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

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Date of Decision : 28.11.2024

+ **W.P.(C) 3965/2021 & CM APPL. 8514/2024 (delay)**

FAB INDIA OVERSEAS PRIVATE LIMITEDPetitioner

Through: Mr. Rajan Bhatia, Advocate.

versus

ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE 7(1)
NEW DELHI & ANR.Respondents

Through: Mr. Sanjay Kumar, SSC with Ms.
Monica Benjamin, JSC & Ms.Easha
Kadian, JSC.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

VIBHU BAKHRU, J. (ORAL)

1. The petitioner has filed the present petition, *inter alia*, impugning an order dated 28.01.2021 (hereafter *the impugned order*) passed by the learned Transfer Pricing Officer (hereafter *TPO*) relating to the assessment year (AY) 2011-12. The petitioner also prays that directions be issued to the Assessing Officer (hereafter *AO*) to compute the petitioner's claim of depreciation for AY 2011-12 under Section 32 of the Income Tax Act, 1961 (hereafter *the Act*) in respect of the written down value of the trademark, FABINDIA, as on 01.04.2010.

2. The purchase of the trademark in question was considered as an



international transaction and a reference was made to the TPO. The learned TPO rejected the transfer pricing documentation and analysis submitted by the petitioner and passed an order determining the arm's length price (ALP) of the international transaction as Nil.

3. The assessment was based, *inter alia*, on the aforesaid basis. Aggrieved by the assessment order, the petitioner preferred an appeal before the learned Commissioner of Income Tax (Appeals) [hereafter *CIT(A)*] on various grounds. Although the petitioner succeeded before the learned *CIT(A)* in respect of the same grounds, the petitioner's appeal in respect of the issue of determining the international transaction for purchase of FABINDIA as Nil, was rejected by an order dated 31.01.2013.

4. Aggrieved by the same, the petitioner preferred an appeal before the learned Income Tax Appellate Tribunal (hereafter *the ITAT*) being ITA No.2244/Del/2013. The petitioner's appeal was heard together along with other appeals and was disposed of by an order dated 13.03.2016. The said order also disposed of the petitioner's appeal (being ITA No.2245/Del/2013) in respect of the assessment year 2009-10, which also involved a similar issue.

5. The learned ITAT faulted the TPO's determination of the ALP, and therefore, to the aforesaid extent, set aside the order passed by the TPO; the assessment order passed by the AO; as well as the appellate order passed by the learned *CIT(A)*. The learned ITAT restored the same to the file of the TPO for examining afresh. Paragraph no. 23 of the said order is set out below:



“...23. Therefore, on an overall consideration of the facts of the case and the judicial precedents available, it is our considered opinion that it is not necessary for the assessee to show that any legitimate expenditure incurred by him was also incurred out of necessity. It is also not necessary for the assessee to show that any expenditure incurred by him for the purpose of business carried on by him has actually resulted in profit or income either in the same year or in any of the subsequent years. The only condition is that the expenditure should have been incurred "wholly and exclusively" for the purpose of business and nothing more. It is this principle that inter alia finds expression in the OECD guidelines. As far as the objection of the Ld. TPO that whether there is any need for purchase of such intangible or not is concerned, we are of the view that what is to purchase and what not to purchase is not in the domain of the TPO - AO, because it is a business decision of the assessee company and accordingly, when assessee purchased an intangible asset, what is required under the law is to examine whether the price paid by the assessee is arms length price or not. The TPO has no role to play in examining the decision of commercial nature. Under the guise of TPO provisions, the TPO cannot determine the ALP at NIL as held by the Hon'ble Delhi High Court in the case of EKL Appliances Ltd., {supra}. Therefore, rejecting the entire payment without there being any analysis on the CUP method cannot be accepted. In the guise of analyzing the transactions in the CUP method, the TPO has not brought any evidence on record to reject the payment made to Fab India Inc. In the instant case, the TPO did not examine the arm's length price of the impugned royalty payment in accordance with the provisions of Sec.92C of the Act. Accordingly, we are of the opinion that the ALP of the impugned payment for trademark and the issue relating to the depreciation on trade mark need to be examined afresh. Accordingly, we set aside the order of Assessing Officer /TPO /CIT (A) on this issue and restore the same to the file of the TPO for examination of the same afresh in accordance with the law, after affording necessary opportunity of being heard. In the result, Ground nos. 1 & 2 of the assessee's appeal are allowed for statistical purposes...”

6. The controversy in the present petition relates to the petitioner's claim for depreciation in respect of the intangible asset – trademark 'FABINDIA'



– which it had acquired from Fabindia Inc. during the FY 2006-07.

7. The petitioner claimed depreciation of an amount of ₹39,55,078/- during the previous year 2010-11 relevant to the AY 2011-12 in respect of the intangible asset – the trademark FABINDIA. However, the AO disallowed the same by referring to the findings of the learned TPO as recorded in its order dated 15.10.2010 in respect of the AY 2007-08. The AO found that since the ALP of the asset FABINDIA had been determined at Nil, there was no question of claiming any depreciation in respect of the said asset.

8. The petitioner filed an appeal against the assessment order dated 27.02.2014 in respect of the AY 2011-12 before the CIT(A). However, the petitioner was unsuccessful and the CIT(A) passed an order dated 17.02.2016.

9. Aggrieved by the same, the petitioner preferred an appeal before the learned ITAT (being ITA No.5316/Del/2015 captioned *Fabindia Overseas Private Limited v. DCIT, Circle 11(1), New Delhi*).

10. The learned ITAT held that the controversy had been decided in favour of the petitioner by the co-ordinate Bench of the learned ITAT in respect of the AY 2007-08 and 2008-09. After noting the aforesaid passage from the decision in respect of the AY 2007-08, the learned ITAT passed an order dated 08.10.2018 remanding the matter to the AO for consideration afresh. The relevant extract of the order dated 08.10.2018 reads as under:

“7. Bare perusal of the operative part of the order passed in assessee's own case for AYs 2007-08 and 2009-10 by the



coordinate Bench of the Tribunal goes to prove that disallowance of depreciation claim by the assessee u/s 32 of the Act qua trademark acquired in FY 2006-07 is not sustainable as the TPO is not to decide the business expediency of any intangible assets purchased by the assessee by sitting on the armchair of a businessman. Moreover, when the decision rendered by the TPO for AY 2007-08 has been set aside by the coordinate Bench of the Tribunal to the TPO, the present assessment order passed by following the said order is also not sustainable. Similarly identical issue in AY 2010-11 in ITA No.5629/Del/2014 order dated 30.06.2017 in assessee's own case has also been set aside by the Tribunal to the TPO for determining the arm's length price of international transaction qua purchase of intangibles.

8. In view of what has been discussed above, issue in controversy is also remanded back to the TPO/AO to decide afresh after providing an opportunity of being heard to the assessee in view of the case laws discussed by the coordinate Bench of the Tribunal in AYs 2007-08 and 2009-10 (supra). Consequently, appeal filed by the assessee is allowed for statistical purposes.”

11. Clearly, the acquisition of the trademark during the financial year 2006-07 could not possibly be treated as an international transaction within the meaning of Section 92B of the Act, which was entered into during the previous year relevant to the AY 2011-12. The transaction to purchase an asset is a singular transaction, if the same is an international transaction under Section 92B of the Act, the same may require to be benchmarked for determining the ALP under Section 92C of the Act.

12. However, this determination is required to be made in the AY relevant to the previous year in which the said transaction was entered into. In view of the above, the order remanding the controversy to “*the TPO/AO to decide afresh*” as directed by the learned ITAT cannot be construed as a reference



to the TPO in regard to the issue of determining the ALP of the transaction relating to purchase of the trademark FABINDIA. In terms of the order passed by the ITAT, the AO was required to examine the admissibility and the quantum of depreciation allowable in respect of the asset in question, namely, the trademark FABINDIA.

13. The counter-affidavit filed on behalf of the Revenue indicates that the only reason for making the reference was the order passed by the learned ITAT in respect of the AY 2007-08. Paragraph 10 of the counter-affidavit is set out below:-

“...10. From the above provision it is apparent that to initiate a TP Audit proceeding in a case a TPO must have received reference from an AO u/s 92CA of the Act. In the present case the proceeding for the A.Y. concerned in consequent of the direction of the Ld. ITAT has been initiated and concluded by TPO after getting due reference from the office of the Addl. Commissioner of Income Tax, Special Range-3 (Delhi) u/s 92CA of the Act vide letter F.No. Addl. CIT/ Special Range-3/TPO/2019-20/ 307 dated 20.09.2020. In the reference letter it was also mentioned that the reference has been made subsequent to the approval received from the office of the Pr. CIT-3, New Delhi vide letter F. No. Pr.CIT-03/ DEL/ HQ/ TP/ 2019-20/ 1401 dated 19.09.2019. Therefore, it is crystal clear that the proceeding by TPO is as per the law and in terms of the remand of Ld. ITAT, as the proceeding has been initiated and concluded in the case of the assessee by the TPO after due compliance of provisions of the Section 92CA of the Act.

Notably, the Ld. ITAT had remanded the issue to the file of the AO/ TPO after taking due cognizance of the fact that no reference was made by the AO to the TPO to determine the arm's length price qua the international transaction entered into by the assessee during the original TP Audit for the A.Y. 2011-12. The reference, thus, made by the AO to the TPO in the remand proceeding is in sync with the direction given by the Ld. ITAT for the A.Y. concerned. Also, due precaution has been taken by the TPO during the TP audit to ensure that the effect of benchmarking



transaction(s), if any, remains confined to the benefit that has been claimed by the assessee for the A.Y. 2011-12 only.

Given the aforesaid facts, the contention of the assessee that the TPO has wrongly assumed jurisdiction and the order passed by the TPO is illegal and nullity is based on flimsy ground and as such not tenable...”

14. It is apparent that the Revenue has misconstrued the direction of the learned ITAT to mean that it required to make a reference to the TPO for the purpose of assessment for AY 2010-11. Since no international transaction was entered into in this year, the reference made by the AO is fundamentally flawed. The petitioner’s challenge to the impugned order dated 28.01.2021 passed by the TPO under Section 92(CA) of the Act, is without jurisdiction. The same is accordingly set aside.

15. Before concluding, we would like to observe that Mr. Sanjay Kumar the learned counsel for the Revenue had stated that he is unable to ascertain the fate of the petitioner’s assessment of income for the AY 2007-08. As noted above, the learned ITAT had passed an order dated 13.06.2016 in respect of the AY 2007-08, restoring the matter to the file of the TPO for examination afresh in the light of the said decision. The learned counsel is not aware as to any further orders that have been passed by the TPO pursuant to the orders passed by the learned ITAT. Clearly, if any, transfer pricing adjustment has been made on account of the ALP determining by the TPO and the same has attained finality, the said value would be appropriate for determining the depreciation, if any, allowable on the value of the said asset.

16. Insofar as the Assessee’s prayer that directions be issued to the AO



for computing the depreciation on the written down value of trademark in question as on 01.04.2010 is concerned, we do not propose to issue any such direction. The AO shall consider the petitioner's claim for depreciation afresh in the light of the directions issued by the learned ITAT in its order dated 08.10.2018 as well as the present order.

17. The petition is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

SWARANA KANTA SHARMA, J

NOVEMBER 28, 2024
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Click here to check corrigendum, if any