

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "C",
MUMBAI
BEFORE SHRI PAWAN SINGH JUDICIAL MEMBER AND
SHRI RAJESH KUMAR ACCOUNTANT MEMBER
ITA No. 4590/Mum/2017
(Assessment year: 2010-11)

DCIT-Cent. Cir-6(1), Room No.1905,19 th Floor, Air India Building, Nariman Point, Mumbai-400021	Vs	M/s Indoco Remedies Ltd, Indoco House, 166 CST Road, Santacruz (East) Mumbai-400 098 PAN : AAACI0380C
APPELLANT		RESPONDEDNT

ITA No. 4538/Mum/2017 (Assessment year: 2010-11)

ITA No. 4627/Mum/2017 (Assessment year: 2010-11)

M/s Indoco Remedies Ltd, Indoco House, 166 CST Road, Santacruz (East) Mumbai-400 098 PAN : AAACI0380C	Vs	DCIT-Cent. Cir-6(1), Room No.1905,19 th Floor, Air India Building, Nariman Point, Mumbai-400021
APPELLANT		RESPONDEDNT

Assessee by	Shri Madhur Aggarwal with Fenil Bhatt ARs
Revenue by	Shri Ashish Pophare Sr DR

Date of hearing	20.08.2019
Date of pronouncement	27.08.2019

ORDER

Per Pawan Singh, Judicial Member :

1. This group of three appeals, out of which two cross appeal against the order of Commissioner of income tax (Appeals) hereinafter called learned

Commissioner (Appeals)-54 Mumbai, dated 20 March 2017. Third appeal by revenue arises out of order passed by assessing officer under section 154, dated 29th July 2015, which was set aside by learned Commissioner (Appeals) vide order dated 20 March 2017. All appeal relates to same assessment year, therefore, all the appeals were clubbed, heard together and are decided by common order for the sake of brevity and to avoid the conflicting decision. The assessee in its appeal in ITA No. 4538/M/2017 has raised following grounds of appeal:

(1)(a) The Commissioner of income tax (Appeals) Mumbai erred in holding that AO was right in relocating certain expenses to Baddi Unit (80IC unit), total amounting to ₹ 5,92,70,207/-

The appellant submits that allocation of expenses is in accordance with the provision of section 80IC and AO has been consistently followed and accepted in the earlier years.

The appellants therefore pray that AO be directed to accept the allocation of expenses by the appellants.

(1)(b) Without prejudice to ground No. 1 above, the AO made an arithmetical error in computing the reallocation of expenses. The AO completed the amount at ₹5,92,70,207/- as against ₹ 2,88,77,337/-

2. The revenue in its cross appeal has raised following grounds of appeal:

(1) On the facts and in the circumstances of the case and in law, learned CIT(A) erred in deleting the disallowances of gifts, being in the nature of freebies given to doctors without considering that Hon'ble Himachal Pradesh High Court in case of Confederation of Indian Pharmaceutical industries versus CBDT & others (CWP No. 10793 of 2013) has upheld the constitutional validity of CBDT Circular No. 5/2012, which has in turn laid down that claim of any expenses incurred in providing freebies

in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and ethics) Regulation 2002 shall be inadmissible under 37(1) of the income tax Act being an expenses prohibited by law.

- (2) On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the disallowances of gifts, being in the nature of freebies given to doctors even though Indian Medical Council (Professional Conduct, Etiquette and ethics) Regulation 2002 mandate that a physician shall not give, solicit or receive nor shall he offer to given, solicit or receive, and gratuity commission or bonus in consideration of all return for refereeing, recommending or procuring of any patient for medical, surgical or other treatment.
 - (3) On the facts and in the circumstances of the case and a law, learned CIT(A) erred in deleting the disallowance of gifts, being in the nature of freebies given to doctors after observing that prohibition by Indian Medical Council (IMC) Regulations (IMC), 2009 is applicable on Medical Practitioner and not on Pharmaceutical companies without appreciating that the aim of IMC Regulations 2002 and 2009 is to curb the malpractices in the Medical profession and for the benefit of public and patient and equally binding on both medical practitioner and Pharmaceutical companies.
 - (4) On the facts and in the circumstances of the case and in law, learned CIT(A) erred in deleting the disallowances of gifts, being in the nature of freebies given to doctors after observing that prohibition by Indian Medical Council (IMC), Regulations (IMC) 2009 is applicable on medical practitioner and not on Pharmaceutical companies without appreciating that apex court in case of Maddi Venkatraman & Company Private Limited versus CIT[1998] 229 ITR 534 has adjudicated that it would be “against the public policy” to allow under one statue the benefit of deduction of expenditure incurred in violation of the provisions of another statue.
3. Brief facts of the case as extracted from the order of lower authorities are that assessee is a company engaged in manufacturing of Pharmaceuticals and trading of bulk drugs and formulations filed its return of income for assessment year 2010-11 on 6th October 2010, declaring total income at Rs.

Nil under normal provisions and book profit under section 115JB at ₹42,99,79,822/-. Subsequently, the assessee filed revised return declaring total income at Rs. Nil under normal provisions and book profit under section 115 JB at ₹ 43,00,60,245/- In the return of income the assessee claimed deduction under section 80IC in respect of profits of the eligible unit. The assessee claimed deduction under section 80 IC after allocating common expenses on account of packaging and delivery charges, analytical expenses and advertisement and sale promotion expenses. No allocation on account of depreciation on head office assets and research and development expenses on the ground that no parts of the same were attributable for earning the profit of unit eligible for deduction under section 80IC. The assessing officer rejected the aforesaid claim of allocation of the expenses and after reallocating the common expenditure as well as allocating expenses to head office (HO) asset and research and development (R&D) expenses reduce the claim of deduction under section 80IC by ₹ 5,92,70,207/-. The assessee also claimed expenses on account of presentation articles at ₹1,06,75,897/-. On perusal of details furnished by assessee the assessing officer took his view that such expenses are in contravention of Clause 6.4.1 of chapter 6 of Indian Medical Council Regulations, wherein it has been prescribed that making such professional

gifts to Doctors is an unethical act and receipt of such gifts by professional is barred under Regulation of Indian Medical Council and disallowed the same. On appeal before learned Commissioner (Appeals) the action of assessing officer in disallowance on expenses on presentation of articles was reverse/allowed, however, disallowance of reallocation of expenses was upheld. Thereby, aggrieved by the order of learned Commissioner (Appeals) both the parties have filed their respective appeal raising the grounds of appeal which we have referred above.

4. We have heard the rival submissions of learned authorized representative (AR) of assessee and learned departmental representative (DR) for revenue and also gone through the orders of lower authorities.
5. At the outset of hearing the learned AR for assessee submits that the tax effect involved in the appeal filed by the revenue is less than ₹ 50 lakh, thereby the appeal of the revenue is not maintainable in view of CBDT Circular No. 17 of 2019 dated 8th August 2019. On the other hand the learned DR for the revenue after going through the grounds of appeal fairly submits that the additions/disallowances made on account of the presentation of gift of articles of ₹ 1,06,75,897/- only and tax effect on such disallowance is less than ₹ 50 lakhs. Considering the submission of both the parties, we are of the view that the appeal filed by revenue is not

maintainable as the revenue is precluded from filing appeal before the tribunal wherein tax effect involved in the appeal is less than ₹ 50 lakhs.

6. In the result appeal of the revenue is dismissed.
7. In respect of grounds of appeal in assessee's appeal. the ld. AR for the assessee submits that the assessee claimed deduction under section 80IC in respect of profits of the units eligible for deduction, the assessee claimed deduction under section 80 IC after allocating common expenses on account of packaging and delivery charges, analytical expenses and advertisement and sale promotion expenses. No allocation on account of depreciation on head office assets and research and development expenses as no part of the same were attributable for earning the profit of unit eligible for deduction under section 80IC. The assessing officer rejected the aforesaid claim (stand) of allocation of the expenses and after reallocating the common expenditure as well as allocating expenses to head office (HO) asset and research and development (R&D) expenses, reduce the claim of deduction under section 80 IC by ₹ 5,92,70,207/-. The ld. AR for the assessee submits that following working of reallocation.

Expenses	% applied	Total expenses	Allocation to but the unit by AO	Expenses are allocated by the assessee	(Excess) short allocation
Packaging and delivery charges	39%	1468999842/-	57290938/-	52126085/-	51,64,853/-

Analytical expenses	39%	32787107/-	12786972/-	7053988/-	57,32,984/-
Advertisement on sale promotion expenses	39%	121863844/-	47526899/-	77919769/-	(30392870) The AO has taken it nil
			Total	(A)	(1,94,95,033)
Depreciation on HO assests	39%	21805765/-	8504248/-	0	8504248/-
R&D expenses	39%	102225954/-	39868122/-	0	39868122
			Sub total	(B)	48372370/-
			Gross total	A+B	28877337/-
				As per AO order	59270207/-

8. The learned AR of the assessee further submit that the allocation made by assessing officer in respect of packaging and delivery charges, analytical expenses and advertisement on sale promotion expenses results in increasing the profit of eligible undertaking by ₹ 1,94,95,033/-. The learned AR for assessee submit that if the basis of allocation made by assessing acing officer is upheld, the same should be followed in respect all the items and not on selective basis as has been done by him by not reallocation of the expenses to the extent of packaging & delivery charges, analytical expenses and advertisement on sale promotion expenses. Therefore, the learned AR submits that relocation of the expenses to the extent of packaging delivery charges, analytical expenses are and advertisement on sale expenses should be deleted. The learned AR further submits that issue of reallocation of

packaging and delivery charges, analytical expenses and advertisement on sale promotion expenses has been decided in assessee's own case in assessee's favour by Tribunal in assessment year 2008-09 in ITA No. 7373/Mumbai/2011, dated 23.10.2012.. And the issue of reallocation of depreciation on head office asserts and R&D expenses has been remanded back to the file of assessing officer by the Tribunal in assessee's own case for assessment year 2009-10 in ITA No.4478/Mumbai/2012 dated 09.10.2013, the learned AR further submits that to that extent the matter may be restored to the assessing officer with similar directions.

9. On the other hand the learned AR for the revenue supported the order of assessing officer.

10. We have considered the rival submission of the parties and have gone through the orders of authorities below. Perusal of the order of the tribunal assessee's own case for assessment year 2008-09 shows that on similar issue of reallocation of packaging and delivery charges, analytical expenses and advertising and sale promotion expenses, the issue was decided in fair of assessee.

“11. As regards the issue raised in ground No.2 relating to allocation of overhead expenses to Baddi Unit entitled for deduction u/s 80IC, it is observed that the basis adopted by the assessee for apportionment of HO and other common expenses of Baddi unit was not found to be acceptable by the AO.

According to him, the common expenses should be apportioned on prorate basis in the ratio of sales and accordingly adopting the said basis, additional expenses attributable to the Baddi unit were worked out by the AO at Rs.5,63,14,836/- and the claim of the assessee for deduction u/s 80IC was restricted by him. On appeal, the learned CIT(Appeals) accepted the basis adopted by the assessee for apportionment of common expenses to Baddi unit following the order of his predecessor in assessee's own case for assessment year 2007-08 as well as the order of the Tribunal in assessee's own case for assessment year 2003-04 on a similar issue.

12. At the time of hearing before us, the learned counsel for the assessee has filed a copy of the order of the Tribunal dated 11th Sept., 2009 passed in assessee's own case for assessment years 2001-02 to 2004-05 and a perusal of the same shows that a similar issue was considered and decided by the Tribunal in paragraph No. 45 of the said order. As noted by the Tribunal therein, the reallocation of expenses was made by the AO for the reasons stated in the block assessment completed in the case of the assessee on 27-02-2004. As further noted by the Tribunal, the said basis adopted by the AO in the block assessment for allocation of expenses, however, was not accepted by the learned CIT(Appeals) while disposing of the appeal filed by the assessee against the block assessment order and the addition made by the AO by restricting the claim of the assessee for deduction u/s 80IB was deleted. Since the said order of the learned CIT(Appeals) giving relief to the assessee on this issue was not challenged by the Revenue and had become final, the Tribunal accepted the basis of allocation adopted by the assessee and decided the similar issue in favour of the assessee. As the issue involved in the year under consideration as well as all the material facts relevant thereto are similar to that of the earlier years decided by the Tribunal vide its order dated 11th Sept., 2009, we respectfully follow the said order and uphold the impugned order of the learned CIT (Appeals) giving relief to the assessee on this issue.”

11. Further on similar set of facts the issue of reallocation of depreciation on head office assets and research under development expenses has been restored back to the file of assessing officer in appeal for assessment year 2009 -10. The coordinate bench passed the following order;

“15. We have heard the rival arguments and have perused the orders passed by the revenue authorities and the facts as noted by the AO and as submitted by the DR.

16. On going through the various details and submissions, we are of the considered view that though the assessee has allocated packing & delivery charges and analytical expenses, there is a difference in the allocation made by the assessee and the AO. Also we find that R&D expenses and depreciation have not been allocated at all by the assessee. We are aware that the assessee has maintained separate books for HO and Baddi unit, and R&D unit, which would benefit the business as such, like wise depreciation would also have some element of commonality of the HO and R&D unit and eligible unit at Baddi. We are also aware, consistently the coordinate Benches have been allowing the claim of the assessee, but to iron out the doubts in the mind of the AO, it is necessary that the AO must factually get satisfied that the assessee has allocated expenses wherever necessary and not allocated wherever it was not found to be not necessary. Both the parties have no objection if the matter is restored to the AO for verification. We, therefore, restore the issue to the file of the AO, who shall examine the allocability of expenses of R&D and depreciation if at all, relying on the books as maintained by the various units.

17. Ground no. 2 is therefore, allowed for statistical purposes.”

12. Therefore, considering the decision of Tribunal on similar set of the issue raised by assessee in the present appeal is restored back to the file of assessing officer to allow the reallocation of packaging and delivery charges, analytical expenses and advertisement & sale promotion expenses as per the order of Tribunal in assessment year 2008-09. The assessing officer is also directed to verify the fact and pass the order in accordance with the direction of Tribunal in assessee's own case for assessment year 2009-10 on reallocation of depreciation of head office and R&D expenses. Needless to order that before passing the order the assessing officer shall grant opportunity of hearing to assessee and to furnish its documents and submissions and pass the order in accordance with law.

13. In the result the appeal of the assessee is allowed for statistical purpose.

ITA No. 4627/Mum/2017 by Revenue (arising on order u/s 154)

14. The facts leading to file the present appeal is that the assessment for assessment year 2010-11 was completed under section 143(3) on 28th March 2013. The assessing officer while passing the assessment order made reallocating of R&D expenses of ₹ 10,22,25,954 /-debited to the profit and loss account, between 80IC and known 80 IC unit, thereby reduce the profit eligible for deduction under section 80IC by ₹ 3,98,68,122/-. On appeal before Commissioner (Appeals) the said action of assessing officer was

confirmed. Subsequently, the assessing officer issued notice under section 154 dated 15th November 2014, for proposing to recompute the deduction under section 35 (2AB), on the basis of information available from department of Scientific and Industrial Research (DSIR) *website* concerning the expenditure incurred on R&D activities by assessee. The assessee filed its reply dated 4th December 2014, which was duly accepted by assessing officer. However, the assessing officer recomputed the allocation of R&D expenses of Baddi unit which was eligible for deduction under section 80IC, on the ground that the reallocation ought to have been made on the basis of weighted deduction claimed under section 35 (2AB) and not on the basis of amount debited/charged to the profit and loss account. Accordingly the assessing officer reduce the claim of deduction under section 80IC by ₹3,93,39,283/-. Aggrieved by the order of assessing officer the assessee filed appeal before learned Commissioner (Appeals) wherein it was held that assessing officer erroneously exercise jurisdiction under section 154. Thus, aggrieved by the order of learned Commissioner (Appeals) the revenue has filed present appeal before the Tribunal.

15. We have heard the submission of learned DR for the revenue and the learned AR of the assessee and gone through the order of the lower authorities. The learned DR for the revenue supported the order of assessing officer. The

learned DR further submits that matter of apportionment was note a debatable issue as held by learned Commissioner (Appeals).

16. On the other hand the learned AR of the assessee supported the order of Commissioner (Appeals). The learned AR further submit that issue of a allocation of R& D expenses of Baddi unit eligible for deduction under section 80IC has been remanded back to the assessing officer in earlier years to determine as to whether R&D expenses is relatable to Baddi unit. Therefore, the question of the quantum of allocation itself become a debatable issue and, hence, outside the purview of section 154. The learned AR further submit that even if allocation of R&D expenses has to be made to Baddi unit, the allocation should be as per the expenses debited to the profit and loss account or as computed under section 35(2AB) itself debatable. The learned AR further submit that issue of reallocation of R&D expenditure being considered by appellate authority, the same was outside the purview of section 154. In support of his submission the learned AR of the assessee relied upon the decision of Hon'ble Gauhati High Court in P Das & Co. Vs DCIT (217 ITR 29 Gau HC) and CIT versus Shri Eklingi Trust (250 ITR 699 Raj HC). The learned AR further submits that issue of allocation of R& D expenses was not raise in the show cause notice or during the course of hearing of proceedings under section 154. The learned

AR submitted that the show cause notice to the assessee was in respect of R&D expenses as per information available on the DSIR *website* and not for allocation of R&D expenses to the Baddi unit. Therefore, the order passed under section 154 is erroneous being contrary to the principle of natural justice.

17. We have considered this rival submission of parties and perused the order of lower authorities. We have also deliberated on various case law relied by learned AR of the assessee. We have noted that the issue on which assessing officer issued notice under section 154 for rectification, was the subject matter of appeal before learned Commissioner (Appeals). We are further noted that the allocation/reallocation of various expenses of eligible unit was upheld by learned Commissioner (Appeals). However, on further appeal before the Tribunal we have allowed certain expenses and restored the two components of this issue to the assessing officer by following the order of Tribunal in earlier years. The learned AR of the assessee vehemently argued before us that the issue of the quantum of allocation itself become a debatable issue and, hence, outside the purview of section 154. We find merit in the submission of learned AR of the assessee as the similar issue was restore back to the file of assessing officer in the appeal of earlier years.

18. The learned AR for assessee in his other submission has also vehemently submitted that the Hon'ble Gauhati High Court in case of P. Das & Co. (supra) wherein it was held that when appeal is filed relating to a matter and same was considered or decided to be treated to have been considered or decided by appellate authority, it is no longer open for assessing officer to reopen or reargue or rectify the said issue, which we concur.

19. Further the Hon'ble Rajasthan High Court in CIT Versus Shri Eklingji Trust (supra) held that section 154(1A) does not permit rectification of the original order in respect of which appeal has been taken to the superior authority and that matter has been subjected to appellate decision. Moreover, we have noted that the learned Commissioner (Appeals) while granting relief to the assessee held that a low concern of common expenses incurred to various units, itself is a debatable issue and the issue as considered by assessing officer in the impugned rectification order under section 154 of the Act of allocation of claim under section 35 of the Act to various units is also debatable, particularly when assessing officer while computing the Gen assessment had not won any finding on such issue therefore the same is beyond the purview of provision of section 154 of the act. The learned Commissioner (Appeals) has cleared the held that concept of allocation of common expenses to various units is to compute correct and true profit of

various unit to ensure that assessee does not get excess claim by inflicting the profit of eligible unit and deflating the profit of the unit which are not eligible for deduction. Considering the above factual and legal position, we do not find any illegality or infirmity in the order passed by learned Commissioner (Appeals), which we are affirms. In the result the grounds of appeal raised by the revenue is dismissed.

20.In the result appeal of the revenue is dismissed

Order pronounced in the open court on 27-08-2019.

Sd/-	Sd/-
(Rajesh Kumar)	(Pawan Singh)
Accountant Member	Judicial Member

Mumbai, Date : 27th August, 2019

Copy to :

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By order

Asstt. Registrar, ITAT, Mumbai