IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "C", PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI SONJOY SARMA, JUDICIAL MEMBER

ITA No.460/PUN/2017

निर्धारण वर्ष / Assessment Year : 2012-13

Biz Secure Labs Pvt. Ltd., 1206, Sadashiv Peth, Pune 411 030 PAN : AADCB6188L	Vs.	DCIT, Circle- 1(1), Pune
Appellant		Respondent

ITA Nos.2603 /PUN/2017

निर्धारण वर्ष / Assessment Year : 2013-14

Biz Secure Labs Pvt. Ltd., 1206, Sadashiv Peth, Pune 411 030 PAN : AADCB6188L	Vs.	DCIT, Circle- 1(1), Pune
Appellant		Respondent

ITA Nos.2622 /PUN/2017

निर्धारण वर्ष / Assessment Year : 2013-14

DCIT, Circle- 1(1), Pune	Vs.	Biz Secure Labs Pvt. Ltd., 1206, Sadashiv Peth, Pune 411 030 PAN : AADCB6188L
Appellant		Respondent

Assessee by	Shri V.L. Jain
Revenue by	Shri Rajeev Kumar
Date of hearing	22/23-03-2022
Date of pronouncement	28-03-2022

आदेश / ORDER

PER R.S.SYAL, VP :

This batch of two appeals by the assessee and one appeal by the Revenue involves the assessment years 2012-13 and 2013-14.

These appeals have some common issues. We are, therefore, proceeding to dispose them off by this consolidated order for the sake of convenience.

A.Y. 2012-13 :

2. The first issue raised in this appeal is against the partial rejection of the claim of deduction u/s. 80IC of the Income-tax Act, 1961 (hereinafter also called 'the Act') to the extent of Rs.10,90,23,322/-.

3. Succinctly, the factual panorama is that the assessee filed its return declaring total income of Rs.19.14 crore after claiming deduction u/s.80IC of the Act at Rs.21.09 crore. During the course of assessment proceedings, the Assessing Officer (AO) observed that the assessee was into the business of manufacture and sale of Antivirus software `Net Protector', with one unit in Pune (Taxable) and the other in Parwanoo, Himachal Pradesh (Non-taxable) because of deduction u/s.80IC of the Act. The assessee was called upon to explain the process of manufacture of the Antivirus software in Parwanoo, in response to which, it was submitted that the raw material for the manufacturing activity, consisted of blank CDs, which are procured from third party vendors. After checking

on computer, the same are kept for writing in the CD writer racks, where CD writing takes place. It was explained that similar process is followed for manufacturing at both the units, viz., Pune and Parwanoo. On further inquiry about the Antivirus software development, the assessee submitted that its R&D Centre in Pune is involved in updating and managing the Master software. The updated software is uploaded on a server as an FRP file. The master software is updated by downloading the updated software and after that production is carried out on its updated software. The AO observed that the only activity undertaken at the Parwanoo unit was that of CD writing with the help of a few unskilled employees, whereas the software development required for the antivirus, was being done by the Pune R&D Centre only. He took note of the fact that only 19 employees were working at Parwanoo unit with their educational qualifications ranging from 10th to Graduation and the highest annual salary paid was of Rs.1,19,425/- As against that, all the technical engineers, involved in the process of the software development work, were in the Pune R&D Centre having annual salary ranging up to Rs.11,03,003/-. He further observed that the value of assets deployed at Pune unit was Rs.1.36

crore as against the value of assets at Parwanoo unit amounting to a mere sum of Rs.1.24 lakh, which demonstrated the total absence of any advanced machinery or manpower relating to software development in Parwanoo. On being called upon to explain the position, the assessee submitted that it has set up four independent units in Pune, namely, R&D Centre, Head Office, Manufacturing unit and Sales Depot and one Manufacturing unit in Parwanoo. The R&D unit in Pune was carrying out the work relating to software development. The assessee further put forth that the costs incurred in development of software by the R&D unit were allocated between the Pune and Parwanoo units on the basis of number of units of Antivirus software sold by them. The AO, on a consideration of all the relevant submissions advanced on behalf of the assessee, came to hold that the software development activity was carried out exclusively at the Pune unit, while the work done at the Parwanoo unit was only of Antivirus software CD writing. As the assessee was engaged in manufacturing Antivirus software, with the core activity of software programme done by the technical engineers working at the Pune R&D unit only, the AO came to conclusion that only the profit attributable to CD writing process in

Parwanoo unit was liable to be considered for deduction u/s.80IC. He observed from the assessee's annual accounts of the Parwanoo unit that out of total sales of Rs.28.45 crore, sales to the Pune unit amounted to Rs.14.97 crore (4,95,230 units) at 52.60%. He took into consideration the Direct and Indirect costs incurred by the Parwanoo unit at Rs.1.30 crore at Rs.36.69 lakh respectively and applying 52.60%, he determined total cost of CD writing attributable to sales to Pune unit at Rs.89,68,217/-. A mark up of 10% was added to such costs for finding out the market value of CD writing at Rs.98,65,039/-. In this manner, he computed excess profit of total sales to Pune unit at Rs.13.98 crore (Rs.14.97 crore minus Rs.98.65 lakh). The assessee was confronted with this calculation and called upon to explain its stand. In reply, the assessee submitted that it set up separate Sales depot/trading in Pune with a view of operational efficiency of its Parwanoo Manufacturing unit. Because of the Maharashtra VAT Act and Rules, the assessee was required to have a single VAT and CST for all the units sales from Pune. With a view to overcome the difficulty in selling software directly to independent customers in Maharashtra, the assessee submitted that it made sales to Pune

unit and thereafter the Pune unit made sales directly to the customers in Maharashtra. The AO took note of the provisions of section 80IA(8) of the Act and issued notice u/s.133(6) to Centre for Development of Advanced Computing, Pune (CDAC) requesting them to furnish cost of CD writing. The reply was received giving cost of CD writing of 4,93,250 units at Rs.1.82 crore, as against the AO's own such calculation at Rs.98.65 lakh. Taking note of section 80IC(7) r.w.s.80IA(8) and further section 80IA(10), the AO called upon the assessee to submit its point of view on cost of CD writing. The assessee, without prejudice to its submission that deduction u/s.80IC was rightly calculated, furnished the calculation computing excess profit u/s.80IC(7) r.w.s. 80IA(8) at Rs.10,90,23,322/-. The AO made disallowance of the excess deduction u/s 80IC at this level. Though, the AO had initially referred to sub-section (10) of section 80IA, but later on left it from consideration, which was a right decision, since the sub-section (10) has no application to the facts of the case. During the course of the first appellate proceedings, the assessee raised several points as have been reproduced on pages 7 to 21 of the impugned order. The ld. CIT(A) echoed the assessment order on

this score. Aggrieved thereby, the assessee has come up in appeal before the Tribunal.

4. We have heard both the sides and gone through the relevant material on record. The assessee became entitled to deduction u/s.80IC of the Act because of establishing its unit in Parwanoo, Himachal Pradesh. The claim of the assessee is that it was engaged in the manufacture of the Antivirus software at its Parwanoo unit and hence entitled to deduction of the full profit of that unit. The AO, on appreciation of the entire material before him, found that the software development activity was done at the R&D cost centre of the assessee in Pune and only the CD writing activity, of the software developed by the Pune R&D Centre, was taking place at the Parwanoo unit. The assessee has specifically submitted before the ld. CIT(A), as has been recorded on page 9 of the impugned order, that it had 4 units in Pune, namely, R&D Cost Centre unit, Head Office, Manufacturing unit and Sale Depot, albeit the accounts of Pune units were maintained in a consolidated manner. The assessee also admitted before the authorities below that the Antivirus software development, its updation and maintenance was taken care by the R&D cost centre in Pune, whereas the

manufacturing units in Pune and Parwanoo were engaged in CD writing of the software developed by Pune R&D Centre. The AO opined that deduction u/s.80IC could be allowed only with reference to the profit attributable to the CD writing activity at the Parwanoo unit and not the software development. As against that, the stand point of the assessee is that the costs incurred by the R&D Centre in Pune for developing the Antivirus software were allocated between the Pune and Parwanoo units on the basis of number of units sold and since such costs were included in the cost base of the Parwanoo unit, the entire profit earned from the sale made by the Parwanoo unit to the Pune unit was eligible for deduction u/s.80IC of the Act.

5. In order to appreciate the rival contentions, it would be apt to take note of sub-sections (1), relevant part of sub-section (2) and relevant part of sub-section (3) of section 80IC, as under:

> "(1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (2), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains, as specified in sub-section (3).
>
> (2) This section applies to any undertaking or enterprise,—

(*a*) which has begun or begins to manufacture or produce any article or thing, not being any article or thing specified in the Thirteenth Schedule, or which manufactures or produces any article or thing, not being any article or thing specified in the Thirteenth Schedule and undertakes substantial expansion during the period beginning—

(i)…..

(*ii*) on the 7th day of January, 2003 and ending before the 1st day of April, 2012, in any Export Processing Zone or Integrated Infrastructure Development Centre or Industrial Growth Centre or Industrial Estate or Industrial Park or Software Technology Park or Industrial Area or Theme Park, as notified by the Board in accordance with the scheme framed and notified by the Central Government in this regard, in the State of Himachal Pradesh or the State of Uttaranchal; or

(*iii*) …

(*b*) …

(3) The deduction referred to in sub-section (1) shall be—

(*i*)…

(*ii*) in the case of any undertaking or enterprise referred to in sub-clause (*ii*) of clause (*a*) or sub-clause (*ii*) of clause (*b*), of sub-section (2), one hundred per cent of such profits and gains for five assessment years commencing with the initial assessment year and thereafter, twenty-five per cent (or thirty per cent where the assessee is a company) of the profits and gains."

6. On a conjoint reading of the first three sub-sections of section 80IC, it is manifested that the deduction has been provided to an assessee in respect of the profits and gains of a business (an undertaking or enterprise) which has begun manufacturing or production of any article or thing, not being an article or thing specified in 13th schedule, in the state of Himachal Pradesh etc.

The AO has not disputed that the assessee manufactures or produces an article in its Parwanoo, Himachal Pradesh, unit, which is not specified in 13th schedule. The fact that the AO has accepted a part of the claim of the deduction, implies that the assessee fulfils all the requisite conditions of the eligibility and the dispute is only on the quantum of deduction. The manner of computation of the quantum of deduction, as given in section 80IC(3), is as to a specific percent of "such profits and gains" for certain number of years. The expression "such profits and gains" takes us back to sub-section (1) of section 80IC, which talks of "*profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (2)*". This demonstrates that only the profit of the eligible unit at Parwanoo from the activity done thereat is eligible for deduction and nothing more than that.

7. Broadly, the activity of producing the Antivirus software of the assessee has two sub-activities, viz., the Software development activity and of writing such developed software on CDs. The former activity is done at R&D Centre, Pune, which is not covered u/s 80IC. Costs incurred by the R&D Centre are proportionately charged to the Parwanoo unit without any mark-up. Only the latter

activity is done at the eligible unit in Parwanoo. *Ex consequenti,* only the profit of the latter activity is eligible for the deduction. In that view of the matter and in the strict sense, profit relating to software development activity embedded in the total profit on sale, though realized by the Parwanoo unit, is not eligible for deduction u/s.80IC because such activity was not done at the Parwanoo unit.

8. In order to produce some article at an eligible unit, there can be a situation in which an assessee may outsource some part of the activity from a third party and then produce its finished product. In that case, it is the ultimate profit on the sale of finished product which should be taken into consideration for computing the deduction u/s.80IC. The reason is that the profit in respect of the outsourced activity will naturally have the mark-up of the supplier added to his cost price, which also goes into the cost base of the eligible unit, as a result of which the amount of profit on the ultimate sale price of the products produced by the eligible unit will be restricted to the activity carried out thereat alone. It, therefore, follows that the qualifying profit of the eligible unit has to be restricted to the activity done there at and such profit can be deduced from the books of the eligible unit maintained in normal

course without making any further adjustment outside the books of account.

9. At this stage, it would be fruitful to refer to sub-section (7) of section 80IC, which reads as under:

> "The provisions contained in sub-section (5) and sub-sections (7) to (12) of section 80-IA shall, so far as may be, apply to the eligible undertaking or enterprise under this section."

10. It can be seen from sub-section (7) of section 80IC that the provisions of certain sub-sections of section 80IA have been made applicable to the deduction u/s.80IC as well. The AO, though primarily relied on sub-section (8) of section 80IA, but also took note of sub-section (10) of section 80IC, the relevant parts of both of which are as under:

> "(8) Where any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods or services held for the purposes of any other business carried on by the assessee are transferred to the eligible business and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the eligible business does not correspond to the market value of such goods or services as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods or services as on that date:"

> "(10) Where it appears to the Assessing Officer that, owing to the close connection between the assessee carrying on the eligible

> business to which this section applies and any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to the assessee more than the ordinary profits which might be expected to arise in such eligible business, the Assessing Officer shall, in computing the profits and gains of such eligible business for the purposes of the deduction under this section, take the amount of profits as may be reasonably deemed to have been derived therefrom:
> …."

11. We have noted above that sub-section (3) read with sub-section (1) of section 80IC stipulates computing the profit of the eligible unit from the books maintained by the assessee without making any adjustment outside the books of account. In a case, where an assessee has both eligible and non-eligible businesses, and there are some inter-transfer of goods or services between the two, there may be a temptation to value the transfer of such goods or services between the two businesses in such a way that higher profit results in the eligible business availing deduction with the resultant lower profit in the fully taxable business. Similarly, there can be a situation in which the eligible business of the assessee has business dealings with another connected person and such business dealings have been valued in such a manner so as to increase the amount of profit in the eligible business. It is with a view to remedy such situations that sub-section (8) and (10) of section 80IA come into

play to adjust the profit of the eligible and non-eligible businesses to arm's length. Sub-section (8) deals with two distinct situations, viz., first, where goods or services of the eligible business are transferred to the non-eligible business at higher than market price, and second, where goods or services of any non-eligible business are transferred to the eligible business at lower than market price. This provision provides for computing the deduction w.r.t. the market value of the goods or services transferred or received and not the book value. But for these sub-sections, the profit as deduced from the books of account, having been arrived at with the artificially-priced dealings, would have qualified for deduction. On an overview of sub-sections (1), (2) and (3) of section 80IC r.w. sub-sections (8) and (10) of section 80IA, it gets graphically clear that the first step is to compute profits and gains derived by the eligible unit from manufacture and sale of the goods or services in an ordinary manner as per the books of accounts maintained by the eligible business in terms of sub-section (1) of section 80IC; and then, in the second step, to make suitable adjustments to such artificially-inflated profit by bringing it down to normal profit in case some goods or services of the eligible business are transferred

to/from any other business of the assessee at other than market value or the business transacted with any other connected person has produced more than normal profits in the hands of the eligible undertaking in terms of sub-section (7) of section 80IC read in the hue of sub-sections (8) and (10) of section 80IA. Result of this two-staged exercise will give the true amount of profit qualifying for deduction u/s.80IC of the Act.

12. Adverting to the facts of the extant case, it is seen that the AO invoked sub-section (8) of section 80IA for restricting the amount of the deduction. We have noted above that the assessee has mainly two activities, that is, software development, done at the R&D Centre, Pune and CD writing, done at the Parwanoo unit. The first situation of section 80IA(8), as discussed above, will be triggered on the Parwanoo unit transferring the CD writing activity to the Pune unit at higher than market price and the second will arise when the Pune R&D Centre transfers the software development activity to the Parwanoo unit at a lower than market price. Both such situations will lead to needlessly pushing the profit of the Parwanoo unit. The AO has restricted the deduction by opining that the CD writing done by the eligible business of the

Parwanoo unit for the non-eligible business of the Pune unit was not at market value and then he went on to find out the market value of the CD writing activity done by the Parwanoo unit and arrived at the amount of excess deduction. Impliedly, he invoked the first situation dealt with by sub-section (8) of section 80IA.

13. Let us examine if sub-section (8) of section 80IA of the Act was, in principle, correctly applied. We have found it as an admitted position that the activity of the software development and maintenance is done by the R&D Centre of the assessee in Pune and charged, *inter alia,* to the Parwanoo unit at cost without any mark-up. This deciphers that only the cost element involved in the software development done at the R&D Centre in Pune has become part of the cost base of the Parwanoo unit. Consequently, the total profit earned from the ultimate sale of the Antivirus software, included in Parwanoo unit's profit, also consists of the profit attributable to the software development, which activity has not taken place in Himachal Pradesh. In other words, the activity of CD writing done by the Parwanoo unit for transfer to the Pune unit has been recorded at more than its market value. As against that, the mandate of sub-section (8) of section 80IA is that the

transfers between the eligible business and non-eligible business of the assessee should be rewritten at market value. The logic behind recording the inter-business transfers of the assessee at market value under section 80IA(8) is that only the profit from the activity actually undertaken by the eligible business remains available for deduction and such profit is not needlessly increased at the cost of the profit of a non-eligible business, when both the businesses are of the assessee itself. That is the *raison d'etre* for adopting the market value of the goods or services. In the absence of such a provision, the artificially higher than the normal price of the goods or services transferred by the eligible business to a non-eligible business will proportionately increase its profit and the resultant amount of the deduction, with the corresponding reduction in the profit of the non-eligible unit, leading to exploitation of the incentive provision causing unintended loss to the exchequer. Thus, the AO, in principle, cannot be faulted with for determining the market price of the CD writing done by the Parwanoo unit and then transferred to the Pune unit in an inclusive manner for reducing the amount of eligible profit for the deduction. The situation in the instant case would have been different if the

assessee, instead of recording software development at cost price in its Parwanoo unit's books of account, had taken market value of such software development activity, so as to unload that profit from the overall profit derived on the sale of the Antivirus software for ascertaining profit from the only activity of writing CD done at the eligible Parwanoo unit within the meaning of sub-section (1) of section 80IC of the Act.

14. The ld. AR argued that sub-section (8) is attracted only when goods or services are transferred by the eligible business to a non-eligible business or *vice versa.* He accentuated on the use of the word `business' in the provision and stated that since the assessee had only one business, with one unit in Pune and other in Parwanoo, section 80IA(8) was not magnetized.

15. There is no force in this contention. The stand of the assessee *ab initio* had been that the Pune had four independent units, namely, R&D Centre, Head Office, Manufacturing unit and Sales Depot and one Manufacturing unit in Parwanoo. As the R&D Centre in Pune is doing the only activity of software development and not the CD writing or its sale, the same clearly becomes a

business independent of the Parwanoo unit, which is into CD writing and its sale and not in software development.

16. At this point, it would be apt to record that the assessee raised several contentions in support of its case before the ld. CIT(A) challenging the assessment order, some of which were beyond the discussion made in the assessment order. To be more particular, the assessee, *inter alia,* submitted that:

- VAT and CST problem necessitated the sale of packaged software from Parwanoo unit through the Pune unit.
- Sale from Pune Sales Depot was part of business of Parwanoo unit.
- Deduction u/s.80IC(1) was available on profits and gains derived from business of an undertaking and not profits and gains derived from an undertaking.
- The AO wrongly re-characterized the transaction of transfer of packaged software into that of CD writing.
- The transfer pricing assessment for the A.Y.2013-14 accepted that the transfer of packaged software from Parwanoo unit to Pune Sales Depot was at ALP and hence no further addition could have been made.
- The assessee also sold packaged software to third party customers from its Parwanoo unit and the AO accepted the eligibility of deduction u/s.80IC on profits earned from such third party sales.
- The AO has given dual treatment for the same transaction, first one as ‘sale of goods’ and second one as ‘provision of service’ which is not correct.
- Section 80IA(8) was wrongly invoked by the AO.
- Section 80IA(10) is not applicable to the present case.

17. The ld. CIT(A) recorded such submissions of the assessee in the impugned order. Thereafter, he briefly recorded the AO's point of view in paras 7 and 8. The para 9 is operative part of the impugned order on this issue, which reads as under:

> "9. The appellant's claim that it was not cost effective to dispatch goods from Parwanoo units to customers outside H.P. as credit for CDT paid was not available to customers outside H.P. against the local VAT liability cannot be appreciated for the simple reason that what was sold to Pune was CD after writing and not complete software and the cost of writing CD cannot be the amount claimed by the appellant shown in its invoice. Further the qualification of employees at Parwanoo unit, their numbers and assets used clearly proves that activities carried out there was at elementary level and actual value addition was done at Pune. Therefore, on totality of facts, I do not find any merit in the submissions of the appellant and action of the AO disallowing Rs.10,90,23,323/- by invoking the provisions of section 80IC(7) r.w.s.80IA(8) is upheld and ground No.1 and 2 are dismissed."

18. On going through the above operative part of the impugned order, it is overt that the ld. CIT(A) has confined his decision precisely to the view point of the AO as incorporated in the assessment order. All the submissions made by the assessee beyond the assessment order, which have bearing on the ultimate decision, albeit recorded in the impugned order, remained unaddressed. In other words, the impugned order does not deal with all the issues raised by the assessee. The ld. AR emphatically

submitted, which we also endorse, that the ld. first appellate authority ought to have disposed of all the points raised by the assesee so that an effective challenge could be laid before the Tribunal against his decision, if warranted. In view of the fact that several issues raised by the assessee have not been adjudicated by the ld. CIT(A), we are of the considered opinion that it would be in the fitness of the things if the impugned order is set-aside and the matter is restored to his file for dealing with all such issues and then pass a speaking order thereon. We order accordingly. Needless to say, an adequate opportunity of hearing will be granted by the CIT(A) to the assessee in such proceedings. Before parting with this issue, it is hereby clarified that we have confined our discussion *supra* only to the issues raised by the AO and upheld by the ld. CIT(A) or the argument advanced by the ld. AR before the Tribunal. All other issues, taken up before the ld. CIT(A) and not dealt with in the impugned order, which have not been argued before the Tribunal because of non-decision by the ld. CIT(A) thereon, are left open for an appropriate decision by the ld. first appellate authority.

19. The next issue raised in this appeal is against the confirmation of disallowance u/s.14A of the Act. The AO observed that the assessee earned exempt income from mutual funds at Rs.31,99,150/-. No disallowance was offered by the assessee u/s.14A of the Act. After recording proper satisfaction, the AO went on to compute the amount disallowable u/s.14A r.w. rule 8D(2)(iii) at 0.50% of the average value of investments. Such disallowance came to Rs.12,46,250/-, which was confirmed in the first appeal. Aggrieved thereby, the assessee has come up in appeal before the Tribunal.

20. We have heard the rival submissions and perused the material on record. The ld. AR did not raise any dispute as to the computation of disallowance at 0.5% of the average value of investments. He simply requested that only such investments as yielded the exempt income during the year under consideration should be considered for the purpose of the calculation.

21. The Hon'ble Delhi High Court in *ACB India Ltd. vs. CIT (2015) 374 ITR 108 (Del)* has held that the average value of investments, for the purposes of Rule 8D(2)(iii), should be confined to those securities in respect of which exempt income is

earned and not the total investments. Similar view has been taken by the Special Bench of the Tribunal in the case of *ACIT vs. Vireet Investments (P) Ltd. (2017) 165 ITD 27 (Del) (SB)*. In view of the afore referred precedents, we set aside the impugned order to this extent and remit the matter to the file of the ld. CIT(A) for re-computing the disallowance under Rule 8D(2)(iii) by considering only such investments in calculating the average value of investments, which yielded exempt income during the year. The assessee will be allowed hearing opportunity in such fresh proceedings.

22. In the result, the appeal is allowed for statistical purposes.

A.Y. 2013-14 :

23. These cross appeals – one by the assessee and other by the Revenue arise out of the order passed by the CIT(A) on 18-08-2017. Whereas, the assessee is aggrieved by the countenance of the partial rejection of claim of deduction u/s.80IC of the Act to the extent of Rs.17,73,89,930/-, the Revenue is agitating the deletion of rejection of the claim u/s.80IC to the tune of Rs.9,86,61,718/-.

24. Briefly stated, the facts for this year are that the assessee filed its return declaring total income of Rs.6.26 crore, after claiming deduction u/s.80IC of the Act amounting to Rs.40.77 crore. The assessee also reported certain Specified Domestic Transactions (SDTs) aggregating to Rs.59.80 crore in Form No. 3CEB. The AO made a reference to the Transfer Pricing officer (TPO) for determining the Arm's Length Price (ALP) of the SDTs. The TPO accepted the transactions at ALP. When the matter came up before the AO for passing the final assessment order, he took note of the fact that the assessee claimed excess deduction u/s.80IC of the Act in respect of the Parwanoo unit as was done in the preceding year. The reason for the AO's opinion was that the assessee was doing the only activity of CD writing in the Parwanoo unit, whereas the Antivirus software development activity was taken care of by the R&D Centre of the assessee situated in Pune. As against that, the deduction u/s 80IC was claimed on the profit arising from both the activities. He called upon the assessee to explain the reasons as to why the deduction u/s.80IC be not allowed only to the extent of the activity of CD writing carried out in the Parwanoo unit. Unlike the preceding year in which the disallowance of deduction u/s 80IC

was restricted only to the transfer of CD writing done by the Parwanoo unit to the Pune unit, the AO, for the instant year, opined that the scope of disallowance was to be extended to the total sales made by the Parwanoo unit. The assessee contended before him that the TPO had accepted the ALP of all the SDTs between the Pune and the Parwanoo units at the declared value and hence, he was bound to follow the TPO's order and complete the assessment accordingly. The AO did not find any force in the assessee's argument about the lack of his jurisdiction in the face of the order passed by the TPO u/s.92CA(3) of the Act. He further rejected the assessee's contention on merits by opining that the software development work was carried out in the Pune R&D Centre and deduction was available only for the CD writing activity done at the Parwanoo facility. He computed the amount of disallowance at Rs.27,60,51,648/-. Similar to the preceding year, the assessee made elaborate submissions before the ld. first appellate authority, which have been reproduced extensively in the impugned order. Following his view taken in the appeal order for the A.Y. 2012-13, the ld. CIT(A) held that the partial disallowance of deduction u/s.80IC was to be made but restricted only to the

extent of the CD writing activity in respect of sales made by the Parwanoo unit to the Pune unit and not the sales made by the Parwanoo unit to unrelated third parties. Aggrieved thereby, the assessee as well as the Revenue have come up in appeal before the Tribunal on their respective stands.

25. We have heard the rival submissions and scanned through the relevant material on record. At the outset, both the sides fairly admitted that the facts and circumstances for the A.Y. 2013-14 under consideration are *mutatis mutandis* similar to those for the A.Y. 2012-13 except that for the current year -

i. the assessee furnished the Transfer pricing study report and the TPO passed his order accepting the declared consideration as ALP of the SDTs; and

ii. the AO restricted the claim of deduction u/s 80IC of the Act on CD writing of the Parwanoo unit to the extent of sales made not only to the Pune unit but also to third parties elsewhere.

26. First of all, we take up the assessee's first contention about lack of jurisdiction of the AO in making the disallowance of deduction u/s.80IC in the light of the fact that the TPO passed the order accepting the SDTs at ALP. We have gone through the order

dated 17-08-2016 passed by the TPO u/s.92CA(3) of the Act, whose copy is available at pages 51 to 53 of the paper book. It can be seen from such order that the SDTs reported by the assessee and considered by the TPO are primarily of 'Sale from unit at Himachal Pradesh to unit at Pune' and 'Allocation of common expenses from Pune unit to Himachal Pradesh unit'. The assessee applied the Comparable Uncontrolled Price (CUP) method for demonstrating that these transactions were at ALP. The TPO accepted the declared value as the ALP. The argument of the ld. AR about the binding nature of the TPO's order and the consequential AO's lack of jurisdiction to proceed further on this issue dwells on section 92CA(4) of the Act, which provides that: "On receipt of the order under sub-section (3), the Assessing Officer shall proceed to compute the total income of the assessee under the sub-section (4) of section 92C *in conformity with the arm's length price* as so determined by the Transfer Pricing Officer". It is vivid from the mandate of the sub-section (4) that where the ALP of a SDT has been determined by the TPO, the AO cannot tinker with the same and will have to complete the assessment in conformity with such an ALP. When we closely

examine the facts and circumstances under consideration, it turns out that the command of this provision has no application. The AO made a reference to the TPO for determining the ALP of the reported SDTs, mainly, of 'Sale from unit at Himachal Pradesh to unit at Pune' and 'Allocation of common expenses from Pune unit to Himachal Pradesh unit'. The AO in his order has neither disputed the sales price from unit at Parwanoo to the Pune unit nor the allocation of common expenses from the Pune unit to the Parwanoo unit, whose ALP was determined by the TPO. The subject matter of the instant partial disallowance u/s 80IC is the over-pricing of the CD writing activity done by the Parwanoo unit. Thus, the case is not hit by section 92CA(4) in any manner. As such, we hold that the ld. CIT(A) was justified in jettisoning the assessee's argument on this issue.

27. Espousing the second new feature *vis-à-vis* the preceding year, it is seen that the AO expanded the scope of disallowance u/s 80IC w.r.t. the CD writing anent to entire sales made by the Parwanoo unit, unlike CD writing on the sales made to Pune unit alone for the preceding year. In doing so, the AO computed the disallowance at page 30 of his order as under:

COMPUTATION OF DISALLOWANCE U/s.80IC of the Act.

(in Rs.)

Total Costs of Parwanoo Unit (including allocated costs)	19,58,69,734
Less : Allocated common costs	15,72,04,389
Total Costs of Parwanoo Unit	3,86,65,345
80IC of Parwanoo Unit by the assessee	40,77,43,467
Less :80IC Claim 10% of Total Costs of Parwanoo unit	38,66,535
Eligible 80IC Claim for Parwanoo Manufacturing Unit due to Excise benefit claim	12,78,25,284
Disallowance of excess deduction	27,60,51,648

28. It can be seen from the above computation of disallowance that the AO first of all took total costs of the Parwanoo unit, covering the costs incurred by it on CD writing and also the allocated costs of the software development incurred by the by R&D Centre at Pune. Thereafter, he reduced the allocated common cost of Rs.15.72 crore to find out the cost of CD writing at Parwanoo unit at Rs.3.86 crore. This amount was subjected to 10% mark-up for finding out the market value of the CD writing activity. This is how, the AO proceeded to compute excess deduction u/s 80IC at Rs.27.60 crore w.r.t. the CD writing on total sales made by the Parwanoo unit. We have discussed *supra* that section 80IA(8) of the Act deals with two situations, one, in which

the goods or services of the eligible business (Parwanoo unit) are transferred to non-eligible business of the assessee (Pune unit), and second, in which the goods or services of any non-eligible business of the assessee (Pune R&D Centre) are transferred to the eligible business (Parwanoo unit). Both the situations are like two water-tight compartments and no overlapping can happen in the sense that for one particular transaction, it can be either of the two situations and not a mixture of both. In the facts and circumstances of the case, the first situation will result as consequence of the AO finding out the market value of the activity of CD writing done by the Parwanoo unit and the second on the AO finding out the market value of the activity of the software development done by the R&D Centre Pune. Though both the options were open to the AO, but similar to the preceding year, the AO for the year under consideration also went on to find out the market value of the CD writing activity done by the Parwanoo unit, thereby bringing the case in the first situation of the sub-section (8). Once a case gets covered under any of the two situations, then the latter part of this sub-section provides that: `for the purposes of the deduction under this section, the profits and gains of such eligible business shall be

computed as if the transfer, in either case (in our case the transfer of the CD writing activity of the Parwanoo unit to the Pune unit), had been made at the market value of such goods or services as on that date'. It means that once the AO invoked the first situation of the sub-section (8) and found out the market value of the CD writing activity done by the Parwanoo unit, then the deduction was required to be restricted within four corners of sub-section (8) w.r.t. the transfer of the CD writing activity of the Parwanoo unit to the Pune unit alone. However, the AO proceeded to restrict the disallowance of the deduction with reference to the CD writing activity done not only for the assessee's non-eligible business of Pune but also *qua* the unconnected third parties as well. Ideally, the correct course of action for the AO was to restrict the deduction w.r.t. the second situation of the sub-section (8) by computing the market value of the software development activity done by the R&D Centre, Pune and transferred to the Parwanoo unit at cost only, and then apply it across the board on the total sales made by the Parwanoo unit. But, the AO having followed the first situation contemplated by the sub-section (8) by determining the market value of the CD writing activity done at the Parwanoo unit and not

the market value of the software development activity done by the Pune R&D Centre, the Tribunal cannot improve the order of the AO. As the AO has gone with the first situation of the sub-section (8), the deduction u/s 80IC will consequently have to be restricted only to the transfer of CD writing activity of the Parwanoo unit to the Pune unit and not beyond that. As such, the argument of the Department in its appeal to restore the entire disallowance made by the AO in respect of sales made to third parties as well, cannot be accorded our imprimatur.

29. As can be seen from the impugned order that the assessee raised similar contentions before the ld. CIT(A) as were taken up before him for the A.Y. 2012-13, the crux of which has been briefly reproduced above in para 16 of this order. Similar to the preceding year, the ld. CIT(A) for this year too, failed to dispose off some of such contentions. Following the same view as taken for the preceding year *qua* such undisposed off contentions, we set-aside the impugned order and remit the matter to the file of the ld. CIT(A) for passing a speaking order on such issues. It is again clarified at the cost of repetition for this year also that we have confined our discussion and decision only to the issues raised by

the assessee and decided in the first appeal. The other issues taken up before the ld. CIT(A) but not dealt with in the impugned order, which have also not been argued before the Tribunal because of non-decision by the ld. CIT(A) thereon, are left open for an appropriate decision by the ld. first appellate authority. It goes without saying that the assessee will be allowed an adequate opportunity of hearing in the consequential proceedings.

30. In the result, the appeal of the Revenue is dismissed and that of the assessee is allowed for statistical purposes.

Order pronounced in the Open Court on 28th March, 2022.

Sd/-	Sd/-
(SONJOY SARMA)	**(R.S.SYAL)**
JUDICIAL MEMBER	**VICE PRESIDENT**

पुणे Pune; दिनांक Dated : 28th March, 2022
Satish

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to</u>:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(A)-1, Pune
4. The Pr. CIT-1, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "**C**" / DR 'C', ITAT, Pune
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	23-03-2022	Sr.PS
2.	Draft placed before author	25-03-2022	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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