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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPEALLATE JURISDICTION

WRIT PETITION NO.1214 OF 2014

Coca-Cola India Private Limited,
a Company incorporated under the
Companies Act, 1956 and having
its registered Office at Plot
No.1109-1110, Pirangut,
Taluka Mulshi, **Pune - 412 108**. ...Petitioner

..Versus..

1) The Assistant Registrar representing
The Income Tax Appellate Tribunal,
having its office at Maharashtra
Jeevan Pradhikaran Building, Near
St.Mary High School, 463,
Stavely Road, **Pune – 411 001.**

2) The Deputy Commissioner of Income-tax
having his office at Range 1, Pune
"A" Wing, 2nd Floor, PMT Building,
Shankar Sheth Road, Swargate,
Pune - 411 037.

3) The Union of India, having its office
at Aaykar Bhavan, Marine Lines,
Mumbai. ...Respondents

Mr.S.E. Dastur, Senior Counsel with Mr.P. Pardiwala, Senior Counsel, Mr.R. Murlidhar and Mr.Arun Siwach i/b M/s.Amarchand & Mangaldas & Suresh A. Shroff & Co. for the Petitioner.

Mr.Vipul Bajpayee i/b Mr.Vimal Gupta, Senior Counsel for the Respondents.

CORAM : S.J. VAZIFDAR &
B.P. COLABAWALLA, JJ.
DATE : 4TH MARCH, 2014.

ORAL JUDGMENT (Per S.J. Vazifdar, J.) :-

1. Rule. With the consent of the parties, the petition is heard finally at the admission stage.

2. Respondent No.1 is The Assistant Registrar, representing the Income Tax Appellate Tribunal (ITAT). Respondent No.2 is The Deputy Commissioner of Income Tax. Respondent No.3 is the Union of India.

3. The petitioner seeks a writ of certiorari to quash and set aside an order dated 20.09.2013 passed by respondent No.2 and an order dated 20.01.2014, passed by respondent No.1. By these orders, respondent Nos.1 and 2 granted the petitioner a stay of recovery of only about 50% of the demand in respect of one aspect of the matter, which we will refer to shortly.

4. The petitioner carries on business of manufacture and sale of alcoholic beverage bases, known as concentrates used in the manufacture of beverages. The concentrates are sold to bottlers, who use the same to prepare beverages.

5. The matter pertains to the Assessment Years 2007-2008 and 2008-2009. The facts relevant to this petition, pertaining to both the assessment years are similar. We will for convenience refer to the facts pertaining to the AY 2007-2008.

6. The petitioner filed a return of income on 29.10.2007

offering an income of Rs.52,03,46,270/-. The petitioner claimed a deduction of Rs.191,15,03,471/- towards Advertising Marketing Promotion expenses (AMP) and Rs.76,80,37,502/- towards the service charges and reimbursement.

7. A reference was made to the Transfer Pricing Officer (TPO) for determination of the arm's length price (ALP) of certain international transactions disclosed by the petitioner. The TPO noted that the petitioner was indirectly a wholly owned subsidiary of Coca Cola South Asian (India) Holding Limited, who in turn was ultimately held by Coca Cola Inc. Coca Cola Incorporated is a company established under the laws of the state of Delaware, USA and has established a branch in India.

8. The TPO made a report dated 29.10.2010, in which he noted that the petitioner manufactures the concentrate for sale to Hindustan Company Beverage Private Limited and other bottlers and also exports concentrates to its related parties outside India. The total sales of the petitioner during the AY 2007-2008 were Rs.619,22,07,746/-. In paragraph 14, the TPO noted that the petitioner had incurred expenditure of about Rs.1.91 crores on account of advertising and sales promotion and about Rs.94.20 crores on account of marketing support expenses. He further noted that as the petitioner does not own non-routine intangibles, the brand

development activities undertaken by it confers the benefits to the ultimate owner of the brands i.e. the petitioner's Associated Enterprise (AE). The TPO came to the conclusion that as the petitioner had rendered intra group services to its AE it ought to be compensated for the same by its AE at the ALP. He also came to the conclusion that the petitioner had incurred expenditure of Rs.94.20 crores on account of the marketing support expenses, including sales product volume rebates, bottler incentives, concessions etc. which is a part of the AMP expenditure incurred to develop the market for the AE's products and to create the brand loyalty in the minds of the customers and dealers. The TPO refused to accept the petitioner's contention that to compute the AMP / sales ratio value of the sales of the bottlers should be taken into consideration and not the value of its sales of concentrate. The TPO observed that the only method to find the amount of compensation which should have accrued to the assessee is to value the non-routine expenses which were made for strengthening the brand and the benefit to that extent would have accrued to the AE. He then proceeded to compare the expenditure of what he considered to be similarly placed companies. He recorded that the entire burden of AMP expenditure of about Rs.285.00 crores during the relevant year was incurred by the petitioner and that the petitioner had developed marketing intangibles for its AE in India at

its own own cost and risk and by investing money in respect thereof. The AE did not contribute towards AMP.

He proceeded to determine of quantum of AMP expenditure incurred by the petitioner on the promotion of the AE's brand and on development of the marketing intangible of the AE in India in addition to the routine AMP expenditure that the petitioner was expected to spend for its normal, routine distribution business. The TPO adopted the bright line limit / method. He noted that the AMP and marketing support expenses was Rs.285,35,51,777/-. He found the AMP expenses to be 46.04% of the sale. In doing so, he obviously took into consideration the petitioner's sales of about Rs.619.22 crores and not the sales by the bottlers. The routine advertising expenses of similar enterprises was determined at 2.9%. Accordingly Rs.267,13,18,421/- was determined to be the non-routine AMP expenses which the TPO held was for the benefit of the foreign AE and therefore, ought to be added to the petitioner's income.

9. The petitioner opted to go before the Dispute Resolution Panel (DRP). The DRP by its order dated 26.09.2011, merely noted the observations of the TPO, stated that it had looked into the aspect carefully and was of the view that the AMP expenditure was an international transaction ; that the petitioner had incurred costs in

connection with the benefit and service provided to the AE under a mutual agreement, which though not in writing was apparent from the petitioner's conduct. The DRP therefore upheld the order of the TPO.

10. Thereafter the assessment order was passed on 13.10.2011. The AO disallowed the deduction of the AMP expenses claimed by the petitioner under section 37(1). The AO however, observed that since the expense disallowed was more than the adjustment suggested by the TPO, additions on account of disallowances were being made without prejudice to the merits and independent application of the TPO order. The AO assessed the total income of the assessee to be about Rs.420.00 crores together with interest and directed penalty proceedings to be initiated separately.

11. The petitioner challenged the above orders before the ITAT. The appeal is pending.

12. On 05.11.2011, prior to the appeal being filed, the petitioner made an application before the AO, seeking a stay against the recovery. As regards the disallowance of the AMP, the petitioner stated that the issue had been decided in its favour for the previous years i.e. for AY's 1998-1999 to 2004-2005.

During the pendency of the stay application, a Special Bench of the ITAT delivered a judgment in respect of the assessment of *L.G. Electronics* India Private Limited case. We will refer to the

L.G. Electronics case later. The order pertains to transfer pricing in such cases relating to AMP. The petitioner also recorded its submissions regarding the transfer pricing adjustment. Suffice it to note at this stage that the written submissions with respect to the order of the Special Bench of the ITAT in the *L.G. Electronics* case was dealt with in detail and from different angles.

13. The AO denied the stay application by an order dated 20.09.2013 i.e. almost two years later. For the purposes of the application for stay, it was held that the department had not pursued the demand on the issue of the deduction of AMP expenses as well as on the service charges being disallowed as the same had been decided in favour of the petitioner for AYs 1997-1998 to 2004-2005. The order thereafter notes that the department was, for the purpose of the stay application, pursuing only the demand on the basis of the transfer pricing adjustment which had not been decided or adjudicated upon by any authority in the petitioner's case.

The AO proceeded on the basis that the recovery on the basis of the assessment of disallowing the expenses related to AMP ought to be stayed in view of the decision relating to the assessment of the previous year being favour of the petitioner. The AO however, held that recovery ought to be made on the basis of the protective assessment by the assessment order of the previous year viz. on the

basis of the transfer pricing adjustment as it had not been considered in the assessment of the previous years. The tax effect on this issue for the Ay's in question viz. 2007-2008 and 2008-2009 was Rs.64,34,12,068/- and Rs.73,54,73,697/- respectively. The AO kept in abeyance only 50% of the amount viz. Rs.68,88,85,765/- for six months or till the decision of the ITAT, whichever was earlier. He further stayed the demand to the extent of Rs.24.45 crores. Ultimately the AO agreed to treat the assessee as not being in default in respect of the said assessment years of Rs.189.05 crores and Rs.206.26 crores subject to the assessee making a payment of Rs.44.45 crores in six monthly installments.

14. The AO in the order dated 20.09.2013 referred to the *L.G. Electronics* case, but we do not see any analysis by which it was made applicable to the petitioner's case. The issues raised on behalf of the petitioner with respect to the *L.G. Electronics* case have not at all been considered in the order. The judgment of a Division Bench of this Court in the case of *KEC International Limited vs. B.R. Balakrishnan (2011) 251 ITR 158* was merely mentioned.

15(A). On 17.10.2013, the petitioner filed a Miscellaneous Application for rectification of the order dated 20.09.2013. The application was in considerable detail. It raised various issues dealing with several aspects. For instance, the AO's attention was invited to

the fact that in all the matters that had come up after the judgment of the Special Bench in the *L.G. Electronics* case, the Tribunal had remanded the matters to the AO / TPO for recomputing the adjustment in the light of the principles laid down in the judgment. It was contended that considering the facts of the case, there is every possibility of a similar order being passed in the petitioner's case. It was also contended that the assessee had been granted refund of Rs.43.08 crores in respect of the advertising charges for AYs 1999-2000 to 2004-2005. The same however, was adjusted against the demand raised towards the marketing expenses and service charges for AY's 2005-2006 and 2006-2007 though the issues arising in those assessments were covered in favour of the petitioner. Relying upon a circular of the CBDT dated 06.03.1989, it was contended that the demand for those years ought to have been kept in abeyance. It was therefore, contended that the refund of Rs.43.08 crores could always be adjusted against the demand in the present case.

(B). The AO disposed of the miscellaneous application on the same day, on which it was filed viz. 17.10.2013 on the ground that the submissions contained in the Miscellaneous Application had already been considered while deciding the original stay application.

16. The order dated 17.10.2013 wrongly rejected the Miscellaneous Application on the ground that the issues raised

therein had been decided while considering the original application for stay. As we noted earlier, the order dated 20.09.2013 on the original application for stay did not consider the applicability of the order of the Special Bench in *L.G. Electronics* case, although a detailed note in respect thereof was tendered on 11.03.2013. The issue regarding the illegal adjustment of the refund of Rs.43.08 crores due for AYs 1999-2000 to 2004-2005 against the demand in AYs 2005-2006 and 2006-2007 was also not considered in either of the orders. We would not however, on the ground of the adjustment of the refund, have granted the reliefs sought. We may at the highest in that event have remanded the matter to the AO for considering this issue and permitted the petitioner to make an application in the proceedings relating AYs 2005-2006 and 2006-2007 to have the amounts released and thereafter applied to have the same adjusted against the AYs relevant to this petition viz. AYs 2007-2008 and 2008-2009.

17. It is however, clear to us that the most crucial aspect of the matter viz. the applicability of the order of the Special Bench in the *L.G. Electronics* case was not considered by the AO either in the order dated 20.09.2013 on the original application for stay or in the order dated 17.10.2013, disposing of the Miscellaneous Application for rectification. We will presently indicate that there are several

aspects in this regard that require at least *prima-facie* consideration while dealing with the application for stay.

18. The petitioner thereafter filed stay petitions before the ITAT, which were disposed of by an order dated 20.01.2014. The ITAT rejected the application only on the ground that the petitioner had not made out a case of irreparable loss which cannot be compensated in terms of money in case the stay is not granted. The ITAT however, expedited the hearing and directed the matter to be fixed for final hearing on 22.02.2014. For these two reasons, the stay petitions were disposed of.

19. Mr.Dastur's submission that the authorities had not considered the applicability of the decision in *L.G. Electronics* case to the facts of the present case, is well founded. We have referred to the orders in some detail only to establish the same. In the application for stay, the authorities are not expected to deal with the issues in detail but deal with them they must, howsoever briefly. The impugned orders do not indicate any process of reasonings by which the authorities decided the applicability of the *L.G. Electronics* case to the petitioner's case.

20. The decision of the Special Bench in *L.G. Electronics* case is obviously not binding on this Court. It is however, certainly an important factor as far as the AO and the Tribunal are concerned. It

was incumbent upon them to consider the effect of the order on the petitioner's case. It is necessary therefore, to consider the observations of the Special Bench for that reason viz. to ascertain whether the judgment was even considered while rejecting the petitioner's application for stay. We find they have not.

21. The Special Bench found that the assessee in that case had incurred extremely high AMP expenses for promotion and development of the L.G. brand in India. The decision turned to a large extent on the facts of the case. Further the Special Bench observed in paragraph 9.7 that the first question which falls for consideration in such cases is whether there is any transaction between the assessee and the foreign AE building, in India, a brand the legal ownership of which vests in the foreign AE. The Special Bench in paragraph 9.09 also held that there can be no presumption about two parties acting in concert. There must be some evidence formal or informal even oral to establish that the parties acted in concert. It is of vital importance to note paragraphs 9.10 and 9.11 :-

> "9.10 We do not find any force in the contention of the ld. DR that the mere fact of the assessee having spent proportionately higher amount on advertisement in comparison with similarly placed independent entities be considered as conclusive to infer that some part of the advertisement expenses were incurred towards brand promotion for the foreign AE. Every businessman knows his interest best. It is for the assessee to decide that how much is to be incurred to carry on his business smoothly. There can

be no impediment on the power of the assessee to spend as much as he likes on advertisement. The fact that the assessee has spent proportionately more on advertisement can, at best be a cause of doubt for the AO to trigger examination and satisfy himself that no benefit etc. in the shape of brand building has been provided to the foreign AE. There can be no scope for inferring any brand building without there being any advertisement for the brand or logo of the foreign AE, either separately or with the products and name of the assessee. The AO/TPO can satisfy himself by verifying if the advertisement expenses are confined to advertising the products to be sold in India along with the assessee's own name. If it is so, the matter ends. The AO will have to allow deduction for the entire AMP expenses whether or not these are proportionately higher. But if it is found that apart from advertising the products and the assessee's name, it has also simultaneously or independently advertised the brand or logo of the foreign AE, then the initial doubt gets converted into a direct inference about some tacit understanding between the assessee and the foreign AE on this score. As in the case of an express agreement, the incurring of AMP expenses for brand building draws strength from such express agreement; in the like manner, the incurring of proportionately more AMP expenses coupled with the advertisement of brand or logo of the foreign AE, gives strength to the inference of some informal or implied agreement in this regard.

9.11. Adverting to the facts of the instant case, it is noticed that the ld. DR has amply shown that the assessee not only promoted its name and products through advertisements, but also the foreign brand simultaneously, which has remained uncontroverted on behalf of the assessee. This factor together with the fact that the assessee's AMP expenses are proportionately much higher than those incurred by other comparable cases, lends due credence to the inference of the transaction between the assessee and the foreign AE for creating marketing intangible on behalf of the latter. "

Thus the Special Bench rejected the revenue's contention that merely because an assessee has spent a higher amount on advertising than similarly placed enterprises, it would lead to the conclusion that the assessee acted in concert with its foreign AE for the said purpose. There is no finding by the AO in the case before us on these aspects. In an application for stay, the AO is indeed not expected to analyze the entire evidence. There must however be some consideration of the facts and an indication of the same in the order.

After analyzing the facts of the case, the Special Bench came to the conclusion that such an agreement did exist in that case.

In fact in paragraph 17.4, the Special Bench enumerated some of the relevant questions in such cases. Paragraph 17.4 reads as under :-

> **"17.4.** In our considered opinion, following are some of the relevant questions, whose answers have considerable bearing on the question of determination of the cost/value of the international transaction of brand/logo promotion through AMP expenses incurred by the Indian AE for its foreign entity :-
>
> 1. Whether the Indian AE is simply a distributor or is a holding a manufacturing licence from its foreign AE ?
>
> 2. Where the Indian AE is not a full fledged manufacturer, is it selling the goods purchased from the foreign AE as such or is it making some value addition to the goods purchased from its foreign AE before selling it to customers ?

3. Whether the goods sold by the Indian AE bear the same brand name or logo which is that of its foreign AE ?

4. Whether the goods sold bear logo only of foreign AE or a logo which is only of the Indian AE or is it a joint logo of both the Indian entity and its foreign counterpart ?

5. Whether Indian AE, a manufacturer, is paying any royalty or any similar amount by whatever name called to its foreign AE as a consideration for the use of the brand/logo of its foreign AE?

6. Whether the payment made as royalty to the foreign AE is comparable with what other domestic entities pay to independent foreign parties in a similar situation.

7. Where the Indian AE has got a manufacturing licence from the foreign AE, is it also using any technology or technical input or technical knowhow acquired from its foreign AE for the purposes of manufacturing such goods ?

8. Where the Indian AE is using technical know-how received from the foreign AE and is paying any amount to the foreign AE, whether the payment is only towards fees for technical services or includes royalty part for the use of brand name or brand logo also ?

9. Whether the foreign AE is compensating the Indian entity for the promotion of its brand in any form, such as subsidy on the goods sold to the Indian AE ?

10. Where such subsidy is allowed by the foreign AE , whether the amount of subsidy is commensurate with the expenses incurred by the Indian entity on the promotion of brand for the foreign AE ?

11. Whether the foreign AE has its presence in India

only in one field or different fields ? Where it is involved in different fields, then is there only one Indian entity looking after all the fields or there are different Indian AEs for different fields ? If there are different entities in India, then what is the pattern of AMP expenses in the other Indian entities ?

12. Whether the year under consideration is the entry level of the foreign AE in India or is it a case of established brand in India ?

13. Whether any new products are launched in India during the relevant period or is it continuation of the business with the existing range of products ?

14. How the brand will be dealt with after the termination of agreement between AEs ? ”

22. At the cost of repetition, it was necessary for the authorities to indicate some reasons at least before rejecting the application on the basis of the order of the Special Bench. The AO however, did not do so. None of the factors indicated in the order of the Special Bench have been adverted to.

23. The ITAT also in its impugned order dated 20.01.2014 did not address itself to the relevant facts and issues. It merely rejected the application on the ground that the petitioner had not made out a case of irreparable loss which cannot be compensated in terms of money in the case stay is not granted.

24. The question of irreparable loss is not the only consideration while dealing with an application for stay. If this were so, every assessee with the means of deposit would be denied the

right to seek a stay irrespective of the merits of his case. This is insupportable either in principle or on authority.

25. This has been repeatedly observed in the judgments of this Court. A Division Bench of this Court in the case of *KEC International Limited vs. B.R. Balakrishnan (2011) 251 ITR 158* set out the parameters for considering applications for stay. These observations have been repeatedly referred to in subsequent judgments of this Court. It is sufficient to refer to the judgment of a Division Bench of this Court in *UTI Mutual Fund vs. Income Tax Officer, (2012) 345 ITR 71* and *(2012) 206 Taxman 341*. The Division Bench held :-

> "The remedies which are legitimately open in law to an assessee to challenge a demand cannot be allowed to be foreclosed by a hasty recourse to coercive powers. Assessing Officers and appellate authorities perform quasi-judicial functions under the Act. Applications for stay require judicial consideration. Rejecting such applications without hearing the assessee, considering submissions and indicating at least brief reasons is impermissible. The judgment of the Division Bench of this court in KEC International Ltd. v. B. R. Balakrishnan [2001] 251 ITR 158 (Bom), lays down guidelines in regard to the manner in which applications for stay should be disposed of. The parameters which were laid down by the Division Bench presided over by the Hon'ble Mr.Justice S. H. Kapadia (as the learned Chief Justice of India then was) are as follows (page 160) :
>
> "(a) While considering the stay application, the authority concerned will at least briefly set out the case of the assessee.

(b) In cases where the assessed income under the impugned order far exceeds the returned income, the authority will consider whether the assessee has made out a case for unconditional stay. If not, whether looking to the questions involved in appeal, a part of the amount should be ordered to be deposited for which purpose, some short prima facie reasons could be given by the authority in its order.

(c) In cases where the assessee relies upon financial difficulties, the authority concerned can briefly indicate whether the assessee is financially sound and viable to deposit the amount if the authority wants the assessee to so deposit.

(d) .....

(e) …....

The above parameters are not exhaustive. They are only recommendatory in nature."

Unfortunately these guidelines are now being breached by the Revenue.

"In exercising his power, the Income-tax Officer should not act as a mere tax gatherer but as a quasi-judicial authority vested with the power of mitigating hardships to the assessee."

These are, we may say so with respect, sage observations which must be borne in mind by the assessing authorities. …....

10. In view of the aforesaid discussion, we are of the view that the assessee in the present case has a serious issue to urge as regards the legitimacy of the demand which has been raised by the impugned notice dated February 29, 2012, including in regard to the applicability of section 177(3) of the Income-tax Act, 1961, on which the demand has been founded. The assessee has intervened in the appeal filed by the trust before the Commissioner (Appeals). We direct that pending the disposal of the appeal and for

> a period of six weeks thereafter, the Revenue shall not take any coercive steps against the petitioner for enforcing the demand as contained in the communication dated February 29, 2012. The Revenue shall also refrain from taking any coercive steps or from enforcing the notice issued by the Assessing Officer on March 12, 2012, under section 226(3). The attachment, if any, that has been levied shall stand lifted."

26. In the case before us the petitioner has serious issues to urge, some of which have so far not been dealt with either in the assessment order or in the orders on the stay application. We would ourselves have considered the application for stay but we refrain from doing so for two reasons. Firstly, the entire material is not on record. The respondents may well rely upon further material in support of their case, especially in view of the order in *L.G. Electronics.* Secondly, the Tribunal has expedited the hearing. The appeal was fixed on 27.02.2014. We are informed that it was adjourned at the request of the Department. It is sufficient then to direct that the petitioner shall not seek an adjournment of the hearing before the Tribunal on any ground.

27. In the circumstances, the rule is made absolute in terms of prayers (a) and (b). There shall be no order as to costs.

(B.P. COLABAWALLA, J.) ***(S.J. VAZIFDAR, J.)***