



M/s Merck Specialties Private Limited
ITA No.1947/Mum/2014
Assessment Year: 2009-10

आयकर अपीलीय अधिकरण “जे” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“J” BENCH, MUMBAI

माननीय श्री महावीर सिंह, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI MAHAVIR SINGH, JM AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ I.T.A. No.1947/Mum/2014
(निर्धारण वर्ष / Assessment Year:2009-10)

| | | |
|--|---------------------|---|
| M/s. Merck Specialties Pvt. Ltd. Shiv Sagar Estate “A”, Annie Besant Road Worli, Mumbai-400 018. | बनाम/ Vs. | DCIT-Range 6(3) Aaykar Bhavan M.K. Road Mumbai. |
| स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AAECM-2634-B | | |
| (अपीलार्थी/ Appellant) | : | (प्रत्यर्थी / Respondent) |

| | | |
|----------------------|---|----------------------------------|
| Appellant by | : | Ms. Aarti Vissanji-Ld. AR |
| Respondent by | : | Shri Bhupendra Kumar Singh-Ld.DR |

| | | |
|--|---|------------|
| सुनवाई की तारीख/ Date of Hearing | : | 17/09/2019 |
| घोषणा की तारीख / Date of Pronouncement | : | 11/11/2019 |

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member) :-

1. Aforesaid appeal by assessee for Assessment Year [in short referred to as ‘AY’] 2009-10 contest the final assessment order dated 31/01/2014 passed by Ld. Dy. Commissioner of Income Tax- 6(3), Mumbai [AO] u/s 143(3) r.w.s 144C(13) pursuant to the directions of Ld. Dispute Resolution Panel-I, Mumbai, [DRP] u/s 144C(5) dated 30/12/2013. The Grounds raised by assessee reads as under: -



M/s Merck Specialties Private Limited
 ITA No.1947/Mum/2014
 Assessment Year: 2009-10

Grounds

In the facts and circumstances of the case and in law, the Learned Assessing Officer (AO) / Hon'ble Dispute Resolution Panel (DRP) / Transfer Pricing Officer (TPO)(as the case may be) erred in -

1.1 Passing the impugned order U/s. 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (the Act) making huge additions, disallowances and making transfer pricing adjustments based on surmises, conjectures, presumptions and assumptions by merely following the stand taken in the immediately preceding assessment year and without considering the papers and documents submitted as also submissions made during the course of assessment proceedings and the proceedings before the Hon'ble Dispute Resolution Panel.

1.2 Transfer Pricing Issues:

1.2.1 Addition in respect of technical know-how fees of Rs. 1,12,36,000

On the facts and in the circumstances of the case, and in law, the Learned TPO erred in proposing and the Hon'ble DRP / AO further erred in confirming the adjustment of Rs. 1,12,36,000 in respect of technical consultancy fees paid by the Appellant to its AE without specifying any method.

- a) The Ld. DRP and consequently the Ld. AO erred in not considering the Transfer Pricing Methodology adopted by the appellant to justify the arm's length nature of the technical know-how fees paid to the AE;
- b) The Learned DRP and consequently the Learned AO erred in not understanding and appreciating the essence of the inter-company agreement, i.e. Technical and Consultancy Agreement (the agreement) and with preconceived notion proceeded to conclude that the arm's length price to be Nil;
- c) Erred in wrongly concluding with a preconceived notion and without any basis that no benefit has been received by the appellant even though various documents / papers evidencing the receipt of the technical knowhow services were submitted;
- d) Without prejudice, the Ld. DRP and consequently the Ld. AO erred on facts and in law in upholding the Ld. Transfer Pricing Officer's stance of making an adjustment towards the service tax component paid to the government of Rs. 12,36,000 charged on receipt of the aforesaid services on the basis that the payment made towards the technical know-how fees itself has been disallowed.

2. Other issues:

The Learned DRP and consequently the Learned AO in the facts and circumstances of the case of the appellant and in law, erred in -

- 2.1 Disallowing Rs.1,16,197/- U/s.14A of the Act read with Rule 8D of the Income Tax Rules instead and in place of Rs.1,13,793/- as determined by the appellant;
 - 2.1.1 Not disallowed any amount u/s. 14A of the Act as the appellant had not incurred any expenditure in connection with earning any tax-free income.
 - 2.1.2 Not restricting the disallowance u/s. 14A read with Rule 8D at Rs.1 lakh.
- 2.2. Disallowing Rs.9,24,21,875/- in respect of depreciation on intangible assets purchased by the appellant in the earlier year calculated at 25% on their written down value of Rs.36,96,87,500/-;
- 2.3 Applying the provisions of Section 145A of the Act, though however, the appellant follows "net method of accounting".



M/s Merck Specialties Private Limited
ITA No.1947/Mum/2014
Assessment Year: 2009-10

- 2.3.1 Without prejudice to the above and in the alternate, making adjustment to the value of closing stock, sale, purchases and opening stock on account of Cenvat Credit/ Sales Tax /VAT ,as the case may be and determined the adjustment of Rs. 1,10,43,357/- accordingly.
- 2.4 Disallowing Rs.57,32,289/- in respect of alleged leave salary provision U/s.43B(f) of the Act, though, it was contended and explained to the Hon.DRP and the Ld. AO that the said amount was not the provision made during the year and in fact there was a write back of excess provision of Rs.7,55,000/- made during the year ended 31st March, 2009 in respect of earlier year, which was not liable to tax as having not been allowed as deduction in the earlier years.
- 2.5 Charging interest U/S.234B of the Act amounting to Rs.21,87,732.-;
- 2.6 Charging interest of Rs.82,49,678/- U/s.234D of the Act as there was no refund order on the basis of the intimation U/s.143(1) of the Act issued in the case of the appellant as the refund was adjusted against demand as per the records of the Department without any intimation to the appellant U/s.245 of the Act
- 2.7 Initiating penalty u/s. 271(l)(c) in respect of transfer pricing adjustments, disallowance of depreciation in respect of intangibles, adjustment u/s. 145A of the Act and disallowance of leave salary u/s. 43B(f) of the Act.
3. It is humbly prayed that the reliefs as prayed for hereinabove and/or such other reliefs as may be justified by the facts and circumstances of the case and as may meet the ends of justice should be granted.

2.1 Facts on record would reveal that the assessee being resident corporate entity stated to be engaged in trading and manufacturing & chemicals was assessed for year under consideration u/s 143(3) r.w.s. 144C(13) on 31/01/2014 wherein the income of the assessee was determined at Rs.3327.05 Lacs after certain additions / adjustments as against returned income of Rs.2122.69 Lacs e-filed by the assessee on 30/09/2010. The assessment was framed pursuant to the directions of Ld. DRP u/s 144C(5) dated 30/12/2013. Aggrieved by certain additions /adjustments in final assessment order, the assessee is under appeal before us.

2.2 The learned Authorized Representative for Assessee (AR), Ms. Aarti Vissanji, at the outset, placed on record issue-wise chart to submit that most of the issues are covered by various decisions of Tribunal



M/s Merck Specialties Private Limited
ITA No.1947/Mum/2014
Assessment Year: 2009-10

either in assessee's own case or in the case of its sister concern and therefore, the same view may be taken in the matter. The said chart was confronted to Ld. DR, who though fairly acquiesced to the same, but relied on the orders of lower authorities. In the above background, our adjudication to various issues would be as given in succeeding paragraphs.

3.1 Transfer Pricing Adjustment

Certain international transactions as stated to be carried out by assessee with its Associated Concerns (AE) and as reported in Form No. 3CEB were referred to Ld. Transfer Pricing Officer-1(3), Mumbai u/s 92CA(1) for determination of their Arm's Length Price (ALP). The assessee was stated to be incorporated in April, 2005 and subsidiary entity of M/s Merck Holding GmbH, Germany which in turn was stated to be wholly owned subsidiary of M/s Merck KGaA, Germany (MKGaA). The assessee was stated to be engaged in trading and manufacturing of chemicals and related products which were extensively used in quality control, research and development, pathological laboratories, testing of water, food, beverages etc. The Merck group ranked amongst the world's leading producer of high-quality pharmaceutical and chemical products. Although the assessee carried out 9 different transactions aggregating to Rs.77.71 Crores with its AE, however, the subject matter of appeal before us is payment of technical fees of Rs.112.36 Lacs by the assessee to its AE namely MKGaA. This transaction was benchmarked on aggregate basis under trading segment using *Transactional Net Margin Method (TNMM)*. The attention was drawn to the fact that the



M/s Merck Specialties Private Limited
 ITA No.1947/Mum/2014
 Assessment Year: 2009-10

payment was made pursuant to consultancy agreement dated 16/03/2008 entered between the assessee and its AE namely MKGaA. It was also submitted that its AE provided consultancy services, *inter-alia*, in the nature of support of engineering of production and quality control with regard to technical and analytical background, selection of equipment and sourcing of supplies internationally, training of employees on engineering and scientific trends, advising on new trends in IT, assisting /advising launch of new productions etc. It was explained that the agreement provides for a package of services by virtue of which all the services mentioned in the agreement were made available to the assessee on 'as and when need' basis, for which the option to avail the services lies with the assessee. In exchange of services, the assessee agreed to pay fixed fees of Rs.112.36 Lacs including taxes. The assessee, in support, of availing intra-group services, submitted various documents in the shape of email communications etc. However, not convinced with assessee's submissions / explanations, the Ld. TPO determined the ALP of these transactions as *Nil by* observing as under: -

7.4 From the discussion above it can be made out that the assessee did not have any evidence to support the justifications for payment of Rs.1,12,36,000/- to the AE for these technical services. The only evidence given in support of these services are correspondence between employees of the assessee company with the employees of other AE. The assessee was confronted with these facts vide order sheet dated 28.12.2012 that

(i) Most of the evidence given in the form of mails are general mails without any advice or technical or professional support from AE. Some of the mails are of the nature of reporting and other documents are brochures, which pertain to SAP, IT policies etc. There is no evidence that the specific service has been provided by the AE.

(ii) Some of the mails do not pertain to the financial year for which the payment have been made.

(iii) The reports (Emerald SAP Report and Corporate Information Series) are the same which were given in case of Merck Ltd. the other Indian Company.



M/s Merck Specialties Private Limited
 ITA No.1947/Mum/2014
 Assessment Year: 2009-10

(iv) Wherever a specific service was provided by the other AE, the assessee has made the payments to that AE and has been reflected under the head reimbursements.

From the documents submitted by the assessee, it is seen that the most of the documents are in the form of mails which either do not pertain to relevant financial year or are very general in nature. These mails are incidental to the normal course of business or routine correspondences and are not specifically giving any services.

The other documents are of the nature of agreements which pertains to training, SAP or information technology. It is important to note that for specific services, payment of Rs. 4,61,94,985/- has been made to Merck KGA, Germany, Merck Pvt Ltd., Merck Chemicals, Merck New Zealand for advertisements in Oncology, exhibitions, IT, trademark, SAP, training. The details of these payments are given in Annexure-5 of letter dated 28.12.2012. In some of these services the AE has charged markup of 5% from the assessee company. When assessee is charging for specific services, payment to the AE of Rs.1.12 crores in the form of retainership for technical advisory services, is not justified, when there are no details of specific services and documentary evidences.

The Oncology products are developed by the German AE and not by the Indian company. The documents submitted by the assessee company are not regarding development of any Oncology, product but on promotion and marketing of these oncology products. The expenses incurred on the promotion of these products are debited in promotion and marketing expenses. These promotion and marketing expenses are helping the AE's in building the brand for which the AE is charging the trademark royalty also. These documents do not support the case of the assessee for payment of Rs.1.12 crores to the AE.

While examining the arm's length nature of intra group services, it is required to be seen whether the charges paid by the taxpayer for intra group services reflect the same charges for the services that would have been, or would reasonably be expected to be, levied between independent parties dealing at arm's length for comparable services under comparable circumstances. An arm's length entity would be willing to pay for an activity only to the extent that the activity confers on it a benefit of economic or commercial value. Therefore, the arms length charge is not only a function of the price at which a supplier is prepared to perform the service (or the cost of providing the service), but also a function of the value to the recipient of the service (or the willingness of the recipient to pay for such services). The documents submitted by the assessee could not demonstrate tangible and direct benefit is derived by the taxpayer in paying the above amounts to the AEs. The tax payer could not prove that the payment made by the assessee to the AE has given commensurate benefits. Therefore, adjustment of Rs. 1,12,36,000/- needs to be made.

In view of the above, the total adjustment in ALP is as under: -

| | | |
|------|----------------------------------|----------------|
| (ii) | On account of Technical Services | Rs.1,12,36,000 |
| | T O T A L | Rs.1,12,36,000 |

In view of the above, total adjustment of Rs.1,12,36,000/- is proposed in determining ALP of technical services.



M/s Merck Specialties Private Limited
ITA No.1947/Mum/2014
Assessment Year: 2009-10

The stand of Ld. TPO, upon confirmation by Ld. DRP, is under challenge before us.

3.2 Upon due consideration, we find that similar issue is covered in assessee's favor by the order of Tribunal rendered in the case of its group concerns viz. **Merck Limited** for same AY, ITA No.1946/Mum/2014 order dated 31/03/2016 wherein the adjustment has been deleted on identical factual matrix by the coordinate bench by observing as under: -

23. 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.

24. We find that there is a clear contradictions in the findings of the authorities below. On one hand, the stand of the authorities below is that no services are rendered, and, on the other hand, there are categorical findings that the services rendered are so general in nature that even an employee of the assessee could have rendered the same. In the event of no services actually having been rendered, there cannot be any occasion for the same services being rendered by a person without specialized knowledge. On one hand, it is held that arm's length price of these services is zero value, and, in the same breath, it is held that "there would hardly be any substantial payment" for these services. Clearly, services are rendered on the facts of the present case. There is sufficient material on record to show that the assessee was, under the agreement, entitled to receive a package of services on as and when required basis. The emails and other documentary evidences show that the assessee was in receipt of these services. Just because these services were too general, in the perception of the authorities below, or just because the assessee did not need these services from the outside agencies, cannot be reason enough to hold that the services were not rendered at all. We have perused the material before us, and, in our considered view, the assessee has reasonably established rendition of services. The assessee may not have received all the services under the agreement but essentially the assessee had right to receive all these services, as and when required, under the agreement. The payment is made for the rights accruing to the assessee for the bundled services under the contract and not for each service on ala carte basis. The reason that the assessee did not use a particular service cannot justify holding that no payment was warranted for such services. To give an example from day to day life, if an assessee is paying for having right to view a bouquet of television channels, which come as a package, he does not decline to pay the consideration for the bouquet of television channels because he did not view a particular television channel. The example may seem to be so simplistic but it does hammer the message, as we would like to, that not availing a particular service under a contract does not mean that no payments are required to be made for all the services bundled under the contract. The other thing



M/s Merck Specialties Private Limited
 ITA No.1947/Mum/2014
 Assessment Year: 2009-10

is the benefit test. We do not think benefit test has too much relevance in the arm's length price ascertainment. When evaluating the ALP of a service, it is wholly irrelevant as to whether the assessee benefits from it or not; the real question which is to be determined in such cases is whether the price of this service is what an independent enterprise would have paid for the same. In case TPO can demonstrate that the consideration for similar services, under the CUP method, is NIL, he can very well do so. That's not, however, his case. He only states that these services are not worth the amount paid by the assessee. Such band statements and sweeping generalizations cannot help the case of the revenue authorities. The assessee has benchmarked the transaction on TNMM basis, and unless the revenue authorities can demonstrate that some other method of ascertaining the arm's length price on the facts of this case will be more appropriate a method of ascertaining the arm's length price, the TNMM cannot be discarded. Dealing with almost a similar situation, as we are in seisin of, a coordinate bench of this Tribunal, in the case of AWB India Pvt Ltd VS DCIT [(2015) 152 ITD 570 (Del)], has observed as follows:

11. In ground nos. 5 to 9, which we will take up together, the assessee has raised the following grievances:

5. That, on the facts and circumstances of the case, the DRP and TPO/AO have failed to appreciate the business model and business realities of the appellant and role of its AE, while conducting the economic analysis, and concluding that no service is received or no benefit, and/or services received are duplicative in nature.

6. That, on the facts and circumstances of the case, the DRP and TPO/AO erred in presumptively holding that the revenue authorities are empowered to question the commercial decision of the appellant and in not appreciating the jurisprudence that the DRP and the AO/TPO cannot go beyond their powers to question the business decision of the company.

7. That, on the facts and circumstances of the case, the DRP has erred in confirming that the TPO has discharged his statutory onus by establishing the conditions specified in (a) to (d) of Section 92C(3) of the Act have been satisfied before disregarding the arm's length price determined by the appellant and proceeding to decide the arm's length price himself.

8. That, on the facts and circumstances of the case, the DRP and TPO/AO have erred in conducting economic analysis of the international transactions without relying on any comparable transaction/companies using inappropriate method.

9. That, on the facts and circumstances of the case, the DRP and TPO/AO have erred in determining the arm's length price of international transactions consisting of cost and profit margin at 'nil'.

12. So far as these grievances of the assessee are concerned, the relevant material facts are as follows. The assessee is engaged in the business of trading in food grains. It is a part of AWB group Australia and its 99.999% equity is held by AWB Australia Limited and the balance .001% equity is held by another group company, namely AWB Investments Limited. One of the international transactions that the assessee entered into with its AEs was



M/s Merck Specialties Private Limited
 ITA No.1947/Mum/2014
 Assessment Year: 2009-10

payment of Rs 58,20,571 towards 'management services'. On an analysis of the details of the payments made under this head, the TPO was of the view that the benefit of some of the services availed under the head 'management services' was not commensurate with the payments made for the same. He was also of the view that as against the use of TNMM by the assessee in benchmarking, the right course of action will be to follow CUP method because the value under CUP method will be best indicator of the value of these services. It was in this background that the TPO made certain adverse inferences against the assessee. The TPO was of the view that while the assessee has made a payment of Rs 20,35,907 towards financial management and reporting services, "but the services rendered are negligible compared to the cost incurred". The TPO was also of the view that "a minor clarification or seeking of certain guidance on verify basic issue does not call for a payment of Rs 20 lakhs. Therefore, the ALP of these services was taken as 'NIL'. He further noted that while the assessee has made a payment of Rs 1,23,476 towards human resources services, the assessee has "not furnished any specific input on training and development of human resources and it is also noticed that these services are of routine nature and duplicate at best". Accordingly, the TPO also treated ALP of these services as 'NIL'. As regards the payment of Rs 96,355 towards 'legal services', the TPO did take note of the services that the assessee was entitled to under these arrangements but as there is no evidence of any services having been actually rendered by the AE, the TPO concluded that it does not have any value in an arm's length situation. The value of this service was also taken as NIL. The same was the case with respect to the payments for other services. Accordingly, no arm's length value was assigned to these services also. In respect of these cases TNMM was rejected and CUP was applied- though, even under CUP method, value assigned was nil as, in the opinion of the TPO, these services were worthless.

13. When Assessing Officer proposed to make disallowance in respect of payments for the above services, arm's length value of which was taken at 'zero', aggregating to Rs 31,23,325, as against total management fees of Rs 58,20,571 paid by the assessee, assessee carried the matter before the DRP but without any success. The DRP confirmed the stand so taken by the TPO, Accordingly, an ALP adjustment of Rs 31,23,325 was made by the Assessing Officer. The assessee is aggrieved and is in appeal before us.

14. 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.

15. One of the very basic pre condition for use of CUP method is availability of the price of the same product and service in uncontrolled conditions. It is on this basis that ALP of the product or service can be ascertained. It cannot be a hypothetical or imaginary value but a real value on which similar transactions have taken place. Coming to the facts of this case, the application of CUP is dependent on the market value of the arrangements under which the present payments have been made. Unless the TPO can identify a comparable uncontrolled case in which such services, howsoever token or irrelevant services as he may consider these services to be, are



M/s Merck Specialties Private Limited
 ITA No.1947/Mum/2014
 Assessment Year: 2009-10

rendered and find out consideration for the same, the CUP method cannot have any application. His perception that these services are worthless is of no relevance. It is not his job to decide whether a business enterprise should have incurred a particular expense or not. A business enterprise incurs the expenditure on the basis of what is commercially expedient and what is not commercially expedient. As held by Hon'ble jurisdictional High Court in the case of CIT Vs EKL Appliances Limited (345 ITR 241), "Even Rule 10B(1)(a) does not authorise disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same".

16. The very foundation of the action of the TPO is thus devoid of legally sustainable merits. There is no dispute that the impugned payments are made under an arrangement with the AE to provide certain services. It is not even the TPO's case that the payments for these services were not made for specific services under the contract but he is of the view that either the services were useless or there was no evidence of actual services having been rendered. As for the services being useless, as we have noted above, it is a call taken by the assessee whether the services are commercially expedient or not and all that the TPO can see is at what price similar services, whatever be the worth of such services, are actually rendered in the uncontrolled conditions.

17. As for the evidence for each of the service stated in the agreement, it is not even necessary that each of the service, which is specifically stated in the agreement, is rendered in every financial period. The actual use of services depends on whether or not use of such services was warranted by the business situations whereas payments under contracts are made for all such services as the user may require during the period covered. As long as agreement is not found to be a sham agreement, the value of the services covered under the agreement cannot be taken as 'nil' just because these services were not actually required by the assessee. In any case, having perused the material on record, we are satisfied that the services were actually rendered under the agreement and these services did justify the impugned payments.

18. We are also of the considered view that in the absence of prerequisites for application of CUP methods being absent in the present case, it was not open to the TPO to disregard the TNMM employed by the assessee. No defects have been pointed out in application or relevance of TNMM in this case. Under these circumstances, the TPO's impugned action cannot meet our judicial approval.

19. For the detailed reasons set out above, we uphold the grievance of the assessee and direct the AO to delete the impugned ALP adjustment of Rs.31,23,325. The assessee gets the relief accordingly. 25. We see no reasons to take any other view of the matter than the view so taken by the coordinate bench.

26. In the present case, though a finding is given to the effect that no services are rendered, in the light of the contradictions in this finding and the observations above, it is clear that in effect commercial expediency of this payment is questioned. That exercise, in our considered view- particularly in the light of Hon'ble Delhi High



M/s Merck Specialties Private Limited
ITA No.1947/Mum/2014
Assessment Year: 2009-10

Court's judgment in the case of EKL Appliances (supra), cannot be conducted in the course of ascertaining the arm's length price.

27. In view of the above discussions, as also bearing in mind entirety of the circumstance, it is clear that the impugned ALP adjustment is contrary to the scheme of the Act. The authorities below have been swayed by the considerations which were not germane to the issue. We, therefore, uphold the grievances of the assessee and direct the Assessing Officer to delete the ALP adjustments in respect of the payment of fees for technical services. The assessee gets the relief accordingly.

Although the revenue contested this decision before Hon'ble Bombay High Court vide ITA No. 272 of 2014 dated 08/08/2016 but the Hon'ble court refused to admit substantial question of law. We find that the facts in the case of present assessee are *pari-materia* the same as in the case of its sister concern. Nothing on record would suggest that aforesaid ruling is not applicable to the facts of the present case. Therefore, respectfully, following the same, we delete the impugned additions. The grounds raised, in this respect, are allowed.

Non-Transfer Pricing Issues

4.1 Disallowance u/s 14A

It transpired that the assessee earned dividend income of Rs.13,656/- which was claimed to be exempt u/s 10(35). The said exempt income, in the opinion of Ld. AO, called for disallowance u/s 14A r.w.r. 8D. The assessee had offered *suo-moto* disallowance of Rs.1.13 Lacs in its computation of income. In defense, the assessee submitted that it did not incur any expenditure to earn the said income. In the alternative, the assessee offered disallowance of Rs.1 Lacs, being proportionate amount of salary paid to an employee for time devoted towards investment activities. However, rejecting the same, Ld. AO computed aggregate



M/s Merck Specialties Private Limited
ITA No.1947/Mum/2014
Assessment Year: 2009-10

disallowance of Rs.1.16 Lacs which comprised-off of interest disallowance u/r 8D(2)(ii) for Rs.1.01 Lacs and expense disallowance u/r 8D(2)(iii) for Rs.0.14 Lacs. After adjusting the suo-moto disallowance of Rs.1.13 Lacs as made by the assessee, Ld. AO proposed additional disallowance of Rs.2,404/-. The stand of Ld. AO, upon confirmation by Ld. DRP, is under challenge before us.

Upon due consideration, we find that additional disallowance of Rs.2,404/- as made by Ld. AO would not be sustainable in view of the fact that the assessee had already offered suo-moto disallowance in its computation of income which far exceed the exempt income earned by the assessee during the year under consideration. Therefore, by deleting the impugned addition of Rs.2,404/-, we allow this ground of appeal.

4.2 Depreciation on Fictitious assets

It transpired that the assessee claimed depreciation of Rs.924.21 Lacs, @25% on intangibles assets. Since similar depreciation claimed in AY 2007-08 & 2008-09 was disallowed in view of the fact that no assets were transferred and the assets were fictitious assets, the said claim was disallowed by Ld.AO which was confirmed by Ld. DRP.

Upon perusal of chart, we find that this issue would go back to the file of Ld.AO for re-adjudication de-novo on similar lines as directed by co-ordinate bench of this Tribunal in assessee's own case for AYs 2007-08 & 2008-09, ITA No. 3943-44/Mum/2013 order dated 25/01/2017. The Ld. AO is directed to re-adjudicate the same in the light of stand taken in AYs 2007-08 & 2008-09 pursuant to the aforesaid directions of the Tribunal. The ground stand allowed for statistical purposes.



4.3 Disallowance u/s 145A

The financial details revealed that the assessee had some receivables on account of CENVAT credit. The Ld.AO, invoking the provisions of Section 145A which mandate inclusive method of accounting, proceeded to add back the same to the income of the assessee. The assessee defended the same by submitting that it was following net method of accounting with regard to Sales Tax, VAT and excise duty and there would be no overall impact by following either of the method of accounting. However, disregarding the same, Ld. AO proposed an adjustment of Rs.110.43 Lacs.

Upon perusal of chart, we find that this issue would also go back to the file of Ld.AO for re-adjudication de-novo on similar lines as directed by co-ordinate bench of this Tribunal in assessee's own case for AYs 2007-08 & 2008-09, ITA No. 3943-44/Mum/2013 order dated 25/01/2017. The Ld. AO is directed to re-adjudicate the same in the light of stand taken in AYs 2007-08 & 2008-09 pursuant to the aforesaid directions of the Tribunal. The ground stand allowed for statistical purposes.

4.4 Disallowance u/s 43B

The assessee made a provision for leave encashment for Rs.57.32 Lacs, which in the opinion of Ld. AO, was not allowable as per the provisions of Sec. 43B. The Ld. DRP rejected the objections raised by the assessee. The Ld. AR, had drawn attention to para 12.2 of the Ld. DRP's order to submit that there was actually a write-back of Rs.7.55 Lacs during the year and therefore, no disallowance would be warranted. The Ld. DRP had rejected the submissions for want of evidences. The Ld. DR



M/s Merck Specialties Private Limited
ITA No.1947/Mum/2014
Assessment Year: 2009-10

submitted that the issue may be restored back for proper appreciation of facts.

Keeping in view the submissions made, we direct Ld. AO to re-adjudicate the same de-novo in the light of submissions made by Ld. AR. The ground stand allowed for statistical purposes.

4.5 Other Grounds

The other grounds raised in the appeal are related with interest u/s 234 and initiation of penalty. These grounds being consequential, would not require any specific adjudication. The Ld. AO is directed to compute interest in accordance with law.

5. Finally, the appeal stands partly allowed in terms of our above order.

Order pronounced in the open court on 11th November, 2019.

Sd/-

(Mahavir Singh)

न्यायिक सदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 11/11/2019
Sr.PS, Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent



M/s Merck Specialties Private Limited
ITA No.1947/Mum/2014
Assessment Year: 2009-10

3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त/ CIT– concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai.