IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "B" BENCH AHMEDABAD

BEFORE, SHRI PRAMOD KUMAR, ACCOUNTANT MEMBER
AND SHRI S. S. GODARA, JUDICIAL MEMBER

ITA No. 3136/Ahd/2015
(Assessment Year: 2012-13)

DCIT, Circle – 1(1)(1),
Ahmedabad — Appellant

Vs.

M/s. Astral Poly Technik Ltd.,
207/1, Astral House, B/h. Rajpath
Club, Off. S.G. Highway, Ahmedabad 380 059 — Respondent

PAN: AABCA2951N

राजस्व की ओर से/By Revenue	: Shri Surendra Kumar, CIT. D.R
आवेदक की ओर से/By Assessee	: Shri Vartik Choksi & Gulab Thakor, A.R.
सुनवाई की तारीख/Date of Hearing	: 01.01.2018
घोषणा की तारीख/Date of Pronouncement	: 10.01.2018

ORDER

PER S. S. GODARA, JUDICIAL MEMBER

This Revenue's appeal for assessment year 2012-13 arises against the CIT(A)-1, Ahmedabad's order dated 20.08.2015 in case no. CIT(A)-1/DCIT,Cir-1(1)(2)/719/2014-15, reversing Assessing Officer's action disallowing/adding amounts of Rs.5,31,60,408/- and Rs.96,81,300/- u/s. 80IC and on account of interest expenses / Forex loss; respectively, in proceedings u/s.143(3) of the Income Tax Act, 1961; in short "the Act".

Heard both the parties. Case records perused.

2. We come to the former issue of allocation of expenditure in assessee's eligible unit at Baddi and Ahmedabad resulting in disallowance/addition in question of Rs.5,31,60,408/-. The CIT(A)'s findings under challenge qua this issue discuss the relevant backdrop of facts as follows:

> *"4.3). I have carefully considered the Assessment Order and submission filed by the Appellant. The Assessing Officer has disallowed deduction under Section 80IC for profit attributable to brand value and marketing network relying upon Assessment Order for A.Y. 2007-08 to 2011-12 and similar disallowance so made was deleted by my predecessor CIT (Appeals) for all the Assessment Years. The appeal filed by Department against above order is pending before the Hon'ble Ahmedabad I.T.A.T. It is pertinent to note that my predecessor CIT (Appeals) while adjudicating the appeal ofA.Y.2011-12 vide his order dated 22nd July, 2014 has referred to above Appellate Order and held as under:*
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> > *"4.2 Identical issue came up in appellant's own case for A.Y. 2010-11. Vide my order dated 16-07-2014 in Appeal No. CIT(A)-VI/DC.Cir.1/122/13-14, it was held as under.*
> >
> > > *"4.2 Identical issue came up in appellant's own case for A.Y. 2009-10. Vide my order dated 26-03-2013 in Appeal No. CIT(A)-VI/DC.Cir. 1/316/11-12, it was held as under.*
> > >
> > > *3.2 Identical issue arose in appellant's own case in A.Y. 2008-09. In order u/s. 143(3) dated 22-12-2010, similar disallowance was made. In the appellant order dated 20-12-2011 in appeal No. CIT(A)-Vi/AC!T.Cir.1/292/10-11, my predecessor held as under: -*
> > >
> > > *3.2 Identical issue arose in Appellant's own case in A.Y. 2008-09. In order under Section 143(3) dated 22-12-2010, similar disallowance was made. In the Appellate Order dated 20-12-2011 in Appeal No. CIT (A)-VI/CIT. Cir 1/292/10-11, my predecessor held as under:*
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> > > > *"3.3 I have considered the facts of the case; assessment order and appellant's written submission. It is not in dispute that identical issue came up in assessment year 2007-08 in which assessing officer restricted the deduction under section 80 1C. In the first appeal; Undersigned decided the appeal by order dated 30-10-2011. The relevant part of order is quoted below-*
> > > >
> > > > *"I have considered the facts of the case, assessment order and appellant's submission. Assessing officer restricted deduction under section 80 1C on the profit of Baddi unit on the ground that profit claimed as deduction also included marketing and brand value which is attributable to the existing unit not eligible for this deduction. Assessing officer worked out normal gross profit of Baddi unit after reducing excise and sales tax benefits available to the said unit and thereafter 35% gross profit on account of marketing and 5% gross profit on account of brand were reduced while computing deduction under section 80 1C. The focus of assessing officer's argument is that since a new*

industrial undertaking was only manufacturing and was using existing marketing set up and brand of the appellant company, only profits derived from manufacturing in the Baddi unit is eligible for deduction and profits relating to marketing activities and brand are not eligible for deduction under section 80IC. Assessing officer quantified the gross profit derived from Brand and marketing at Rs. 40459475 on page 23 of the assessment order. ***It is not in dispute that what is quantified by the assessing officer for disallowance of deduction is gross profit attributable to marketing and brand value.*** *The deduction section 80 1C is claimed in respect of net profit and therefore disallowing gross profit attributable to marketing and brand value is not correct. It is argued by the appellant that If marketing, which is a cost centre in the case of appellant company, is considered a separate division then marketing expenses debited in the profit and loss account of Baddi unit has to be removed and reduced from the gross profit of marketing and brand activity attributed by the assessing officer. As per the details given, the marketing expenses debited in the profit and loss a count of Baddi unit are RS 45732681. If marketing expenses debited in the P&L account of eligible unit is reduced from the gross profit from marketing and brand activity of RS 40459475, then there can be no disallowance out of deduction claimed by the appellant. I agree with the appellant's logic that the marketing expenses debited in the P&L account of eligible unit has to be reduced from the gross profit of marketing activity worked out by the assessing officer. Since expenses debited are more than the gross profit computed by the assessing officer, there cannot be any disallowance of deduction under section 80 1C. Therefore* ***without going into merit of allocation of gross profit to manufacturing and marketing activities separately, no disallowance out of deduction claimed by the appellant can be made. Accordingly the disallowance of deduction made by the Assessing Officer is deleted.***

Coming to the merit of segregating profits attributable to marketing and brand value, appellant submitted ***that marketing was not done by any separate division or undertaking.*** *It is done through agents and distributors to whom commission and discounts were given. Marketing is not done by way of separate activity and therefore marketing activity is a cost centre. Marketing costs were allocated to the eligible and not eligible undertaking. Direct costs are debited directly and common expenses are allocated on the basis of turnover. Since marketing was not a separate division, there was no transfer by the eligible undertaking to so-called marketing division.* ***In the absence of any transfer, the provisions of section 80 IA (8) are not applicable.*** *Administration, finance, marketing etc are common activities of both eligible and non-eligible undertakings, the costs attributable to these undertakings were allocated and therefore the question of* ***transfer of goods and service non-eligible undertaking does not arise.***

As regards profits derived from brand value, appellant submitted that most of the products were sold in the brand name of its

foreign collaborator and therefore any profit attributable to appellant's own brand will not be there. As per agreement with the foreign collaborator, appellant is required to import raw material from it and sale its finished products in the brand name of foreign collaborator.

Considering this, there is hardly any profit attributable to the brand value. The basis of assessing officer's disallowance is the AAR decision in the case of Rolls-Royce pie. In that decision, the manufacturer was the foreign company and selling cars in Indian market through the marketing PE setup in India. It was therefore held that profit was not only derived from manufacturing of cars but also from marketing the some in India by Indian PE. The Indian PE was analyzing and scrutinizing the proposals and orders and actively involved in negotiating, concluding or fulfilling the contracts, Since Indian PE, which was the marketing division, was carrying out presale, sale and post sale activities, a definite profit was attributable to this undertaking. It cannot be said that Indian PE was not carrying out profitable activity. The issue involved was of transfer pricing in which the profits of Indian PE was to be worked out. The facts of the appellant's case are altogether different. ***There is no division or undertaking for marketing.*** *The appellant's employees were handling the marketing through distributors and agents. Marketing was not an independent activity. It was only for the products of the appellant company and accordingly a cost centre rather than a profit, centre. Costs for marketing were distributed to both eligible and ineligible undertaking. Assessing officer did not find any fault with the said allocation. When there was no element of profit in the marketing, no profit can be attributed to the marketing activity which is only supporting activity for the manufacturing divisions. Like head office expenses, marketing expenses were also allocated to the eligible undertaking and therefore presuming any profit in marketing activity is not required.*

Assessing officer also referred provisions of section 80 I A (5) as per which the profit of the undertaking has to be considered as if it was the only undertaking of the assessee. Marketing, head office expenses, purchases, accounting etc. are carried out from Ahmedabad office and the related costs were debited to the Baddi unit. The profit of eligible unit is worked out as if this was the only undertaking. All costs relating to the eligible undertaking were debited and profits were worked out accordingly. In the working of profit of eligible undertaking, there is no violation of section 80 IA (5). The decision of the Supreme Court in the case of liberty India relied upon by the assessing officer is not applicable to the facts of the appellant's case since for working out profit of eligible manufacturing undertaking sales value of the products sold is to be considered. Any other income not relating to sale of manufactured goods will be outside the purview of deduction under section 80 I A. The appellant worked out eligible profit by taking sales value of products manufactured. No other income was considered which

is not relating to sale of manufactured goods therefore appellant's case is not hit by the decision of apex court.
After considering the appellant's submission on all the issues raised by the assessing officer, I am of the view that there is no marketing division the case of appellant and therefore there was no transfer of goods from eligible to non-eligible undertaking. ***In the absence of marketing division being a separate undertaking, no profit can foe attributed to the marketing activity. As regards brand value, the same is owned by the foreign collaborator there can't be any profit attributable to brand.*** *The disallowance of deduction made by the assessing officer is therefore without any basis and the same cannot be sustained on merit also. The addition made by the assessing officer is accordingly deleted."*

Since facts are identical in this year also, the aforesaid appellate order is directly applicable to the issue this year also. In view of the aforesaid reasoning, it is held that there is no marketing division in the case of appellant and therefore there was no transfer, of goods from eligible to non-eligible undertaking. In absence of marketing division being a separate undertaking, no profit can be attributed to the marketing activity. ***The reduction in deduction under section 80IC made by the assessing officer is therefore not sustainable. Accordingly the addition made by the AO is deleted.***

In view of the above discussion, as facts of year under consideration are identical to facts of earlier Assessment Years and following the order of my predecessors CIT(Appeals), disallowance of Rs.5,31,60,408/- made by Assessing Officer is deleted. ***These grounds of appeal are allowed."***

3. Learned Departmental Representative vehemently contends that the Assessing Officer had rightly allocated assessee's brand value and marketing network expenses so as to make the impugned disallowance. It is evident that this issue has not come up for the first time before this tribunal. Case records indicate that a co-ordinate bench's order dated 06.06.2016 for assessment years 2007-08 & 2009-10 has decided the very issue in assessee's favour in Revenue's appeals. Hon'ble jurisdictional high court's judgment in Tax Appeal No. 481 of 2017 has affirmed the tribunal's above order upholding CIT(A)'s action. The very factual position continued in assessment years 2010-11 & 2011-12 as well since Revenue's appeals stand declined in this tribunal's common order in ITA No. 2666 & 2667/Ahd/2014 decided on 29.11.2017. The Revenue is fair enough in not pinpointing any distinction on facts or law in all these assessment years. We

therefore see no reason to adopt a different approach in the impugned assessment year. The Revenue's first substantive ground is accordingly declined.

4. This leaves us with latter issue of disallowance of Rs.96,81,300/- on account of interest expenses and Forex loss made in the course of assessment as deleted in lower appellate proceedings as follows:

> ***"5.3).*** *I have carefully gone through the Assessment Order and the submission filed by the Appellant The Assessing Officer has disallowed deduction under Section 80IC for allocation of interest expenditure relying upon Assessment Order for A.Y. 2007-08 to 2011-12 and similar disallowance so made was deleted by my predecessor CIT(Appeals) for all the Assessment Years. The appeal filed by Department against above order is pending before the Hon'ble Ahmedabad I. T.A. T. It is pertinent to note that my predecessor CIT (Appeals) while adjudicating the* ***appeal of A.Y. 2011-12*** *vide his order dated 22nd July, 2014 has referred to above Appellate Order and held as under:*
>
> > *"5.2 Identical issue came up in appellant's own case for A.Y. 2010-11. Vide my order dated 16-07-2014 in Appeal No. CIT(A)-VI/DC.Cir.1/122/13-14, it was held as under:*
> >
> > > *"5.2 Identical Issue came up in appellant's own case for A.Y. 2009-10. Vide my order dated 26-03-2014 in Appeal No. CIT(A)-VI/DC.Cir.1/316/11-12, it was held as under:*
> > >
> > > *"5.3 Identical Issue came up for consideration in the preceding A.Y. 2008-09 in the appellant's own case. Vide my order of even date in Appeal No. CIT(A)-VI/DC. Cir. 1/239/11-12, it was held as under:*
> > >
> > > > *"4.4 The contentions of the ld. A.R. are tenable. The allocation of interest expenditure between the H.P. Unit and Gujarat Unit was being done consistently on daily product basis. In the immediately preceding year, interest expenditure of Rs. 22.83 lakhs was allocated to the H.P. Unit. In the year under consideration since no borrowed funds were utilized by the H.P. Unit, interest expenditure was not allocated to it. The contention that the H.P. Unit was generating enough profits/cash surplus and was in a position to advance surplus money to the head office (instead of utilizing the funds borrowed by the head office) was not controverted by the A.O. As regards the foreign exchange gain/loss, in the reasons recorded for re-opening, this issue was figuring therein. However, in the year under consideration, A.O. did not allocate the foreign exchange gain to H.P. Unit, whereas in the subsequent A. Y. 2009-10 the foreign exchange loss was allocated between the two units. In the preceding A.Y. 2007-08 the interest expenditure allocated by the appellant to the H.P. Unit of Rs. 22.83 lakhs was not disturbed by the A.O. Thus, the AO's approach in allocating interest expenditure and foreign exchange gain/loss between the two units has been inconsistent It is varying merely on the basis of*

the assessability of higher or lower income. Taking into account the totality of the facts, I do not find any reason to disturb the allocation as being done by the appellant consistently over the years. I am the view that impugned disallowance is not sustainable. It is deleted. Accordingly, Ground No. 3,4 & 5 are allowed. Ground No. 6 is an alternate claim and has become infructuous in view of my finding above. Accordingly, it dismissed."

In the preceding A.Y. 2008-09, A.O. allocated interest expenditure between the two units but did not allocate the foreign exchange gain between the two units. Whereas in the year under consideration he has allocated interest expenditures and the foreign exchange losses between the two units. As seen from the chart furnished by the appellant (reproduced at page-40 of this order) the foreign exchange loss was Rs. 31.24 lakhs in A.Y. 2006-07, foreign exchange gain was Rs. 87.09 lakhs in A.Y. 2007-08 , foreign exchange gain was Rs. 115.63 lakhs for A.Y. 2008-09, foreign exchange loss was Rs. 733.67 lakhs in A.Y. 2009-10, foreign exchange gain was Rs. 300.54 lakhs in A.Y. 2010-11 and foreign exchange gain was Rs. 24.47 lakhs in A.Y. 2011-12. Irrespective the foreign exchange gain or loss, appellant has been allocating the entire gain or loss only to the Gujarat Unit, which is not eligible for deduction u/s. 80IC.

All other facts remaining the same in the year under consideration, following my order for A.Y. 2008-09, I am of the view that the allocation of interest expenditure and foreign exchange loss was not warranted. Accordingly, impugned disallowance is deleted. These grounds of appeal are allowed."

Facts remaining the same in the year under consideration, following the above mentioned order, impugned addition is deleted. This ground of appeal is allowed."

*In view of the above discussion, as facts of year under consideration are …….. of earlier Assessment Years, following the order of my …… disallowance of Rs.96,81,300/- made by Assessing Officer ……. **appeal are allowed."***

5. Heard both the parties reiterating their respective stands against and in support of CIT(A)'s order deleting the impugned disallowance. We notice herein as well that the CIT(A) has followed his earlier years' order(s) in deleting the impugned disallowance. Case records indicate that the Revenue has lost the very issue in assessment year 2008-09 before this tribunal. Learned co-ordinate bench therein observed that assessee had been having sufficient reserves and surplus to meet its impugned interest liability. The same factual position continues herein as well since learned Departmental Representative fails to highlight any such factual

distinction from the relevant materials on record. We thus adopt consistency qua this latter issue as well to affirm CIT(A)'s findings.

6. The Revenue's appeal is accordingly dismissed.

[Pronounced in the open Court on this the 10th day of January, 2018.]

Sd/-	Sd/-
(PRAMOD KUMAR)	(S. S. GODARA)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Ahmedabad: Dated 10/01/2018

True Copy

S.K.SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।