

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

**INCOME TAX APPEAL NO. 705 OF 2014
WITH
INCOME TAX APPEAL NO. 713 OF 2014
WITH
INCOME TAX APPEAL NO. 798 OF 2014
WITH
INCOME TAX APPEAL NO. 1347 OF 2014**

Commissioner of Income Tax Central IV

... Appellant

V/s.

Ajanta Pharma Limited

... Respondent

Mr. Arvind Pinto for the Appellant.

Mr. J.D. Mistri, Senior Counsel a/w Mr. Madhur Agarwal and Mr. Atul Jasani for the Respondent.

**CORAM : S.C.DHARMADHIKARI &
SMT. VIBHA KANKANWADI, JJ.
DATE : 09th AUGUST, 2017**

P.C.:

. These appeals of the Revenue challenge the order passed by the Income Tax Appellate Tribunal dated 26th July 2013.

2 The Tribunal disposed of in all 8 Appeals for various Assessment Years commencing from 2000-2001 to 2003-2004.

3 Since, the Tribunal found that the bunch of eight Appeals and out of which four have been disposed of by us and remaining four by this order, raised identical issues, it passed a Common Order.

4 They contained identical grounds. The lead case was taken as Income Tax Appeal No. 1492/MUM/2009 which pertains to Assessment Year 2000-2001.

5 The brief facts were that original assessment under Section 143(3) was completed on 30th November 2002. The Assessing Officer proceeding on a report known as Volcker Committee Report (for short 'the report') and issued a notice under Section 148 of the Income Tax Act, 1961 on 20th March 2007. It was served on the assessee on the same day. On 18th April 2007, the assessee filed a letter, requesting to treat the original return as return in response to the notice under Section 148 and in the same letter asked for the reasons for reopening. The Assessing Officer vide letter dated 07th June 2007 met the objections raised by the assessee. The assessee thereafter, preferred a Writ Petition, but was unsuccessful. Hence, the proceedings initiated by the Assessing Officer under Section 148 of the Income Tax Act continued.

6 The understanding of the Assessing Officer is that consequent to the Gulf War, United States imposed trade sanctions against Iraq. The United Nations

initiated Oil-for-Food programme as per UN Resolution 986, whereby Iraq was given choice to decide the countries to whom it sold its oil. In this programme, the countries would pursue UN Monitored route for the supplies to be made to Iraq and all payments to be received by the suppliers, were routed through the United Nations, after obtaining approvals from the Reserve Bank of India. It is only on a recommendation of the Reserve Bank of India, in the case of Indian Companies/entities, the UN Board instructed the designated banks, with whom the escrow funds were parked, to release the payments to be made to Indian Companies who were supplying goods to the Iraq Government. To make the programme clear and transparent, global tenders were floated, under which the companies place their bids in the segment and goods which they were agreeable to supply so that they can participate. The Assessee before us being a Pharma Company and being in that business won the bid in Pharma segment for Supply of medicines in North Iraq, raged in war.

7 With the view to pursue its business in Iraq, the assessee sought help of a Jordan based company M/s. Galala and Company and appointed it as its agent, who would look after their interest in Iraq. The assessee would pay commission on agreed basis. Pertinently, the appointment of agent and payment of commission was as per UN sanctioned percentage of 10% of trade amount/invoice price.

8 Thereafter, the Assessing Officer found from the findings and conclusions in a report styled as ' Volcker Committee Report' that Iraq devised a mechanism, which were actually kickbacks demanded by Iraq Government and under this method certain levies were imposed. These levies were imposed and demanded by Iraq Government from the suppliers and in later years. That is how, Iraq Government raised millions of US Dollars and in the garb of participating in programme and scheme for Oil-for-Food.

9 It is relying upon the findings of this report that the assessment of the assessee before us was reopened.

10 The Tribunal in the context of the challenge to the Assessing Officer's findings and conclusions and as confirmed by the first Appellate Authority held as under:

“1. As pointed out, the regular assessment was framed on 30.04.2002. In the course of the assessment proceedings, the AO made detailed enquiry with regard to commission payment made to M/s Galala & Company, which was debited as part of selling expenses, at Rs.2,88,22,428/-. The details as furnished by the assessee, indicated that there were seven payments made to M/s Galala & Company from 26.07.1999 to 29.02.2000, which were made through RBI, after the assessee had sought the approval. The assessee had also placed before the AO agency agreement dated 29.10.1998 entered into by the assessee with

Galala for execution of services and activities on behalf of the assessee company in Iraq. This agreement with Galala included, with respect of MOU between Iraq and the UN, for supply of medicines and medical supplies in Iraq. This was in accordance with the sanctioned commission of 10%, by UN and UNSC, of contract/invoice value. This commission shall include all the costs and expenses incurred by Galala. It was submitted that except for the payment of commission, no other expense or costs were to be borne by the assessee for obtaining and executing the contract and orders. This aspect and manner of payment made by the assessee to Galala was examined by the AO in detail in the regular assessment, framed under section 143(3), dated 31.11.2002.

2. *In this backdrop and on the basis of the report of Volcker Committee, the department proceeded to initiate reassessment proceedings and issued notice under section 148, wherein, the AO informed the assessee, that, "... May be, because at the time of original assessment, the report of Volcker Committee was not available with the AO". The AO further held, "It is by now settled law that a mistake of not only on facts but also under law, if not examined with due application of mind by the AO, such cases also would properly fall in the scope of section 147 of the Act." Hence, the proceedings under section 148.*

3. *We take up the merits first, i.e. ground no.2, on account of disallowance of Rs.2.88 crores paid to Galala under section 37 (1), read with Explanation.*

4. *As pointed out earlier, the assessee company paid Rs.2,88,22,428/- as commission to M/s. Galala & Company, a company in Jordan to look after the commercial interests of the assessee for its supplies made under oil for food programme under the aegis of the UN."*

11 The specific stand of the assessee before us was noted by the Tribunal that it did not participate in any illicit payments concerning kickbacks. Further, the Assessee before us and the Tribunal was never examined by the Volcker Committee. The Assessing Officer accepted this factual position, but went on and held that even if, the payments were made, to Jordan based Company post sanction of the Reserve Bank of India, but such payment has been made with illicit intention, thus, was against legal sanction and against law. Hence, the payment of Rs.2,88,22,428/- was held to be covered by the explanation to Section 37(1) of the Income Tax Act, 1961.

12 In this factual background, the Tribunal concluded that the facts as assumed by the Assessing Officer /Revenue do not attract the explanation to Section 37(1) of the Income Tax Act, that explanation reads as under:

“[[Explanation.1]—For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.]

13 A perusal of this explanation would denote that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or

profession and no deduction or allowance shall be made in respect of such expenditure.

14 The sum and substance of the lengthy discussion in the Tribunal's order is that even if what is alleged by the Assessing Officer and relying upon the report is taken as true and correct, still, the participation of the assessee was not established and proved. The assessee was not found to have made any kickbacks or payment of that nature which reached the Iraq Government and through the channels indicated in the Volcker Committee Report. There was no material of this nature in possession of the Assessing Officer against the assessee. It is in these circumstances that the Tribunal concluded, and essentially in the peculiar facts of the case of the assessee, that the assessee has not incurred any expenditure for any purpose which is an offence or which is prohibited by law. The essential ingredients of explanation below Sub-Section 1 of Section 37, therefore, were not attracted to the Assessee's payment made to M/s. Galala & Company in Jordon.

15 This is a finding of fact and based on the material placed before the Tribunal. We do not think that the Tribunal committed any error of law apparent on the face on record in reversing the view of the Assessing Officer and the order of the first Appellate Authority confirming it. We have carefully perused the

appeal paper book with the assistance of Shri. Pinto and we do not think that the present Appeals of the Revenue raise any substantial questions of law. They are dismissed but without any order as to costs.

16 Before parting, we would like to invite the attention and specifically to the Authorities who exercise quasi judicial and judicial power under the Income Tax Act, 1961, to the following pertinent observations of the Hon'ble Supreme Court in the case of *Krishena Kumar & Ors. V/s. Union of India & Ors., AIR 1990 SC 1782*.

“29. The argument of Mr. Shanti Bhushan is that the State's obligation towards pension retirees is the same as that towards PF. retirees. That may be morally so. But that was not the ratio decidendi of Nakara. Legislation has not said so. To say so legally would amount to legislation by enlarging the circumference of the obligation and converting a moral obligation into a legal obligation. It reminds us of the distinction between law and morality and limits which separate morals from legislation. Bentham in his Theory of Legislation, Chapter XII, page 60 said:

“Morality in general is the art of directing the actions of men in such a way as to produce the greatest possible sum of good. Legislation ought to have precisely the same object. But although these two arts, or rather sciences, have the same end, they differ greatly in extent. All actions, whether public or private, fall under the jurisdiction of morals. It is a guide which leads the individual, as it were, by the hand through all the details of his life, all his relations with his fellows. Legislation cannot do this; and, if it could, it ought not to exercise a continual interference and dictation over the conduct of men. Morality commands each individual to do all

that is advantageous to the community, his own personal advantage included. But there are many acts useful to the community which legislation ought not to command. There are also many injurious actions which it ought not to forbid, although morality does so. In a word legislation has the same center with morals, but it has not the same circumference.”

(SMT. VIBHA KANKANWADI, J.)

(S.C.DHARMADHIKARI, J.)