

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

**BEFORE SHRI RAJENDRA, AM &
SH. SANDEEP GOSAIN, JM**

आयकरअपीलसं./ I.T.A. No. 2670 & 3337/Mum/2016
(निर्धारणवर्ष / Assessment Year: 2007-08 & 2010-11)

DCIT -15 (3) (1) Room No. 451, 4 th Floor, AayakarBhavan, M. k. road, Mumbai-400020	बनाम/ Vs.	Zydus Nycomed Healthcare Pvt. Ltd. C-4, MIDC, Village Pawane, Thane Belapur Road, Vashi, Navi Mumbai-400705.
स्थायीलेखासं ./जीआइआरसं ./PAN No. AAACZ0736D		
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri A. Mohan, DR
प्रत्यर्थीकीओरसे/Respondentby	:	Shri Mukesh M. Patel & Shri B. V. Jhaveri, AR

सुनवाईकीतारीख/ Date of Hearing	:	14.02.18
घोषणाकीतारीख / Date of Pronouncement	:	14.03.18

आदेश / ORDER

Per Sandeep Gosain, Judicial Member:

The present two Appeals have been filed by the revenue
against the order of Commissioner of Income Tax (Appeals)-

24, Mumbai, dated 22.01.16 & 02.02.16 for A.Y. 2007-08 & 2010-11 respectively.

2. Since the issues raised in these two appeals are identical, therefore, for the sake of convenience, these two appeals are clubbed, heard and disposed of by this consolidated order.

I.T.A. No. 2670/Mum/2016 (AY 2007-08)

3. First of all we take up revenue's appeal in I.T.A. No. 2670/Mum/2016 (AY 2007-08) on the grounds mentioned herein below:-

1) "on the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the addition made by AO by restricting the claim of the assessee for deduction under section 10B of the Act invoking the provisions of section 80IA(10)/9C of the Act".

2) "On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deciding that net profit @ 84% is not "more than ordinary profits" despite the fact that close connection between the parties carrying on the eligible business has been established and the course of business between the parties is so arranged

that the business transacted between them earned "more than ordinary profits".

3) "The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary".

4. The brief facts of the case are that assessee is a company engaged in the business of manufacturing key intermediates used in production of anti-ulcerant drug Pantoprazole. The return of income for the year under consideration was filed on 25.10.07 declaring total income of Rs. 1,57,04,200 and the same was processed u/s.143(1) of the Act. Later on, the case was selected for scrutiny and after serving statutory notices, order of assessment u/s 143(3) was completed by the Ld. AO on 22.12.10 determining income at Rs. 1,31,23,04,610/-.

Aggrieved by the order of AO, assessee preferred appeal before Ld. CIT(A) and Ld. CIT(A) after considering the case of both the parties partly allowed the appeal of the assessee.

Now before us, the revenue has preferred the present appeal by raising the above grounds.

Ground No. 1 & 2.

5. These grounds raised by the revenue are inter connected and inter related and relate to challenging the order of Ld. CIT(A) in deleting the addition made by AO by restricting the claim of the assessee for deduction under section 10B of the Act by invoking the provisions of section 80IA(10)/9C of the Act and in deciding that net profit @ 84% is not "more than ordinary profits", therefore we thought it fit to dispose of the same by this common order.

6. We have heard counsels for both the parties at length and we have also perused the material placed on record as well as the orders passed by revenue authorities.

Before we decide the merits of the case, it is necessary to evaluate the orders passed by Ld. CIT(A). The Ld. CIT(A) has dealt with the above grounds raised by the revenue in para no. 2.4(2.4.1 to 2.4.29) of its order. The operative portion of the order of Ld. CIT(A) is contained in para no. 2.4.27 to 2.4.29 of its order and the same is reproduced below:-

2.4.27 *"Therefore, on a close and careful consideration of the above, I am of the view that the Id. AO was not justified in restricting the appellant's claim for exemption u/s.10B(7). For arriving at this conclusion, I have been guided by the following important aspects:*

a. Ld. AO has restricted the appellant's claim for exemption by invoking the provisions of Sec.80IA(8) and (10). As regards the applicability of the provisions of Sec.80IA(8), the appellant is quite justified in contending that Sec.80IA(8) is attracted only in a case, "where any goods or services held for the purposes of the eligible business are transferred to any business carried on by the assessee." On the facts of the appellant's case, it is seen that the sale of KSM-6 and KSM-14 manufactured by the appellant were not transferred to any business carried on by it rather the products manufactured by it were independently sold as per the terms of the Joint-Venture Agreement to its Joint-Venture Partner, Nycomed GmbH, Germany. Under the circumstances, I am inclined to agree with the appellant's contention that the invoking of the provisions of Sec.80IA(8) is not called for on the facts of its case.

b. As pointed out earlier, it is a matter of record that the provisions of Sec.10B(7) r.w.Sec.80IA(10) were sought to be invoked for the first time in the appellant's assessment for A.Y.2004-05 and its claim for exemption u/s.IOB was restricted by the Id. A.O. who framed the assessment then. On the basis of the view taken in A.Y.2004-05, not only was the assessment for the A.Y.2005-06 finalized accordingly, restricting the appellant's claim u/s.10B, but also the completed assessment for / A.Y.2003-04 was reopened u/s.147. The appeals filed by the appellant for all the three years were duly allowed by the Id. CIT(A) and they came to be challenged by the Department before the Hon'ble ITAT. As clearly highlighted by the Hon'ble ITAT in para 16 of its Order dated 31110/2013 (supra), the provisions of Sec. 1013(7), r.w.s. 801A(10) can be invoked, "only if it can be said that the course of such business between the assessee company and APAG, Germany was so arranged that the same produced to the assessee more than the ordinary profits which might be expected to arise in such eligible business as contemplated in section 801A(10) of the Act." In the same paragraph, Hon'ble ITAT further observed that, "the case of the A.O. in this

regard is based on the comparative working of profitability made by him to allege that the profits shown by the assessee for all the three years under consideration were more than the profits shown by the assessee for the first year i.e. A. Y. 2002-03 which was taken by the him abnormal profits of the assessee's eligible business." Thus, the effective benchmark laid down by the Hon'ble ITAT was as to whether the profits for the three years A.Ys. 2003-04 to 2005-06, could be compared to be fair and reasonable, considering the base parameters of A.Y. 2002-03, which the Id. AO himself had accepted as the comparable base. On the basis of the above, the Hon'ble ITAT, after referring to the figures as per respective Tax Audit Reports, has reproduced in para 19 of its Order the comparable Net Profit before tax for the four years from A.Y. 2002-03 to A.Y. 2005-06. On due appreciation of the relevant facts of the subsequent three years, Hon'ble ITAT has given a categorical finding in para 20 that, "the increase in gross profit rate for the years under consideration as compared to that of A. Y. 2002-03 which was taken by the A. O. as the year of ordinary profits thus was properly explained by the assessee and keeping in view the said

explanation which was based on the relevant facts and figures, we are of the view that the Id. CIT(A) was fully justified in holding that the profits of the assessee company from its eligible business for the years under consideration could not be regarded as more than the ordinary profits which are expected to arise in such eligible business so as to attract the provisions of section 801A(10) of the Act."

c) Keeping in view the above benchmark reasoning adopted by the Hon'ble ITAT, the appellant has emphatically contended that even for the year under consideration, viz. A.Y. 2007-08, the profits are in no manner unreasonable or more than ordinary, as compared to the base year A.Y. 2002-03, on the two counts, viz., (i) the Sale Price of KSM-6 and KSM-14 charged by the appellant to M/s. Nycomed GmbH Germany, are the same at Euro 220 per kg. and Euro 270 per kg. respectively, both in A.Y. 2002-03 and A.Y. 2007-08; and (ii) the Net Profit before tax for A.Y. 2007-08 works out to 80%, which is in fact marginally lower than 84.54%, being the similar rate for A.Y. 2005-06, which has been upheld by the Hon'ble [TAT to be fair and reasonable and beyond the scope of invocation of the provisions

of Sec. 801A(10). This important fact highlighted by the Appellant in its submissions has not been controverted by the Id. AO, even in his two Remand Reports submitted during the appellate proceedings.

d. Further, in the aforesaid order, the Hon'ble Tribunal's observations in para 21 are pertinent, wherein it has been noted that, "APAG Germany was a Joint Venture partner in the assessee company having 50% share only and it is difficult to comprehend as to how and why it will enter into any sort of arrangement to allow the assessee company to make more than ordinary profits at its own cost knowing fully well that the benefit of such arrangement as a result of any excess profit could be shared by it only to the extent of 50% with the balance 50% going to the other Joint Venture party."

e. The Hon'ble ITAT has usefully relied on the ratio in the case of Digital Equipment India Ltd. vs. DCIT, (2006) 103 TTJ (Bang.) 359 by noting that, "a similar issue was involved wherein the deduction claimed by the Joint Venture company was restricted by the Revenue Authorities by invoking the provisions of section 801(9) which

are analogous to the provisions of section 801A(10) of the Act and the addition made on this issue was deleted by the Tribunal holding that the Digital Group Worldwide, the overseas Joint Venture partner will not pay any undue sum to the Joint Venture which it could not recoup entirely to the -exclusion of others. It was also held that mere substantial profit by itself would not give rise to a conclusion that there could be any such arrangement to produce more than the ordinary profits to the assessee from eligible business."

f. As far as the approach of the Id. AO in reworking the profit of the appellant adopting the market prices of Rs.2,000 for KSM-6 and Rs.4,000 for KSM-14 is concerned, for the said purpose, he has relied on the sale prices of similar products as available in the case of M/s. Nosch Lab Pvt. Ltd. I find that there was no definite information in the possession of the Id. AO as to whether during the relevant period under consideration, M/s. Nosch Lab Pvt. Ltd was a manufacturer of KSM-6 & KSM-14 or it was a mere trader. Id. AO has also not placed on record any information in regard to the manufacturing facilities (if any) and/or process involved in the manufacture, the quality standards

of the same etc. The appellant is, therefore, quite justified in contending that in the absence of any information in regard to the quality standards followed by some Chinese and Indian suppliers who had supplied KSM-6 and KSM-14 to M/s. Nosch Lab, the prices of the products manufactured by the appellant complying with the highest quality standards for supply in the European market could not be arbitrarily compared to the half hearted information collected by the Id. AO in the manner as pointed out hereinabove.

g. I also find that the appellant's submissions in regard to its pricing being fair and profits being reasonable are logically convincing. It is not in dispute that as per the contractual understanding, the price charged by the appellant to M/s Nycomed GmbH is lower than the price paid by M/s Nycomed GmbH to any other party in the world for KSM-6 and KSM-14. It is also a matter of record that Pantoprazole' manufactured by M/s Nycomed GmbH was a patented product and therefore, as patent owners, M/s Nycomed GmbH commanded a healthy price on the sale of Pantoprazole' and thus earned substantial profits. The appellant has placed on record the earning of

M/s Nycomed from the sale of Pantoprazole' in 2007 and pointed out that it was fetching Rs.9,70,710/per kg. on sale of the said product. As against the same, the per kg. rate paid to the Appellant for KSM-6 was Rs. 11,320/- per kg. and the same for KSM-14 was Rs.15,3201-. As explained by the appellant, the cost of major raw materials (nearly 90%) incurred by M/s. Nycomed for manufacturing Pantoprazole was just around 1.80% of the effective sale price fetched by it on sale of Pantoprazole. Moreover, M/s. Nycomed had agreed with the Appellant Company to purchase KSM-6 and KSM-14 at a price, even lesser than the price it would have paid to M/s. Isochem Inc, which was the European supplier of the said products to M/s Nycomed.

h. I also find force in the appellant's submissions that in order to ascertain the prevailing market price of the products manufactured by the Appellant Company, the price charged by the appellant to M/s. Nycomed should be compared with the price paid by M/s. Nycomed to its other suppliers for similar products and it cannot be compared, as done by the Id. A.O. with the price of products (though available at a much cheaper price), but which M/s. Nycomed is not purchasing

as its raw materials. It is important to bear in mind that a comparison of prices, should be of products which are like to like in terms of their specification, standards and quality. The appellant is quite justified in contending that M/s. Nycomed is a global company and, therefore, it would have known that KSM-6 and KSM-14, which are being manufactured by the appellant Company, are also available from manufacturers in other countries such as China, at cheaper prices than the price paid by it to the appellant Company or to M/s. Isochem Inc. However, M/s. Nycomed did not prefer to procure its requirements of KSM-6 and KSM-14 from such suppliers at cheaper rates, because it did not wish to compromise on the manufacturing standards and quality control adherence, required for manufacturing KSM-6 and KSM-14. It is a known fact that such high standards are not complied with by such manufacturers who produce the same products at cheaper rates. As the product Pantoprazole was patented by M/s. Nycomed, it was required to comply with the strict specifications of Drug Master File and of European Food & Drug Regulatory Authority, otherwise it could lose its Patent. M/s. Nycomed

had, thus, taken a conscious decision to procure its requirements of KSM-6 and KSM-14 from the Appellant Company, as it was fully complying with the specifications of Drug Master File and of European Food & Drug Regulatory Authority.

i. To support its contention that M/s. Nycomed GmbH is not paying to the appellant any excessive price for procuring KSM-6 and KSM-14 for manufacturing of Pantoprazole, the appellant has submitted a financial analysis of both, M/s. Nycomed, as also M/s. Isochem Inc. which was forwarded to the Id. AO in remand proceedings but no comments have been offered by him. From the same, it is evident that Nycomed's own profit margins are as high as 74%. Moreover, the profit margin of around 81% to 84% in the case of M/s. Isochem Inc., also goes to justify that M/s. Nycomed GmbH is not paying any excessive price to the appellant company, more particularly in view of the fact that the appellant's profit margin for the year under consideration being 80% is very much comparable with that of M/s. Isochem.

2.4.28 It is pertinent to note that the facts as noted hereinabove have not been controverted in any manner by the Id. AU in his Remand Reports. In view of the

same, I hold that the Id. AO was clearly not justified in invoking the provisions of Sec. 10B(7) r.w.s. 801A(10), since it cannot be said that the business transacted between the appellant and M/s. Nycomed produced to the appellant more than the ordinary profits expected to arise in such business.

2.4.29 Therefore, aforesaid findings of the Hon'ble ITAT, in the Appellant's own case, can be squarely applied to resolve the controversy before me in A.Y. 2007-08, more particularly, keeping in view the material facts as highlighted hereinbefore, which are similar to those of A.Ys. 2003-04 to 2005-06. Thus, respectfully following the same, I have no hesitation in holding that the Id.AO was not justified in drawing his conclusion against the appellant that its course of business with Nycomed GMBH, Germany was so arranged that the business transacted between them produced to the Appellant more than the ordinary profits, which might be expected to arise in such case. Therefore, the action of restricting the exemption u/s.10B as done by the Ld. AO cannot be upheld. He is, accordingly, directed to allow the appellant's claim for exemption u/s. 10B of the IT. Act as claimed in its Return of Income.

After having gone through the facts of the present case as well as considering the orders passed by revenue authorities and submissions made by both the parties, we find that Ld. CIT(A) has rightly appreciated the facts of the present case and passed its judicious order by following the decision of Hon'ble ITAT in assessee's own case for AY 2003-04 to 2005-06 and holding that the AO was not justified in invoking the provisions of section 10B(7) r.w.s 80IA(10).

Moreover, no new facts or contrary judgments have been brought on record before us in order to controvert or rebut the findings so recorded by LdCIT(A). Therefore, there are no reasons for us to interfere into or deviate from the findings recorded by the Ld.CIT(A). Hence, we are of the considered view that the findings so recorded by the Ld. CIT (A) are judicious and are well reasoned. Resultantly, these grounds raised by the revenue stands **dismissed**.

Ground No. 3 & 4

7. These grounds are general in nature, thus requires no specific adjudication.

ITA No. 3337/Mum/2016 (AY 2010-11)

8. Now we take up revenue's appeal in ITA No. 3337/Mum/2016 for AY 2010-11. Since we have already decided the similar grounds of appeal in ITA No. 2670/Mum/2016 for AY 2007-08 on merits. Therefore, following our own decision in ITA No. 2670/Mum/16, we apply the same findings in the present appeal in order to maintain judicial consistency which is applicable *mutatis mutandis* in the present case.

9. In the net result, both the appeals filed by the revenue stands **dismissed**.

Order pronounced in the open court on 14th March, 2018

Sd/-
(Rajendra)
लेखासदस्य / Accountant Member
मुंबई Mumbai; दिनांक Dated : 14.03.2018
Sr.PS. Dhananjay

Sd/-
(Sandeep Gosain)
न्यायिकसदस्य / Judicial Member

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार

(Dy./Asstt.Registrar)

आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai