IN THE INCOME TAX APPELLATE TRIBUNAL
" D" BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And SMTMADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.525/Ahd/2015
&
Cross Appeal No.49/Ahd/2015
(**निर्धारण वर्ष /** Assessment Year :2009-10)

DCIT, Circle – 4(1)(1), Ahmedabad.	**बनाम**/ Vs.	Schutz Dishman Biotech Ltd., Bhadraraj Chambers, Nr. Swastik Cross Road, Navrangpura, Ahmedabad – 380 009.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :AACCS 0988 C		
(अपीलार्थी/**Appellant**)	..	(प्रत्यर्थी / **Respondent**)/Cross Objector

अपीलार्थी ओर से/ **Appellant by :**	Shri Vinod Talwani, Sr. D.R.
प्रत्यर्थी की ओर से/**Respondent by:**	Shri T.P. Hemani , A.R.

सुनवाई की तारीख/ **Date of Hearing**	29/10/2018
घोषणा की तारीख /**Date of Pronouncement**	01/01/2019

आदेश / O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

Thisappeal by the Revenue along with a Cross Objection by the assessee are directed againstthe order of the Commissioner of Income Tax (Appeals)–8, Ahmedabad[CIT(A) in short] vide appeal no.CIT(A)-8/DCIT C-8/89/2013-14dated 15.12.2014 arising in the matter of assessment order passed under s.143(3)of the Income Tax Act,

1961(here-in-after referred to as "the Act") dated 11.03.2013relevant to Assessment Year (AY)2009-10.

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

1). "Whether the Ld. Commissioner of Income-Tax (Appeals) is right in law and on facts in deleting the addition of Rs.1,70,77,868/- made on account of unexplained investment in purchases of raw materials and Rs.69,55,191/- on account of inflation of purchases of raw materials u/s.69 of the Act."

2). "Whether the Ld. Commissioner of Income-Tax (Appeals) is right in law and on facts in enhancing the claim of deduction u/s.10B of the Act made by the assessee."

3). On the facts and in the circumstances of the case, the Ld. Commissioner of Income-Tax (Appeals) ought to have upheld the order of the Assessing Officer.

4). It is therefore, prayed that theorder of the Ld. Commissioner of Income-Tax (Appeals) may be set-a-side and that of the order of the Assessing Officer be restored."

3. The first issue raised by the Revenue is that Ld.CIT(A) erred in deleting the addition made by the AO for Rs.1,70,77,868/- and Rs.69,55,191/- on account of unexplained investment in the purchase of raw materials and inflation of purchases respectively.

4. Briefly stated facts are that the assessee is a limited company and engaged in the manufacturing business of Pharmaceuticals and Fine Chemicals. The AO during the assessment proceeding observed the

certain difference between the actual consumption of raw material vis-à-vis standard consumption prescribed under the Exim Input-OutputNorms (Duty Exemption Schemes) 2002-2008. On the question by the AO about the difference as discussed above, the assessee vide reply dated 28.12.2012 submitted as under:

> ***"1. Statement showing consumption of raw-materials as per our books of Accounts viz-a-viz as per the input output norms.***
>
> *As required by you, we have worked out the consumption of raw-material for eachitem of our finished goods as per our books of accounts and that as per the input output norms of Ministry of Commerce. Govt. of India.*
>
> *Please note that during the year under review, we had produced and sold the following finished goods.*
> *a. Chlorexdine Acetate*
> *b, Ghlorexdine Base*
> *c. Chlorexdine Gluconate 20% Solution*
> *d, Chlorexdine Hydro Chloride*
> *e.Progunail HCL*
> *f. Flupirtine Maleate*
>
> *Out of the above products, the Ministry of Commerce has fixed norms in respect of first four products only. The two remaining products namely, Progunail HCL & Flupirtine Maleate are such products for which no norms have been fixed. We enclose by way of Annexure-1 hereto, the copies of relevant pages of Input-Output Norms (Duty Exemption Schemes) 2004-2009.*
>
> *We have worked out consumption as per books and as per norms as required by you.*
>
> *We enclose the following papers in this connection.*

a) A statement giving production of a/I finished goods items as Annexure-2.
b) A statement showing actual consumption of raw-material as per books of accounts as Annexure-3.
c) A statement showing month wise details of consumption of raw-material as per Input Output Norms and comparison of consumption as per books and as per Norms as Annexure-4.
d) A summary of total consumption as per books and as per norms as Annexure-5.

2. Explanation regarding variation in consumption

We offer our detailed explanation regarding variation in consumption and reasons for request of not adding the difference in consumption to our taxable income by way ***of Annexure-6*** *hereto.*

While we have dealt with the above issue at length in Annexure-6, we summarise our contention /submission on this as follows.

1. *Differences due to changes in formula/composition of raw-materials*
2. *Hazardous material no longer used*
3. *Use of Catalyst materials not considered in fixing norms*
4. *Use of Pollution causing materials is banned*
5. *Our finished products details*
6. *Reasons for non-applicability of Norms to us*
7. *Difference due to our R&D efforts*
8. *Our submission for not disallowing the differences*
9. *Acceptance of consumption as per books by the Excise Authorities*
10. *Acceptance of consumption as per books by the Sales Tax VAT authorities*
11. *Maintenance of Quantitative records by the company*
12. *Acceptance of consumption as per books by statutory Auditors*
13. *No such requirement as per Accounting Standards*
14. *Position of Past Assessments, Appeals and acceptance of our contentions by appellate authorities.*

In the light of the above discussion, we hereby request you not to make addition to our total income on account of variation in consumption of raw-material."

However, the AO disagreed with the submission of the assessee and worked out the value of short consumption of raw material of Rs.1,70,77,868/- which was treated as an undisclosed investment. Similarly, the AO also worked out excess consumption of raw material of Rs.69,55,191/- which was treated as inflated purchases made by the assessee. Thus, the AO made the addition of Rs.2,40,33,059/- to the total income of the assessee for undisclosed investment and inflated purchases.

5. Aggrieved, assessee preferred an appeal to Ld.CIT(A) who has deleted the addition made by the AO.

Being aggrieved by the order of Ld. CIT(A) assessee is in appeal before us.

6. The Ld. AR before us submitted that in the identical facts and circumstances in the own case of the assessee in ITA No.954 & 1229/Ahd/2012 pertaining to the A.Y. 2007-08 deleted the addition made by the AO.

6.1 The Ld. AR also submitted that the order passed by the Hon'ble ITAT was subsequently confirmed by the Hon'ble Gujarat High Court pertaining to the A.Y. 2002-03 in Tax Appeal No.1182 of 2008 vide order dated 12.08.2016.

7. On the other hand Ld. DR vehemently supported the order of authorities below.

8. We have heard the rival contention and perused the materials available on record. At the outset, we note that the identical issue was decided by this tribunal in the case of the assessee in ITA 1229/AHD/2012 for the AY 2007-08 vide order dated 5th June 2018. The relevant extract of the order is reproduced below:

> *"13. Brief facts in this regard are that the Id.AO noticed that there was a variation in actual consumption of raw-material and standard consumption of material. To the show cause, assess,-e explained reasons for the variations in the consumption of the raw material as also extent of and how the variations arisen. However, the ld.AO did not accept the explanation of the assessee and busing his earlier order for the assessment year 2002-03 to 2006-07, an addition of Rs.62,63.591/- on account of items consumed less than the standard norms and further addition of Rs. 1,43,79,263/- on account of items consumed more than the standard norms were made. These two additions were challenged before the ld. First Appellate Authority, who folloiwng his order of the assessment year 2006-07 while following the order if the Tribunal in the case of assessee for the assessment years 2002-03, 2003-04 and 2004-05 deleted the impugned additions.*

14. At the outset. ld. counsel for the assessee has placed on record copy of the order of the Tribunal passed in the assessment year 2005-06 an 2006-07 in ITA No.2060/Ahd/2009 and 3l41/Ahd/2011 wherein similar addition has been deleted. The ld. First Appellate authority has followed the order of the Tribunal passed in the assessment years 2002-03, 2003-04 and 2004-05. The relevant observation of the ld.CIT(A) reads as under:

> ***"4.3 Decision:***
> *I have carefully perused the assessment order and the submissions given by the appellant. The addition was made by the A. O. by following the order of the A.O. for A. Y. 2002-03. The similar addition was also made by the A.O. for A. Y. 2006-07 while deciding of the appellant for that year. The addition have been deleted by me by following the order of the ITAT, Ahmedabad in the case of the appellant for A. Ys. 2002-03, 2003-04 & 2004-05. Accordingly, the addition made by the A. O. in this year is also directed to be deleted. Therefore, the additions of Rs.1,43,79,263/-on account of inflation of purchase of raw materials and Rs.62,63,591/- u/s. 69 of the Act is directed to be deleted. The grounds of appeal are accordingly allowed."*

15. We have considered rival submissions and gone through the record. We find dial the Tribunal has discussed this issue from para 4 to 4.1 in the assessment year 2005-06 and in para 9 in assessment year 2006-07. Basically, the Tribunal has followed order passed in the assessment year 2003-04 and 2005-06 on this issue and confirmed the order of the ld.CIT(A). Considering the similarity of the issue, we do not find any error in the order of the ld.CIT(A). This ground of appeal of the Revenue is rejected."

8.1 We further find that the Hon'ble Gujarat High Court in the case of the assessee has also decided the issue in its favor in Tax Appeal No.1182 of 2008 pertaining to the A.Y. 2002-03 vide order dated 12.08.2016. The relevant extract of the order is reproduced below:

> *"7. We have heard learned counsel for the parties. Inview of the observations made by the Tribunal, we are of theopinion, that the assessee was manufacturing pharmaceutical, medicines, which are being exported. The assessee was maintaining the norms which are prescribed by the Government of India for a particular pharmaceutical medicine which is to be exported. Since there was a variation in the ratio, the Assessing Officer made addition based on the statement of the General Manager, in-charge production. In our view, the Assessing Officer has based his addition on the basis of the documents which are not available on the record and based on the statement of the General Manager, in-charge production. Whether the assessee has followed the prescribed norms is not within the purview of the Income-tax Authority, In our view, the Tribunal has rightly held that the CIT(A) was wrong in relying on the input out consumption ratio. In our view, the Assessing Officer and the Commissioner of Income-tax (Appeals) have gone on different directions. Therefore, the view taken by the Tribunal is required to be accepted. In that view of the matter, we answer issue No. 1 in Tax Appeal No.1182 of 2008 in favour of the assessee and against the revenue."*

In view of the above, and respectfully following the same, we do not find any infirmity in the order of ld. CIT(A). Hence the ground of appeal of the Revenue is dismissed.

9. The second issue raised by the Revenue is that Ld. CIT(A) erred in enhancing the claim of deduction u/s 10B of the Act for Rs.28,50,411/-.

10. The assessee during the year has claimed a deduction of Rs.28,50,411/- on account of foreign exchange fluctuation loss in the foreign currency loan taken by the assessee. As such, the assessee has

claimed loss of Rs.28,50,411/- due to currency fluctuation as on 31-03-2009. As per the assessee, such loss was incurred as per the accounting standard as well as the mercantile system of accounting at the end of the Financial Year due to fluctuation in the foreign currency. The assessee also claimed that similar losses were also claimed in the earlier years and the gains were offered to tax in the earlier years.

However, the AO disagreed with the submission of the assessee and treated the impugned loss as capital in nature. Thus, the same was disallowed and added to the total income of the assessee.

11. Aggrieved, assessee preferred an appeal to Ld.CIT(A). The assessee before the Ld.CIT(A) among other arguments has made an alternate claim that even the disallowances are made on account of fluctuation in the foreign currency loan the same will be eligible for deduction u/s 10B of the Act. The Ld.CIT(A) after considering the submission of the assessee deleted the addition made by the AO in part by observing as under:

> *"With regard tofurther submission that lost disallowed should be consideredfor the purpose of allowing deduction under section 10B, it is seen that assessing officer has objected to admission of this additional ground by citing decision of Supreme Court in CIT vs Goetz India Ltd 157 taxmann 1(SC). 1 am of the view that the additional ground can be admitted in appeal proceedings based on decision of Supreme Court in the case of NTPC Ltd 229 ITR 383 (SC), especially when all the relevant material is already available on record. This ground of appeal*

is therefore the admitted. From the working of section 10B, it is seen that out of the total Forex loss of Rs. 2850411, an amount of Rs.2780464 was claimed against EOU and since this is disallowed the assessee is deduction under section 10 B will increase by amount of Rs. 2780464 and balance addition of Rs. 69947 is hereby confirmed. Thus this ground is partly allowed."

Being aggrieved by the order ofthe Ld.CIT(A) both the Revenue and assessee are before us.

12. The Revenue is in appeal before us against enhancement of exemption allowed by the Ld. CIT(A) on account of losses in the foreign currency loan whereas the assessee is in appeal against the order of Ld.CIT(A) wherein the impugned loss was treated as capital in nature.

First, we take up Revenue's ground of appeal:

13. The Ld. DR vehemently supported the order of AO. On the other hand the Ld.AR supported the order of Ld.CIT(A).

14. We have heard the rival contentions and perused the materials available on record. There is no ambiguity about the eligibility of deduction claimed by the assessee u/s 10B of the Act. Thus, if any disallowance is made in respect of the unit eligible for deduction u/s 10B of the Act, then the assessee will be entitled todeduction on the amount of profit enhanced by such disallowance. In this regard, we find relevant

to reproduce the necessary portion of Circular No.37 of 2016 issued by CBDT dated 02.11.2016 which is reproduced below:-

> *"3. In view of the above, the Board has accepted the settled position that the disallowances made under sections 32, 40(a)(ia), 40A(3), 43B, etc. of the Act and other specific disallowances, related to the business activity against which the Chapter VI-A deduction has been claimed, result in enhancement of the profits of the eligible business, and that deduction under Chapter VI-A is admissible on the profits so enhanced by the disallowance."*

In view ofthe above, we do not find any reason to disturb the finding of Ld.CIT(A). Hence the ground of appeal of the Revenue is dismissed.

coming to Assessee's Ground of CO:

15. The Learned AR before us submitted that the issue is covered in favor of the assessee by CBDT Circular No. Circular No.37 of 2016 issued by CBDT dated 02.11.2016. Therefore, the Ld. AR without going into the controversy whether the impugned loss is capital in nature relied on the CBDT Circular as discussed above. On the other hand, Ld. DR vehemently supported the order of authorities below.

16. We have heard the rival contentions and perused the materials available on record. At the outset, we note that the impugned issue has been decided in favor of the assessee by us vide paragraph No.14 of this order in the appeal of the Revenue.

16.1 As the assessee has not advanced any argument in support of his ground of appeal on the reasoning that his case is already covered in its favor by the CBDT Circular as discussed above. Therefore, we are not inclined to adjudicate the issue raised in the CO. by the assessee. Hence, we dismiss the same as infructuous.

Now coming to Cross Objection filed by the assessee:

17. The assessee has raised the following grounds of appeal in his Cross Objection:

> *"1. The learned CIT(A) has erred in law and on facts of the case in confirming the action of AO in disallowing Rs.43,689/- u/s 36(1)(va) r.w.s 2(24)(x) on account of alleged late payment of employees' contribution towards provident fund, ESI, etc. Under the facts and circumstances of the case, no such disallowance is required to be made.*
>
> *2. The learned CIT(A) has erred in law and on facts of the case in confirming the action of AO in making disallowance of Rs.28,50,411/- in respect of forex loss by holding the same to be capital in nature. Under the facts and circumstances of the case, no such addition is required to be made.*
>
> *3. Alternatively and without prejudice to above, ld. CIT(A) has erred in law and on facts of the case in not granting depreciation on enhanced cost of acquisition on account of adding foreign exchange fluctuation loss of Rs.28,50,411/- to the cost of assets.*
>
> *4. The learned CIT(A) has erred in law and on facts of the case in confirming action of the Id. AO in levying interest u/s 234A/B/C of the Act.*

5. The learned CIT(A) has erred in law and on facts of the case in confirming action of Id. AO in initiating penalty proceedings u/s 271(1)(c) of the Act.

18. The first issue raised by the assessee is that Ld.CIT(A) erred in confirming the disallowance u/s 36(1)(va) r.w.s. 2(24)(x) of the Act for Rs.43,689/-.

19. The AO during assessment proceedings observed that the assessee failed to deposit the employee's contribution to PF/ESI within the due date as specified under the relevant act, rule or notification issued thereunder. Therefore, the AO disallowed the same after having a reliance on the judgment of Hon'ble Gujarat High Court, in the case of CIT vs. GSRTC reported in 41taxmann.com 100 and added to the total income of the assessee.

20. Aggrieved, assessee preferred an appeal to Ld.CIT(A) who confirmed the order of the AO.

Being aggrieved by order of theLd.CIT(A) assessee is in the second appeal before us.

21. The Ld. AR before us conceded the fact that the issue is covered against the assessee by the Hon'ble Gujarat High Court in the case of CIT vs. GSTRC reported in 41taxmann.com 100. However, the Ld. AR

before us further submitted that the due date for the depositing the amount of employees contribution towards PF/ESI is to be seen from the relevant month, in which salary was paid to the employees and not from the month in which salary became due. The Ld. AR in support of his claim relied on the order of this jurisdictional Tribunal in the case of Suzlon Energy Ltd. vs. DCIT reported in 764 & 765/Ahd/2018 vide order dated 27.06.2018, wherein it was held as under:

> *"We may, however, add that a co-ordinate bench of this Tribunal, in the case of Rajjratna Metal Industries Ltd Vs. ACIT (ITA No.940/Ahd/2015; order dated 22.09.2017), has observed as follows:-*
>
> > *"3. Assessee's latter substantive ground challenges correctness of both the lower authorities' action disallowing/adding a sum of Rs.3,85,810/- u/s. 36(1)(va) r.w.s. 2(24) of the Act on account late payment of employees' contribution to PF & ESI in question. There is no dispute that hon'ble jurisdictional high court's decision in CIT vs. Gujarat State Road Transport Corporation (2014) 366 ITR 170 (Guj) upholds such a disallowance in principle. The assessee's case however is that relevant due date has to be seen not from the relevant month of salary but the one pertaining to its payment. He then files a computation chart indicating it to have paid above employees' PF/ESI contributions on 22.05.2009 and 28.05.2009 as against the due dates thereof following on 20.06.2009. The Revenue fails to dispute this factual position. We therefore quote this tribunal's co-ordinate bench decision in Kanoi paper & Industries Ltd. vs. ACIT 75 TTJ 448 that the relevant date in such case is that of month of the actual payment of wages/salaries. We therefore rely on the above co-ordinate bench decision and direct the Assessing Officer to delete the impugned disallowance as well."*
>
> *4. In effect thus while any delayed deposit of PF/ESI is to be disallowed, in terms of Hon'ble Gujarat High Court's judgment in the*

case of Gujarat State Road Transport Corporation (supra), the question as to whether there is a delay or not may be decided by the Assessing Officer in the light of above observations by the coordinate bench. The assessee will get relief, if found admissible, on that basis.

5. In the result, appeals of the assessee are allowed for statistical purposes."

In view of the above, the Ld. AR of the assessee before us submitted that the matter should be restored to the file of AO for fresh adjudication in terms of the above.

22. On the other hand, the Ld. DR submitted that the jurisdictional ITAT in the case of *Suzlon Energy Ltd. (supra)* has relied on the order of Hon'ble ITAT, Kolkata Benches in the case of Kanoi Paper & Industries Ltd. vs. ACIT reported in 75 TTJ 448, wherein, the issue was decidedabout employees provident fund. As such, there was no issue about the payment of employee's contribution towards ESI. Therefore, the disallowance of the contribution towards ESI should be seen from the month in which it became due. Therefore, the claim of the assessee in the case of delay in the payment of employee's contribution towards ESI, cannot be decided/ allowed by the date of payment.

22.1 The Ld. DR further submitted that the payment of Wages Act, 1936 requires that the payment should be made before the expiry of the 7th day after the last day of the wage period, where the salary is less than

thousand rupees and in other cases, it should be the 10th day. The payment of Wages Act requires that the payment should be made within the period as specified. Thus, if the assessee can claim a deduction of the employee's contribution towards PF/ESI on the payment basis, then there is a possibility that the assessee will delay in the payment of wages to the workers. Thus, if the deduction for contribution towards PF / ESI is allowed to the assessee by date of payment of salary, then the purpose of Wage Act, 1936 will be defeated.

The Ld. AR in his rejoinder submitted that no reference should be made to the payment of wages Act while deciding the issue under the Income Tax Act.

23. We have heard the rival contentions and perused the materials available on record. In the instant case, the assessee has delayed in making the payment of employee's contribution of PF/ ESI as specified under the relevant Act. Therefore, the disallowance was made by the AO u/s 36(1)(va) r.w.s. 2(24)(x) of the Act. The Ld. CIT-A subsequently confirmed the view taken by the AO. The Ld. AR before us has not challenged the proposition laid down by the Hon'ble Gujarat High Court in the case of CIT Vs. GSRTC (Supra), wherein it was held as under:

> *"In view of the above and for the reasons stated above, and considering section 36(1)(va) of the Income Tax Act, 1961 read with sub-clause (x) of clause 24 of section 2, it is held that with respect to the sum received*

by the assessee from any of his employees to which provisions of sub-clause (x) of clause (24) of section (2) applies, the assessee shall be entitled to deduction in computing the income referred to in section 28 with respect to such sum credited by the assessee to the employees' account in the relevant fund or funds on or before the "due date" mentioned in explanation to section 36(1)(va).Consequently, it is held that the learned tribunal has erred in deleting respective disallowances being employees' contribution to PF Account / ESI Account made by the AO as, as such, such sums were not credited by the respective assessee to the employees' accounts in the relevant fund or funds (in the present case Provident Fund and/or ESI Fund on or before the due date as per the explanation to section 36(1)(va) of the Act i.e. date by which the concerned assessee was required as an employer to credit employees' contribution to the employees' account in the Provident Fund under the Provident Fund Act and/or in the ESI Fund under the ESI Act."

However, the Ld. AR before us has submitted that the due date for depositing the employee's contribution towards PF/ESI should be seen from the date of the payment and not from the due date. In this regard, we note that the Jurisdictional Tribunal in the identical facts and circumstance in the case of Suzlon Energy Ltd.(supra) has restored this issue to the file of the AO for fresh adjudication. Therefore, respectfully following the same, we are inclined to restore the issue on the hand to the file of AO for fresh adjudication in accordance to the provision of law as well as after considering the order of this Tribunal in the case of Suzlon Energy Ltd. *(Supra).* Thus, the issue raised by the assessee in its CO is **allowed for statistical purpose.**

24. The second issue raised by the assessee in this appeal is that the Ld.CIT(A) erred in treating the forex loss of Rs.28,50,411/- as capital in nature.

25. The above issue has already been decided in favor of the assessee vide para no.16 of this order wherein we have held that the ground raised by the assessee is infructuous and does not require any separate adjudication. Thus, we dismiss the same.

26. In the result, the appeal of the Revenue is dismissed, and CO of the assessee is partly allowed for statistical purposes.

This Order pronounced in Open Court on	**01/01/2019**

Sd/- Sd/-

(MADHUMITA ROY) **(WASEEM AHMED)**
JUDICIAL MEMBER **ACCOUNTANT MEMBER**

Ahmedabad; Dated 01/01/2019
Priti Yadav, Sr.PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-8, Ahmedabad.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad.
6. गार्ड फाईल / Guard file.

आदेशानुसार/BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad