

3. Briefly, the facts of the case are as under :-

The appellant is a company incorporated under the provisions of the Companies Act, 1956. The return of income for the assessment year 2017-18 was filed on 20.03.2018 disclosing Rs.Nil income. The assessee also reported some international transactions in the Form No.3CEB.

4. On noticing the said international transactions, the Assessing Officer referred the matter to the Transfer Pricing Officer (TPO) for the purpose of benchmarking the said international transactions.

5. On receipt of the reference from the Assessing Officer, the TPO passed an order u/s 92CA(3) dated 28.01.2021 suggested the upward TP adjustments of Rs.1,70,51,220/-.

6. Pursuant to receipt of the TPO's order, the Assessing Officer passed the draft assessment order dated 22.03.2021 passed u/s 143(3) r.w.s. 144C(1) of the Act wherein, the Assessing Officer had proposed apart from TP adjustment of Rs.1,70,51,220/- also proposed to disallow claim for allowance of non-compete fee of Rs.8,26,31,590/-. The factual background of this issue relating to the disallowance of non-compete fee of Rs.8,26,31,590/- is as under :-

The appellant had entered into a consultancy agreement with Mr. Ajay Pitre on 29.10.2013 in terms of which the non-compete fee of Rs.21.55 crores was payable to Mr. Ajay Pitre over the period of 3 years. The said amount was shown as "intangible assets" in the financial statements of the appellant company and 1/3rd cost of the entire consideration of Rs.21.55 corres was amortized in the books of accounts, which was added back in the computation of total income. However, the claim of 1/3rd of the same is made as revenue expenditure while computing the income under the head "business" in the return of income. It is worth mentioning here that the appellant had acquired business of Shri Ajay Pitre in terms of share purchase agreement dated 09.04.2013. The Assessing Officer was of the opinion that the said expenditure cannot be allowed as revenue expenditure for the reason that it is a capital in nature as the expenditure was incurred only towards smoothening the process of acquisition of the ongoing business/unit of Shri Ajay Pitre including the intellectual rights and not of revenue nature in view of the fact that the said case is clearly is on capital account not of revenue nature. The ratio of the Hon'ble Delhi High Court in the case of Sharp Business System vs. CIT, 254 CTR 233 (Del) is squarely applicable. The Assessing Officer also doubted the true nature of

the agreement as it is subsequent/ continuation of the share purchase agreement. This is further corroborated by the fact that there was no evidence or details of services rendered by the said Shri Ajay Pitre. There is a dichotomy in the treatment given in the books of account and the claim made in the return of income as in the books of accounts the non-compete fee was claimed as intangible assets and depreciation thereon was claimed, whereas in the return of income the same is claimed as revenue expenditure. Accordingly, the Assessing Officer disallowed the same as revenue expenditure.

7. On receipt of the draft assessment order, the appellant had filed objection before the Hon'ble DRP contesting the disallowance of non-compete fee as revenue expenditure on the ground that the entries in the books of accounts do not determine the allowability of the claim for deduction and without prejudice to the above, it is pleaded that the depreciation should be allowed on non-compete fee.

8. On due consideration of the objections of the assessee company, the ld. DRP gave a finding that when the assessee was following mercantile system of accounting, the expenditure can be allowed as deduction only in the year in which the liability of expenses had crystallized i.e. in the year 2014-15 and the

expenditure was incurred only in relation to the acquisition of shares from erstwhile shareholders, therefore, it is part and parcel of the consideration paid for the acquisition of shares which is capital in nature. Accordingly, the ld. DRP confirmed the findings of the Assessing Officer.

9. On receipt of the direction from the ld. DRP, the Assessing Officer had passed the final assessment order dated 04.01.2022 passed u/s 143(3) r.w.s. 144C(13) r.w.s. 144B of the Act after making the addition on account of disallowance of non-compete fee of Rs.8,26,31,590/-.

10. Being aggrieved by the above final assessment order, the assessee is in appeal before us in the present appeal.

11. The ld. AR submitted that non-compete fee paid to Shri Ajay Pitre in terms of the consultancy agreement is revenue expenditure as the consideration was paid to Shri Ajay Pitre was not to compete in similar line of business for a period of 3 years. Reliance in this regard was placed on the decision of the Hon'ble Bombay High Court in the case of PCIT vs. Six Sigma Gases India Pvt. Ltd. (ITA No.1259 of 2016 dated 28.01.2019 (Bom.) and CIT vs. Everest Advertising Pvt. Ltd. (ITA No.6539 of 2010 dated 04.12.2012 (Bom.).

12. On the other hand, ld. CIT-DR placing reliance on the orders of the lower authorities submitted that the sum and substance transactions is only purchase of share, acquisition of business of the appellant company through purchase of shares from erstwhile promoters of the company. This is nothing but part and parcel of the share purchase agreement, as is evident from clause (iii)(b) which clearly stipulates that the payment of non-compete fee is Rs.21.55 crores as a condition precedent of agreement of sale and purchase of shares of the appellant company. Therefore, entire consideration paid for acquisition of the shares cannot be treated as revenue expenditure. He further submitted that the assessee claim for revenue expenditure can be allowed only in the year in which the liability for the expenditure had crystallized. The fact that in the books of account, the expenditure of non-compete fee was treated as intangible assets, goes to prove that the consideration was paid towards acquisition of capitalized assets. There is no evidence brought on record by the appellant company establishing the nature of services of consultancy services by Shri Ajay Pitre to the appellant company. Therefore, the sum and substance of transactions is that it should be treated as part and parcel of

purchase of shares of the appellant company and the same cannot be allowed as revenue expenditure.

13. We heard the rival submissions and perused the material on record. The issue in the present appeal relates to the allowability of non-compete fee paid in the year 2013-14 in terms of the consultancy agreement entered by the appellant company on 29.10.2013 with Shri Ajay Pitre. In terms of the said agreement, the appellant company had agreed to pay consultancy fee of Rs.21.55 crores in 3 equal instalments. The said consideration was stated to have been paid to Shri Ajay Pitre towards not to compete with the business of the appellant company. The Assessing Officer had doubted the sum and substance transactions and held that the payment was made as part and parcel of purchase of shares of the appellant company which entered on 09.04.2013. The Assessing Officer was of the opinion that this non-compete fee was paid as part of obligation stipulated in the agreement to purchase of shares of the appellant company. The Assessing Officer had come to this conclusion based on the Closing Deliverables placed at page no.108 of the Paper Book by clause no.5.3(b) of the Agreement to Sale, reads as under :-

"5.3 Closing Deliverables

> *(b) The Company shall, and the Purchaser shall cause the Company to, deposit a sum of INR 215,560,687 as non-compete consideration in an escrow account to be established pursuant to the Ajay Pitre Consultancy Agreement on an immediate basis after Closing and in any event within fifteen days of the Closing Date."*

14. In nutshell, the case of the Assessing Officer appears to be that the non-compete consideration of Rs.21,55,60,687/- is nothing but a part of the consideration payable for acquisition of shares of the appellant company and, therefore, any consideration paid for acquisition of shares cannot be allowed as revenue deduction while computing the business profits as taxable. This finding made by the Assessing Officer remains uncontroverted by leading necessary evidence on record. Further, admittedly, the expenditure was incurred in terms of the agreement entered between Shri Ajay Pitre and the appellant company on 09.04.2013. Therefore, in terms of the said agreement, the liability had clearly crystallized during the financial year 2013-14 relevant to the assessment year 2014-15 and had not incurred during the assessment year 2017-18. Thus, the assessee company had also failed to satisfy the conditions precedent to claim as revenue expenditure, as the expenditure was incurred during the previous year relevant to the assessment year under consideration, therefore, the claim made by the assessee cannot be

allowed as deduction for the reasons stated above. Accordingly, the grounds of appeal raised by the assessee stands dismissed.

15. In the result, the appeal filed by the assessee stands dismissed.

Order pronounced on this 21st day of June, 2022.

Sd/-	**Sd/-**
(S. S. VISWANETHRA RAVI)	**(INTURI RAMA RAO)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

पुणे / Pune; दिनांक / Dated : 21st June, 2022.

Sujeet

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The DRP-3, Mumbai-2.
4. The TPO-1(1), Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "**C**" बेंच, पुणे / DR, ITAT, "**C**" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.