IN THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai

Before Shri Jason P. Boaz, Accountant Member
and Shri Sandeep Gosain, Judicial Member

ITA Nos. 5991 & 5992/Mum/2014
(Assessment Years: 2011-12 & 2012-13)

Income Tax Officer (TDS)-3(4) Room No. 909, 10th Floor Smt. K.G.M. Ayurvedic Hospital Bldg., Charni Road, Mumbai - 004	Vs.	M/s. Unichem Laboratories Ltd. Unichem Bhawan, S.V. Road 8, Prabhat Estate Jogeshwari (W), Mumbai 400102
	PAN - AAACU0551B	
Appellant		**Respondent**

Appellant by: Ms. Kranti
Respondent by: Shri Milin Bakhai

Date of Hearing: 20.04.2016
Date of Pronouncement: 22.04.2016

O R D E R

Per Jason P. Boaz, A.M.

These appeals by the Revenue are directed against the orders of the CIT(A)-14, Mumbai dated 11.07.2014 for A.Y. 2011-12 and dated 14.07.2014 for A.Y. 2012-13. Identical issues being involved, these appeals were heard together and are being disposed off by way of this consolidated order.

2. The facts of the case, in brief, are as under: -

2.1 The assessee-company is engaged in the business of manufacturing and trading of formulation and bulk drugs. A survey under section 133A of the Income Tax Act, 1961 (in short 'the Act') was conducted at the business premises of the assessee on 14.10.2011 in order to verify compliance of TDS provisions as contained in Chapter XVIIB of the Act. The assessee-company has manufacturing plants at Goa, Ghaziabad, Sikkim, Roha and Pithampur and warehouses at Bhiwandi, Ghaziabad and Zirakpur. Finished products are dispatched from the factories/warehouses to distributors and Consignment Agents based on orders/indents received from them. The assessee-company sells the

formulation products to Distributors on Principal to Principal basis and to stockists through consignment agents. Collections are received from distributors, consignment agents and stockists in the assessee's bank accounts. In the course of survey proceedings under section 133A of the Act the Assessing Officer (AO) found that the assessee is selling its products by way of exports and through its distributiors, stockists and consignment agents at a fixed MRP for its product and that the assessee is accounting its sales after deducting the margin earned by the distributor/ stockist. The AO observed that while the assessee is paying commission to its consignment agents and deducting tax at source thereon at the rates applicable under section 194H of the Act, the assessee has given discounts/ schemes to the distributors/stockists and no tax is deducted at source thereon. In this regard, a statement on oath was recorded by the Department of the G.M. Finance of the assessee-company on 14.10.2011.

2.2. The AO observed that the assessee used three methods for sale of drugs/medicines. First, through consignment agents, second through distributors and, thirdly by way of exports. In respect of consignment agents, the assessee is paying thereon commission after deduction of tax at source in accordance with the provisions of section 194H of the Act. With regard to Distributors, the AO observed that the assessee's submission was that the drugs/medicine were sold to the distributors who then further sell them to the stockists/retailers and then are finally sold to the ultimate customers. The contention of the assessee-company is that the distributors are independent traders and are not its agents. The AO, however, observed that in the course of survey it was seen that the MRP margins for drugs/medicines was fixed by the assessee-company, which would be different for controlled and uncontrolled drugs. In the event of expiry of the medicines, the same are returned by the distributors to the assessee-company, who in turn refunds the monies paid by the distributors to procure the same material. Thus, all the risk is borne by the assessee-company and not by the distributors. The AO observed that since it is the assessee who decides the margins to be charged by the

distributors and the discount/incentives payable to them, their relationship may be inferred to be one of principal and agent.

2.3 After considering the assessee's submissions in the matter, the AO held that the relation between the assessee and the distributor was one of principal and agent and the discount/incentives/rebate given to/retained by the distributor is nothing but commission payments for services rendered in the course of buying and selling of goods within the meaning of section 194H of the Act. The AO held that these discounts/incentives/ rebates are nothing but commission payments embedded in a mutually beneficial pricing structure and is nothing but income within the meaning of section 194H of the Act. The AO accordingly held that the company has failed to deduct tax at source, which it was liable to deduct under section 194H of the Act vide orders dated 15.03.2013 and consequently held the assessee as an 'assessee in default' in terms of section 201(1) of the Act for non deduction of tax at source on payment of commission and charged interest thereon under section 201(1A) of the Act. In these orders the AO also held that the assessee was required to deduct tax at source on Directors sitting fees as per the amendments to the provisions of section 194J(ba) w.e.f. 01.07.2012.

2.4 On appeal, the learned CIT(A)-14, Mumbai disposed off the assessee's appeals vide the impugned orders dated 11.07.2014 for A.Y. 2011-12 and order dated 14.07.2014 for A.Y. 2012-13, allowing the assessee partial relief.

3. Revenue is aggrieved by the orders of the learned CIT(A)-14, Mumbai dated 11.07.2014 for A.Y. 2011-12 and dated 14.07.2014 for A.Y. 2012-13 and has raised identical grounds for both these years. We would therefore proceed to first dispose off the appeal for A.Y. 2011-12.

Revenue's appeal in ITA No. 5991/Mum/2014 for A.Y. 2011-12

4. The grounds of appeal raised by the Revenue are as under: -

> "*1. Grounds of Appeal:*
>
> *(i). On the facts and circumstances of the case and in law, the Id. CIT (A) has erred in holding that the relationship between the assessee and*

distributors is in the nature of principal to principal and not that of principal to agent and held that the assessee company was not liable to deduct TDS u/s. 194H of the IT. Act and thereby erred in deleting the non deduction/short deduction u/s. 201(1) and interest u/s. 201(1A).

(ii). On the facts and circumstances of the case and in law, the Id. CIT (A) erred by holding that the assessee company was not liable to deduct TDS u/s. 194H of the I.T. Act and thereby erred in deleting the non deduction/short deduction u/s. 201(1) and interest u/s. 201(1A)without appreciating that the pricing structure between the assessee company and distributors is nothing but "a payment received or receivable directly or indirectly by a person acting on behalf of another person for services rendered or for any services in the course of buying or selling of goods within the meaning of section 194H of the Act.

(iii). On the facts and circumstances of the case and in law, the Id. CIT (A) erred in holding that the assessee cannot be held as an 'assessee-in-default' for not deducting tax on sifting fees paid to directors and thereby erred in deleting the short deduction u/s. 201(1) and interest u/s. 201(1A) without appreciating that the payment was made as honorarium for the managerial services rendered by the directors and was clearly in the nature of professional fees paid for the services rendered by them.

(iv) On the facts and circumstances of the case and in law, the Id. CIT (A) erred in holding that no TDS is required to be deducted on directors' sifting fees as the amendment to the provisions of section 194J(ba) were made w.e.f. 01 .07.2012 and it is not applicable to the relevant A.Y. without appreciating that this amendment is curative in nature.

2. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary at the time of the hearing of the case or thereafter.

3. The order of the CIT(A) being erroneous be set aside and Ld. A.O's order be restored."

5. **Grounds 1(i) & (ii)**

5.1 In these grounds Revenue contends that the impugned order of the learned CIT(A) is erroneous in holding that the relationship between the assessee and distributors is in the nature of principal to principal and that therefore the assessee-company was not liable to deduct tax at source under section 194H of the Act. It is contended that the learned CIT(A) in holding so did not appreciate that the pricing structure between the assessee-company and distributors is nothing but a payment received or receivable, directly or indirectly by a person acting on behalf of another

person for services rendered in the course of buying or selling of goods within the meaning of section 194H of the Act. The learned D.R. was heard in support of the grounds raised.

5.2 At the outset, the learned A.R. for the assessee submitted that the issue in question raised by the Revenue (supra) has been considered and adjudicated in favour of the assessee by a Coordinate Bench of this Tribunal in the assessee's own case for A.Y. 2009-10 and 2010-11 in ITA No. 4592 & 4593/Mum/2014 dated 29.01.2014.

5.3.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncement cited (supra). We find that the issue of whether or not the assessee-company is liable to deduct tax at source (TDS) under section 194H of the Act in respect of payments in the form of discounts/rebates/incentives on MRP given by the assessee to the distributors in the course of selling its goods was considered and held in favour of the assessee by the Coordinate Bench of this Tribunal in the assessee's own case for assessment years 2009-10 and 2010-11 in ITA Nos. 5492 & 5493/Mum/2014 dated 29.01.2016, holding as under at para 8 thereof: -

> *"8. We have considered the rival contentions and perused the material on record, we have observed that the perusal of the clauses of the distributor agreement dated 01-07- 2001 entered into by the assessee company and the Rudra Pharma Distributors Ltd. which is placed in the paper book page No. 18 to 34 clearly reveals that the assessee company is selling goods/products i.e. drugs-medicine to the distributor which is being paid by the distributor on principal to principal basis and property in goods with all risk and rewards passes to the distributor at the time of selling of the goods by the assessee company to the distributor when the goods are delivered by the carrier to the distributor. In-fact the distributors are the customers of the assessee company to whom the sales of the products i.e. drugs-medicine were effected by the assessee company. It is pertinent to note that the assessee company is dealing in products/goods i.e. drugs-medicine and not in the services. The distributors are required to notify any shortages during shipping or handling within 7 days of arrival of products at final destination to the assessee company along with endorsement on Lorry Receipt of the transporter along with shortage certificates by the transporter to claim loss from the assessee company, in other situations the loss or damage to products shall be borne by the distributor. The drugs being medicines contains certain restriction on*

the sale w.r.t. good governance and conduct by the distributors to follow first expiry and first out basis as the medicines having expiry could not be sold after the stipulated date of expiry, otherwise it will be health hazard to the consumers , the assessee company as normal market practice takes back the said expired drug-medicines from distributors which has expired and pay back the distributors but that does not in our humble opinion is decisive or change the character of dealing between the assessee company and the distributor which primarily continues to be on principal to principal basis. Such exception of taking back the expired products has its genesis to the sensitivity of the product being drugs-medicine handled by the assessee company otherwise it could have severe health hazard impacts on the consumer which is a normal market practice in the industry but the same is not decisive to conclude that the property in the goods with all risks and rewards have not passed to the distributor on sale of products by the assessee company to the distributor at the time of delivery by the carrier to the distributor as per stipulated terms of distribution agreement. We have also observed that the assessee company is raising sale invoice's on the distributor M/s Rudra Pharma Distributors Limited which are placed on the paper book filed by the assessee company at page 35 while the ledger account showing invoices raised and payments received from distributor M/s Rudra Pharma Distributors Limited by the assessee company is also placed in the paper book filed by the assessee company at page 36 to 51. We have also observed that the said distributor M/s Rudra Pharma Distributors Limited is registered with VAT authorities and is raising its invoices (including VAT) to their customers , whereby all the above facts clearly reflects that the distributors is buying the products from the assessee company and then selling the same in its own right with all risks and rewards of ownership got vested in the said distributors on the delivery of goods by carrier to the said distributor which is also supported by the clause 5 of the distribution agreement dated 01-07-2001. Thus, we, therefore, hold that the assessee company has paid discount to MRP to the distributors at the time of sale of the said goods/products i.e. drugs-medicine which in our considered view is not covered u/s 194H of the Act and no tax was required to be deducted at source on these discount to MRP given by the assessee company to the distributors at the time of sale of drugs-medicine to the distributors. We hold accordingly."

5.3.2 Following the aforesaid decision of the Coordinate Bench of the Tribunal in the assessee's own case for assessment years 2009-10 & 2010-11 (supra) we hold that the discount on MRP granted by the assessee to distributors at the time of sale of the drugs/medicines (i.e. goods) does not fall within the ambit of section 194H of the Act and therefore no tax was required to be deducted at source thereon and therefore the assessee

cannot be held to be an assessee in default under section 201(1) of the Act and charged interest under section 201(1A) of the Act. Consequently, grounds 1(i) & (ii) of Revenue's appeal are dismissed.

6. **Ground No. 1(iii) & (iv)**

6.1 In these grounds, Revenue contends that the learned CIT(A) erred in holding that the assessee cannot be held as an 'assessee in default' for not deducting tax at source on sitting fees paid to the Directors without appreciating that the payment was made as honorarium for the management services rendered by the Directors and was clearly in the nature of professional fees paid for services rendered by them. It was further contended that the learned CIT(A) erred in holding that no TDS is required to be made on sitting fees paid to Directors, as the amendment to the provisions of section 194J(ba) made w.e.f. 01.07.2012 was not applicable to the relevant assessment year, when the amendment was only curative in nature. The learned D.R. was heard in support of the grounds raised.

6.2 At the outset, the learned A.R. for the assessee submitted that this issue before us, raised by Revenue (supra) has been considered and adjudicated in favour of the assessee by a Coordinate Bench of this Tribunal in the assessee's own case for assessment years 2009-10 and 2010-11 in ITA No. 4592 & 4593/Mum.2014 dated 29.01.2016.

6.3.1 We have heard the rival contentions and perused and carefully considered the material on record, including the judicial pronouncement cited (supra). We find that the issue of whether or not the assessee-company is liable to deduct tax at source (TDS) under section 194J(ba) of the Act in respect of sitting fees paid to Directors as per the amendment thereto w.e.f. 01.07.2012 has been considered and held in favour of the assessee by the Coordinate Bench of this Tribunal in the assessee's own case for assessment years 2009-10 and 2010-11 in ITA No. 5492 & 5493/Mum/2014 dated 29.01.2016, holding as under at para 13 thereof: -

> "*13. We have heard the rival parties and perused the material on record and we are in respectful agreement with the decision of the*

> *Pune Tribunal in the case of Bharat Forge Limited (supra) that no tax is to be deducted at source on Director sitting fee payable to Director u/s 194J of the Act prior to the amendment w.e.f. 01-07-2012 in Section 194J by insertion of sub-section (ba) to Section 194J(1) of the Act . The insertion of sub-section (ba) to Section 194J of the Act has clearly stipulated that tax is to be deducted at source on any remuneration or fees or commission by whatever name called to a director of a company, other than those on which tax is deductible at source u/s 192 of the Act. The said amendment is brought in by the Finance Act, 2012 w.e.f. 01-07-2012. The Memorandum to the Finance Bill 2012 has stipulated that there is no specific provisions in the Act providing for deduction of tax at source on remuneration paid to directors which is not in the nature of salary whereby tax is deductible covered u/s 192 of the Act, which clearly indicates that there was no provision for deduction of tax at source prior to the amendment by Finance Act,2012 w.e.f. 01-07-2012 on payment of remuneration or fee or commission by whatever name called to Directors other than those on which tax is deductible at source u/s 192 of the Act. The amendment to the Section 194J(1) of the Act by insertion of subsection (ba) to Section 194J(1) of the Act has caste an additional burden on the taxpayer with respect to deduction of tax at source on remuneration, fee or commission to Director other than salary which as per memorandum to Finance Bill 2012 was not existing as per specific provisions of the Act prior to the aforesaid amendments and the amendments to Section 194J(1) of the Act by insertion of sub-section (ba) to Section 194J(1) of the Act were made effective from 01-07-2012, which in our considered view is prospective in nature to be applicable only from 01-07-2012 as it has caste an additional burden on the tax-payer by way of deduction of tax at source on remuneration, fees or commission to directors other than the salary for which tax is to be deducted at source under Section 192 of the Act. Since the instant appeal is for the assessment year 2009-10 which is prior to the assessment year 2013-14, we hold that no tax was deductible at source on payment of Directors sitting fee paid by the assessee company to its Directors u/s 194J of the Act and the assessee company could not be held as 'assessee in default' u/s 201(1) and 201(1A) of the Act. We order accordingly."*

6.3.2 Following the aforesaid decision of the Coordinate Bench of this Tribunal in the assessee's own case for assessment years 2009-10 and 2010-11 (supra), we hold that since the instant appeal is for A.Y. 2010-11 which is prior to A.Y. 2013-14, from when the amendment to section 194J(ba) comes into force w.e.f. 01.07.2012, we hold that no tax is deductible at source on payment of sitting fees to Directors and the assessee cannot be held as 'assessee in default' under section 201(1) of the Act or be charged interest under section 201(1a) of the Act. Consequently, grounds 1(iii) & (iv) raised by revenue are dismissed.

7. **Grounds at S.Nos. 2 & 3** being general in nature, no adjudication is called for thereon.

8. In the result, the Revenue's appeal for A.Y. 2011-12 is dismissed.

Revenue's appeal in ITA No. 5992/Mum/2014 for A.Y. 2012-13

9. The grounds raised by Revenue in A.Y. 2012-13 being on identical issues as raised in A.Y. 2011-12 (supra), our decision for A.Y. 2011-12 in ITA No. 5991/Mum/2014 shall mutatis mutandis apply to this appeal. We therefore dismiss the grounds raised by Revenue.

10. In the result, Revenue's appeal for A.Y. 2012-13 is dismissed.

11. To sum up, Revenue's appeals for both assessment years 2011-12 and 2012-13 are dismissed.

Order pronounced in the open court on 22nd April, 2016.

Sd/
(Sandeep Gosain)
Judicial Member

Sd/-
(Jason P. Boaz)
Accountant Member

Mumbai, Dated: 22nd April, 2016

<u>*Copy to:*</u>

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) - 14, Mumbai*
4. *The CIT (TDS), Mumbai*
5. *The DR, "F" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.