IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1434 OF 2013
ALONG WITH
INCOME TAX APPEAL NO. 1371 OF 2013
AND
INCOME TAX APPEAL NO. 1526 OF 2013

The Commissioner of Income Tax-8, Mumbai … Appellant in all appeals.

v/s

M/s.Garware Polyster Ltd. … Respondent in all appeals.

Mr.Arvind Pinto for the appellant in all appeals.

Mr.P.J. Pardiwalla, senior counsel along with Atul Jasani for the respondent in all appeals.

CORAM: M.S. SANKLECHA &
N.M. JAMDAR, JJ.

DATED : 23RD JUNE, 2015

P.C.:

These three appeals by the revenue under Section 260-A of the Income Tax Act,1961 (the Act) challenge three orders all dated 19 December 2012. One impugned order each for the assessment years 2003-04, 2005-06 and 2006-07 passed by the Income Tax Appellate Tribunal (the Tribunal).

2 The grievance of the revenue as urged before us is that the impugned order upholds the order of the Commissioner of Income Tax (Appeals) that Arms Length Price (ALP) of commission to be paid to Associate Enterprises (AE) be taken at 8% plus 2% for additional risk i.e. 10% instead of the 5% canvassed by the revenue and adopted by the Transfer Pricing Officer (T.P.O.).

3 It is the contention of the revenue that the T.P.O. adopted 5% as ALP of commission paid to AE. This was on the basis of the average commission paid to Non AE in different countries and not accepting the assessee's claim of 12.5%.

4 We find that the Commissioner of Income Tax (Appeals) examined in depth, the relationship existing between the respondent-assessee and the Non AE Agent as also with the AE Agents. It found that the business model in respect of each of the two classes was different warranting a difference in commission being payable to AE from that being paid to a Non AE. The Commissioner of Income Tax (Appeals) analyzed the difference between the two as under :-

Agency Arrangement with AE GPIL	*Agency Arrangement with Non-AE Foreign Agents.*
AE GPIL has been appointed as sole selling agent for promoting and canvassing orders and undertakes market development, advertising and	*Non AEs have been appointed as indenting agent for only canvassing orders. They are not obliged to undertake market development, sales*

sales promotion at its own cost and resources.	*promotion and advertising at their own cost and resources.*
AE GPIL is acting as full fledged Agent who undertakes market development, brand promotion of its principal (i.e. appellant) at its own cost, risks and resources.	*Non AE agents are limited risk agents as they are not under any obligation to appellant to undertake any promotional and market development efforts and thereby the risk of financial loss does not exist for them.*

Product difference.

The agency arrangement with Ae GPIL is for all types of polyster film products such a Metalized films, Plain films and Sun Control films i.e. sun control films products which are consumer products (“CPD products) and Plain films which are industrial products (“IPD products”).	*The agency arrangement with Non AE foreign agents is only for Plain Film ('Garfilm') i.e. only for IPD products. Consumer products are not covered in the arrangement with Non Ae foreign agents.*

Market Territory Differences.

AE GPIL operates in Europe where the costs of operations are comparatively higher.	*Non Ae foreign agents operates in the territories of Iran, Egypt, Argentina, Srilanka, Philippines, Sough Africa, Turkey, etc. where the cost of operations are comparatively lower.*

Industry & Competition differences.

CPD products are used as final product in automobile industry and building industry by ultimate end consumers. Thus, these are consumer products.	*IPD products are industrial products (and not consumer products) and are used as input by various industries viz. Packaging industry, electric and motor insulation industry, etc.*
CPD products are sold in more than 300 qualities and broadly in 80 to 90 quality categories. Each quality differs from other based on customers specific requirement, specifications, etc. For example, in case of Building industry mainly used in window application, customer may require particular VLT % (visual light transmission within the limit of particular country's specific parameters), particular colour, particular thickness for safety purposes, etc.	*IPD products are sold only in maximum 12 to 16 qualities.*

In case of CPD products, substitute products are available in the market which almost looks similar as appellant's products but performance wise it is of inferior quality. But one cannot make out these differences unless practically it has been used.	*IPD products are commodity products. Almost all competitors' products are alike with little variation.*
Resultantly, it is very difficult to develop market for these products. One has to make extra efforts to sell these products like organizing video film presentations, make advertisements by various medium such as taking part in exhibitions, do a market survey on a regular basis to check the customers tastes, etc. For CPI products, customer is king and one has to depend purely on customers requirement, tastes, likes, dislikes and accordingly strives hard to convince, satisfy and demonstrate customers its quality products.	*Being industrial product, these is no need to make such effort in selling IPD products. The marketing of these products does not involve significant promotional expenses.*
One cannot build a market for consumer products unless it demonstrates and satisfies customers in all respect viz. Durability, latest product, convenient to use etc. It can only be alone by extensive sales and marketing efforts which require additional expenses of advertisement and sales promotion activities. Further, European and American markets are very competitive markets as compares to other markets. The customers in these markets are highly educated customers and one cannot remain in such market unless it offers a quality product.	*In some of the countries the customers prefer introduction of an agent in between in order to chase for timely delivery and completing all custom clearance formalities involved in the import process. Hence, appellant has no other choice except to appoint an agent in these countries to sale plain film products. The role of these Non AE foreign agents is very limited for this specific purpose of liaisoning and co-ordination with already established industrial customer base.*

5 The Commissioner of Income Tax (Appeals) on the above analysis noticed that Non AE Agents had limited risk and had incurred no expenditure to develop markets for the

respondent's products which the AE Agents do. Moreover, AE carries risk which a Non-AE does not carry. It was in these circumstances that the Commissioner of Income Tax (Appeals) determined the transfer pricing adjustment on account of commission paid at 8% with 2% on account of additional risk i.e. 10% as the ALP commission payable to AE Agents.

6 The view taken by the Commissioner of Income Tax (Appeals) has been upheld by the Tribunal after detailed analysis justifying the difference in the commission paid to a AE Agent as against that paid to Non AE Agent. The view taken by the Tribunal in the impugned order is a reasonable and possible view, particularly in view of the fact that the scope of activity involved in respect of the agency work done by AE Agent is much wider than that done by Non-AE Agent. Consequently, the view taken by the Tribunal being a possible view on the facts of the case, no substantial question of law arises for our consideration.

7 We may point out that Mr.Pinto, learned counsel appearing for the revenue submits that for the Assessment Year 2004-05, the Commissioner of Income Tax (Appeals) as well as the Tribunal had arrived at ALP of commission paid to AE Agents at 5%. This is not factually correct as for the Assessment Year 2004-05 no ALP of the commission payable to AE Agents was determined. For the Assessment Year 2004-05, the issue under consideration by the Tribunal was in respect of disallowance under Section 40A(2)(b) of

the Act and this would have no relevance to the present dispute arising before the Tribunal for the subject assessment years.

8 Accordingly, appeals dismissed. No order as to costs.

(N. M. JAMDAR, J.) ***(M.S. SANKLECHA, J.)***