IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No.116 of 2014 (O&M)
RESERVED ON: 21.05.2015
DATE OF DECISION: 27.05.2015

The Commissioner of Income Tax-I, Chandigarh

…..Appellant

versus

M/s DSM Anti Infectives India Ltd.

.....Respondent

CORAM:- HON'BLE MR.JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE G.S.SANDHAWALIA

Present: Ms. Urvashi Dhugga, Advocate for the appellant

Ms. Shashi M. Kapila, Mr. Deepak Suri,
Mr. Pravesh Sharma and Mr. Sanjay Kumar,
Advocates for the respondent

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S.J.VAZIFDAR, ACTING CHIEF JUSTICE:

This is an appeal against the order of the Income Tax Appellate Tribunal dated 08.08.2013 in so far as it directs the Transfer Pricing Officer (TPO) to consider Torrent Gujarat Biotech Limited and Standard Pharmaceuticals Limited as comparables for the purpose of determining the arms length price (ALP) in respect of the international transaction entered into by the respondent in respect of the assessment year 2005-06.

2. The appellant contends that the following substantial question of law arises in this appeal:

> "Whether in the facts and circumstances both on facts and in law of the case the learned ITAT has

> erred in directing AO/TPO to include M/s Torrent Gujarat Biotech Limited and M/s Standard Pharmaceuticals Limited as comparables considering the fact that they were using only a very small percentage of Penicillin-G as raw material as compared to taxpayer and could not have been used as a filter."

The question was re-framed and tendered across the bar. The only question before us is whether the Tribunal erred in directing the TPO to include the two companies as comparables.

3. During the assessment year 2005-06, the respondent/assessee entered into various international transactions with its associated enterprises inter alia for the purchase of raw material and finished goods, export of finished goods, purchase of capital goods, interest on loans, reimbursement of expenses and for corporate services.

4(A) The respondent adopted the transactional net margin method contending that it is the most appropriate method for determining the ALP. The choice of this method is not in question. As comparables, the respondent selected six companies, namely, Amol Drug Pharma Limited, Avinash Drugs Limited, Ind-Swift Laboratories Limited, JK Pharmachem Limited, Kopran Limited and Torrent Gujarat Biotech Limited.

(B) The TPO, however, rejected each of these companies in the transfer pricing study on various grounds. With respect to

Torrent Gujarat Biotech Limited, the TPO held that the proportion of the main ingredient, Penicillin-G (PEN-G), as a raw material was negligible. After going through a detailed selection process, the TPO selected as comparables three companies namely, Aurobindo Pharma Ltd., Nectar Life Sciences Ltd. and Standard Pharmaceuticals Ltd. It is sufficient at this stage only to note that the usage of PEN-G by Standard Pharmaceuticals Limited in proportion to the other ingredients was only 5.23% *i.e.* less than the proportionate usage of PEN-G by Torrent Gujarat Biotech Limited which was 7.60%.

(C) Prior to finalizing the comparable concerns, the TPO had, for the assessment year 2005-06, applied the following filters/criteria:

> "Only companies using Penicillin-G as raw material were selected.
>
> Companies having no data for the financial 2004-05 were rejected.
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> Companies predominantly engaged in trading activity were rejected.
>
> Companies having negative net worth were rejected."

It may be noted at this stage that the first filter, namely, only companies using Penicillin-G as raw material, did not stipulate the extent of usage of Penicillin-G.

5. For the year 2005-06, the respondent chose the CIT route. Against the order of assessment based on the report of the TPO, the respondent filed an appeal before the Commissioner of Income Tax (Appeals). It did not take the matter before the Dispute Resolution Panel (DRP). It chose the DRP route in the subsequent assessment year 2006-07.

The CIT (Appeals) held only Nectar Life Sciences Limited to be the appropriate comparable and rejected Aurobindo Pharma Limited and Standard Pharmaceuticals Limited as comparables. It did not accept the respondent's contention that Torrent Gujarat Biotech Limited ought also to be considered a comparable.

6. Against the order of the CIT (Appeals), the appellant/department and the respondent/assessee filed appeals before the Tribunal which were disposed of along with certain other appeals by the common order which is impugned in the present appeal. The appellant/department contended that the CIT (Appeals) had wrongly rejected Aurobindo Pharma Limited as a comparable and the respondent/assessee contended that the CIT (Appeals) had wrongly rejected Torrent Gujarat Biotech Limited as a comparable.

7. The Tribunal held as appropriate comparables four companies, namely, Torrent Gujarat Biotech Limited, Aurobindo Pharma Limited, Nectar Life Sciences Limited and Standard Pharmaceuticals Limited.

The Tribunal accepted the respondent's contention that where the facts are identical from year to year similar filters should be adopted for benchmarking international transactions. The Tribunal accepted the respondent's contention that Torrent Gujarat Biotech Limited ought not to be rejected on the ground that it's use of PEN-G was only 7.60% of its total sale. The tribunal based its decision on two relevant and important factors. Firstly, the aforesaid filter applied by the TPO of selecting only companies using PEN-G as raw material did not specify the extent of use of PEN-G as compared to the total sales of the company. Indeed, the TPO himself had obviously not considered the extent of use of PEN-G as compared to the total sales of a company or as compared to the total use of ingredients by a company to be a determinative factor. This is evident from the fact that the TPO, as we noted earlier, considered Standard Pharmaceuticals Limited to be one of the comparables, although this company's usage of PEN-G was only 5.23% of its total sales. As we have also noted earlier, the proportionate usage of PEN-G by Torrent Gujarat Biotech Limited was 7.60% i.e. higher than that of Standard Pharmaceuticals Limited.

In the circumstances, the Tribunal's conclusion that the said companies would be appropriate comparables irrespective of the percentage of use of PEN-G by them since companies selected should be functionally comparable and not identical, cannot be said to be perverse or absurd. It is, to say the least, a possible view.

8. Indeed, the Tribunal went a step further and in fairness to the department also included Standard Pharmaceuticals Limited as a comparable. This was only logical in view of its finding that a company ought to be considered as an appropriate comparable irrespective of its percentage of use of PEN-G to the total raw material.

9. Faced with this, Mrs. Dhugga contended that the Tribunal has erred in including Standard Pharmaceuticals Limited despite the department having conceded before the Tribunal that Standard Pharmaceuticals Limited was not an appropriate comparable in view of its relatively negligible use of PEN-G as compared to its total use of raw material or sales. We noted earlier that the TPO had himself considered Standard Pharmaceuticals Limited to be a comparable. The so called concession of the department was not binding either on the respondent or on the Tribunal. The Tribunal

was called upon to determine whether or not Torrent Gujarat Biotech Limited was an appropriate comparable. The Tribunal's conclusion was not based merely upon the department having initially considered Standard Pharmaceuticals Limited to be a comparable. It came to the conclusion also on the ground that the filters adopted by the TPO did not stipulate the percentage of use of PEN-G by a company of its total sales or use of raw material.

10. Mrs. Dhugga then contended that Torrent Gujarat Biotech Limited did not fulfil the last of the said filters/criteria of not being a company having a negative net worth. She contended that Torrent Gujarat Biotech Limited had made a reference under the Sick Industrial Companies (Special Provisions) Act, 1985 (in short 'SICA') which itself indicated that it had a negative net worth. This contention was not raised before the authorities. It is sought to be raised before us for the first time across the bar. It would be unfair to the respondent to permit the appellant to do so before us. A question such as this is not a pure question of law. It would, at least essentially, be a question of fact. The appellant was not even clear in this regard. For instance, it was contended that the company had a negative net worth in the assessment year 2006-07. We are, however, concerned with the assessment year 2005-06 which corresponds to the financial year 2004-05. Prima facie at least there is nothing to indicate that at the relevant time, namely, financial year 2004-05 Torrent Gujarat Biotech Limited had a negative net worth. If the issue is raised before the authorities, while giving the matter appeal effect or in any other proceedings, it would be decided in accordance with law. The contentions of the parties including as to the maintainability of such a contention are kept open.

11. The issues that arise in this case do not raise a question of law much less a substantial question of law. The Tribunal's order is far from perverse or absurd. It was a possible view. It was in fact a view that the TPO himself took by selecting Standard Pharmaceuticals Limited where use of PEN-G was only 5.23% as against the 7.60% use of PEN-G by Torrent Gujarat Biotech Limited. The Tribunal's view was more than just a probable one. Our attention was not invited to any error on principle in the choice of the said companies as comparables.

12. The appeal is, therefore, dismissed.

(S.J. VAZIFDAR)
ACTING CHIEF JUSTICE

27.05.2015
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(G.S. SANDHAWALIA)
JUDGE