

IN THE INCOME TAX APPELLATE TRIBUNAL  
“C” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT  
AND SHRI B R BASKARAN, ACCOUNTANT MEMBER

ITA Nos.1373 & 1374/Bang/2015
Assessment years : 2010-11 & 2011-12

The Assistant Commissioner of Income Tax, Circle 1, Raichur.	Vs.	Shilpa Medicare Ltd., 10/80, 1 <sup>st</sup> Floor, Rajendra Gung, Raichur – 584 102. <b>PAN: AADCS 8788F</b>
APPELLANT		RESPONDENT

ITA Nos.1351 & 1352/Bang/2015
Assessment years : 2010-11 & 2011-12

Shilpa Medicare Ltd., Raichur – 584 102. <b>PAN: AADCS 8788F</b>	Vs.	The Addl. Commissioner of Income Tax, Circle 1, Raichur.
APPELLANT		RESPONDENT

Revenue by	:	Shri Pradeep Kumar, CIT(DR) (ITAT), Bengaluru.
Respondent by	:	Shri S. Annamalai, Advocate

Date of hearing	:	20.01.2020
Date of Pronouncement	:	06.02.2020

**ORDER**

*Per N.V. Vasudevan, Vice President*

**ITA Nos. 1351 & 1373/Bang/2015**

Both these are cross appeals by the revenue and the assessee are directed against the orders dated 9.9.2015 of the CIT(Appeals), Kalaburgi relating to assessment year 2010-11.

**ITA No.1351/B/15 (AY 2010-11) – Assessee's appeal**

2. Ground No.1 is general in nature and calls for no specific adjudication.

3. Ground Nos.2 & 3 raised by assessee reads as follows:-

“2. The learned Assessing Officer was not justified in law in passing the assessment order without issuing the mandatory notice under section 143(2) of the Act on the second revised return of income filed by the appellant on the facts and circumstances of the case.

3. The assessment order passed by the learned Assessing Officer on the invalid notice issued under section 143(2) on the original return filed by the appellant is bad in law, consequently the order passed on the invalid notice is liable to be set aside on the facts and circumstance of the case.”

4. As far as the aforesaid grounds are concerned, the facts are that the assessee is a company engaged in the business of bulk drug manufacturing and intermediary products besides operating windmills. For AY 2010-11, the assessee filed return of income on 28.9.2010 disclosing a total income of Rs.54,96,04,630. The first revised return was filed on 10.1.2012 and the second revised return filed on 28.2.2012. The AO issued notice u/s. 143(2) of the Income-tax Act, 1961 [the Act] dated 26.8.2011 which was duly served on assessee on 3.9.2011. This notice

u/s. 143(2) of the Act was served within time contemplated u/s. 143(2) of the Act and there is no dispute on this aspect. The grievance projected by the Assessee in grounds 2 & 3 before the Tribunal is that since the assessee had filed a second revised return on 28.2.2012, the AO ought to have issued a notice u/s. 143(2) of the Act on this revised return of income and failure to do so renders the order of assessment invalid. In this regard, the Id. counsel for the assessee placed reliance on the decision of ITAT Bangalore Bench in the case of *DCIT v. IDEB Buildcon P. Ltd.*, ITA No.317/Bang/2013 for the AY 2009-10, order dated 18.7.2014. In the aforesaid decision, the AO did not take cognizance of return of income and proceeded to frame assessment on the basis of original return. The Tribunal held that since the revised return was filed within time, the AO ought not to have framed the assessment with reference to original return of income. This order of Tribunal was taken in appeal by the revenue to the High Court in ITA No.507/2014, but the Hon'ble Karnataka High Court vide order dated 2.2.2016 dismissed the appeal at the admission stage. The Id. counsel for the assessee placing reliance on the aforesaid decision submitted that the 2<sup>nd</sup> revised return was filed on 28.2.2012 and that return was taken cognizance by the AO as total income was computed with the starting point of computation being income returned as per the 2<sup>nd</sup> revised return. According to him, therefore, the ratio laid down in the aforesaid decision should be applied and it should be held that the order of assessment is null and void.

5. We have considered the submission of Id. counsel for the assessee and we find that in the present case, the AO assumed jurisdiction on the basis of original return of income filed by the assessee by issuing a notice u/s. 143(2) of the Act dated 26.8.2011 which was served on assessee on 3.9.2011. This notice having been issued and served within the period contemplated by the provisions of section 143(2) of the Act, the AO has

assumed valid jurisdiction. The fact that the assessee subsequently on 28.2.2012 filed a revised return is not of any significance. The AO was already seized of the assessment proceedings. In this case, revised return was taken cognizance by the AO, whereas the decision of the Bangalore Bench of Tribunal in *IDEB Buildcon P. Ltd. (supra)*, the revised return was not taken cognizance and therefore the decision cited by the Id. counsel for the assessee is clearly distinguishable. In our opinion, the AO has assumed valid jurisdiction in this case by issue of proper notice u/s. 143(2) of the Act within the time contemplated by law. The original return u/s. 139(1) of the Act has not been treated as *non est* and the revised return is only for the purpose of certain errors and mistakes in the original return. In such circumstances, there is no requirement of law to issue a notice u/s. 143(2) of the Act with reference to revised return. We derive support for the aforesaid conclusions from the decision of the Hon'ble Delhi High Court in the case of *Vinod Kumar Khatri v. DCIT [2016] 129 DTR 377 (Del)*. We are therefore of the view that there is no merit in grounds No.1 & 2 raised by the assessee and accordingly the said grounds are dismissed.

6. Ground Nos.4 & 5 is with regard to the action of the revenue authorities in not treating the subsidy grant from the State Govt. as a capital receipt and consequently not in the nature of income. The admitted factual position as it emanates from the order of AO and the CIT(Appeals) is that the assessee did not file a copy of the scheme under which subsidy was received by assessee. In the absence of details of the scheme, it is not possible to decide the question, whether the subsidy is capital or revenue in nature. Since the burden was on the assessee to show that the subsidy received was capital receipt not chargeable to tax and since the assessee failed to do so, we uphold the order of CIT(Appeals) on this issue and dismiss grounds 4 & 5.

7. Grounds 6 to 10 raised by assessee are with regard to rejection of the claim of assessee for grant of weighted deduction u/s. 35(2AB) of the Act. The admitted position u/s. 35(2AB) of the Act is that approval of prescribed authority on the scientific research on in house R&D facility is required to be obtained. It is also the admitted position that the assessee obtained the approval from the prescribed authority w.e.f. 1.4.2011. The assessee had made application to the prescribed authority for grant of approval on 12.5.2011 and the date of approval of the scientific research by the prescribed authority was 7.12.2011. It was the case of AO that since in the previous year relevant to AY 2010-11, the assessee had not even made application for grant of approval to the prescribed authority and since the approval of the prescribed authority is only w.e.f. 1.4.2011, the deduction cannot be allowed for AY 2010-11. The assessee, however, had placed reliance on the decision of Hon'ble Gujarat High Court in the case of *Claris Lifesciences Ltd. [326 ITR 251 (Guj)]* wherein the Hon'ble High Court held that the provisions of section 35(2AB) nowhere suggests or implies that the R&D facility is to be approved from a particular date or that the date of approval only will be the cut-off date for allowability of weighted deduction. The CIT(Appeals) on this aspect held as follows:-

“ The contents of the Assessment order and the submissions of the Assessee are perused and considered. The Hon'ble High Court of Gujarat has approved in-principle that cut-off date for claiming deduction under section 35(2AB) is not the date of approval by the Government. In the instant case, the Approval has been received during the FY 2011-12, which is after 2 years of the current AY. The Assessee is into the business of manufacturing of bulk drugs and intermediaries, which go into production of pharmaceutical products. In this kind of industry, research and development is part and parcel of the production and without which survival becomes difficult. The Appellant's eligibility to claim the deduction is also not in dispute, however, what is unacceptable is that the Assessee has claimed the deduction in

respect of the current AY. without receiving approval during the year. As discussed elsewhere, Approval has been received by the Assessee-company during the period relevant to subsequent AY 2012-13. Of course, a deduction is allowed in Assessment in AY 2012-13. The decision in the case of *Claris Life Sciences*, is distinguishable for the reason that Approval in that case was received during the year itself. Whereas in the case on hand, as said above, the Approval is received not during the current year. In the circumstances, I take the view that the Appellant is not eligible to take a deduction in the current AY. Accordingly. I uphold the stand of the AO in disallowing the deduction.”

8. Aggrieved by the order of CIT(Appeals), the assessee is in appeal before the Tribunal.

9. The Id. counsel for the assessee apart from relying on the decision of the Hon'ble Gujarat High Court in the case of *Claris Life Science (supra)* further placed reliance on the decision of Hon'ble Delhi High Court in the case of *CIT v. Sandan Vikas (India) Pvt. Ltd., 335 ITR 117 (Del)* laying down identical proposition and also on the decision of the Hon'ble Gujarat High Court in the case of *Banco Products (I) Ltd., 405 ITR 318 (Guj)*.

10. We have perused the aforesaid decisions and we find that in the case of *Claris Lifesciences (supra)*, weighted deduction was claimed by the assessee in AY 2001-02 and the approval was received in that year itself. Similarly in the case of *Sandan Vikas (India) Pvt. Ltd. (supra)*, weighted deduction was claimed in AY 2005-06 and the application was filed by the assessee company on 10.1.2005 i.e., during the relevant previous year. In the case of *Banco Products (I) Ltd. (supra)*, weighted deduction was claimed for AY 2008-09 and application to the prescribed authority was made on 22.12.2006, much prior to the previous year relevant to AY 2008-09. It was in those circumstances that that the High Court took the view that the date of recognition or date of approval is irrelevant, but the existence of recognition or approval is sufficient to grant deduction u/s.

35(2AB). In our view, the ratio laid down in the aforesaid decision cannot be applied to the case of assessee. As we have already mentioned that the approval for grant of recognition to the prescribed authority was made by the assessee only on 12.5.2011 and not at any time during the relevant previous year. In the given facts and circumstances, we are of the view that the order of CIT(Appeals) should be upheld on this basis. We may also mention a similar claim has been made by the assessee in AY 2011-12 which is also being decided in this common order and in that year the assessee would be entitled to the benefit of deduction u/s. 35(2AB) as the approval was received on 12.5.2011 during the previous year relevant to AY 2011-12. We will discuss this issue while deciding the relevant ground of appeal for AY 2011-12. As far as AY 2010-11 is concerned, we are of the view that there is no merit in grounds No.6 to 10 and consequently they are dismissed.

11. In the result, the assessee's appeal for AY 2010-11 is dismissed.

ITA No.1373/B/15 (AY 2010-11) – Revenue's appeal

12. The first ground of appeal of the revenue reads as follows:-

“1. The Ld. CIT(A) ought to have upheld the allocation of proportionate expenses relating to windmills on the basis of turnover, particularly when the assessee had not maintained separate books of accounts in respect of windmills.”

13. As far as the aforesaid ground is concerned, the facts are that the assessee claimed deduction u/s. 80IA of the Act in respect of income derived from power generation out of 4 windmill units to the tune of Rs.2,46,06,965. After claiming expenses on account of depreciation and operating & maintenance expenses, the net profit was Rs.2,12,79,462 which was claimed as deduction u/s. 80IA of the Act. The AO was of the view that in arriving at the net profit, the assessee has not reduced finance

charges incurred on loans for the purpose of installation of windmills and also employee cost and other administrative expenses before arriving at the net profit of windmill power generation. According to the AO, the assessee had not maintained separate books of account in respect of windmill units and therefore he allocated the finance charges, employee cost and other administrative charges on the basis of turnover of the various businesses of the assessee and accordingly reduced the net profit of the windmill units on which deduction u/s. 80IA of the Act was to be allowed.

14. On appeal by the assessee, the CIT(Appeals) deleted the addition made by the AO, by following the decision of his predecessor CIT(Appeals) on a similar allocation of expense in AY 2008-09 & 2009-10, wherein the CIT(Appeals) held that the allocation of expenses was uncalled for because there was an operating & maintenance contract with a person who supplied and installed windmill and therefore there was no personnel of the assessee used for the purpose of running the windmill. Similarly, it was also factually found that no loans were availed for installation of windmills which were outstanding during the previous year and therefore there was no reason why finance charges should be allocated. The CIT(Appeals) also found that the department did not dispute the order of CIT(A) for AY 2008-09 and 2009-10 and therefore those issues attained finality. The CIT(Appeals) therefore held that allocation of expenses for windmill unit was uncalled for. Aggrieved by the order of CIT(Appeals), the revenue has raised ground No.1 before the Tribunal.

15. The only point urged by the revenue in ground No.1 is that the assessee had not maintained separate books of account in respect of windmill units. In our view, this grievance is without any basis because the revenue has not disputed the fact that neither the operating & maintenance

expenses, employee cost and other finance & administrative expenses nor the claim of depreciation, is attributable to the windmill unit and this finding of fact remains uncontroverted. The question of allocation of expenses therefore will not arise for consideration at all. We therefore find no merit in ground No.1.

16. Grounds 2 to 4 read as follows:-

“2. The Ld. CIT (A) ought to have appreciated that assessee's reliance on Accounting Standard-10 of the Institute of Chartered Accountants of India is out of context and that there is no dispute with regard to the issue that the cost of roads is to be capitalized but that the dispute is regarding the block under which it has to be capitalized.

3. Ld. CIT(A) ought to have appreciated that when different percentages are provided for different blocks of assets by law, they cannot be clubbed for the simple reason that a consolidated invoice was received for erection and commissioning cost.

4. The Ld. CIT(A) ought to have appreciated that the decision of ITAT, Ahmedabad in the case of ACIT (OSD) Vs. Parry Engineering & Electronics Pvt. Ltd. Is only with regard to civil work and foundation for installing the windmill and not relating to approach roads.”

17. The issue in the aforesaid grounds is with regard to claim of assessee for higher depreciation on internal road laid for approach to windmills. These grounds are related to the profits of the windmill unit for which deduction u/s. 80IA was claimed by assessee. It is not in dispute before us that identical issue was raised by revenue in assessee's own case for AYs 2008-09 & 2009-10 in ITA Nos. 174 & 175/Bang/2014 and this Tribunal vide order dated 12.04.2016 has adjudicated the said grounds as follows:-

“10. Grounds 5 to 8 are regarding higher depreciation on internal roads approaching the wind-mills.

11. Assessee claimed higher depreciation on the cost of installation of wind-mills which include the cost of the roads constructed / prepared for the purpose of installation of the wind-mill. AO denied the claim of higher depreciation (80%) in respect of roads.

12 On appeal, CIT (A) has allowed the claim of depreciation on the entire wind-mill cost by holding that the foundation, civil and electrical works are necessary for installation of wind-mill and is part and parcel of the wind-mill project which is eligible for depreciation at the rate of 80%. While allowing the claim of higher depreciation CIT (A) has followed the decision of Ahmedabad bench of this Tribunal in the case of ACIT v. Parry Engineering [ITA No.3317/Ahd/2011].

13. Before us Ld. DR has submitted that roads are not part of wind-mills and therefore, not eligible for higher depreciation. In support of his contention he has relied upon the decision dt.29.05.2013 of Pune Benches of this Tribunal in the case of Rajmal Lakhichand Jewellers P. Ltd v. DCIT in ITA.319 to 322 /Pune/2012, dt.29.05.2013, and submitted that the Tribunal has held that depreciation on approach road is allowable only at the rate of 10%.

14. On the other hand, Ld. AR has submitted that Chennai Bench of this Tribunal vide order dt.24.07.2012 in the case of DCIT v. Madras Cement Ltd, [ITA Nos.1391, 1392 & 1655/Mds/2011, has held that approach roads are an integral part of the wind-mills and therefore it is entitled for higher rate of depreciation. He has also relied upon the decision dt.25.07.2014 of Jaipur Bench of this Tribunal in the case of ACIT v. Shivani Enclave (P) Ltd, in ITA No.840/JP/2011, dt.25.07.2014, and submitted that the Tribunal has been consistently taking a view that apart from civil and electrical work for installation of wind-mills, the roads are also integral part of the windmills and therefore eligible for higher depreciation as applicable on the wind-mills.

15. We have considered the rival submissions and relevant material on record. We find that the road in question are not the proper roads constructed for the purpose of transportation or any

other use, but these are operating condition for generation of power. Accordingly, when the roads in question are integral part of the installation work of the wind-mill, the same is eligible for depreciation applicable on the wind-mill. In view of the above facts and circumstances of the case, we do not find any reason to interfere with the impugned order of the CIT(A).”

18. In the light of the aforesaid decision of the Tribunal, we find no merit in grounds 2 to 4 raised by the revenue.

19. Grounds 5 & 6 are as follows:-

“5. The Ld. CIT(A) ought to have appreciated that the AO has rightly brought forward (notionally) the losses of the earlier years in respect of the eligible business to set it off against the income of the current year in terms of the provisions of Section 80IA(5).

6. The Ld. CIT(A) ought to have appreciated that the decision of Hon'ble Karnataka High Court in the case of CIT Vs. Anil H. Lad [2014] 45 taxmann.com 98 (Karnataka) relied upon by the assessee has not become final and the Department has filed SLP before the Supreme Court.”

20. On the aforesaid grounds, it is not in dispute before us that in AY 2008-09 in ITA Nos.174 & 175/Bang/2014 in assessee's own case (*supra*), similar issue had come up for consideration and this Tribunal held that the brought forward losses of the earlier years need not be set off against the income of the current year on which deduction u/s. 80IA of the Act was to be allowed to the assessee. Following were the relevant observations:-

“4. Grounds 2 to 4 are regarding disallowance of claim of deduction u/s.80IA of the Act and unabsorbed depreciation of the earlier years. Assessee claimed deduction u/s.80IA of the Act, being income from wind-mill. AO in the assessment order observed that the assessee claimed deduction u/s.80IA of the Act, in respect of profits derived from three units to the extent of Rs.1,63,33,926/- and the assessee has not exercised its option to claim deduction in respect of fourth unit. In the statement of computation of deduction of Rs.1,63,33,926 assessee has

deducted the depreciation of the current year as well as other charges from the gross receipts of each unit and arrived at net profit which is eligible for deduction u/s.80IA of the Act. AO was of the view that the computation of deduction u/s.80IA of the Act, has to be done on the profit after adjustment of the brought forward losses and unabsorbed depreciation of the earlier years. Accordingly, AO recomputed eligible profit of the assessee after adjustment of the brought forward losses and unabsorbed depreciation of the earlier years and arrived at a negative profit. Consequently the AO denied the deduction u/s.80IA of the Act.

5. On appeal, CIT (A) has allowed the claim of the assessee by following the decision of this Tribunal dt.21.05.2010 in the case of Swarnagiri Wire Insulations p. Ltd, v. ITO in ITA No.200/Bang/2010, dt.21.05.2010.

6. Before us, Ld. DR has submitted that CIT (A) has not properly appreciated the decision of the Tribunal in the case of Swarnagiri Wire Insulations p. Ltd (supra) while allowing the claim of the assessee. He has contended that while computing the deduction u/s.80IA of the Act, brought forward losses and unabsorbed depreciation has to be notionally set off against the profits of the current year. He has relied upon the order of the AO.

7. On the other hand, Ld. AR of the assessee has submitted that this issue is covered by the decision of the coordinate bench of this Tribunal, dt.19.06.2015, in the case of DCIT v. Kamal Trading Co. in ITA Nos.1206 to 1208/Bang/2013 & ITA NO..63/Bang/2014. He has pointed out that the decision of the Tribunal in the case of Swarnagiri Wire Insulations p. Ltd (supra), has been considered by the coordinate bench while deciding this issue in favour of assessee. Ld. AR has also relied upon the decision of the Hon'ble jurisdictional High Court in the case of CIT v. Anil H. Lad [225 Taxmann 170 (Kar)]. Thus Ld. AR has submitted that CIT (A) has decided the issue which is now covered by the judgment of Hon'ble jurisdictional High Court in favour of the assessee.

8. We have considered the rival submissions as well as the relevant material on record. At the outset, we know that an

identical issue has been considered and decided by the coordinate bench of this Tribunal in the case of Kamal Trading Co., (supra) in paras 6.3.1 to 6.3.3 as under :

6.3.1 We have heard the rival contentions and perused and carefully considered the material on record; including the judicial pronouncements cited. The sole issue in these four appeals preferred by Revenue for Assessment Years 2006-07 to 2009-10 is with regard to the assessee's claim for deduction under Section 80 IA of the Act which was entirely disallowed by the Assessing Officer. The Assessing Officer disallowed the assessee's claim holding that even though depreciation and business loss relating to earlier assessment years had already been set off against the profits of the other businesses it is necessary for the purpose of deduction under Section 80 IA of the Act to carry forward that depreciation and business loss in a notional manner for set off against the profit of the impugned assessment years and if on being so set off there remained any profit available in the hands of the assessee to claim deduction under Section 80 IA of the Act, deduction to that extent only can be allowed. In other words, the Assessing Officer held that for the purpose of arriving at the profits from the assessee's wind mill, the brought forward depreciation and business losses are to be taken into account and after set off of the same against the income from wind mill, if there—remains any positive income, the claim of deduction under Section 80 IA of the Act to that extent only will be available.

6.3.2 As contended by the learned Authorised Representative, we find that the solitary issue in these four appeals of the allowability of the assessee's claim for deduction under Section 80-IA of the Act: is covered by the decision of the co-ordinate bench of this Tribunal in the case of Anil H Lad (supra) which was confirmed by the Hon'ble High Court of Karnataka in the case reported in 225 Taxman 170. The Hon'ble High Court in the case of Anil H Lad (supra) at para 10 thereof has held as under :-

"10. Therefore, keeping in mind the object with which these provisions are introduced, it is clear that an assessee is given the benefit of 100% deduction of the profits and gains from the eligible business. The

quantum of de-duct/on is to be calculated when the claim for deduction is made. If before claiming deduction, the loss and depreciation claimed by the assessee even in respect of eligible business is set off against income of the assessee or other source, the said loss or depreciation is already absolved, it does not exist. For the purpose of determining the quantum of deduction under sub-section (5) of Section 80-IA, the revenue cannot take into consideration the loss and depreciation which is already set off against the income of the assessee from other source and compute the profit under section 80-IA. Therefore, the approach of the Tribunal is in accordance with law. The Assessing Authority and the Commissioner committed a serious error in setting off the profit earned by the assessee under Section 80-IA against the losses and depreciation of the eligible business which is already set off from other source before such a claim is put forth. Thus, there is no error committed by the Tribunal in setting aside the order passed by the assessing authority as well as the lower Appellate Authority. The substantial question of law is answered in favour of the assessee and against the Revenue."

6.3.3 From the decision of the Hon'ble High Court of Karnataka in the case of Anil H Lad (supra) which is extracted above, at para 6.3.2 of this order, it is clear that when depreciation and losses of earlier years, even in respect of the eligible business (viz. in the instant case; the windmill), have already been set off against other business income of those assessment years. there is no need for notionally carrying forward and setting off the some depreciation and business loss for computing the quantum of deduction under Section 80-IA of the Act as such action would be contrary to the scheme of the Act. In this view of the matter and respectfully following the decision of the Hon'ble High Court of Karnataka in the case of Anil H Lad (supra), we dismiss the grounds raised by Revenue at 5.Nos. 2 to 4 of these appeals and consequently uphold the impugned orders of the learned CIT (Appeals) for Assessment Years 2006-07 to 2009-10

in allowing the assessee the deduction claimed under Section 80-IA of the Act.

9. As it is clear from the decision of the coordinate bench that an identical issue was considered by the Hon'ble jurisdictional High Court in the case of Anil H. Lad (supra) and by following the said judgment of Hon'ble jurisdictional High Court. the Tribunal has decided this issue in favour of the assessee by holding that the depreciation and losses of the earlier year even in respect of the eligible business (the wind-mill) has already been set off against other business income of those assessment years, there is no need for notionally carrying forward and set off of the same for computing the quantum of deduction u/s.80IA of the Act. Respectfully following the judgment of Hon'ble jurisdictional High Court as well as the coordinate bench of this Tribunal in principle, we concur with the view of the CIT (A) on this issue subject to verification of the fact that the losses and depreciation of the earlier years has already been set off against the other business income of those assessment years. AO is direct to verify the same and give effect to the findings on this issue.”

21. In view of the above, we find no merit in ground No.6 raised by the revenue.

22. Ground No.7 reads as follows:-

“7. The Ld. CIT(A) erred in deleting the addition made towards notional interest on interest free loan given to the Associated Enterprise of the assessee ignoring the special provisions contained in Chapter X of the Income-tax Act governing the international transactions when the transaction was not at the arm's length price.”

23. On this issue, the admitted factual position is that the assessee gave advances to its subsidiary by name Zatortia Holdings Ltd., a Cyprus based company. It came to be noticed by the AO that the Assessee had invested Rs. 107,380 towards 1,000 no of equity shares in the financial year relevant to the AY 2008-09 in M/s. Zatortia Holdings Limited. He also

noticed that a sum of Rs. 4,66,53,500 is advanced to the said Company during the year on various dates. As on 31.3.2010, the total amount advanced by the Assessee Company to the said Zatortia Holdings Limited ('ZHL') stood at Rs. 22,51,16,941/- which includes the opening balance of Rs. 17,84,63,441. The AO, therefore, proposed to charge interest on the advances made to ZHL, since no income had accrued to the Assessee from the said investments. The proposal was objected to by the Assessee saying that advances were made to ZHL, which is a Wholly-owned Subsidiary, a Special Purpose Vehicle for acquiring a Step-Down Subsidiary Company called, LOBA Feinchemie from its own sources. LOBA is situated in Austria, and acquisition of the Company was necessary for the purpose of penetrating into the vast regulated markets with potential to reach higher margins. The Assessee also stated that the decision to make the investment was based on Commercial Expediency. The Company LOBA had already been acquired in the previous years. LOBA was a sick Company and the infusion during the current year as well as in the previous years was to run the said Company. Further, it was used as equity infusion in LOBA by ZHL. The investments were in accordance with the provisions of Foreign Investment policy and the Assessee Company was entitled to have Overseas Direct Investment under the Automatic Route. The condition was that the investment is made to acquire a company in the same field, the Assessee stated to the AO. The Assessee relied on the decision rendered.\* the Hon'ble Supreme Court in the case of *S.A. Builders reported in 228 ITR 1 (SC)*.

24. The AO rejected the claim of the Assessee and held that the transaction between the Assessee Company and that of subsidiary Company (ZHL) is in the nature of International Transaction and he further held that Commercial Principles are to be applied to evaluate the International Transaction. The AO further held that International lending

rate of LIBOR has to be considered while determining the Arm's Length Interest rate. The AO again held that the decision rendered in the case of *SA Builders (supra)* would not be relevant in taxing notional interest which involves application of Chapter-X dealing with Transfer Pricing provisions. The AO did not accept the Assessee's contention that the Associated Enterprise was in a start-up phase and the Assessee had to finance them as no one would have given loan. The contention of the Assessee that the advancement of fund to the subsidiary in turn to the step-down subsidiary was for the purpose of investment as Quasi-Equity was not accepted to the AO who rejected the theory that the advances were made out of Commercial Expediency. Accordingly, the AO adopted the LIBOR rate at 6% relevant for the AY 2008-09 plus mark up of 1% for other profit elements and computed the interest that was chargeable on their advances made to the Subsidiary Company. It worked to Rs. 1,45,92,830, the details are as under:

		Rs.
a.	Interest @ 7% on Opening Balance of Rs. 17,84,63,441/-	1,24,92,441/-
b.	Interest @ 7% on Loan given on 28.05.2009 at Rs. 1,98,66,750 (307 Days)	11,69,689/-
c.	Interest @ 7% on Loan given on 22.06.2009 at Rs. 1,01,23,125 (282 Days)	5,47,481/-
d.	Interest @ 7% on Loan given on 15.10.2009 at Rs. 1,03,36,125 (167 Days)	3,31,039/-
e.	Interest @ 7% on Loan given on 16.02.2010 at Rs. 63,27,500 (43 Days)	52,180/-
	Total interest	1,45,92,830/-

25. Before CIT(A), the Assessee submitted that the Advances made to the subsidiary Company, ZHL was used as equity infusion into the step-down subsidiary Company, LOBA, which is also a wholly owned subsidiary. Further, the said advance to ZHL was also converted into Equity in the

subsequent year. The amount was given as an advance to the subsidiary as there was a delay in obtaining regulatory approvals from the Cyprus jurisdiction. **The same AO who passed the order for the AYs 2008-09 and 2009-10 has not added any notional interest on the same advances.** The Assessee has relied on the decision of the Hon'ble Supreme Court in the case of *SA Builders (supra)*, wherein it has been held that money advanced to sister concerns, if it is proved to be for Commercial Expediency then interest is not to disallowed on interest paid on borrowings. In the instant case, the advances are found to have been made out of own funds and that for making investment as equity.

26. The CIT(A) accepted the contentions of the Assessee. He held that the fund has flown from the books of the Assessee to the Step-Down Subsidiary through the subsidiary company for the purpose of being used as investment in equity and also of the fact that the advances have not been made out of borrowals. In view of the above, he held that the disallowance being unwarranted and unjustified and accordingly, the addition was directed to be deleted.

27. Aggrieved by the aforesaid order of the CIT(Appeals), the revenue has raised ground No.7 before the Tribunal.

28. The Id. counsel for the assessee relied on the order of CIT(Appeals) and the Id. DR relied on the stand of the revenue as reflected in the ground of appeal before the Tribunal.

29. We have given a careful consideration to the rival submissions. At the time of hearing, it was brought to our notice that the Special Bench of ITAT Kolkata in the case of *Instrumentarium Corporation Ltd. v. ADIT (IT) in ITA No.1548 & 1549/2009* dated 15.7.2016 held that interest-free loans are subject to the provisions of section 92 of the Act and the ALP of such

transaction have to be determined. In view of the aforesaid decision, we are of the view that the conclusion of the CIT(Appeals) that the provisions of section 92 of the Act were not attracted, cannot be sustained. We, however, remand the question of determination of ALP to the AO/TPO, who shall in accordance with the provisions of section 92 refer the question of determination of ALP interest to the TPO, only with regard to rate of interest to be adopted in adopted in determining the ALP of the interest payment. This ground is accordingly treated as partly allowed.

30. In the result, the revenue's appeal for AY 2010-11 is partly allowed.

**ITA Nos. 1352 & 1374/Bang/2015**

31. These are cross appeals by the revenue and assessee directed against the separate orders dated 9.9.2015 of the CIT(Appeals), Kalaburgi relating to assessment year 2011-12.

**ITA No.1352/B/15 (AY 2011-12) – Assessee's appeal**

32. As far as this appeal of assessee for AY 2011-12 is concerned, ground Nos.1, 7 & 8 are general in nature and class for no specific adjudication.

33. Ground Nos.2 to 6 are with regard to grant of weighted deduction to the assessee u/s. 35(2AB) of the Act. We have already seen while deciding identical ground of assessee for AY 2010-11 that the claim of assessee was rejected only because of the approval of the prescribed authority u/s. 35(2AB) of the Act was effective only from 1.4.2011. In AY 2011-12 also, the revenue took the same stand that the approval was obtained only on 7.12.2011 and it was valid only from 1.4.2011 to 31.3.2012 relevant to AY 2012-13.

34. We have already held while deciding identical ground for AY 2010-11 that the deduction has to be allowed for AY 2011-12 because the application for grant of approval to the prescribed authority was made by the assessee on 12.5.2011 i.e., during the relevant previous year. In the circumstances, the decision of the Hon'ble Gujarat High Court in the case of *Claris Lifesciences Ltd. (supra)* as well as the decision of the Hon'ble Delhi High Court in the case of *Sandan Vikas (I) Ltd. (supra)* will be applicable. Following the aforesaid decisions, we hold that the assessee should be allowed weighted deduction u/s. 35(2AB) of the Act for AY 2011-12. Thus, the relevant grounds of appeal are allowed.

35. In the result, the assessee's appeal for AY 2011-12 is allowed.

ITA No.1374/B/15 (AY 2011-12) – Revenue's appeal

36. The grounds of appeal raised by the revenue for AY 2011-12 are as follows:-

“1. The Ld. CIT(A) ought to have upheld the allocation of proportionate expenses relating to windmills on the basis of turnover, particularly when the assessee had not maintained separate books of accounts in respect of windmills.

2. The Ld. CIT (A) ought to have appreciated that assessee's reliance on Accounting Standard-10 of the Institute of Chartered Accountants of India is out of context and that there is no dispute with regard to the issue that the cost of roads is to be capitalized but that the dispute is regarding the block under which it has to be capitalized.

3. Ld. CIT(A) ought to have appreciated that when different percentages are provided for different blocks of assets by law, they cannot be clubbed for the simple reason that a consolidated invoice was received for erection and commissioning cost.

4. The Ld. CIT(A) ought to have appreciated that the decision of ITAT, Ahmedabad in the case of ACIT (OSD) Vs.

Parry Engineering & Electronics Pvt. Ltd. is only with regard to civil work and foundation for installing the windmill and not relating to approach roads.

5. The Ld. CIT(A) ought to have appreciated that the AO has rightly brought forward (notionally) the losses of the earlier years in respect of the eligible business to set it off against the income of the current year in terms of the provisions of Section 80IA(5).

6. The Ld. CIT(A) ought to have appreciated that the decision of Hon'ble Karnataka High Court in the case of CIT Vs. Anil H. Lad [2014] 45 taxmann.com 98 (Karnataka) relied upon by the assessee has not become final and the Department has filed SLP before the Supreme Court.

7. The Ld. CIT(A) erred in deleting the disallowance of deduction u/s. 10B despite the assessee falling to substantiate the claim with evidence.

8. The Ld. CIT(A) ought to have appreciated that the fact that the assessee never mentioned about functioning of the 100% EOU Unit in the returns filed for the earlier years and that there was no mention about the same in the Form No.3CD filed before the AO.”

37. Ground No.1 is identical to ground No.1 raised in AY 2010-11 by the revenue and for the reasons stated therein while deciding that ground, we find no merit and dismiss the same.

38. As far as grounds 2 to 4 are concerned, these are identical to ground Nos. 2 to 4 raised in AY 2010-11 by the revenue and for the reasons stated therein while deciding those grounds, we find no merit and dismiss these grounds of appeal.

39. Ground No.5 & 6 are also identical to grounds 5 & 6 in AY 2010-11 by the revenue and for the reasons stated therein while deciding those grounds, we find no merit and dismiss the same.

40. Ground Nos. 7 & 8 are with reference to claim for deduction u/s. 10B which was rejected by the AO, but allowed by the CIT(Appeals). The facts in this regard are that the Assessee claimed deduction under section 10B of the Income tax Act amounting to Rs.18,95,68,278/- for the A.Y. 2011-12. On going through the details furnished, the AO noticed that the assessee has shown unabsorbed depreciation of Rs. 3,80,21,039/- for the A.Y. 2008-09 and loss of Rs. 27,44,49,575/- for the A.Y. 2009-10. For the A.Y. 2010-11 the assessee has declared profit of Rs. 4,78,70,069/-. The AO also observed that if the assessee has not opted for application of 10B for those years it should have furnished a declaration in writing before the due date for filing the return u/s. 139(1) as provided u/s. 10B(8) of the Act. The AO found no such declaration. The AO was therefore of the view that in the absence of such declaration the earlier years unabsorbed depreciation and losses have to be set off against eligible profits and consequently there would be no income on which deduction u/s.10B of the Act can be given. Accordingly, the AO rejected the claim of the Assessee by observing as follows:-

“ As per the information furnished by the assessee, the 100% EOU has claimed losses/unabsorbed depreciation for the A.Yrs. 2008-09 & 2009-10 and these losses have been adjusted against the profit of the non-eligible unit even though the assessee is not entitled to make such adjustments. By making the adjustments, the assessee company has reduced the profit to the extent of Rs. 3,80,21,039/- for the A.Y. 2008-09 and Rs.27,44,49,575/- for the A.Y. 2009-10.

With regard to the deduction claimed under s. 10B of the Income Tax Act for the A.Y. 2011-12, it is noticed that the assessee had filed only one Profit & Loss Account wherein the net profit was shown at Rs. 65,83,64,069/-. In the computation statement, the assessee claimed deduction u/s. 10B amounting to Rs. 18,95,68,278/-

As per the provisions of section 10B (8) of the I. T. Act, where the assessee before the due date for furnishing the return of income under sub-section (1) of section 139, furnishes to the Assessing Officer a declaration in writing that the provisions of this section may not be made applicable to him, the provisions of this section shall not apply to him for any of the relevant assessment year. However, it is noticed that the assessee has not furnished any such declaration for the A.Yrs. 2008-09 to 2010-11. In the absence of any such declaration, it cannot be said that the assessee has not opted for application of provisions of section of 10B for the A.Yrs 2008-09 to 2010-11. Therefore, the losses pertaining to earlier assessment years are to be given set off against the profit earned during the year and the remaining profit if any only to be allowed as deduction under section 10B of the I.T. Act. As per the details furnished by the assessee, the profits of the 100% EOU for the current year after set off of losses works out as under:

A.Y. 2008-09: Unabsorbed depreciation to be carried forward	Rs. 3,80,21,039/-
A.Y. 2009-10: Net loss claimed	Rs. 27,44,49,575/-
Total loss to be carried forward	Rs. 31,24,70,614/-
A.Y. 2010-11: Net profit	Rs. 4,78,70,069/-
less brought forward loss	Rs. 31,24,70,614/-
Balance loss to be c/f	Rs. 26,46,00,545/-
A.Y. 2011-12: Profit admitted for the year	Rs. 23,05,22,438/-
Less loss of earlier years b/f	Rs. 26,46,00,545/
Balance loss to be c/f	Rs. 3,40,78,107/-

From the above, it can be seen that no income is available for the A.Y. 2011-12 which is eligible for claiming deduction under s. 10-B of the I.T. Act.

In view of the above mentioned facts, it is to be stated that the assessee has not furnished any declaration in writing as provided u/s. 10B(8). Further, separate financial statements have not been furnished from the commencement of unit. In addition, the profit earned in respect of this unit was also included in the Profit & Loss Account enclosed to the return of income. Therefore, the assessee is not eligible for claiming deduction u/s.

10B of the I. T. Act. Further, even for argument sake, if the unit is treated as eligible deduction u/s. 10B, this unit is not having any profits after set off of earlier losses for claiming deduction u/s. 10B of the I. T Act.

Therefore, the deduction claimed u/s. 10B amounting to Rs.18,95,68,278/- is disallowed and added to the income returned.”

41. Before CIT(A) it was argued by the Assessee that the provisions of section 10B are in the nature of deduction and not in the nature of exemption. The provisions of section 10B(6) of the Income Tax Act were amended vide the Finance Act, 2003 (FA, 2003) w.r.e.f. 1st April, 2001 to permit the losses earned in an Eligible Unit during the period after 1st April, 2001 and before the last year in which the tax incentive to be carry forward and set off against the profits earned from the business after the tax holiday period. This amendment clearly brings out the intention behind the amendment to section 10B vide Finance Act, 2000 that the incentive prior to 01.04.2001 was in the nature of an exemption and post the same it has been classified as a deduction. Section 10B is an optional section and is applicable when all the provisions of section 10B are complied with in toto. The company has not opted for application of section 10B(6) of the Act for the AYs 2008-09, 2009-10 and 2010-11 as it has not filed Audit Report as prescribed under section 10B(5) of the Income Tax Act. Section 10B(8) clearly states that the provisions of this section would not apply for any of the relevant assessment year wherever the company opts for it. Once the option is exercised by the Company, the income will have to be computed as provided under Chapter-IV of the Act. In support of the above the assessee relied upon the following.

1. Board's Circular dated 16th July, 2013 wherein the Departmental view has been communicated.
2. Decision of the Hon'ble Bombay High Court in the case of Hindustan Unilever Limited (2010) 325 ITR 102 (Bom.).

3. Decision of the Hon'ble Bombay High Court in the case of Black & Veatch Consulting Pvt. Ltd — 348 ITR 72(Bom.) and Ganesh Polychem Ltd. – 35 Taxman.com 446(Bom.)
4. Decision of the Hon'ble Bombay High Court in the case of M/s. Galaxy Surfactants Ltd. (2012) 19 taxman.com141(Bom.).

42. The CIT(Appeals) held that the assessee was entitled to deduction u/s. 10B of the Act. The CIT(Appeals) in this regard relied on the CBDT Circular referred to by assessee before him and also the decision of the Hon'ble Karnataka High Court in the case of *Anil H. Lad [2014] 45 taxmann.com 98 (Kar)*. Aggrieved, the revenue is in appeal before the Tribunal.

43. As can be seen from ground No.8 raised by the revenue, the grievance seems to be that assessee's declaration for opting out of provisions of section 10B for AYs 2008-09, 2009-10 & 2010-11 was not mentioned in Form 3CD filed before the AO. In our view, this is purely a technical objection. The Assessee has given declaration opting out of the provisions of Sec.10B of the Act for the relevant AYs and copies of those declarations are placed at page 46 to 48 of Assessee's paper book relating to appeal for AY 2011-12. Once the assessee opts out of provisions of section 10B for a particular year, then the losses/unabsorbed depreciation in that year will not be considered while allowing deduction u/s. 10B of the Act for the eligible period when deduction is claimed in a subsequent AY. In view of the above legal position, we find no merit in the ground No.8 raised by the revenue. Accordingly the same is dismissed.

44. In the result, the revenue's appeal for AY 2011-12 is dismissed.

45. In the combined result, while appeals of the assessee for AY 2010-11 is dismissed and for AY 2011-12 is allowed, the revenue's appeal

for AY 2010-11 is partly allowed for statistical purposes and for AY 2011-12 is dismissed.

Pronounced in the open court on this 6<sup>th</sup> day of February, 2020.

Sd/-

( B R BASKARAN )  
ACCOUNTANT MEMBER

Sd/-

( N V VASUDEVAN )  
VICE PRESIDENT

Bangalore,  
Dated, the 6<sup>th</sup> February, 2020.

*/Desai S Murthy /*

Copy to:

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

By order

Assistant Registrar  
ITAT, Bangalore.