

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD “C” BENCH, AHMEDABAD**

[Coram: Pramod Kumar VP and Rajpal Yadav JM]

ITA No. 2757/Ahd/2017
Assessment Year: 2007-08

Nabros Pharma Pvt LtdAppellant
*3rd Floor, Nabros House,
B/h British Library, Law Garden,
Ahmedabad – 380 006
[PAN : AAACN 7886 N]*

Vs.

Dy. Commissioner of Income-taxRespondent
Circle 3 (1)(1), Ahmedabad

Appearances by:

***Bandish Soparkar, for the Appellant
Mudit Nagpal, for the Respondent***

Date of concluding the hearing : 15.03.2019
Date of pronouncing the order : 15.03.2019

O R D E R

Per Pramod Kumar, VP:

1. The petition seeking an early hearing of this appeal was fixed before us today. When the said petition came up for hearing and our attention was invited to the fact that the grievance raised in this appeal, on merits, is covered by a co-ordinate bench order dated 01.11.2018 in assessee's own case, we put it to the parties whether appeal itself can be disposed of today. In response to this suggestion, and after going through the co-ordinate bench decision, learned Departmental Representative was gracious enough to accept the suggestion. We, therefore, heard the appeal today itself.
2. The appeal is directed against order dated 11th October 2017 passed by the CIT(A) in the matter of assessment under section 143(3) r.w.s. 147 of the Income Tax Act, 1961, for the assessment year 2007-08.
3. Grievance of the appellant, as pressed before us, is that "*learned CIT(A) erred in law and on facts confirming reworking of exemption under section 10B by Assessing Officer reducing profit of eligible unit by reducing profit of eligible unit by Rs.33,08,149/- invoking provisions of section 10B(7) r.w.s. 80IA(10) of the Act.*"
4. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

5. We find that the issue is squarely covered by the co-ordinate bench decision (supra) wherein, on admittedly materially identical facts, the co-ordinate bench has, *inter alia*, observed as follows:-

"4. When the matter was called for hearing, the learned AR for the assessee insisted that the action of the Revenue is neither sustainable on the jurisdictional point nor on merits of the addition. The learned AR simultaneously submitted that where the Tribunal is convinced with the substantive issue on merits, the adjudication on legal ground may not be necessary. Addressing the issue on merits, the learned AR pointed out that the assessee is a manufacturer of pharmaceutical products and has derived income from 100% export oriented unit which is eligible for deduction under s.10B of the Act. The assessee also derives income from other non-eligible unit as well. Making reference to the assessment order as well as the first appellate order, the learned AR submitted that it is the case of the Revenue that the Directors/shareholders of the assessee company have advanced huge amount of interest free funds to the assessee company running into crores during the period of exemption/deduction claimed by the assessee company under s.10B of the Act in respect of eligible unit. It was submitted that it is the case of the Revenue that by providing interest free funds to the assessee company and by not charging interest thereon, the profits of the eligible unit under s.10B of the Act has been artificially jacked up. The learned AR thus pointed out that provisions of Section 10B(7) r.w.s. 80IA(10) of the Act was applied and the AO took a view that the availability of interest free funds of large amounts to the assessee company by the Director/shareholder was an arrangement to show more than ordinary profits by the assessee company to enable the assessee company to claim deduction on large profits under s.10B of the Act. The AO accordingly computed notional costs towards interest on such interest free funds made available by the Directors/shareholders to the company and assumed that to be an ordinary expenditure for the purposes of determination of ordinary profits in terms of Section 10B(7) r.w.s. 80IA(10) of the Act. The notional interest expenditure attributable to eligible unit amounting to Rs.41,54,153/- was accordingly reduced from the deduction available to the assessee company and as a corollary, the taxable income of the assessee company was increased to this extent. In this background, the learned AR referred to the financial statement as annexed in the paper book and submitted that while the deduction under s.10B of the Act was claimed from AY 2007-08, the Directors/shareholders of the assessee company had provided interest free funds of similar type in the earlier financial years as well. The funds of the Directors/shareholders were also found to be their own and were not borrowed by them to, in turn, provide interest free lending to the company. The learned AR submitted that 80IA(10) of the Act does not contemplate providing for expenses on notional basis which has not been incurred by the assessee company at all. The law does not oblige the assessee to incur expenses. The learned AR also pointed out that the issue is no longer res integra and covered by the decision of the co-ordinate bench of Tribunal in the case of ITO vs. Gilvert Ispat ITA No. 345/Chd/2011.

5. The learned DR, on the other hand, relied upon the observations made by the CIT(A) concluding the issue against the assessee.

6. We have carefully considered the rival submissions. The central issue involved in the captioned appeal is whether an 'arrangement' of business transacted between the assessee and its Directors/shareholders can be inferred whereby the assessee earned more than ordinary profits as contemplated under s. 10B(7) r.w.s. 80IA(10) of the Act. An integral question would also arise as to whether the charge of interest on money lent by the Directors/shareholders can be said to be an activity falling within the scope of the expression 'business transacted between them' as codified in Section 80IA(10) of the Act.

6.1 Section 10B of the Act essentially provides for tax incentive in the form of deduction of profits and gains derived from export of articles or things etc. By virtue of sub-section 7 of Section 10B of the Act, fetters imposed under s.80IA (10) of the Act are applicable while determining deduction under s.10B of the Act. Section 80IA(10), in turn, seeks to negate an artificial inflation in profits due to some business arrangements with an object to claim higher deduction. Section 80IA(10) enables the AO to substitute the ordinary and reasonable profits for the purposes of deduction under s.10B of the Act in certain circumstances.

6.2 As pointed out on behalf of the assessee and as borne out from the orders of the authorities below, it is apparent that the assessee had provided interest free funds of substantial amounts even prior to financial year 2006-07 (AY 2007-08) when the deduction under provisions of Section 10B of the Act was first availed. Secondly, Directors/shareholders have utilized their own funds for lending to the assessee company albeit interest free. Needless to say, the corporate veil exists between the shareholders and the company. The extra profit allegedly earned by the corporate company owing to such interest free funds cannot be returned to the coffers of its shareholders without incurring dividend tax etc. even under Income Tax Laws. Besides, we find it manifest that the charging of interest or otherwise on funds provided by the Directors/shareholders to the assessee company cannot fall within the sweep of expression 'business transacted between them' as contemplated under s.80IA(10) of the Act. The aforesaid expression impliedly indicates transaction in the course of 'business activity'. A mere diversion of funds in the form of interest free lending by shareholders to its company do not partake the character of a business transaction. We are alive to the fact that while alleging 'arrangement', the AO has narrated circumstances like withdrawal of interest free funds immediately on the completion of eligible period for availing benefit under s.10B of the Act. No doubt, such circumstances bring some disquiet. However, such circumstances cannot be regarded as overwhelming for the purposes of grave allegation of arrangement contemplated under s. 80IA(10) of the Act. We thus find that the Revenue has mis-directed itself in law as well as on facts in artificially computing the non-existent interest costs and thus denying the deduction under s.10B of the Act eligible to the assessee. The action of the Revenue is wholly unsustainable in law and deserves to be set aside and cancelled. While doing so, we also note that similar issue had cropped up in the case of Gilvert Ispat (supra) also which was answered in favour of the assessee. Consequently, the order of the CIT(A) on the aforesaid issue is set aside and the AO is directed to exclude the aforesaid adjustment for the purposes of determination of profits of the assessee company under s.10B of the Act.

7. Resultantly, appeal of the assessee is allowed on merits on this score.”

6. We see no reasons to take any other view of the matter than the view so taken by the co-ordinate bench. Respectfully following the same, we upheld the plea of the assessee and delete the impugned reduction of 10B relief by Rs.33,08,149/-. The assessee gets the relief accordingly.

7. In the result, the appeal is allowed in the terms indicated above. Pronounced in the open court today on the 15th March, 2019

Sd/-

Rajpal Yadav
(Judicial Member)

Ahmedabad, the 15th day of March, 2019

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Copies to: (1) The appellant
(2) The respondent
(3) Commissioner
(4) CIT(A)
(5) Departmental Representative
(6) Guard File

Sd/-

Pramod Kumar
(Vice President)

By order

TRUE COPY

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad