IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH ' A '

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER AND
SHRI JASON P BOAZ, ACCOUNTANT MEMBER

I.T. A. No.1251/Bang/2015
(Assessment Year : 2008-09)

Joint Commissioner of Income Tax (LTU),
Bangalore. …. Appellant.

Vs.

M/s. Biocon Limited,
No.20, KM, Hosur Road,
Electronic City, Hebbagodi,
Bangalore-560 100. ….. Respondent.

I.T. A. No.1255/Bang/2015
(Assessment Year : 2008-09)
(By Assessee)

Assessee By : Shri Padamchand Khincha, CA
Revenue By : Shri C. H. Sundar Rao, CIT-1 (D.R)

Date of Hearing : 20.02.2018.
Date of Pronouncement : 25.04.2018.

O R D E R

Per Shri Jason P Boaz, A.M. :

These are cross appeals, by the assessee and Revenue, directed against the order of Commissioner of Income Tax (Appeals)-14, Bangalore dt.23.07.2015 for the Assessment Year 2008-09.

2. Briefly stated, the facts of the case are as under :-

2.1 The assessee, a company in the business of manufacture of enzymes and pharmaceutical ingredients, filed its return of income for Assessment Year 2008-09 on 30.9.2008 declaring income of Rs.336,54,93,391 and Book Profits at Rs.37,84,02,814. The return was processed under Section 143(1) of the Income Tax Act, 1961 (in short 'the Act') and the case was subsequently taken up for scrutiny. The assessment was completed under Section143(3) of the Act, vide order dt.31.12.2010 wherein the assessee's income under normal computation was determined at Rs.336,64,93,391 in view of various additions / disallowances. On appeal, the CIT (Appeals) – 14, Bangalore vide the impugned order dt.23.7.2015 allowed the assessee partial relief. The learned CIT (Appeals) also enhanced the assessee's income by considering an amount of Rs.14,93,60,236 as income of the DTA Unit escaping assessment.

3. Both Revenue and the assessee, being aggrieved by the order of the CIT (Appeals) -14 dt.23.7.2015 for Assessment Year 2008-09, have filed cross appeals. These appeals will be disposed off hereunder in seriatum.

Assessee's Appeal in ITA No.1255/Bang/2015 for A.Y. 2008-09.

4. In this appeal, the assessee has raised the following grounds :-

1) The learned CIT(A) has erred in law and in fact in passing an order under section 250 of the Act which is bad in law and in fact and is void ab initio.

Addition made under section 40(a)(i) for not withholding taxes on payments in the nature of royalty

1) The learned CIT(A) erred in law and in fact in upholding the disallowance made by the AO and disallowing the royalty amount of Rs 9,066,718 on export sales outside India under section 40(a)(i) of the Act and disregarding the fact that the provisions of withholding tax would not be attracted in respect of the above royalty payment

2) The learned CIT(A) erred in law and in fact in having disregarded the favorable decision of the Honorable Madras High Court in the case of CIT vs Aktiengesellschaft Kuhnule Kopp and Kausch W Germany in disallowing the royalty amount of Rs 9,066,718 on export sales outside India under section 40(a)(i) of the Act

3) The learned CIT(A) erred in law and in fact in having disregarded the favorable decision of the jurisdictional Bangalore Income-tax Appellate Tribunal in the case of Synopsis India Private Limited vs ITO in disallowing the royalty amount of Rs 9,066,718 on export sales outside India under section 40(a)(i) of the Act

4) The learned CIT(A) erred in law and in fact in having applied the decision of the Authority of Advanced Ruling in the case of Dell International Service Private Limited vs CIT in disallowing the royalty amount of Rs 9,066,718 on export sales outside India under section 40(a)(i) of the Act.

Deduction under section 10B and 10AA and denial of carry forward of unabsorbed depreciation

5) The learned CIT(A) has erred in law and in fact in denying the benefit of carry forward of unabsorbed depreciation in respect of the amount of Rs 197,886,929 as reflected by the Appellant in its Return of Income ("RoI").

6) The learned CIT(A) has erred in law and in fact in upholding the Assessing Officer's ("AO") order that the unabsorbed depreciation of Rs 197,886,929 sought to be carried forward represents relief under section 10B/ 10AA of the Act in excess of total income.

7) The learned CIT(A) has erred in fact in holding that the unabsorbed depreciation proposed to be carried forward by the Appellate pertains to Units eligible for relief under section 10B/10AA of the Act.

8) The learned CIT(A) has erred in law and in fact holding that the relief under section 10B/10AA of the Act in excess of total income cannot be treated as business loss to be carried forward in accordance with the provisions of the Act.

9) The learned CIT(A) has erred in law and in fact in examining the provisions of section 70 of the Act in determining whether the loss of Rs 197,886,92 could be carried forward as against examining the provisions of section 32 of the Act that pertains to unabsorbed depreciation.

10) The learned CIT(A) has erred in law and in fact in limiting the relief under section10B/10AA of the Act to the extent of total income of the Appellant prior to claiming relief under section 10B/10AA of the Act but after setting off the losses of the Appellant from its businesses other than the business of the units eligible for relief under section 10B/10AA of the Act, thereby resulting in the losses of the other businesses of the Appellant being set off against the profits of the units eligible for relief under section 10B/10AA of the Act.

11) The learned CIT(A) has disregarded the decision of the Honorable Bangalore Income-tax Appellate tribunal ("ITAT") in the appellant's own case for AY 2007-08, where it was held that the current year loss or brought forward loss shall not be set off against profits of the tax holiday eligible unit. The Honorable ITAT placed reliance on the decision of the Karnataka High Court in the case of *Yokogawa India Limited 341 ITR 345* in concluding this matter.

Attribution of EOU profits to taxable DTA Unit

12) The learned CIT(A) has erred in facts by enhancing the income of the appellant by considering a ground which did not form part of the original grounds of appeal against the assessment order

13) The learned CIT(A) has erred law and facts in attributing profits of an eligible EOU unit to the DTA Unit, thereby denying the relief under section 10B of the Act to the extent of such profits and subjecting the DTA unit to taxable income.

14) The learned CIT(A) has erred in law and on facts in considering Rs 746,801,183 as taxable income of the DTA Unit and disregarding the same as income of the EOU Unit.

15) The learned CIT(A) has erred in law and on facts in imposing tax on the Appellant on the income of Rs 149,360,236 on adhoc basis, being one -fifth of the Rs 746,801,183 for the year under consideration.

16) The learned CIT(A) has erred in law and facts by making an enhancement to the income of the appellant which is not in line with the initial notice of enhancement served on the appellant.

17) The learned CIT(A) has erred in law in making the subject adjustment as the same is not covered under any specific provision of the Income-tax Act, 1961

18) The learned CIT(A) has erred in facts in not appreciating the pricing policy adopted by the appellant

19) The learned CIT(A) erred in disregarding the submission of the appellant where it has been stated that the sale price of the product is based on prevailing market conditions and the cost of the product only includes cost of process research & development as against the product research & development cost.

20) The learned CIT(A) erred in law and on facts in holding that the Appellant sought to take double benefit under the Act by claiming relief under section 35(2AB) and 10B of the Act for the same expenditure/ cost incurred.

5. **Ground No.1** is general in nature and therefore no adjudication is called for thereon.

6. **Ground Nos.1 to 4 – Disallowance u/s.40(a)(i) payment in the nature of Royalty.**

6.1.1 These grounds (supra), are raised in respect of disallowance under Section 40(a)(i) of the Act, in respect of payments of royalty amounting to Rs.90,66,718 for non-deduction of tax at source under Section 195 of the Act, made by the Assessing Officer on the basis of disclosure made in the assessee's tax audit report in Form 3CD in Note 3 to Attachment 8, wherein it was mentioned that royalty has not been subjected to TDS. Before the Assessing Officer, the assessee contended that royalty was payable in respect of export sales and was therefore not liable for TDS under Section 195 of the Act and in support thereof placed reliance on the decision of the Hon'ble Madras High Court in the case of CIT Vs. Aktiengesellschaft Kuhnle Kopp and Kausch W. Germany (262 ITR 513) (Mad). The Assessing Officer did not agree with the assessee's claim and relying on the ruling of the AAR in the case of Dell International Services P. Ltd. V CIT (305 ITR 37), held that as the technology was used in India, the taxable event for the non-resident is in India. The Assessing Officer further held that the sale is completed in India, as once the goods are handed over to the Customs House Agent (CHA), the exporter looses control over the goods. In view of the sales having been completed in India, the Assessing Officer held that royalty is

liable for TDS under Section 195 of the Act and in the absence of such TDS having been made, the same is to be disallowed under Section 40(a)(i) of the Act.

6.1.2 On appeal, the assessee apart from its submissions before the Assessing Officer, also placed reliance on the decision of the co-ordinate bench of this Tribunal in the case of Synopsis India Pvt. Ltd. V ITO (ITA No.919 & 912/Bang/2002). The learned CIT (Appeals) was, however, of the view that the aforesaid decision of the ITAT, Bangalore Bench is not applicable as in the cited decision the entire turnover comprised of exports only, whereas in the case on hand the assessee's turnover comprised both domestic and export turnover and the linkage of the expenditure solely with exports is not possible. In that view of the matter, the learned CIT (Appeals) upheld the disallowance under Section 40(a)(i) of the Act.

6.2.1 Before us, the learned Authorised Representative for the assessee, in support of the contention that royalty was not payable in connection with the export sales, placed reliance on the following judicial pronouncements :-

(i) CIT V Aktiengesellschaft Kuhnle Kopp and Kausch W. Germany (262 ITR 513) (Mad); and

(ii) Synopsis India Pvt. Ltd. V ITO (ITA No.919 & 912/Bang/2002) of ITAT, Bangalore.

In this context, it was argued that the royalty payable in respect of any right, property or information used on services utilized for the purposes

of a business carried on outside India or for the purpose of making or earning any income from any source outside India and therefore the said income was outside the purview and scope of Sec. 9(1)(vi) of the Act and consequently, not liable for TDS under Section 195 of the Act.

6.2.2 In support of the contention that royalty is chargeable to tax only on actual payments under the DTAA and hence liability to deduct tax at source under Section 195 of the Act does not arise till actual payment of royalty is made, the learned Authorised Representative placed reliance on the following judicial pronouncements :-

(i) Booz, Allen & Hamilton (India) Ltd. V ADIT (IT) (2012) 28 taxmann.com 245 (Mum – Tribunal); and

(ii) Pizza Hut International LLC V Dy. DIT (IT) (2012) taxmann.com 111 (Del)

6.2.3 The learned Authorised Representative further submitted that even if royalty is to be disallowed, corresponding deduction under Section 10B & 10AA of the Act should be allowed in respect of the said disallowance. In support of this contention, the learned Authorised Representative, inter alia, placed reliance on the following :-

(i) CIT V Gem Plus Jewellery India Ltd. (2011) 330 ITR 175 (Bom);

(ii) Bearing Point Business Consulting Pvt. Ltd. V DCIT (M.P. No.47/Bang/2013 dt.5.7.2013 arising out of ITA No.1124/Bang/2011);

(iii) CBDT, Circular No.37/2016 dt.2.11.2016 Sub : Chapter VI-A deduction on enhanced profits.

6.3 Per contra, the learned Departmental Representative for Revenue vehemently supported the orders of the authorities below. According to the learned Departmental Representative, as the assessee has not demonstrated that the royalty is exclusively payable in respect of export sales, it cannot be held that the said expenditure was incurred in connection with the business carried on outside India or for making or earning of income from any source outside India. In this context, the learned Departmental Representative placed reliance on the decision of the Hon'ble Delhi High Court in the case of CIT V Havells India Ltd. (2013) 352 ITR 376 (Del) and submitted that merely because the customer is outside India, the source of income / citus cannot be said to be outside India. It was contended that TDS is applicable on the said royalty payments in view of Explanation 5 to Sec. 9(1)(vi) of the Act when payment is made by a resident to a non-resident. On the issue of chargeability of royalty income on receipt basis under the DTAA, the learned Departmental Representative submitted that relevant facts to demonstrate and establish the above arguments put forth by the assessee, are not on record.

6.4.1 We have heard the rival contentions, perused and carefully considered the material on record; including the judicial pronouncements cited (supra). As per the Article 12 of the India – USA DTAA Treaty, royalty becomes liable to tax in India only when the payments are actually made and not when the assessee credits such amount(s) in its books of account. In Booz, Allen & Hamilton (India) Ltd. Co. (supra), the ITAT, Mumbai Bench at para 17 of its order held as under :-

> **" 17.** We have considered the rival submissions and also perused the relevant material on record. It is observed that the amount in question payable by BAH India to the USA entity was not paid during the year under consideration and there is no dispute about the same. The said amount payable to the USA entity has been brought to tax in India in its hands by the Revenue authorities as fees for technical services. As per the relevant provisions of the Double Taxation Avoidance Treaty between India and the USA, the term "fees for technical services" as used in the relevant treaties is defined to mean "Payments of any amount in consideration for the services of managerial, technical or consultancy nature including the provision of services of technical or other personnel." In the case of *Siemens Aktiengesellschaft* (*supra*), a similar language was employed in the relevant provisions of DTAA between India and Germany and keeping in view the language so employed, the Tribunal held that royalty and fees for technical services should be reckoned for taxation only when it is actually received by the assessee and not otherwise and this decision of the Tribunal was upheld by the Hon'ble Bombay High Court observing that the assessment of royalty or any fees for technical services should be made in the year in which the amounts are received as per the relevant provisions of the DTAA and not otherwise. The coordinate bench of this Tribunal at Delhi in the case of *CSC Technology Singapore Pte. Ltd.* (*supra*) has also taken a similar view holding that royalty/FTS which had accrued as income to a foreign company, could not be taxed in the source country (being India) unless this amount had been received by the foreign company. In our opinion, the issue thus is squarely covered in favour of the assessee by the decision of Hon'ble Bombay High Court in the case *Siemens Aktiengesellschaft* (*supra*) as well as the decisions of the Tribunal in the case of *UDHE GmbH* (*supra*) and in the case of *CSC Technology Singapore Pte. Ltd.* (*supra*) and respectfully following the said judicial pronouncements, we hold that the amount payable by BAH India to the USA entity could not be brought to tax in India during the year under consideration as fees for technical services as per the relevant provisions of the DTAAs since the same had not been paid to the said entity. Ground No. 7 of the assessee's appeal is accordingly allowed."

6.4.2 Similar view has been taken by the ITAT, Delhi-Bench in the case of Pizza Hut International Ltd. V Dy. DIT (IT) (supra).

6.4.3 In the case on hand, the important fact as to whether the royalty is actually paid or not, are not on record. In this factual matrix of the case, we deem it appropriate to set aside / remand this issue to the file of the Assessing Officer to examine and verify whether the royalty in the case on hand is actually paid or not and to examine the relevant provisions of the India – USA DTAA in the light of the aforesaid decisions

(cited at paras 6.4.1 and 6.4.2 of this order) and then decide whether the royalty is exigible to tax under the DTAA and consequently liable for TDS under Section 195 of the Act and disallowance under Section 40(a)(i) of the Act.

6.5 The alternate claim put forth by the assessee is that even if, for any reason, the disallowance under Section 40(a)(i) of the Act is sustained, deduction under Section 10B and 10AA of the Act should be allowed on the enhanced income, will be consequential in nature. In this regard the Hon'ble Bombay High Court in CIT V Gem Plus Jewellery India Ltd. (2011) 330 ITR 75 (Bom) and the co-ordinate bench of this Tribunal in the case of Bearing Point Business Consulting Pvt. Ltd. V DCIT (supra) have held that deduction under Section 10A of the Act should be allowed in respect of disallowance made by the Assessing Officer which results in increase of business income. The Assessing Officer shall consider and allow this alternate claim of the assessee in the light of the aforesaid judicial pronouncements, if the royalty income is held to be exigible to tax under the DTAA on actual payment basis and consequently liable for TDS under Section 195 of the Act and for disallowance under Section 40(a)(i) of the Act. Consequently, Grounds 1 to 4 of the assessee's appeal are allowed for statistical purposes.

7. **Grounds 5 to 11 – Deduction u/s.10B and 10AA of the Act and denial of carry forward of unabsorbed depreciation.**

7.1.1 These grounds (supra) are raised in respect of the denial of carry forward of unabsorbed depreciation relating to domestic unit and SEZ

Unit. The authorities below following the decision of the Hon'ble Karnataka High Court in the case of Himtsingha Seide Ltd. (286 ITR 255), held that deduction under Section 10B and 10AA of the Act should be computed and allowed only after set off of unabsorbed depreciation relating to both domestic unit and SEZ Unit.

7.1.2 At the outset, the learned Authorised Representative for the assessee submitted that these ground Nos.5 to 11 are not being pressed, as the assessee has got relief on this issue in view of the Assessing Officer's order under Section 154 of the Act dt.30.1.2018 rectifying the order of assessment for Assessment Year 2008-09 dt.31.12.2010. In this view of the matter, the grounds raised by the assessee at S.Nos.5 to 11 of this appeal are rendered infructuous and are accordingly dismissed.

8. **Ground Nos.12 to 20 - Attribution of EOU Profits to taxable DTA Unit – Enhancement of income**.

8.1.1 In these grounds, the assessee contends that the learned CIT (Appeals) has erred in facts by enhancing the assessee's income by considering a ground which did not form part of the original grounds of appeal against the order of assessment. According to the learned Authorised Representative for the assessee, the facts of the matter on this issue are that in the course of appellate proceedings, the learned CIT (Appeals) required the assessee to file a copy of the License Agreement between the assessee and Research Corporation Technologies Inc. ('RCT'). After going through the same, the learned CIT (Appeals) issued a notice of enhancement under Section 251(2) of the Act dt.5.8.2013,

proposing to enhance income of the assessee by disallowing the deduction claimed under Section 10B of the Act in respect of the RHI EOU Unit as he was of the view that under the aforesaid License Agreement with RCT, the assessee paid upfront fees for the use of know how received from RCT and the same was claimed as a deduction in the domestic tariff (DTA) unit. The learned CIT (Appeals) was of the view that the said know how was employed in the RHI EOU unit in the manufacturing process and the RHI EOU unit being nothing but an expansion of an existing unit / business or the setting up of a new unit / business by using components of an existing business; this violates the condition of eligibility for claim of deduction under Section 10B of the Act.

8.1.2 In response to the notice of enhancement under Section 251(2) of the Act issued by the learned CIT (Appeals) on 5.8.2013, the learned Authorised Representative submitted that the assessee filed its reply dt.27.8.2013, submitting that the eligibility of RHI EOU unit for deduction under Section 10B of the Act was neither a ground of appeal raised by the assessee nor related to any of the grounds raised by the assessee and therefore no adjustment can be made in respect of this issue. It was explained that the RHI EOU unit was an independent unit and not formed by the splitting up of any business already in existence and the deduction under Section 10B of the Act in respect of the RHI EOU unit was claimed and also allowed by the Assessing Officer from Assessment Year 2006-07 onwards and therefore the said deduction cannot be disallowed for Assessment Year 2008-09. It was submitted that under the License Agreement with RCT, the assessee obtained a

license to use a strain, namely, picha pastoris which could be utilized for manufacture of various products including insulin and in this regard it obtained regulatory approvals and set up a new facility for manufacture and of human insulin and was successful in evaluating manufacture of insulin in bulk form using the strain. It was also submitted that no other facility of manufacturing / producing the human insulin prior to setting up of the said unit and this unit has been also evaluating the feasibility of using the picha pastoris for manufacture of certain antibiotic products.

8.1.3 The assessee submits that the learned CIT (Appeals) issued further notices of enhancement under Section 251(2) of the Act on 30.8.2013 and a third notice thereunder dt.17.6.2015. In the notice dt.17.6.2015, it was stated that the DTA Unit has transferred the manufacturing rights to the EOU Unit for 'NIL' consideration and in the event that R&D expenses are to be included in the sale price adopted by the EOU Unit, the sale consideration to that extent will be deemed as receivable by the DTA Unit and the deduction under Section 10B of the Act will be allowed only on the reduced amount. In response thereto, the learned Authorised Representative of the assessee; submitted that it was explained that the sale price of insulin is dependent on the conditions of demand and supply prevalent in the market and was not solely dependent on the cost of the product. It was mentioned that in response to a further notice of enhancement dt.6.7.2015, the assessee had filed its reply vide letterdt.9.7.2015. Subsequent thereto, the learned CIT (Appeals) in the impugned order held that the assessee had recouped the cost of investment on R&D in development of the product through its EOU sales of F.Y. 2005-06 to 2009-10 i.e. over the minimum

opening period available to it of 5 years from the date of commercial manufacture and sale. The total investment in R&D from Assessment Year 2003-04 to 2005-06 being Rs.74,68,01,183, the learned CIT (Appeals) treated a minimum of 1/5 th of Rs.74,68,01,183; i.e. Rs.14,93,60,236 as the rightful income of the DTA Unit, booked during the period relevant to Assessment Year 2008-09 in the EOU Unit and claimed exempt from taxation.

8.1.4 According to the learned Authorised Representative for the assessee, a new source of income cannot be added by the learned CIT (Appeals) at the appellate stage by exercising the powers of enhancement under Section 251(2) of the Act. It was further contended that the impugned addition of income, of Rs.14,93,60,236 was neither accrued nor received by the DTA Unit and this amounts to imputation of hypothetical income on notional income which is not impermissible under the provisions / scheme of the Income Tax Act, 1961. It was contended that the R&D expenses pertaining to Assessment Year 2003-04 to Assessment Year 2005-06, as considered by the learned CIT (Appeals), were, in fact, allocated to all units including those eligible for deduction under Section 10B and 10AA of the Act and this fact was confirmed to the learned CIT (Appeals) vide letter dt.9.7.2015 and details thereof and the orders of assessment for the earlier years, viz. Assessment Years 2003-04 to 2005-06 were submitted to substantiate the above claim. Therefore, the consequential claims by the assessee for deduction under Section 10B of the Act are reduced to the extent of allocation of R&D expenses. In view of the above, it was argued that there was no double benefit claim as held by the learned CIT (Appeals).

It was submitted that the R&D Unit or any other existing unit was not capable of manufacture of human insulin and therefore there was no escapement of income as held by the learned CIT (Appeals). It was also contended that since the RHI EOU Unit started claiming deduction under Section 10B of the Act from Assessment Year 2006-07 onwards and the same has been accepted by the Assessing Officer in the orders of assessment passed for those years, it was now too late to partially reduce the said claim for the year under consideration i.e. Assessment Year 2008-09.

8.2 Per contra, the learned Departmental Representative supported the order of the learned CIT (Appeals) on this issue and submitted that the learned CIT (Appeals) had took the said view in the matter only after thorough investigation and hence the same should be upheld.

8.3.1 We have heard the rival contentions, perused and carefully considered the material on record; including the judicial pronouncements cited. In the case on hand, the learned CIT (Appeals) has made an addition of Rs.14,93,60,236 treating the same to be the rightful income of the DTA Unit, booked during the year in the EOU Unit. Consequently, the impugned sum was held to be income of the DTA Unit escaping assessment during the assessment year under consideration. Even assuming that the learned CIT (Appeals) was right in her impugned findings, the learned CIT (Appeals), in our view, ought to have ideally reduced the claim of deduction under Section 10B of the Act in the EOU Unit. However, the learned CIT (Appeals) has held the sum of Rs.14,93,60,236 as income of the DTA Unit; which action tentamounts to

taxing a notional on hypothetical income. In this regard, the observations of the Hon'ble Madras High Court in the case of CIT Vs. J. Chelladurai (2012) 204 taxman 258 (Madras), at para 13 thereof are very relevant in this context are extracted hereunder :-

> " **13.** The learned counsel appearing for the Revenue vehemently contended that the assessee and his wife are the only trustees of the Trust and had full control over the Trust and therefore, the assessing officer was right is assessing the notional income from the income deposited by the assessee. He further contended that in respect of the interest on deposits from the bank, the assessee purposely deposited it in the Trust only with a view to avoid payment of tax. He further contended that the assessee ought not to have deposited the amount without charging interest. The argument of the learned counsel appearing for the assessee is that the assessee can deposit the amount wherever he prefers and it is for the assessee to decide whether to deposit or not and whether to charge interest on the deposited amount or not. Normally the interest income can be charged on accrual or receipt basis. In the present case, there is no income received or earned by the assessee. Only the assessing officer was of the view that instead of depositing the amount in the fixed deposit, the assessee for reducing the tax liability, deposited the same with the Trust without charing interest. It is not the case of the Revenue that the assessee was unable to prove the source of deposit. Per contra, the assessing officer has given a finding that the assessee deposited the excess amount on various deposits with the bank. So it indicates that the deposited amount already suffered tax and it is not the case of the assessee that the assessee borrowed money and diverted it for non-business purpose. Therefore, the assessing officer is wrong in holding that there was evasion of payment of tax merely because the assessee deposited the amount with the Trust without charging interest. The learned counsel appearing for the Revenue has not shown any provision of law to charge notional income. It is well settled principles of law in a taxing statute, one has to look merely at what is said in the relevant provision and there is no presumption as to a tax. The Apex Court in the case of *Ajmera Housing Corpn.* v. *CIT* [2010] 326 ITR 642/ 193 Taxman 193 considered the scope of taxing statutes and in paragraph 32 it has been held as follows:
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> "It is trite law that a taxing statute is to be construed strictly. In a taxing Act one has to look merely at what is said in the relevant provision. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. There is no room for any intendment. There is no equity about a tax (See. *Cape Brandy Syndicate* v. *IRC* [1921] 1 KB 64 and Federation of *A.P. Chambers of Commerce and Industry* v. *State of A.P.* [2000] 6 SCC 550). In interpreting a taxing statute, the Court must look squarely at the words of the statute and interpret them. Considerations of hardship,

injustice and equity are entirely out of place in interpreting a taxing statute. (Also see:*CST* v. *Modi Sugar Mills Ltd.* [1961] (2) SCR 189."

Considering the above principles to the facts of the present case, we are of the view that the assessing officer is wrong in holding that the assessee ought to have charged interest on the amount deposited with the Trust, which is not in accordance with law. Therefore, the appellate authorities are correct in holding that notional interest cannot be added by the assessing officer and rightly deleted the addition made on the said amount and there is no error or irregularity in interfering with the impugned order of the Tribunalé é ò

8.3.2 The view of the learned CIT (Appeals) that the rightful income of DTA Unit has been booked in the EOU Unit, also suffers from infirmity as the R&D costs considered by the learned CIT (Appeals) for making the aforesaid addition had been allocated to all units including 10B and 10AA units in the earlier years when such claims were made and allowed and such addition has been factored in while arriving at the profits of 10B and 10AA units. The business decision of the assessee to commence manufacturing operations in the RHI EOU Unit, therefore, cannot be found fault with in the facts and circumstances of the case on hand.

8.3.3 In this factual view of the matter, we find that there is no merit in the contention of the learned CIT (Appeals) that the assessee has been claiming double benefit. In the light of the facts and circumstances of the case, as discussed above at paras 8.1 to 8.3.2 of this order, we are of the opinion that the impugned addition of Rs.14,93,60,236 is to be deleted. We hold and direct accordingly. Consequently, grounds raised by the assessee in this regard are partly allowed. As this addition is deleted on merits, we are not adjudicating the grounds relating to the jurisdiction of the learned CIT (Appeals) to make an enhancement / addition in respect of a new source of income not considered by the Assessing Officer in assessment proceedings.

9. In the result, the assessee's appeal for Assessment Year 2008-09 is partly allowed.

Revenue's appeal in ITA No.1251/Bang/2015 for A.Y. 2008-09.

10. In Revenue's appeal the grounds raised are as under :-

1. The order of CIT(A) is opposed to the facts and law in so far as the below issues decided against the revenue.

2. The CIT(A) has erred in directing the AO to delete the disallowance made on account of amortised ESOP expenses of Rs.2,76,37,000 when the assessee had neither incurred any expenditure in connection with ESOP, nor had any liability arisen to incur the same during the year.

3. The CIT(A) has erred in directing the AO to delete the disallowance made on account of ESOP expenditure relating to R&D Unit of Rs.28,11,142 contrary to the findings of the Assessing Officer.

4. The CIT(A) has erred in directing the AO to delete the disallowance made on account of ESOP expenditure relating to business sold of Rs.10,00,000 when it was established that there was no liability for the assessee in this regard.

5. The CIT(A) erred in bringing to tax only the 1/5th of the R&D expenditure under export oriented unit relatable to domestic entity.

6. The appellant craves leave to add, to alter or to delete any grounds that may be urged at the time of hearing of the appeal.

11. **Ground Nos.1 and 6** being general in nature, no adjudication is called for thereon.

12. **Ground Nos.2 to 4 - Disallowance of Expenditure on ESOP.**

12.1 In these grounds (supra), Revenue challenges the order of the learned CIT (Appeals) on various facets of ESOP expense on which the

learned CIT (Appeals) directed deletion of the disallowances made by the Assessing Officer. The learned Departmental Representative placed strong reliance on the order of the Assessing Officer in this regard.

12.2 Per contra, the learned Authorised Representative for the assessee submitted that the issues raised in these grounds have been correctly dealt with by the learned CIT (Appeals), as he allowed the assessee's claim relying on the decision of the Special Bench of ITAT, Bangalore in the assessee's own case reported in (2013) 35 taxmann.com 335 (Bang-Trib).

12.3.1 We have heard the rival contentions, perused and carefully considered the material on record; including the judicial pronouncement cited. We find that in the above decision of the Special Bench of ITAT, Bangalore in the assessee's own case reported in (2013) 35 taxmann.com 335 (Bang-Trib) for Assessment Years 2002-03 to 2007-08, it was held that the discount on ESOP is an allowable deduction under Section 37(1) of the Act during the years of vesting on the basis of percentage of vesting during such period; subject to adjustment at the time of exercise of options. At para 11.3 of its order, the Special Bench of the ITAT, held as under :-

> " **11.3** We, therefore, sum up the position that the discount under ESOP is in the nature of employees cost and is hence deductible during the vesting period w.r.t. the market price of shares at the time of grant of options to the employees. The amount of discount claimed as deduction during the vesting period is required to be reversed in relation to the unvesting/lapsing options at

> the appropriate time. However, an adjustment to the income is called for at the time of exercise of option by the amount of difference in the amount of discount calculated with reference the market price at the time of grant of option and the market price at the time of exercise of option. No accounting principle can be determinative in the matter of computation of total income under the Act. The question before the special bench is thus answered in affirmative by holding that discount on issue of Employee Stock Options is allowable as deduction in computing the income under the head 'Profits and gains of business or profession'."

12.3.2 Respectfully following the above decision of the Special Bench of ITAT, Bangalore in the assessee's own case for Assessment Years 2002-03 to 2007-08 (supra), we find no reason to interfere with or deviate from the order of the learned CIT (Appeals) in deleting the aforesaid disallowances. Consequently, Grounds 2 to 4 of Revenue's appeal are dismissed.

13. **Ground No.5**.

In this ground, Revenue contends that the learned CIT (Appeals) has erred in bringing to tax only 1/5 th of the R&D expenditure under the EOU relatable to the domestic entity. In this regard, we have already held that the learned CIT (Appeals) was not correct in making the impugned addition of Rs.14,93,60,236 in respect of the same issue while considering and adjudicating grounds 12 to 20 of the assessee's appeal (supra). Consequently, Ground No.5 of Revenue's appeal is liable to be dismissed.

14. In the result, Revenue's appeal for Assessment Year 2008-09 is dismissed.

15. To sum up, the assessee's appeal for Assessment Year 2008-09 is partly allowed and Revenue's cross appeal is dismissed.

Order pronounced in the open court on the 25th day of April, 2018.

Sd/-	Sd/-
(SUNIL KUMAR YADAV)	**(JASON P BOAZ)**
Judicial Member	Accountant Member

Bangalore,
Dt. 25.04.2018

*Reddy gp

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1	Appellant	4	CIT(A)
2	Respondent	5	DR. ITAT, Bangalore
3	CIT	6	Guard File

Senior Private Secretary
Income Tax Appellate Tribunal
Bangalore.