

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "B", MUMBAI**

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER**

**ITA No.1710/M/2014
Assessment Year: 2007-08**

M/s. Medley Pharmaceuticals Ltd., D-2, Medley, 16 th Road, MIDC Area, Andheri (East), Mumbai – 400 093 PAN: AAACM2764J	Vs.	DCIT, Central Circle-44, Mumbai - 44
(Appellant)		(Respondent)

**ITA No.950/M/2015
Assessment Year: 2007-08**

DCIT, Central Circle-8(1), R.No.656, 6 th Floor, Aayakar Bhavan, M.K. Road, Mumbai – 400 020	Vs.	M/s. Medley Pharmaceuticals Ltd., D-2, Medley House, 16 th Road, MIDC, Andheri (East), Mumbai – 400 093 PAN: AAACM2764J
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Prakash Jotwani, A.R.
Revenue by : Ms. Kavita P. Kaushik, D.R.

Date of Hearing : 22.09.2020
Date of Pronouncement : 25.09.2020

ORDER

Per Rajesh Kumar, Accountant Member:

The above titled appeals, one by the Revenue and the other by the assessee, have been preferred against the order dated 26.09.2014 of the Commissioner of Income Tax (Appeals)

[hereinafter referred to as the CIT(A)] relevant to assessment year 2007-08.

ITA No.1710/M/2014

2. The assessee has raised the following grounds of appeal:

“Ground No. 1 : Rejection of Books of Accounts

- i. The learned CIT(A) erred in confirming the action of the AO of rejecting the Books of accounts and estimating the profit on the basis of 4.5% of sales as is done in AY. 2006-07, although in AY 2006-07, books were not rejected.
- ii. The Learned CIT(A) erred in confirming the action of the AO of rejection of books without pointing out the specific defects in the books of accounts which led to the rejection and mere suspicion would not lead to the identification of defects in the books.

Without prejudice

Ground No. 2 : Estimation and allocation of Profits amongst trading and Exempt units

- i. The learned CIT(A) erred in confirming that the Appellant is fudging/manipulating figures, amongst the Manufacturing Units and Trading Unit, without any basis and without any proof.
- ii. The learned CIT(A) erred in confirming the estimated profit on Unit II at Rs. 65.32 lakhs, against the loss of 66.94 lakhs, as claimed by the Appellant in its return.
- iii. The learned CIT(A) erred in confirming the action of the AO in reducing the profits from the Jammu Unit (to the extent of Rs. 122.26 lakhs being alleged estimated profits of Unit II included in the Jammu Unit), without substantiating justifiable reasons for the reduction from the income of tax free Unit.
- iv. The learned CIT(A) erred in confirming the estimated profit on account of manufacturing done from others (trading activity) at Rs. 652.86 lakhs, against the loss of 522.29 lakhs, as claimed by the Appellant in its return.
- v. The learned CIT(A) erred in confirming the disallowance made by the AO, on the ground that trading profits had been shifted to tax free units when in Para 7.1, the CIT(A) gave a finding that there was no reason to allocate profits between taxable and non-taxable units.

Without Prejudice

Ground No. 3 : Adjustment to Book Profit u/s. 115JB

The learned CIT(A) failed to take into consideration that no disturbance can be made to the book profits u/s. 115JB by making an addition to the book profit and not considering the Supreme Court decision in the case of Apollo Tyres which held that if the Appellant's accounts are prepared as Companies Act, then the book profit cannot be disturbed and more so when the book profits have been accepted.

3. The facts in brief are that the assessee filed the return of income declaring nil income whereas the book profit was

declared at Rs. 12,52,68,147/- which was processed under section 143(1) of the Act. Thereafter, the case of the assessee was selected for scrutiny and notices were duly issued and served upon the assessee. It is pertinent to state that assessee is in the business of manufacturing of pharmaceuticals products for the last more than 30 years. Originally, it had a manufacturing unit at Aurangabad, which was totally closed down in 1997. Thereafter, assessee has set-up five other manufacturing units consisting of four manufacturing units at Daman and one at Jammu. Unit No. 1 was started in 1994, Unit No. 2 in 1999, Unit No. 3 in 2001, Unit No. 4 in 2003 and Jammu unit was started in 2005. The assessee has been claiming deduction under Section 80IB of the Act for all these units. During the year the Unit No. 1 is having no tax exemption available while for Unit Nos. 2 & 3, exemption was available equal to 30% of the tax and in respect of Unit No. 4 and Jammu unit, 100% of the profits were exempt during the year. The assessee is also engaged in purchasing of finished goods or getting finished goods manufactured for sale purposes, for trading activity or consignment sales, etc. According to the Assessing Officer, the alleged trading activity (qua goods manufactured by others) is deliberately shown as at loss to set-off the profits arising from Unit Nos. 1, 2 & 3 having either no exemption or less exemption of tax. The Assessing Officer further held that since a portion of the trading activity has been transferred to Unit No. 4 and Jammu unit, loss to that extent is required to be disallowed. The assessee has declared following

GP in respect of various units and claimed deduction equal to the percentage as mentioned below:

	<u>G.P.</u>	<u>Eligible Exemption %</u>
Daman I	49.87%	Nil
Daman II	21.85%	30%
Daman III	42.55%	30%
Daman IV	42.82%	100%
Jammu	55.78%	100%
Trading	17.93%	Nil

Thereafter, the AO issued show cause notice calling upon the assessee to explain the variation in GP which was 21.85% in Daman-II while the average GP of other unit was around 43% which was responded to by the assessee vide letter dated 16.11.2009 whereby it was stated that in Unit II, the consumption of raw material was higher since the cost of antibiotics is high and also the selling price of some products are controlled and fixed by the government from time to time. The assessee also filed detail of consumption of raw material to demonstrate and corroborated the assessee's contention. On the issue of trading division having lower profit vis-à-vis the Jammu GP which was much higher it was explained that major portion of higher margin products in trading category were being self manufactured at Jammu and hence this was effect of that only. Finally, the AO reduced the deduction under section 80IB and computed the taxable income at Rs.3,23,98,291/- by reducing the reduction under section 80IB and added the same to the normal income. The AO also took the book profit at Rs.19,05,53,835/- in place of Rs.12,52,68,147/- as declared by the assessee and levied tax thereon accordingly.

4. In the appellate proceedings, the Ld. CIT(A) affirmed the order of AO while relying upon the findings in A.Y. 2006-07 and thus confirmed the addition. The same addition was also added to the book profits.

5. The Ld. A.R., at the outset, submitted that the ground 1 & 2 are squarely covered by the decision of the co-ordinate bench of the Tribunal in assessee's own case in ITA No. 1709/Mum/2014 A.Y. 2006-07 vide order dated 06.08.2000 wherein these issues were decided in favour of the assessee under identical circumstances and facts. The Ld. A.R., therefore, prayed before the Bench that the same may kindly be decided in favour of the assessee by allowing ground No.1 & 2. So far as the ground No.3 is concerned, the Ld. A.R. submitted that the issue in ground No.3 is consequential and may be decided accordingly.

6. The Ld. D.R., on the other hand, relied on the order of authorities below.

7. After hearing both the parties and perusing the material on record, we observe that the issue involved in Ground No.1 & 2 is squarely covered by the decision of co-ordinate bench of the Tribunal in assessee's own case in ITA No.1709/M/2014 in A.Y. 2006-07 wherein the co-ordinate bench of the Tribunal has allowed the appeal of the assessee setting aside the order of Ld. CIT(A) wherein the reduction of exemption under section 80IB was confirmed by the ld. CIT(A). The operative part is reproduced as under:

“10. We have heard the rival submissions and perused the material on record. We note that the deduction under Section 80IB of the Act was reduced to Rs.5,90,33,441/- on ad hoc basis as against actual claimed by assessee of Rs.8,88,99,369/-. We find that the Assessing Officer has given various reasons in the assessment order for reducing the claim of assessee, however, before resorting to making the said disallowance under Section 80IB of the Act by restricting the deduction, the Assessing Officer has not rejected the books of account under Section 145 of the Act and made the estimation of profit/disallowance of deduction under Section 80IB of the Act which appears to be incorrect and against the provision of law. We also find that in the earlier years, under similar facts, Revenue has accepted the profit and loss of the units and has not given a finding that the profit/loss shown in the books of account of the assessee was manipulated or non-genuine or excessive. Thus, we find merits in the contentions of the learned AR that when the case of assessee in earlier year has been accepted under similar facts, there is no reason for the Assessing Officer to vary from the settled position by estimating the profit in this year. We also find that the assessee has given cogent and convincing reply before both the lower authorities qua the reduction of gross profit in the current year vis-a-vis the earlier years. In our considered opinion, this is not a case of diversion of profit from one unit to another or once division to another, but was done out of business expediency and commercial consideration. We also note that the assessee has sufficiently proved that the turnover of assessee having higher margin in the earlier years have reduced while the products where there is lower margin have increased substantially. We further find that there is not gross loss, but a fall in gross profit of the assessee which has also been explained by stating that with the increase in excise duty, margin of assessee has come down. The rate of excise duty earlier was 16.23% on MRP while after amendment, the said rate was applied on MRP less abatement and thus the effective increase in duty is approximately 355% while on some other products, percentage increase in excise duty was over 600%. Thus, we do not find any reason to concur with the observations of the Assessing Officer. Besides, the Assessing Officer did not consider the fact that assessee has shifted product manufactured through other in earlier years to self-manufacturing unit at Jammu and this has also created the fallacious and misleading findings by the AO as to the Jammu profit on which deduction under Section 80IB of the Act has been denied. Finally, we note that both the authorities below have failed to give a cogent and convincing reasons for reducing the claim of assessee under Section 80IB of the Act as various doubts and suspicion of the authorities below were duly addressed by the assessee by furnishing various details and information qua the various units. Under these circumstances, we are not in a position to sustain the order of CIT(A) wherein the order of Assessing Officer has been confirmed. Accordingly, we set-aside the order of CIT(A) and direct the Assessing Officer to allow the deduction Under section 80IB of the Act as claimed by the assessee.”

8. Since the facts of the present case are identical to ones as decided by the co-ordinate bench of the Tribunal in the above case, we therefore respectfully following the same set aside the

order of Ld. CIT(A) by allowing the ground No.1 & 2 in favour of the assessee. The AO is directed accordingly.

9. Since we have allowed the ground No.1 & 2 in favour of the assessee which has resulted into complete deletion of entire addition as made by the AO, consequently, the issue in ground No.3 being consequential as the main addition does not survive. Needless to say that no addition can be made under section 115JB as the same has been deleted by us in ground No.1 & 2.

10. Appeal of the assessee is allowed.

ITA No.950/M/2015 (Revenue's appeal)

11. The present appeal has been preferred by the Revenue against the order dated 26.09.2014 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2007-08.

12. At the outset, it is noticed that the CBDT recently has amended the CBDT Circular No. 3/2018 dated 11.07.2018 vide Circular No. 17/2019, F.No. 279/Misc.142/2007-ITJ(Pt.) dated 08.08.2019 increasing the limit for filing of appeal before Income Tax Appellate Tribunal i.e. ₹ 50 lacs in each of the case. We noted that earlier Circular No. 3 of 2018 was made applicable to pending appeals also and this clause of the circular remains unchanged even after the amendment. Admittedly, in this case tax effect is below prescribed limit for filing of appeal before the Tribunal by the Revenue i.e. ₹ 50 lacs.

13. When this was confronted to the learned Sr. Departmental Representative, he could not point out that this appeal falls under

any of the exception as provided in Circular No. 17 of 2019. Admittedly, the tax effect in this appeal of Revenue is much below the prescribed limit of filing appeal before the Tribunal i.e. ₹ 50 lacs as per CBDT circular No. 17 of 2019. In view of the above, this appeal of Revenue is dismissed as withdrawn in view of Circular No. 17 of 2019.

14. Now, before us, the learned CIT Departmental Representative only requested that he want to verify whether this appeal falls under any of the explanation provided in CBDT Circular No. 3/2018. Here, we are of giving liberty to Revenue that in case, after passing of the order it comes to the notice of the Revenue that this appeal does not falls under any explanation of the CBDT by 3/18, the AO can move for recalling of the order within the prescribed time limit under section 254 of the Act. Hence, this appeal is dismissed as low tax effect covered by CBDT Circular No. 17/2019.

15. Accordingly, the appeal of the Revenue is dismissed.

16. In the result, the appeal of the assessee is allowed and the appeal of the Revenue is dismissed.

Order pronounced in the open court on 25.09.2020.

Sd/-
(Amarjit Singh)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated: 25.09.2020.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.