

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA Nos.892/2010 & 935/2010**

% **Reserved On: 29.03.2011**
Date of Decision: 06.04.2011

ITA No.892/2010

Commissioner of Income Tax **APPELLANT**

Through: Ms.Prem Lata Bansal, Sr. Advocate with
Mr.Deepak Anand, Sr. Standing Counsel

Versus

Shri Vibhu Talwar **RESPONDENT**

Through: Mr.Salil Aggarwal and Mr.Prakash Kumar,
Advocates

AND

ITA No.935/2010

Commissioner of Income Tax **APPELLANT**

Through: Ms.Prem Lata Bansal, Sr. Advocate with
Mr.Deepak Anand, Sr. Standing Counsel

Versus

Shri Shravan Talwar **RESPONDENT**

Through: Mr.Salil Aggarwal and Mr.Prakash Kumar,
Advocates

CORAM:
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

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| 1. | Whether reporters of Local papers be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | No |

M.L. MEHTA, J.

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1. These appeals are directed against the common order dated 6th March, 2009 of the Income Tax Appellate Tribunal (hereinafter referred to as “the Tribunal”. Both these appeals are being disposed of by this common judgment since facts and also issues in both the appeals are common.

2. The assessees along with other family members are the promoters of Paper Products Limited (for short “PPL”). They entered into an agreement dated 16th July, 1999 with M/s.Royal Packaging Industries Van Leer, N.V. Netherlands (for short “M/s.RPIVL”). As per the agreement, the assessees along with other members of the promoters family were restrained for a period of 10 years from entering into any business that is same or similar to that of the business of PPL in India and at all such places where PPL has manufacturing presence or export boards or carries any trading activity. The assessees had received a

sum of Rs.7.40 crores in consideration of said agreement from M/s.RPIVL. In the income tax return filed for the assessment year 2000-2001, the assessee, Shravan Talwar, showed income of Rs.4.26 crores and assessee, Vibhu Talwar, Rs.4.36 crores.

3. In computation of the income, the assessees showed 45% of Rs.7.40 crores as relating to manufacturing activity, taxable under Section 55 of the Income Tax Act (hereinafter referred to as “the Act”) and balance 55% relating to the marketing activity, not liable to be charged to tax. This segregation of non-compete fees in the ratio of 45% (manufacturing) and 55% (marketing) was based on the report of M/s.Ernst and Young Pvt. Ltd. dated 15th July, 1999 filed by the assessees along with the returns. According to Assessing Officer there were various discrepancies in the aforesaid report as it gave 55% weightage to marketing and 45% toward non-compete fees (manufacturing). In arriving at this conclusion, the Assessing Officer referred to some literature of economics on the subject and specifically noted that the amounts of manufacturing was not properly projected in the report of the M/s.Ernst and Young Pvt. Ltd. He specifically noted few points relating to manufacturing process missing in the said report. Persuaded by the literature on the study of the subject,

he made a fresh conclusion in the ratio of 38% and 62% respectively for marketing and manufacturing components. Consequently, he made addition of Rs.1,25,80,000/- by making disallowance on non-compete fee. The Assessing Officer also ordered for initiation of penalty proceedings under Section 271(1)(c).

4. Aggrieved by this, the assessees preferred appeals before the Commissioner, Income Tax (Appellate) [CIT(A)], which came to be allowed by the common order dated 05.09.2003. The Revenue preferred appeals against the order of CIT(A) which were dismissed by the Tribunal by order dated 06.02.2009. It is against this common impugned order that the appeals have been preferred by the Revenue.
5. Learned counsel appearing for the Revenue tried to justify the order of the Assessing Officer by taking us through various items as noted by the Assessing Officer to be missing in the report of the M/s.Ernst and Young Pvt. Ltd. Our attention was also drawn to the table showing comparison of the items mentioned in the order of the Assessing Officer and in the report of M/s.Ernst and Young Pvt. Ltd. Comparison was sought to be demonstrated with

regard to various items to bring home the point that all the items which were found to be missing by the Assessing Officer were specifically not mentioned in the report of M/s.Ernst and Young Pvt. Ltd. On the other hand, learned counsel for the assessee stated that the report of M/s.Ernst and Young Pvt. Ltd. covered all the items which were alleged to be missing by the Assessing Officer. It was also submitted that in any case, this was nowhere submitted by the Revenue before the CIT(A) and also the Tribunal and thus this question couldnot be raised at this stage before this Court.

6. We may note that the Assessing Officer while arriving at his conclusion regarding the weightage of 38% to the component of non-competing (marketing) and 62% to that of manufacturing he referred to good and valuable literature on the subject. While the work done by the Assessing Officer is appreciable, at the same time, the manner of arriving at this conclusion needs to be deprecated. There is no doubt that M/s.Ernst and Young Pvt. Ltd. is a Chartered Accountant firm of international repute and its report cannot be brushed aside so easily. At the same time, there can also be no dispute that the Tax Department was within its rights and competence to get the same verified from some

other equally reliable independent sources. Maybe the Assessing Officer was an expert on the subject, but still, in all fairness, he ought to have got the same either verified or compared by some independent report of an expert.

7. On his part, CIT(A) proceeded to rely upon the report of M/s.Ernst and Young Pvt. Ltd. and also a comparative charge presented by the assesseees in support of their claims that the report had covered all the factors as pointed out by the Assessing Officer. The CIT(A) while further noting that the valuation report of an expert could not be brushed aside lightly also stated that the same could be done by report of another expert. The CIT(A) proceeded to pass a cryptic order in the following manner:

“It is a settled position of law that valuations report of an expert can not be brushed aside in a lighthearted manner. It has to be done by another report of an expert. Ernst & Young have rated the company, (PPL) vis-à-vis their competitors, which can be done only after studying the industry & the competition. The contention of the appellant that Ernst & Young is an expert professional firm of international repute and is engaged even by Governments also appears to be correct. The Ld. AO though not have the where with all both in reference to data and professional experience in such matters to give a finding on his own.

I have gone through the report of Ernst & Young and find that the contentions of the appellant that all the factors alleged by the AO to have been missed by Ernst & Young were indeed considered by them have sufficient

force in them therefore, I am inclined the delete this changes made by the AO in the ratios and direct him to accept the ratios adopted by the appellant on the basis of the report of Ernst & Young Pvt. Ltd., both on law and merit,”

8. The Tribunal also on its part did not do any exercise and simply proceeded to accept the aforementioned observation of CIT(A) in the manner as noted hereunder:

“7. We have carefully considered the rival submission in the light of material placed before us. Ld. CIT(A) has found that the observations of AO, according to which all the points which were stated to be non considered had been considered by Earnest & Young in their report. And thus, Id. CIT(A) has held that the AO could not substitute the allocation by distributing the said report without calling another report of an expert. During the course of hearing Id. DR also could not controvert the findings of Id CIT(A) that the issues which have been brought in the charts reproduced in the order of CIT(A) were considered by Earnest & Young while preparing their report through the terminology was different. Ld. DR could not point out any discrepancy in such observation of CIT(A) that the issues which are stated to be not considered by the AO in the report of Earnest & Young were considered by them in their report. In this view of the situation, as no defect is pointed out in such observation of CIT(A) that all the points were considered by Earnest & Young in their report for which the another weightage was given by the AO, we decline to interfere in the order of CIT(A) vide which the allocation done by Earnest & Young has been upheld. Therefore, the ground No.1 of the revenue is dismissed.”

9. It may also be noted that in the case of **Commissioner of Income Tax – IV, Delhi and another v. M/s.Glaxo Smithkline Asia (P) Ltd.**, SLP(C) No.18121/2007, similar

question arose before the Hon'ble Supreme Court. In this case, assessee claimed deduction under Section 37 of the Act based on the allocation of expenses as suggested by M/s.Price Waterhousecooper. The same was not acceptable to the Assessing Officer. The Supreme Court observed that allocation of expenses in such case is a complex exercise and since the assessee has relied on a formula suggested of M/s. Price Waterhousecooper, the Department may engage an expert in such matters. If the formula suggested by that expert was proper and acceptable, that would bring an end to the controversy failing which the suggestion of that expert will be examined by the Court.

10. Having seen the order of both the CIT(A) and also the Tribunal, we are also of the view that the Assessing Officer if not satisfied could not have substituted his views by discarding the report of M/s.Ernst and Young Pvt. Ltd. without calling for the report of another expert. It appears to us that right course for both the CIT(A) and the Tribunal was to remand the matter back to the Assessing Officer to seek the opinion of some expert on the subject and then proceed to take the comments of the assessee and then to proceed to make assessment. The issues involved

have wide ramifications. We deem it appropriate to remand the matter back to the Assessing Officer with the directions as indicated above. Both the appeals are disposed of accordingly.

11. Needless to say that the assesseees will furnish all the necessary information which the Revenue or their expert may seek.

**M.L.MEHTA
(JUDGE)**

APRIL 06, 2011
'Dev'

**A.K. SIKRI
(JUDGE)**