

IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, MUMBAI

**BEFORE SHRI OM PRAKASH KANT, AM AND
MS. KAVITHA RAJAGOPAL, JM**

ITA No. 2520/Mum/2023
(Assessment Year: 2002-03)

ACIT-2(2)(1) Room No. 545, 5 th Floor, Aaykar Bhavan, M. K. Road, Mumbai-400 020	Vs.	Lyka Labs Ltd. 30 Forjett Street, Grant Road (W), Mumbai-400 036
PAN/GIR No. AAACL 0820 G		
(Assessee)	:	(Respondent)
Assessee by	:	Shri Samir Shah
Respondent by	:	Shri Manish Sareen
Date of Hearing	:	28.02.2024
Date of Pronouncement	:	27.05.2024

ORDER

Per Kavitha Rajagopal, J M:

This appeal has been filed by the Revenue, challenging the order of the learned Commissioner of Income Tax (Appeals) ('Id.CIT(A) for short), National Faceless Appeal Centre ('NFAC' for short) passed u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2002-03.

2. As the appeal has been time barred by two days, the Revenue had filed an application for condoning the said delay. On hearing both the sides, we deem it fit to condone the delay of two days in filing the present appeal as there being a sufficient cause for the said delay. Delay condoned.

3. The grounds of appeal raised by the Revenue reads as under:

1	<i>Whether on the facts and in the circumstances of the case and in law, the ld. CIT(A) is correct in treating the receipt of non compete fees of Rs.10 cr. as capital receipts as against revenue receipts held by AO and erstwhile CIT(A)?</i>	Rs.3,57,00,000/-
2	<i>Whether on the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in deleting the addition of Rs.10 crore towards non-compete fees without appreciating the principle laid down by the Apex Court in the case of Rai Bahadur Jairam Viji (1959) 35 ITR 148?"</i>	
3	<i>Whether on the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in deleting the addition of Rs.10 crore towards non-compete fees without appreciating the facts that the restriction on the assessee as per the agreement is not absolute but restriction shall apply till such time the assessee holds 26% of the total issued and paid equity share capital of LHHCL, thus, the assessee has not given any absolute right in the marketing, distribution and sale of product?"</i>	
4	<i>Whether on the facts and in the circumstances of the case and in law, the ld. CIT(A) erred in treating non-compete fees being capital receipt relying on Supreme Court Judgement in the case of GuffieChems Pvt. Ltd. 332 ITR 602, Wintac Ltd. 306 ITR 614 (Karnataka) when facts of the cited case are distinguished to the case under consideration as assessee has not given any absolute right in the marketing, distribution and sale of products?"</i>	Rs.3,57,00,000/-

4. The solitary grounds of appeal raised by the assessee is pertaining to the receipt of non compete fees of Rs.10 crores which has been treated as 'capital receipt' by the ld. CIT(A) as against the view taken by the ld. Assessing Officer ('A.O.' for short) to be a 'revenue receipt'.

5. The brief facts are that the assessee company is engaged in the business of manufacture and sale of bulk formulation of pharmaceutical products where the manufacturing units are situated at Mumbai, Valsad, Ankleshwar and at Tarapur. The assessee company had filed its return of income dated 31.10.2002, declaring total loss at Rs.5,59,48,890/- under the normal provisions and book profit u/s. 115JB of the Act at Rs.5,10,676/-. The assessee's case was selected for scrutiny and the assessment order u/s. 143(3) dated 30.09.2004 was passed by the ld. A.O. determining the total income at Nil after allowing set off of brought forward unabsorbed business loss and depreciation at

Rs.12,12,14,358/- and book profit u/s. 115JB of the Act at Rs.5,10,676/- after making the following additions/disallowance:

<i>Sr. No</i>	<i>Nature of addition /disallowance</i>	<i>Amount (Rs.)</i>
1	<i>Receipt for non compete, scientific & technical information</i>	<i>17,40,00,000</i>
2	<i>Interest disallowed u/s 14A</i>	<i>18,13,248</i>
3	<i>Interest disallowed as not being for business purpose</i>	<i>13,50,000</i>

6. The assessee was in appeal before the first appellate authority, challenging the additions made by the Id. A.O. and the Id. CIT(A) vide order dated 30.03.2004 had partly allowed the assessee's appeal by deleting the disallowance made u/s. 14A of the Act and also towards the interest disallowance and thereby computing the total income at Rs. Nil after allowing set off of brought forward business loss and unabsorbed depreciation at Rs.11,80,51,110/- and book profit u/s. 115JB of the Act at Rs.3,01,69,094/-, thereby confirming the addition on receipt for non compete, scientific and technical information amounting to Rs.17,40,00,000/-.

7. The assessee and the Revenue were in appeal before the Tribunal, challenging the order of the Id. CIT(A) where the Tribunal vide order dated 05.11.2014 set aside the issue of receipt on non compete fee amounting to Rs.10 crores and upholding the addition of Rs.7.40 crores on transfer of scientific knowhow and technical information in ITA Nos. 681/Mum/2008 and 1430/Mum/2008. The Id. A.O. vide order dated 27.03.2016 passed the assessment order u/s. 143(3) r.w.s. 254 of the Act upholding the addition on non compete fees of Rs.10 crores as being 'revenue receipt'.

8. The first appellate authority in an appeal filed by the assessee deleted the impugned addition by holding the same to be a 'capital receipt' and the such receipt was

liable to tax only after A.Y. 2003-04 as per the amendment to section 28(va) of the Act vide Finance Act, 2002 w.e.f. 01.04.2003.

9. Aggrieved the Revenue is in appeal before us, challenging the order of the Id. CIT(A).

10. The learned Departmental Representative (Id. DR for short) for the Revenue contended that the assessee has not given up its source of income by way of the agreement signed by the assessee with LHHCL and has not proved that it had given up marketing and sale of other products other than those mentioned in the agreement. The Id. DR further contended that the non compete fee of Rs.10 crores was a 'revenue receipt' liable to be taxed in the hands of the assessee. The Id. DR relied on the order of the Id. A.O.

11. The learned Authorised Representative (Id. AR for short) for the assessee, on the other hand, contended that the non compete fee was liable to be taxed as 'revenue receipt' only after A.Y. 2003-04 as per the Finance Act, 2002 and was not liable to tax prior to A.Y. 2003-04. The Id. AR further stated that for A.Y. 1998-99 and 2001-02, the coordinate bench held the non compete fee to be a 'capital receipt' not taxable in the hands of the assessee. The Id. AR relied on a catena of decisions in support of the said proposition.

12. We have heard the rival submissions and perused the materials available on record. It is observed that the assessee has received a total sum of Rs.49,80,00,000/- from

its joint venture company Lyka Hetro Health Care Limited (LHHCL) which are tabulated as under:

<i>Non compete fees</i>	<i>Rs.10,00,00,000</i>
<i>Assignment of registered trade mark</i>	<i>Rs.15,00,00,000</i>
<i>Assignment of unregistered trade mark</i>	<i>Rs.10,00,00,000</i>
<i>Marketing information and consultancy</i>	<i>Rs.7,40,00,000</i>
<i>Scientific know how and technical information</i>	<i>Rs.7,40,00,000</i>
<i>Total consideration</i>	<i>Rs.49,80,00,000</i>

13. It is observed that the non compete fees of Rs.10 crores was claimed as 'exempt income' by the assessee vide agreement dated 12.03.2002 as per which the assessee company had entered into an agreement with LHHCL that the assessee will not engage in marketing, distribution and sale of 20 registered and 36 unregistered Allopathic Pharmaceutical Formulations (hereinafter referred to as 'products') till the time the assessee holds 26% of the total issued and paid up capital of LHHCL as per clause (1) of the said agreement. The Id. A.O. observed that the assessee was holding 51% in LHHCL and that the non compete agreement was merely a self imposed restriction which is not absolute and where the assessee can bring down its holding in LHHCL any time to less than 26% and compete with LHHCL in the business of marketing, distribution and sale of products. The Id. A.O. further held that the assessee was not confined to carrying on business of marketing, distribution and sale of other products which are not mentioned in the agreement, thereby holding that the source of income of the assessee is not in anyway affected by the said agreement. The Id. A.O. relied on the proposition laid down by the Hon'ble Apex Court in the case of *CIT vs. Rai Bahadur Jairam Valji and others* [1959] 35 ITR 148 (SC) along with other catena of decisions on this proposition and held the said receipt to be a 'revenue receipt'.

14. The Id. CIT(A), on the other hand, has relied on the decision of the Hon'ble Apex Court in the case of *Guffic Chems Pvt. Ltd.* 332 ITR 602 (SC) and also section 28(va) of the Act which vide Finance Act, 2002 was effective only after A.Y. 2003-04 where the non compete fee could be taxed as 'revenue receipt'. The Id. CIT(A) has also relied on the decision of the Tribunal in assessee's case for A.Y. 1998-99 where the non compete fee was held to be a 'capital receipt'.

15. In the above factual matrix of the case, it is pertinent to point out that vide an agreement dated 12.03.2002 the assessee has entered into a negative covenant between LHHCL for not competing with LHHCL in the marketing, distribution and selling activities of certain formulations for the trade mark which has been registered or used by the assessee, which also includes brand/trademark extensions, product packet sizes for which the assessee has received a consideration of Rs.10 crores upon execution of the said agreement. This includes a list of 20 products for which the assessee is the registered trade mark owner and around 38 products for which the trademarks are pending for registration with the assessee. It is observed that the lower authorities have not disputed the genuineness of this agreement neither in the assessment order nor during the first appellate proceeding. Be that as it may, the Hon'ble Apex Court in the case of *Shivraj Gupta vs. CIT* (in Civil Appeal No. 12044 of 2016) has held that the Revenue has no authority to question the commercial expediency of the tax payer and cannot enter into the thicket of reasonableness of the amount paid. The assessee as well as the Id. CIT(A) have relied on the decision of Hon'ble Apex Court in the case of *Guffic Chem (P.) Ltd.* (supra) which has categorically held that the amendment to section 28(va) of the Finance

Act, 2002 is only w.e.f. 01.04.2003 relevant to A.Y. 2004-05 onwards and does not have a retrospective effect for taxing the non compete fee received prior to the said period. The Hon'ble Apex Court has held that section 28(va) of the Act is amendatory in nature and not clarificatory thereby negating the retrospective effect of the said provision. The said decision has also distinguished the compensation received for termination/loss of agency and a loss of source of business as per a negative covenant where the former would be a 'revenue receipt' and the latter a 'capital receipt' in the hands of the assessee. There is no iota of doubt that the agreement entered into by the assessee and LHHCL was a negative covenant restraining the assessee from carrying out the activities of marketing, distribution and selling of certain formulations which was exclusive to the assessee and not to public at large, which nevertheless is a loss of source of business to the assessee though not wholly but to the extent of the terms of the agreement. This by no stretch of imagination could be loss of agency where there is involvement of principal and agent. We are, therefore, of the considered view that the consideration received by the assessee towards non compete fee is 'capital in nature', as it is already held that the amendment to section 28(va) of the Act is not applicable to the year under consideration. The intention of the legislature was to clear the ambiguity of the non compete fee received by the assessee by treating the same as a 'revenue receipt' in the hands of the assessee but only post amendment, i.e., w.e.f 01.04.2003. It is trite to reproduce section 28(va) of the Act for ease of reference herein under:

16. We, therefore, find no infirmity in the order of the Id. CIT(A) in holding the non compete fee to be in the nature of a 'capital receipt' for the year under consideration. The

issue pertaining to the period of the said agreement also becomes irrelevant for the fact that the assessee would be liable to tax on non compete fee as 'revenue receipt' from A.Y. 2004 – 2005 as per section 28(va) of the Act. On the above observation, we hold that the appeal filed by the Revenue warrants no merit and is to be dismissed.

17. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 27.05.2024

Sd/-

(Om Prakash Kant)
Accountant Member

Mumbai; Dated : 27.05.2024

Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT - concerned
4. DR, ITAT, Mumbai
5. Guard File

Sd/-

(Kavitha Rajagopal)
Judicial Member

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai