**IN THE INCOME TAX APPELLATE TRIBUNAL,**
**DELHI BENCH: 'I-2' NEW DELHI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER**
**AND**
**DR. B.R.R. KUMAR, ACCOUNTANT MEMBER**

ITA No.4637/Del/2014
Assessment Year: 2009-10

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| M/s. Jubilant Life Sciences Ltd. (Formerly known as Jubilant Organosys Limited), Plot No. 1A, Sector -16A, Noida | **Vs.** | Addl. CIT, Range-1, Moradabad |
| **PAN :AABCV0200H** | | |
| **(Appellant)** | | **(Respondent)** |

**And**
ITA No.4827/Del/2014
Assessment Year: 2009-10

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| DCIT, Circle-1, Moradabad | **Vs.** | M/s. Jubilant Life Sciences Ltd., (Formerly known as Jubilant Organosys Limited), Gujraula, Amroha, Uttar Pradesh |
| | | **PAN :AABCV0200H** |
| **(Appellant)** | | **(Respondent)** |

**And**
ITA No.4638/Del/2014
Assessment Year: 2010-11

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| M/s. Jubilant Life Sciences Ltd. (Formerly known as Jubilant Organosys Limited), Plot No. 1A, Sector -16A, Noida | **Vs.** | Addl. CIT, Range-1, Moradabad |
| **PAN :AABCV0200H** | | |
| **(Appellant)** | | **(Respondent)** |

**And**
ITA No.6196/Del/2014
Assessment Year: 2010-11

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| DCIT,<br>Circle-1,<br>Moradabad | **Vs.** | M/s. Jubilant Life Sciences Ltd., (Formerly known as Jubilant Organosys Limited),<br>Gujraula, Amroha,<br>Uttar Pradesh |
| | | **PAN :AABCV0200H** |
| **(Appellant)** | | **(Respondent)** |

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| Assessee by | Sh. K.M. Gupta, Advocate |
| Department by | Sh. Mahesh Shah, CIT-DR |

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| Date of hearing | 14.02.2022 |
| Date of pronouncement | 28.02.2022 |

**ORDER**

**PER SAKTIJIT DEY, JM:**

Captioned are two sets of cross appeals arising out of two separate orders of learned Commissioner of Income Tax (Appeals), Bareilly, pertaining to assessment years 2019-10 and 2010-11.

***ITA No.4637/Del/2014***
***(Assessee's Appeal for AY : 2009-10***

**2**. Ground no. 1, being general in nature, does not require any adjudication.

**3.** In ground no. 2, the assessee has challenged the disallowances of club expenses amounting to Rs.2,17,799/-

**3.1** We have heard the parties and perused the materials on record. The departmental authorities have disallowed the aforesaid expenses on the reasoning that the expenditure was not incurred wholly and exclusively for the purpose of business. Further, learned Commissioner (Appeals), relying upon the decisions of learned first appellate authority in the earlier assessment year, upheld the disallowance. However, before us, it is a common point between the assessee and the Revenue that the issue is squarely covered by the decision of the Tribunal in assessee's own case in assessment years 2000-01 to 2008-09.

**3.2** On perusal of the order dated 12.03.2019 passed in ITA No. 4410/Del/2003 and others, we find while deciding identical issue in assessee's own case, the Tribunal has held as under:

> *"75. The 3rd ground of appeal is with respect to disallowance of club expenses of INR 48751/-. The fact shows that during year appellant has made certain payment to various clubs, which was disallowed by learned assessing officer holding that it is not for purpose of business of assessee. The learned CIT - A also upheld disallowance holding that assessee being a corporate body is not capable of utilizing club facilities itself.*
>
> *76. On hearing parties, it was noticed that above issue is squarely covered in favour of assessee by order of coordinate bench for assessment year 2001 - 02 in case of assessee wherein it has been held that club expenses are in nature of business expenditure and therefore allowable to appellant relying on decision of honourable Bombay High Court and Gujarat High Court. The honourable Supreme Court has also held in CIT vs. United Glass manufacturing company limited civil appeal number 6449 of 2012 that club expenses are also PO of business expenditure. The honourable Delhi High Court has also taken similar view in 326 ITR 425 and 218*

*taxmann 69 in view of this ground number 3 of appeal of assessee is allowed."*

**3.3** Facts being identical, respectfully following the decision of the coordinate bench, we allow assessee's claim of deduction. Consequently, disallowance is deleted. This ground is allowed.

**4.** In ground no. 3, assessee has challenged the disallowance of prior period expenses of Rs.28,09,028/-.

**4.1** We have heard the parties and perused the materials on record.

**4.2** As could be seen from the facts on record, certain expenses claimed by the assessee were disallowed by the departmental authorities on the reasoning that they do not relate to the impugned assessment year. While confirming the addition, learned Commissioner (Appeals) has observed that the assessee did not claim the deduction by way of a revised return of income. Thus, according to him, the Assessing Officer could not have entertained assessee's claim. Accordingly, he upheld the decision of the Assessing Officer.

**4.3** At the time of hearing, learned counsels appearing for the parties have agreed that the issue is squarely covered by the decision of the Tribunal in assessee's own case in the preceding assessment years. Having deliberated upon the issue, we find

that certain expenditure alleged to be relating to prior period was payable during the previous year 2008-09, as per the claim of the assessee. It is evident, the reason for disallowing assessee's claim is, it was not made through a revised return of income. As we find, identical issue came up for consideration before the coordinate bench in assessee's own case in assessment years 2000-01 to 2008-09. While deciding the issue the bench has observed as under:

> *"36. We have carefully considered rival contention and perused orders of lower authorities. The learned assessing officer has given a clear-cut finding that it was not found that these expenses were quantified during relevant previous year only. By deleting above disallowance also vide para number 1 of order, learned CIT appeal noted that it is clear that assessing officer has not allowed proper opportunity to explain same to assessee and learned AO has straight way referred notes of accounts as mentioned by auditor and concluded that disallowance is made without appreciating proper facts. We do not agree with finding of learned CIT - A that disallowance cannot be sustained as assessee has also been taxed on miscellaneous income of earlier years charged to tax this year. The logic- given by learned CIT appeal that assessing officer should have treated both these items of prior period income and expenses on same parity is devoid of any merit. It is also not acceptable that without examining facts of case that when these expenses have been crystallized, disallowance cannot be deleted. Before neither learned assessing officer nor before learned CIT appeals or before us has assessee shown that, this expenditure has been crystallized during year. Unless this is shown these expenditure cannot be allowed without verification. It is also fact that definition of prior period expenditure for companies act and definition of prior period expenditure for income tax act are different. Therefore it needs to be examined that how assessee has shown in its balance sheet prior period expenditure following companies act 1956 for preparing balance sheet according to schedule VI of companies act, and while filing return of income, it is contesting that same are not prior period expenditure. This dichotomy in argument of assessee is required to be rebutted by assessee himself before assessing officer. There has to be a categorical answer from assessee that disclosure made by it*

*under companies act is erroneous and it is to be demonstrated by reliable evidences. Further, we also do not accept argument of assessee that auditors have certified prior period expenditure. This is devoid of any merit as balance sheet and notes on accounts according to companies act are prepared by assessee, auditor merely expresses an opinion on that. Therefore assessee itself has classified same is a prior period expenditure while preparing its balance sheet and now it is taking a different stand for purpose of computation of its income under income tax act. In view of this,whole issue is set aside back to file of learned assessing officer with a direction to assessee to show that above expenditure is not a prior period expenditure and has been crystallized during year only. If assessee demonstrates that, addition is required to be deleted. Accordingly, ground number 16 of appeal of learned AO is allowed with above direction."*

**4.4** Facts being identical, respectfully following the decision of the coordinate bench in assessee's own case, as referred to above, we restore this issue to the file of Assessing Officer to decide it afresh following the direction of the Bench in the order referred to above. This ground is allowed for statistical purposes.

**5.** In ground no. 4, the assessee has challenged the adjustment made to the Arm's Length Price (ALP) of reimbursement of expenses. In course of proceeding before him, the Transfer Pricing Officer (TPO) noticed that the assessee has provided certain services to the Associated Enterprises (AE) on cost to cost basis without charging markup. Observing that the services provided to the AE in the nature of business support services would not have been provided by any other independent entity in similar circumstances, the Assessing Officer issued a show-cause-notice

to the assessee proposing to charge mark-up of 29.71% on the cost of Rs.23,67,46,713/-.

**5.1** While doing so, he compared the mark-up charged by seven comparables averaging to 29.71%. Though, the assessee objected to the proposed adjustment, however, the TPO was unconvinced and ultimately proceeded to charge a mark-up of 27.13% on the cost incurred, resulting in an adjustment of Rs.6,42,29,383/-. The assessee contested the adjustment before learned Commissioner (Appeals). After considering the submissions of the assessee in the context of facts and materials on record, learned Commissioner (Appeals) directed the Assessing Officer to compute the adjustment to ALP on reimbursement of expenses by charging mark-up of 21.21% on cost. As a result, the adjustment proposed by the TPO was reduced to 5,02,13,977/-.

**5.2** Before us, learned counsel for the assessee submitted, learned first appellate authority has completely misconceived the submissions made by the assessee and has erroneously concluded that the assessee has offered mark-up of 21.21%. Drawing our attention to the submissions made before learned first appellate authority, learned counsel for the assessee submitted, what the assessee has sought is risk adjustment of

21.21% to the margin of the comparables. He submitted, the assessee has never offered mark-up of 21.21%. Further, he submitted, the submission made by the assessee on the comparables selected by the TPO were not at all considered by learned Commissioner (Appeals). He submitted, the assessee does not incur any extra cost and the reimbursement is purely on cost to cost basis. Therefore, there is no reason to charge any mark-up on the cost. He submitted, in assessee's own case in assessment year 2010-11, the TPO has accepted assessee's claim of reimbursement of expenses on cost to cost basis.

**5.3** Per contra, learned Departmental Representative submitted, the cost reimbursed to the assessee are not simply reimbursable expenditure but involves various expenses, including salary expenses of expatriate employees, payment made to consultants towards site inspection charges, designing of packaging material etc. He submitted, neither in course of proceeding before the TPO, nor before learned Commissioner (Appeals), the assessee has furnished cogent evidence. He submitted, expenses incurred are not routine travel expenses which could have been reimbursed on cost to cost basis. He submitted, assessee incurs all the expenses upfront, thereafter, gets the reimbursement. Further, he

submitted, if the assessee can furnish the factual details called for, assessee's claim can be examined.

**5.4** We have considered rival submissions and perused the materials on record. It is noticed, before the TPO the assessee had submitted that it incurs certain expenditure on behalf of its AEs, which, afterwards gets reimbursed at cost. The assessee has further submitted that the function of the assessee is limited to facilitating the payment on behalf of the AEs. It is further observed, before learned first appellate authority, the assessee has made detailed submission contesting the adjustment proposed by the TPO, including on the issue relating to selection of comparables. However, in a cryptic order passed, learned Commissioner (Appeals) has disposed of the issue by stating that the assessee offered average mark-up of 21.21% and accordingly directed the Assessing Officer to compute the adjustment by charging mark-up of 21.21% on cost. On perusal of materials on record, we are convinced that the conclusion drawn by learned Commissioner (Appeals) is erroneous, as, the assessee has never offered mark-up of 21.21%.

**5.5** On the contrary, the assessee has sought risk adjustment of 21.21% to be made to the margin of the comparables towards

credit risk differences. Thus, in our view, learned Commissioner (Appeals) has completely misconstrued the submissions of the assessee. Further, various other submission made by the assessee, including the submissions made relating to selection of comparables, have not at all been considered by learned Commissioner (Appeals). Considering the above, we deem it appropriate to restore the issue to the file of the Assessing Officer for de-novo adjudication after providing due opportunity of being heard to the assessee.

**5.6** It is open to the assessee to furnish further evidence to demonstrate that the reimbursement by AEs on cost to cost basis does not require charging of any mark-up. While deciding the issue, the Assessing Officer must also examine assessee's claim that in assessment year 2010-11, reimbursement of expenses on cost to cost basis was accepted by the TPO. Needless to mention, the Assessing Officer must provide a reasonable opportunity of being heard to the assessee before deciding the issue. This ground is allowed for statistical purposes.

**6.** In the result, the appeal is partly allowed.

***ITA No. 4827/Del/2014***
***(Revenue's Appeal for AY : 2009-10)***

**7.** In ground no. 1, the Revenue has challenged the deletion of disallowance of Rs.32,42,447/-, being the expenditure incurred by the assessee towards purchase of books, magazines and periodicals.

**7.1** At the time of hearing, learned Representatives appearing for the parties have agreed that the issue is squarely covered by the decision of the Tribunal in assessee's own case in preceding assessment years.

**7.2** As we find, identical issue came up for consideration before the coordinate bench in assesee's own case in assessment year 2000-01 to 2008-09 (supra). While deciding the issue, the Tribunal has held as under:

> *"31. Ground number 13 of appeal is against deletion of disallowance of books and periodical expenses of INR 2098978/- which was claimed by assessee as revenue expenditure held by AO as capital expenditure, learned CIT-A allowed it is a revenue expenditure. Ground number 14 is also related to it. On hearing parties it was found that identical issue has been decided in case of assessee for assessment year 98 - 99 in assessee's own case wherein it has been held that expenditure incurred by assessee on 'purchase of books and journals cannot be held to be a capital expenditure. There is no change in facts and circumstances of case, nature of expenditure is also same, no contrary judicial precedent cited, therefore, following decision of coordinate bench, and hence, we dismiss ground number 13 and 14 of appeal of revenue."*

**7.3** Facts being identical, respectfully following the decision of the coordinate bench in assessee's own case, we dismiss the ground.

**8.** In ground no. 2, the Revenue has challenged the deletion of disallowance of deduction claimed under section 80IA of the Act in respect of profit derived from business of generation of power. Before us, it is a common point between the parties that while deciding identical issue in assessee's own case in the preceding assessment years, the Tribunal has upheld the decision of learned Commissioner (Appeals).

**8.1** Having considered the submissions of the parties, we find, identical issue came up for consideration before the Coordinate Bench in assessee's own case in assessment year 2000-01 to 2008-09 (supra). While deciding the issue, the Bench has held as under:

> *"11. We have carefully considered rival contention and perused orders of lower authorities. The facts stated above are undisputed. The first ground of rejection of claim of assessee is that diesel-generating sets are imported where invoices show that these were imported for home consumption. The learned assessing officer has noted that the marking show that goods are not used for purpose of business. There is a clear misunderstanding on part of learned AO in holding that when custom authorities have marked for home consumption means that they are not to be used for purpose of business. The only meaning of that particular Mark is that goods are to be used for consumption in Indian Territory. Therefore, Page | 10 allegation of learned assessing officer that Gen sets imported for*

*home consumption and therefore deduction under section 80 IA of income tax act is not allowable on it is devoid of any merit. Further, with respect to power generation unit not being a separate unit and further power is not supplied to public but it is for captive consumption and therefore no deduction under section 80 IA of income tax act is allowable is also now judicially settled by decision of honourable Delhi High Court in case of CIT vs. Orient Abrasives Ltd [271 CTR 626] wherein honourable Delhi High Court has held where substantial question of law before honourable High Court was Whether "profit and gain" from captive consumption of electricity supplied from generator set and which cannot be sold to any third person will qualify for deduction under Section 80-IA of Income Tax Act, 1961?. The honourable High Court answered same as under:-*

> *"11. A similar issue was raised before Delhi High Court in CIT Vs. Orissa Cement Ltd. [2002] 254 ITR 412 (Delhi), where deduction under Section 80-I was claimed on profits derived from captive consumption of limestone excavated from mines and thereafter used for manufacture of cement in plant of assessee. Revenue"s submission that one cannot earn profit by indulging in business with oneself, was rejected to negate claim. Division Bench relying on Tata Iron and Steel Co. Ltd. & Ors. Vs. State of Bihar [1963] 48 ITR 123 (SC) and several decisions, rejected similar submission of revenue after quoting following paragraph from judgment in Tata Iron and Steel Co. Ltd. (supra):-*
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> *"That even in cases where profit resulting from an ultimate activity is brought to tax there could be an apportionment if there were an exemption in respect of profits resulting from distinct activities at earlier stages is illustrated by provisions of Indian Income Tax Act itself. Thus, in case of, say, a sugar mill, which grows its own cane, in absence of any exemption for income derived from agriculture, i.e., from production of cane, entire profit of mills from sale of sugar would have to be included in taxable profits under Section 10 of Income Tax Act. But Section 4(3)(vii) exempts agricultural income as defined in Section 2(1). The result, Therefore, is that there is a. disintegration or dichotomy of 'incomes, profits or gains' of business and of agricultural income, so that there has to be an apportionment between two in order to determine taxable income of an assessed. It is on account of this situation that Section 59(2) of Income Tax Act provides for rules being made for prescribing manner in which and procedure by which incomes derived in part from agriculture and in part from business shall be arrived at."*

*It was observed that there could be erosion or deviation from principle that one cannot make profit by trading or doing business with oneself. It would be appropriate to also reproduce following observations of Supreme Court in Tata Iron and Steel Co. Ltd. (supra):-*

*"It could not be disputed that factually profit from mining operation and winning of mineral is imbedded in profit realised from sale of end product. A simple illustration would demonstrate this. Let us assume that cost of winning ore is Rs. 50/-a ton and market price of similar ore which would have to be used in absence of ore mined is Rs. 60/-per ton. There could not be any doubt that this difference of Rs. 10/- per ton of ore would be reflected in profit and loss resulting from sale of steel. It is needles to add that if in a given case mined product costs more than market price of commodity, there would be loss on mining operation notwithstanding that there is a profit realised from sale of end product -steel, but these are matters of calculation not relevant at present stage, for we are endeavouring to ascertain whether there could in law be a profit when mined ore is converted into steel in mills of mining-company. It thus factually profit from mine or from mining operation is imbedded in profit from sale of steel is there any principle of law which prevents effect being given to this factual position? The learned Attorney-General submitted that in such a situation "profit" is not a real or an actual profit but is one which is merely notional, and that when Act spoke of a "profit" it meant an actual, real and realised profit and not a merely notional "profit". We find ourselves unable to accept this submission. We start with premise that by sale of end product a real "profit" has been realised. When analysed it is found that that profit is aggregate or resultant of profits from different lines of activity. If arithmetically that total represents resultant aggregation of different items of activity we fail to see how it could be said that profit from each item which results in that total is a notional and not an actual or real profit. In interests of clarity, we should add that principle would be same when sale of end product yields no profit, but results in a loss, only in such a case, relevant component, viz, disintegrated profit or loss resulting from mining operation would diminish loss if that were a profit, or add to loss if that were also a loss. No doubt, there was a further contention urged that you cannot dissect that final profit in order to ascertain its components, but it is quite a different one from that now under consideration and we shall deal with it in its proper place. But what we are now concerned to point out is that if it is capable of dismemberment or disintegration into its components, it would not be correct use of language to*

*designate profit so apportioned and ascertained as attributable to each line of activity any less real than aggregate profit realised from all ventures. In way in which we have approached problem there could be no question involved of any departure from principle that a man cannot trade with himself. In fact, principle of dichotomy is*

*"4. After considering issue, statutory requirement as prescribed under section 80-IA(1) has been stated in paras 8 and 9 of abovesaid judgment which reads thus brought in by learned Attorney-General by first disintegrating business of appellant into two -first as a mine- owner winning ore and later by a Steel Manufacturing Co., consuming won ore and then posing question as to whether transfer of ore from mining section to manufacturing one could in law involve a sale of product so as to yield a "profit". It would be apparent that if one proceeded on basis of treating businesses as a single and integrated one, as learned Attorney-General desired us to do, as one unbroken chain from start of mining operation to sale of finished steel or steel products by company -no question of a person trading with himself would arise, but very different one as to whether there could be a disintegration of profits of an integrated business, between component constituents which go to make it up. Undoubtedly, in order to ascertain profits from mine there would have to be a disintegration of gross profits which finally emerge from sale of finished steel or steel products. What we desire to point out is that this involves no disintegration of business affording scope for contention based upon principle that a person cannot trade with himself, but one far removed from it, viz., whether when a profit has been made as a conjoint result of different but integrated operations, profits so derived could be broken up so as to permit attribution of specific amounts of profit to each or any of several operations or activities."*

*12. Thereafter, Supreme Court in Tata Iron and Steel Co. Ltd. (supra) noticed and went into question whether there was anything in law which prohibits/bars ascertainment of profit and loss attributable to each line of activity, where sale of final end product has resulted in profit or loss for entire venture. Contra argument raised on behalf of Revenue was rejected for reasons given in paragraph which has been quoted in decision of Delhi High Court in Orissa Cement Ltd. (supra). We have already noted statutory provisions of Section 80 IA of Act and observed that statutory provisions in fact were to contrary and stipulate computation of an eligible undertaking profit or loss, even when sales/transactions were made to a related party or to same assessee, but in such*

*cases, profits have to be computed in manner stipulated in sub-sections (10) and (8) to Section 80-IA.*

*13. Madras High Court in Tamilnadu Petro Products Ltd. Vs. Assistant Commissioner of Income Tax, [2011] 338 ITR 643, had an occasion to deal with Section 80 IA in a case where assessee had a electricity generation unit, which was supplying electricity to same assessee and not to third parties, observing that profits from captive consumption would be eligible, Division Bench in paragraph 4 referred to an earlier decision of same Court dated 7th June, 2010 in Tax Case (Appeal) Nos.68 to 70 of 2010, CIT Vs. Jhiagarjar Mills Ltd. and quoted relevant portion and observed:-*

*"8. The contention that only whatever power generated from sale to an outsider or Electricity Board, and profit or gain derived by such sale alone can be taken as profits or gains derived by assessee as mentioned in section 80-IA(1) of Income-tax Act, has been rejected by Tribunal in order impugned. In our considered view, Tribunal was well justified in having rejected such a stand of appellant. Having referred to section 80-IA(1) of Income-tax Act, we are also convinced that what is all to be satisfied in order to be eligible for deduction as provided under sub-section (1) of section 80-IA, assessee should have set up an undertaking or an enterprise and from and out of such an undertaking or an enterprise set up, any profit or gain is derived, falling under sub -section covered by sub-section (4) of section 80-IA of Income-tax Act, such profit or gain derived by assessee can be deducted in its entirety for a period of 10 years starting from date of functioning of set up. The contention that profit or gain can be claimed by assessee only if such profit or gain is derived by sale of its product or power generated to an outsider cannot be manner in which provisions contained in section 80-IA(1) can be interpreted. The expression 'derived' used in said section 80 -IA(1) in beginning as well as in last part of sub-section (4) makes it abundantly clear that such profit or gain could be obtained by one's own consumption of outcome of any such undertaking or business enterprise as referred to in sub-section (4) of section 80-IA. The dictionary meaning of expression 'derive' in New Oxford Dictionary of English states 'obtaining something from a specified source'. In section 80 -IA(1) also no restriction has been imposed as regards deriving of profit or gain in order to state that such profit or gain derived only through an outside source alone would make eligible for benefits provided in said section.*

*9. Therefore, there is no difficulty in holding that captive consumption of power generated by assessee from its own power plant would enable respondent/assessee to derive profits and gains by working out cost of such consumption of power inasmuch as assessee is able to save to that extent which would certainly be covered by section 80- IA(1). When such will be outcome out of own consumption of power generated and gained by assessee by setting up its own power plant, we do not find any lack of merit in claim of respondent/assessee when it claimed by relying upon section 80-IA(1) of Income-tax Act by way of deduction of value of such units of power consumed by its own plant by way of profits and gains for relevant assessment years."*

*14. At this stage, it would be appropriate to also notice judgment of Delhi High Court in CIT Vs. DCM Sriram Consolidated Ltd., [2010] 322 ITR 486 (Delhi), wherein explanation clause (iv) to Section 115JA of Act had come up for interpretation. The clause provided for exclusion of profits derived by an industrial undertaking from business of generation or generation and distribution of power. Revenue had raised contention one cannot earn profit by indulging in business with oneself and thus captive consumption would not be covered by explanation clause (iv) to Section 115JA. Rejecting contention and relying upon decision in case of Tata Iron and Steel Co. Ltd. (supra), it was observed:-*

*"Based on ratio of Supreme Court in Tata Iron and Steel Ltd it is clear that in arriving at an amount that is to be deducted from book profits ' which is really to benefit of assessee as it reduces amount of tax which it is liable to pay under provisions of Section 115JA of Act, principle of apportionment of profits resting on disintegration of ultimate profits realized by assessee by sale of final product by assessee has to be applied. In applying that principle it is not necessary as was observed by Supreme Court to depart from principle no one could trade with himself ' even though it pointedly noticed that House of Lords in Sharkey v. Wernher has opined that there was neither a general proposition that no man could trade with himself and make in its true sense or meaning taxable profits by dealing with himself nor was it universally true, and that, there are situations in which a man could be said to make a profit out of consumption of his own goods. Since earlier decision of House of Lords had found favour with Supreme Court in Kikabhai Premchand (supra), Supreme Court in Tata Iron and Steel Ltd (supra) decided case by applying principle of disintegration of ultimate profits realized on sale of final product."*

> *15. In view of aforesaid discussion, it has to be held that finding of Tribunal that profits derived by respondent-assessee"s power generation unit would be eligible for deduction as a separate undertaking under Section 80 IA, but has referred to decision in West Coast Paper Mills Ltd. vs. Asstt. Commissioner of Income Tax [2006] 286 ITR (AT) 252 (Mum.) is correct. The substantial questions of law mentioned above are accordingly answered in favour of respondent-assessee and against appellant Revenue.*
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> *16. At this stage, learned counsel for appellant Revenue has submitted that Tribunal has passed an order of remand on question of computation of profit and gain from business in terms of sub- section (8) to Section 80IA. Learned counsel for respondent-assessee submits that Assessing Officer is competent to decide said question as per law and hands and power of Assessing Officer have not been curtailed and present order does not give any specific or clear finding/direction. We take statement made by learned counsel respondent-assessee on said aspect on record. Both parties will be entitled to raise their contentions on computation of eligible profit/loss from eligible business."*
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> *12. In view of this, we do not find any infirmity in order of learned CIT - A in holding that above sum cannot be included in book profit for taxation. Accordingly, ground numbers 3 - 6 of appeal are dismissed."*

**8.2** Facts being identical, respectfully following the decision of the Coordinate Bench, we uphold the decision of learned Commissioner (Appeals) by dismissing the ground. This ground is dismissed.

**9.** The issue raised in ground no. 3 relates to adjustment made on account of ALP of corporate guarantee.

**9.1** Briefly the facts are, assessee's AE in USA, i.e., HSL Holdings Inc. had taken a loan of USD 50 million from ICICI Bank UK PIC for acquiring another company. In connection with the

said loan availed by the AE, assessee provided a corporate guarantee of Rs.221.9 crores. Similarly, assessee provided corporate guarantee of Rs.254.7 crores in respect of loan availed by Draxis Speciality Pharma Inc., another AE of the assessee. In course of proceeding before him, the TPO while examining the TP study report found that the assessee had not benchmarked the transaction relating to the provision of corporate guarantee. Therefore, he issued a show-cause-notice to the assessee to explain who ALP of the corporate guarantee should not be determined by applying the rate of commission charged by banks in similar nature of transactions. Though, the assessee objected to the proposed adjustment by submitting that provision of corporate guarantee cannot be considered as an international transaction under section 92B of the Act, however, rejecting the submissions of the assessee, the TPO proceeded to determine the ALP of the corporate guarantee by applying commission rate of 4.86%. This, resulted in an adjustment of Rs.23.16 crores. The assessee contested the aforesaid adjustment before learned first appellate authority. Being convinced with the submission of the assessee, learned Commissioner (Appeals) held that provision of corporate guarantee does not come within the purview of the

international transaction, as per section 92B of the Act. Accordingly, he deleted the adjustment without going into the merits of the issue.

**9.2** Before us, learned Departmental Representative submitted, after amendment to section 92B of the Act vide Finance Act, 2012 with retrospective effect from 01.04.2002, the scope and ambit of international transaction has been expanded and various types of capital financing, including provision of guarantee have been included within the definition. Thus, he submitted, the decision of learned Commissioner (Appeals) that provision of corporate guarantee is not an international transaction, is erroneous. In support of his contention, he relied upon the decision of Hon'ble Madras High Court in the case of PCIT v. Redington (India) Ltd. (2021) 430 ITR 298 (Mad.)(HC).

**9.3** Learned counsel for the assessee, though, fairly accepted the legal position that provision of corporate guarantee falls within the definition of international transaction under section 92B of the Act, however, he submitted, since, learned Commissioner (Appeals) deleted the adjustment by treating provision of corporate guarantee not to be treated as international transaction, he did not consider various other arguments of the

assessee relating to merits of the issue. Thus, he submitted, the issue may be restored back to the Assessing Officer for considering the submissions made by the assessee on the merits of the issue.

**9.4** We have considered rival submissions and perused the materials on record. Insofar as the factual position relating to the issue is concerned, there is no dispute that the assessee has provided corporate guarantee in respect of loans availed by certain overseas AEs. From the initial stage itself, the assessee has taken a stand that the provision of corporate guarantee does not fall within the scope and ambit of international transaction as provided under section 92B of the Act. While, the TPO has rejected the aforesaid contention of the assessee and has determined the ALP of guarantee commission, learned Commissioner (Appeals) accepting assessee's submission, has held that provision of corporate guarantee cannot be treated as international transaction. However, we are unable to subscribe to the view expressed by learned Commissioner (Appeals).

**9.5** By virtue of an amendment made to section 92B of the Act by Finance Act, 2012 with retrospective effect from 01.04.2002, the scope and ambit of the expression 'international transaction'

was widened with the insertion of Explanation to section 92B of the Act. Clause (i)(c) of the Explanation clearly says that *'capital financing, including any type of long term or short term borrowings, lending or guarantee, purchase or sale of marketable securities or any types of advance payments or deferred payments or any other debt arising during the course of business can be regarded as international transaction'*. Thus, keeping in view the amendment made to section 92B of the Act, provision of corporate guarantee has to be regarded as an international transaction in terms of section 92B of the Act. The Hon'ble Madras High Court in case of PCIT v. Redington (India) Ltd. (supra), after taking note of the amendment to section 92B of the Act, has held that provision of corporate guarantee will fall within the scope and ambit of international transaction as defined under section 92B of the Act. Therefore, we hold that provision of corporate guarantee towards loan availed by the AEs constitutes international transaction under section 92B of the Act.

**9.6** Having held so, we must observe, learned Commissioner (Appeals) has deleted the adjustment made in relation to provision of corporate guarantee simply on the reasoning that it is not an international transaction. Therefore, he has not considered

the issue on merits. On perusal of material on record, we have observed, in course of proceeding before the TPO as well as before learned Commissioner (Appeals), the assessee had advanced detailed submissions on merits contesting the adjustment made on account of provision of corporate guarantee. While the TPO has completely rejected the submissions of the assessee, learned Commissioner (Appeals) did not deal with them as he held that the provision of corporate guarantee is not an international transaction. Thus, in our view, the assessee deserves a fair opportunity to contest the issue relating to the determination of ALP of guarantee commission to be charged on provision of corporate guarantee on merits.

**9.7** In view of the aforesaid, we restore the issue to the Assessing Officer for de-novo adjudication after due and reasonable opportunity of being heard to the assesse. Ground is allowed for statistical purposes.

**10.** In the result, Revenue's appeal is partly allowed for statistical purposes.

***ITA No.4638/Del/2014***
***(Assessee's Appeal for AY: 2010-11)***

**11.** Ground no. 1, being general in nature, does not require specific adjudication.

**12.** Grounds nos. 2 and 3 of the instant appeal are identical to ground nos. 2 and 3 of ITA No. 4837/Del/2014 decided by us in the earlier part of the order.

**12.1** Facts being identical, our decision in ground nos. 2 and 3 of ITA No. 4837/Del/2014 would apply mutatis and mutandis to these grounds also. Accordingly, ground no. 2 is allowed and ground no. 3 is allowed for statistical purposes.

**13.** In ground no. 4, 5 and 6, the assessee has challenged the transfer pricing adjustment of Rs.15,28,849/-.

**13.1** Briefly the facts are, during the year under consideration, the assessee had advanced loan of USD 50 Million to one of its AEs in Singapore. Whereas, it did not charge any interest on such loan. Having noticed this, the TPO called upon the assessee to explain, why the advancement of loan to the AE should not be treated as an international transaction and interest on such loan should not be benchmarked. Assessee objected to the proposed adjustment by submitting that the advancement of loan to AE is

in the nature of share holders' activity. Hence, no interest is required to be charged. The TPO, however, did not agree with the submission of the assessee and proceeded to benchmark the interest on loan advanced to AE by applying SBI prime lending rate of 15% p.a. for a period of one month and accordingly proposed adjustment of Rs.2,91,01,563/-. While considering the issue in appeal proceeding, learned Commissioner (Appeals), though, agreed with the TPO that ALP of interest on loan advanced to AE has to be determined, however, he did not accept the rate of interest applied by the TPO. Considering the fact that LIBOR rate of interest is 4.41%, he directed the Assessing Officer to determine the ALP of interest chargeable on the loan advanced to the AE by applying the rate of 6%. As a result, the adjustment was substantially reduced to 15,28,849/-.

**13.2** We have considered rival submissions and perused the materials on record. Assessee's contention that advancement of loan to AE is a share holders activity, hence, would not come within the purview of international transaction is unacceptable, in view of the amendment made to section 92B of the Act by Finance Act, 2012, with retrospective effect from 01.04.2002. As regards the merits of the issue, the facts on record indicate that

while the TPO has determined the ALP of the interest chargeable on the loan advance to AE by applying SBI prime lending rate of 15%, learned Commissioner (Appeals) has substantially reduced it to 6%. The rate of 6% adopted by learned Commissioner (Appeals) is fair and reasonable considering the LIBOR rate of 4.42% prevailing at the relevant point of time. Therefore, we do not find any reasonable basis to interfere with the decision of learned Commissioner (Appeals). Accordingly, ground raised is dismissed.

**13.** In the result, the appeal is partly allowed.

***ITA No. 6196/Del/2014***
***(Revenue's Appeal for AY: 2010-11)***

**14.** Ground nos. 1 and 2 of the instant appeal are identical to ground nos. 1 and 2 of ITA No. 4827/Del/2014 decided by us in the earlier part of the order. Facts being identical, our decision in respect of ground nos. 1 and 2 of ITA No.4827/Del/2014, would apply mutatis mutandis to these grounds also. Accordingly, these grounds are dismissed.

**15.** Grounds no. 3 of the instant appeal is identical to ground no. 3 of ITA No.4827/Del/2014 decided by us in the earlier part of the order. Following our decision therein, we restore this issue

to the Assessing Officer for de-novo adjudication. This ground is allowed for statistical purposes.

**16.** In ground no. 4, the Revenue has raised the issue of ALP on the rate of interest on loan advanced to the AE. While deciding identical issue raised in ground no. 4 of assessee's appeal in ITA No.4638/Del/2014 in the earlier part of the order, we have upheld the decision of learned Commissioner (Appeals). Thus, in view of our decision therein, this ground has become infructuous, hence, dismissed.

**17.** Ground nos. 5 and 6, being of general nature, are dismissed.

**18.** In the result, the appeal is partly allowed for statistical purposes.

**19.** To sum up, assessee's appeals are partly allowed and Revenue's appeals are partly allowed for statistical purposes.

***Order pronounced in the open court on 28th February, 2022***

| | |
|---|---|
| ***Sd/-*** | ***Sd/-*** |
| **(DR. B.R.R. KUMAR)** | **(SAKTIJIT DEY)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

Dated: 28th February, 2022.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi