

**आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ , मुंबई ।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND**

**SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER**

**आयकर अपील सं/ I.TA No.5464/Mum/2013**

**(निर्धारण वर्ष / Assessment Year: 2008-09**

M/s. Marksans Pharma Ltd., 11 <sup>th</sup> Floor, Lotus Business Park, Opp. New Link Road, Andheri (W), Mumbai-400 053	<b>बनाम/</b> Vs.	The DCIT, Circle-8(2), Aayakar Bhavan, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAAC 3153G		
<b>(अपीलार्थी /Appellant)</b>	..	<b>(प्रत्यर्थी / Respondent)</b>
अपीलार्थी ओर से/ <b>Appellant by:</b>		Shri Harsh Bhuta
प्रत्यर्थी की ओर से/ <b>Respondent by:</b>		Shri H.M. Wanare

**सुनवाई की तारीख / Date of Hearing :22.12.2015**

**घोषणा की तारीख /Date of Pronouncement :22.12.2015**

**आदेश / O R D E R**

**PER N.K. BILLAIYA, AM:**

This appeal by the assessee is preferred against the order of the Ld. CIT(A)-39, Mumbai dated 4.6.2013 pertaining to assessment year 2008-09.

2. The only grievance of the assessee relates to the levy of penalty u/s. 271(1)(C) of the Act which was confirmed by the Ld. CIT(A).

3. During the course of the assessment proceedings, it was found that the assessee had not allocated the expenses in a proper manner between the eligible and non eligible units u/s. 10B of the Act. According to the AO, this amounted to excessive claim of exemption made u/s. 10B of the Act. The AO proceeded by allocating expenditure from the non eligible unit to eligible unit and initiated penal proceedings simultaneously.

3.1. During the course of the penalty proceedings, same issues were confronted to the assessee and on receiving no plausible reply, the AO proceeded by levying penalty on the claim of exemption treated as excessive during the course of the assessment proceedings. The penalty were levied firstly on the claim of deduction of Rs. 4,30,65,118/- and secondly on the reallocated the indirect/Head Office expenses. The penalty so levied were computed at Rs. 34,70,905/-.

4. Aggrieved by this, the assessee carried the matter before the Ld. CIT(A) but without any success.

5. Before us, the Ld. Counsel for the first time stated that the DEPB claim was not part of the computation of income. Drawing our attention to the relevant documents of the Paper book, the Ld. Counsel pointed out that the DEPB claim relates to the period prior to 10.5.2007 and the claim u/s. 10B of the Act was made in respect of units after 12.05.2007. The Ld. Counsel fairly admitted that since this fact which goes to the route of the issues was not examined by the

lower authorities, the matter may be restored back to the files of the AO.

6. The Ld. Departmental Representative did not object to this submission made by the Ld. Counsel.

7. We have gone through the relevant documentary evidences placed on record. We have also considered the computation of income qua the profit and loss account. We find force in the contention of the Ld. Counsel. Since this issue was never raised nor examined, nor verified by the lower authorities, in the interest of justice, we restore this issue to the file of the AO. The AO is directed to verify the claim of the assessee after giving reasonable opportunity and if found correct, no penalty should be levied. Ground No. 1 & 2 are treated as allowed for statistical purpose.

8. Ground No. 3 relates to the allocation of expenses between the eligible and non eligible unit.

8.1. We find that the only reason for the levy of penalty is that according to the AO, certain expenditures need to be allocated between the eligible and non eligible unit on proportionate basis. There are divergent views in so far as proportionate allocations of expenditures are concerned. The assessee has allocated the expenditure following a particular method. The AO has reallocated the expenditure following a different method. Such difference of opinion/view on a debatable issue would not amount to concealment of income or furnishing inaccurate particulars. We, therefore, direct

the AO to delete the penalty levied on the reallocated expenditure of Rs. 16,75,601/-. Ground No. 3 is accordingly allowed.

9. In the result, the appeal filed by the assessee is partly allowed for statistical purpose.

Order pronounced in the open court at the time of hearing on 22<sup>nd</sup> December, 2015.

Sd/-  
(SAKTIJIT DEY)

Sd/-  
(N.K. BILLAIYA)

न्यायिक सदस्य/JUDICIAL MEMBER लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated :22<sup>nd</sup> December, 2015

व.नि.स./ Rj , Sr. PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण,  
मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार**

(Dy./Asstt. Registrar)

**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**