IN THE INCOME TAX APPELLATE TRIBUNAL, 'H' BENCH MUMBAI

BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No.5387/Mum/2012
(**Assessment Year :2008-09**)
&
ITA No.5388/Mum/2012
(**Assessment Year :2009-10**)

M/s. Hikal Ltd., 717/718, Maker Chambers V Nariman Point, Mumbai – 21	Vs.	Dy. Commissioner of Income Tax, Circle-3(1) Aaykar Bhawan M.K.Road Mumbai – 400 020
PAN/GIR No.AAACH0383A		
(Appellant)	..	**(Respondent)**

ITA No.5372/Mum/2012
(**Assessment Year :2009-10**)

ACIT Circle-3(1) Room No.607, 6th Floor Aaykar Bhawan M.K.Road Mumbai – 400 020	Vs.	M/s. Hikal Ltd., 717/718, Maker Chambers V Nariman Point, Mumbai – 21
PAN/GIR No.AAACH0383A		
(Appellant)	..	**(Respondent)**

Assessee by	Shri Sanjay Parikh
Revenue by	Shri Vivek Anand Ojha
Date of Hearing	**26/07/2022**
Date of Pronouncement	**23/08/2022**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

These appeals in ITA No.5387/Mum/2012, 5372/Mum/2012 & 5388/Mum/2012 for A.Y.2008-09 & 2009-10 respectively arise out of the order by the ld. Dy. Commissioner of Income Tax (Appeals)-7, Mumbai in appeal No.CIT(A)-7/DCIT.3(1)/IT-304/10-11 & CIT(A)-7/DCIT.3(1)/IT-65/11-12 dated 03/04/2012 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 25/11/2010 & 17/03/2021 by the ld. Dy. Commissioner of Income Tax(OSD), Circle-3 (1), Mumbai (hereinafter referred to as ld. AO).

Let us take up the appeal of the assessee for A.Y.2008-09 in ITA No.5387/Mum/2012 first.

2. The ground Nos. 1 & 2 raised by the assessee is regarding set off of loss of non-EOU units against income from EOU units.

2.1. We have heard rival submissions and perused the materials available on record. The assessee is engaged in the business of manufacturing of organic chemicals, intermediates, pharmaceuticals and bulk drugs. The assessee company has its administrative office at CBD Belapur, Navi Mumbai. The assessee has the following plants in running condition:-

Non-EOU Plants

Plant	***Operation***
Mahad	*Manufacturing of Agro Chemicals*

Panoli	*Manufacturing of Agro Chemicals for the local market*
Bangalore	*R & D facility plant*
Bangalore	*Solvent recovery process*

EOU Plants

Plant	***Operation***
Taloja	*Manufacturing of Agro Chemicals*
Panoli	*Manufacturing of Pharma Products*
Panoli	*Manufacturng of Pharms Products*

2.2. It is not in dispute that assessee in respect of EOU plants are eligible for deduction u/s.10B of the Act. It is not in dispute that assessee had suffered loss in non-EOU units at Rs.11,27,19,352/- which is evident from page 19 of the assessment order. We find that the ld. AO while allowing deduction u/s.10B of the Act for EOU units, adjusted the loss of non-EOU units against profits of EOU units and granted deduction u/s.10B of the Act for the net amount. The ld. CIT(A) vide para 4.3 has dismissed this ground of the assessee by holding that the same does not emanate from the order of the ld. AO. We find that this observation of the ld. CIT(A) is incorrect in view of the fact that the ld. AO had duly arrived at the loss figure of non-EOU units by way of the detailed computation in page 19 of the assessment order and had ultimately granted deduction u/s.10B of the Act only after adjusting the said loss. We find that the issue in dispute before us is no longer res integra in view of the decision of this Tribunal in assessee's own case for A.Yrs. 2003-04 and 2004-05 in ITA No.1039 and 1040/Mum/2007 respectively dated 16/07/2010. The relevant operative portion of the said Tribunal order is reproduced below:-

33. The second ground raised by the Revenue reads as follows:

> *"The Ld. CIT(A) erred in deleting the restriction of deduction claimed u/s. 10B to Rs. 25,09,75,605/- to the extent of available total income"*

34. This issue is covered by the decision of the Madras Special Bench in the case of Scientific Atlanta India Technology Pvt. Ltd. Vs ACIT. The question before the Special Bench was as follows:

> *"Whether the business losses of a non eligible unit whose income is not eligible for deduction u/s. 10A of the Act, have to be set off against the profits of the undertaking eligible for deduction u/s 10A for the purposes of determining the allowable deduction u/s. 10A of the Act?*

35. The Tribunal held as follows:

> *"We have to answer the question posed before us by holding that the business losses of a non-eligible unit, whose income is not eligible for deduction u/s. 10A of the Act, cannot be set off against the profits of the undertaking eligible for deduction u/s. 10A for the purpose of determining the allowable deduction u/s 10A of the Act*

Respectfully following the above Special Bench decision, we dismiss the departmental appeal.

2.3. Further, we find that the said view is also covered by the decision of the Hon'ble Supreme Court in the case of CIT vs. Yokogawa India Ltd., reported in (2017) 145 DTR 1 (SC) dated 16/12/2016. Respectively following the aforesaid judicial precedents, we direct the ld. AO to allow deduction u/s.10B of the Act without setting off of the losses of non-EOU units. The ld. AO is further directed to allow the carry forward of losses of non-EOU units in accordance with the law. Accordingly, the ground Nos. 1 & 2 raised by the assessee are allowed.

3. The ground No.3, 12 & 13 raised are general in nature and does not require any specific adjudication.

4. The ground No.4 raised by the assessee is challenging the action of the ld. CIT(A) who had upheld the action of the ld. AO holding that interest on fixed deposits kept for giving margins for obtaining Letter of Credit (L/C) and bank guarantee and interest on Maharashtra State Electricity Board is not derived from export oriented unit undertaking and thereby, consequently not eligible for deduction u/s.10B of the Act.

4.1. We have heard rival submissions and perused the materials available on record. We find that assessee during the course of assessment proceedings had furnished the details of other income and its bifurcation with respect to EOU and non-EOU units before the ld. AO. The ld. AO observed that assessee had credited the interest from L/C margin and bank guarantee deposits and deposits with MSEB of Rs.7,11,020/- which has been allocated to EOU Unit and deduction u/s.10B of the Act was claimed thereon by the assessee. The assessee pleaded that without placing said margins in the form of fixed deposits, the assessee would not be able to obtain the L/C and bank guarantees that are required for meeting the contractual obligations in its business. Similarly, the assessee argued that the security deposit placed with MSEBC is a mandatory deposit for getting the connection of electricity to run the plant and hence, the same has got direct nexus with EOU unit. The ld. AO further disregarded these contentions of the assessee and proceeded to deny deduction u/s.10B of the Act for the interest income of Rs.7,11,020/-. The ld. AO in support of his contentions stated that the said interest income is not derived from export oriented undertaking and relied on the decision of the Hon'ble Supreme Court in the case of Pandian Chemicals Ltd., vs CIT reported in 129 Taxman 539. However, the ld. AO treated the said interest income of Rs.7,11,020/- as only business income and brought to tax under the head 'income from business or profession'. The ld. CIT(A)

relied on the decision of the Hon'ble Supreme Court in the case of Liberty India Ltd., vs CIT reported in 317 ITR 218 and upheld the action of the ld. AO. The ld. CIT(A) did not disturb the finding of the ld. AO in treating the interest income to be brought to tax under the head 'profits and gains of business or profession'.

4.2. It is not in dispute that the interest income earned by the assessee of Rs.7,11,020/- in its export oriented undertaking has been brought to tax by the lower authorities only under the head 'income from business or profession'. Hence, we hold that once the interest is taxed as business income of the assessee, then the entire profits of the business of the eligible undertaking would be eligible for deduction u/s.10B(4) of the Act. Since relief is entitled to the assessee in the instant case as per the provisions of the Act itself, we are refraining from going into various case laws relied upon by both the sides in this regard. Accordingly, the ground No.4 raised by the assessee is allowed.

5. The ground No.5 & 6 raised by the assessee is with regard to allocation of Research and Development expenses (R & D) expenses to EOU units which consequently results in allowability of lower deduction u/s.10B of the Act.

5.1. We have heard rival submissions and perused the materials available on record. During the year under consideration, the assessee had claimed deduction u/s.35(1)(iv) of the Act of Rs.1,60,41,029/- in respect of capital expenditure incurred on R & D unit. The assessee also claimed deduction u/s. 35 (2AB) i.e. in house Research and Development expenses of Rs.8,94,89,042/-. We find that Taloja Plant is 100% EOU and other two plants are not EOU units catering to the local demands. Mahad Plant was established in 1991 which does not require any Research and

Development facility. The plant at Taloja manufactures a single product called "THIBANDAZOLE" under the contract manufacturing agreement. It was submitted that the manufacturing activity at Taloja plant does not require any research and development facility. These plants were established and were already in operation prior to establishment of R & D Centre at Bangalore. The assessee is manufacturing Pharma APIs at Bangalore unit 1 & 2 and Panoli. Unit No.1 of Bangalore and Plant at Panoli are 100% EOU Units. Unit No.2 of Bangalore is back-up unit of unit No.1 of Bangalore. The pharma plant at Panoli is established as per backward integration for Bangalore Unit 1. The product manufactured at Panoli pharma plant is the raw material for Bangalore unit 1. R & D Units at Bangalore for development of various pharma products for its own pharma plant and also developing knowhow for their parties on project assignment basis. Accordingly, it was pleaded that the R & D Centre is a stand alone unit capable of generating income by sale of products developed by it. It is not in dispute that during the year R & D centre generated Revenue of Rs.3,89,81,984/- net of excise duty. It was submitted that the formulation developed by the R & D unit at Bangalore is not at all dealt with by other units of the assessee company. The assessee company submitted the unitwise quantity details of all the finished goods produced and sold during the year before the ld. AO to drive home the point that the products sold by R & D unit at Bangalore are not at all dealt with by other unit of the assessee company. The assessee furnished the complete details of local as well as export sales made by it indicating the invoice no, invoice date, name of the customer, name of the Country to which products are sold together with invoice amounts from the R & D units at Bangalore.

5.2. During the course of assessment proceedings, the ld. AO sought an explanation as to why the head office expenses and R & D expenses

should not be attributed to export oriented units entitled to deduction u/s.10B of the Act. In response to the said show-cause notice, the assessee made the aforesaid submissions and also furnished a letter received from the Ministry of Science and Technology recognizing in-house R & D unit of the assessee. The ld. AO observed that assessee had not allocated the expenses of R & D unit to EOU unit and accordingly had claimed higher deduction u/s. 10B of the Act. The contention raised by the assessee for R & D unit is a stand-alone unit was rejected by the ld. AO. The ld. AO also observed that deduction u/s.35 (2AB) of the Act would be claimed only by a company manufacturing or producing any drugs. The ld. AO also observed that against R & D Bangalore Unit Revenue of Rs.4,09,20,348, the assessee had claimed deduction u/s.35(1)(iv) of the Act at Rs.1,60,41,029/- and u/s.35(2AB) of the Act at Rs.8,94,89,042/-. With these observations, the ld. AO disregarded the Bangalore R & D unit as a standalone unit and proceeded to allocate expenses incurred in R & D unit to EOU units and correspondingly reduced the claim of deduction u/s.10B of the Act. This action of the ld. AO was upheld by the ld. CIT(A).

5.3. We find that this issue is no longer res-integra in view of the decision of this Tribunal in assessee's own case for A.Y.2006-07 in ITA No.5385/Mum/2012 dated 31/03/2021. The relevant operative potion of the said Tribunal order is reproduced hereunder:-

> *4. The Ground Nos. 3, 4 & 5 raised by the assessee are inter related and deal with allocation of research & development expenses to various units.*
>
> *4.1. We have heard the rival submissions and perused the materials available on record. During the year under consideration, the assessee had claimed deduction u/s 35(1)(iv) of the Act towards capital expenditure on research and development to the tune of Rs. 1,47,44,014/-. The assessee also claimed deduction u/s 35(2AB) of the Act towards in house research and development expenses to the tune of Rs. 4,30,14,243/-. We find that the assessee has units manufacturing pharma products and agro chemicals and*

out of which, some units are eligible for deduction u/s 10B of the Act. The details of units eligible for deduction u/s 10B of the Act have already been tabulated supra. During the course of assessment proceedings, the ld AO sought an explanation as to why R&D expenses should not be attributed to EOU units where deduction u/s 10B of the Act has been claimed. It is not in dispute that the assessee is entitled for deduction u/s 10B of the Act for the respective units and the dispute lies only in the computation figure thereon. We find that the assessee had furnished a letter from Ministry of Science & Technology recognising in house R&D unit of assessee. The evidence in this regard is enclosed in page 140 of the paper book filed before us. We find that the assessee had submitted before the lower authorities that it took around 5 to 7 years to develop a product and chances of success were very low. It was also submitted that R & D unit was a standalone unit having its own customers and capable of generating independent revenue. The assessee had billed separately to its customers in the said unit and generated revenue which are enclosed in pages 144 to 193 of the paper book filed before us. Accordingly, the assessee pleaded that there is no need to allocate R&D expenditure to other units as R&D unit is a separate unit by itself capable of generating independent revenue having its own customers.

4.2. However, without prejudice to the said argument, the assessee submitted that maximum 5% of expenses and depreciation of R&D unit may be allocated to Bangalore EOU unit.

4.3. We find that these submissions did not hold any water and the ld AO observed that assessee was not allocating expenses of R&D unit to EOU unit in order to claim higher deduction u/s 10B of the Act. We find that the ld AO also did not accept the Bangalore R &D unit as a standalone unit as assessee had claimed deduction u/s 35(2AB)(1) of the Act and in the opinion of the ld AO, the deduction u/s 35(2AB) of the Act could be claimed only by a company manufacturing or producing any drugs etc. The ld AO further noted that the Bangalore R&D unit had generated revenue of Rs. 4,09,20,348/- against claim of deduction u/s 35(1)(iv) of the Act for Rs. 1,47,44,014/- and deduction u/s 35(2AB) of the Act for Rs.4,30,14,243/-. Accordingly, the ld AO held that the Bangalore R &D unit was not a standalone unit and allocated expenses to the extent of Rs.2,86,76,162/- to different EOU units. We find that the ld AO further held that deduction u/s 35(1)(iv) of the Act with respect to R&D expenses of Rs.1,47,44,014/- and deduction u/s 35(2AB) of the Act of Rs.4,30,14,243/- was to be reduced from the profits of EOU units. This action of the ld AO was confirmed by the ld CITA.

4.4. We find from the perusal of the financial statements of the assessee enclosed in the paper book filed before us, R & D unit is an independent unit having its own separate plant and situated in a different location. The activity carried out in the said R&D unit is totally different from that carried out at the other units i.e research for developing new products and processes. The said R&D unit has a separate electric meter, has independent staff, unit requires independent inputs or raw materials etc. Separate books of accounts are maintained for this R &D unit so as to

deduce the division wise profitability. The said unit does not need any support from any of the other units and can function independently having its own customers and capable of generating independent revenue on its own. Hence expenditure of R&D unit cannot be apportioned to EOU units which has no connection with R&D unit.

4.5. We further find that similar claim of the assessee was accepted by the revenue in the past scrutiny assessments. The details of the same are asunder:-

> *"Asst Year 2002-03 – 143(3) dt 18.2.2005 – Pg 227 of Paper Book*
> *We find that the ld AO had accepted R& D Unit at Bangalore as a separate unit and deduction u/s 10B of the Act was not disturbed by the ld AO except for other income and miscellaneous income.*
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> *Asst Year 2002-03 - 143(3) rws 147 dt 31.12.2009- Pg 235 of paper book*
> *We find that in this assessment, deduction claimed u/s 10B of the Act was adjusted only in respect of Taloja unit of the assessee which has nothing to do with the Bangalore Pharma unit and R &D unit apart from making disallowance u/s 14A of the Act.*
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> *Asst Year 2003-04 – 143(3) dt 10.1.2006 – Pg 245 of Paper Book*
> *The division wise profitability statement is enclosed in page 244 of the paper book filed before us. We find that the ld AO had accepted R& D Unit at Bangalore as a separate unit and deduction u/s 10B of the Act was not disturbed by the ld AO except for other income and miscellaneous income.*
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> *Asst Year 2003-04- 143(3) rws 147 dt 31.12.2009 – Pg 249 of Paper book*
> *We find that in this assessment, deduction claimed u/s 10B of the Act was adjusted only in respect of Taloja unit of the assessee which has nothing to do with the Bangalore Pharma unit and R &D unit apart from making disallowance u/s 14A of the Act.*
>
> *Asst Year 2004-05 – 143(3) dt 23.2.2006 – Pg 258 of Paper Book*
> *We find that the ld AO had accepted R& D Unit at Bangalore as a separate unit and deduction u/s 10B of the Act was not disturbed by the ld AO except for other income and miscellaneous income.*

Asst Year 2004-05 - 143(3) rws 147 dt 31.12.2009 – Pg 261 of paper book

We find that in this reopened assessment, the ld AO sought to make allocation of total expenses of R&D unit to Bangalore EOU after observing that assessee itself had allocated 5% of total expenses thereon. Accordingly, the ld AO made adjustment of allocation of expenses by allocating Bangalore R&D Unit expenses, deduction u/s 35(1)(iv) of the Act expenses between Pharma EOUs and Bangalore R&D unit on the basis of turnover. But we find that this entire reopened assessment was ultimately quashed by this tribunal, against which , according to ld AR, no further appeal was preferred by the revenue before the Hon'ble High Court. The ld DR also was not able to provide any evidence in this regard before us. Hence the entire allocation of expenses made by the ld AO stood ultimately quashed by the tribunal and had reached finality thereon.

Asst Year 2005-06 – 143(3) dt 31.12.2007 – Pg 276 of Paper Book

We find that the ld AO had accepted R& D Unit at Bangalore as a separate unit and deduction u/s 10B of the Act was not disturbed by the ld AO except for other income and miscellaneous income."

4.5.1. We find from the past behaviour of the department in the income tax scrutiny assessments of the assessee, the revenue had not sought to disturb the contentions of the assessee with regard to this impugned issue. No addition or disallowance could be made merely based on the concession given by the assessee on without prejudice basis that 5% of R &D expenses could be allocated to other units. There is no estoppel against the statute. There is no basis also for the said allocation to be carried out. No contrary evidence has been brought on record by the ld DR before us at the time of hearing. Hence we are not inclined to accede to the request of the ld DR that atleast 5% of expenses should be subject matter of allocation to other units. There is absolutely no change in the facts and circumstances of the case during the year under consideration and hence the revenue having accepted the stand of the assessee in earlier years has to strictly abide by the principle of consistency. Reliance in this regard has been rightly placed by the ld AR on the following decisions :-

a) Decision of Hon'ble Jurisdictional High Court in the case of CIT vs Macbrout Engineering (P) Ltd reported in 232 Taxman 406 (Bom) ;

b) Decision of Hon'ble Delhi High Court in the case of CIT vs EHPT India P Ltd reported in 350 ITR 41 (Del) which is directly addressed on the method of allocation of expenses based on manpower deployed in each unit;

c) Decision of Hon'ble Gujarat High Court in the case of CIT vs Torrent Pharmaceuticals Ltd reported in 393 ITR 625 (Guj) which is directly addressed on the point of independent research centre and also on the point

of expenditure of R&D unit which is eligible for deduction u/s 35(1)(iv) of the Act need not be reduced from profits ;

d) Decision of Hon'ble Jurisdictional High Court in the case of Zandu Pharmaceuticals Works Ltd vs CIT reported in 350 ITR 366 (Bom)

4.5.2. Respectfully following the aforesaid decisions, we hold that there is no need to allocate expenses of Rs 2,86,76,162/- to EOU units and that assessee would be eligible for deduction u/s 35(1)(iv) of the Act of Rs 1,47,44,014/- and the same need not be allocated to EOU units.

4.6. With regard to yet another contention of the ld AO that deduction u/s 35(2AB) of the Act could be claimed only by a company manufacturing or producing products, we find that the said section 35(2AB) of the Act does not restrict the research and development only with respect to the products already in existence. From the bare reading of the Explanation to Section 35(2AB) of the Act, we find that 'expenditure on scientific research', in relation to drugs and pharmaceuticals, shall include expenditure incurred on clinical drug trial, obtaining approval from any regulatory authority under any Central, State or Provincial Act and filing an application for a patent under the Patents Act, 1970. It is not in dispute that the assessee is already engaged in manufacturing pharma products. Accordingly, the assessee would be entitled for deduction u/s 35(2AB) of the Act.

4.7. In view of the aforesaid observations, we hold that allocation of expenses of Rs 2,86,76,162/- to EOU units, allocation of deduction u/s 35(1)(iv) of the Act of Rs 1,47,44,014/- and allocation of deduction u/s 35(2AB) of the Act of RS 4,30,14,243/- to other units is not warranted in the peculiar facts and circumstances of the instant case.

4.8. Accordingly, the Grounds 3 to 5 raised by the assessee are allowed.

5.4. Respectfully following the same, the ground Nos. 5 & 6 raised by the assessee are allowed.

6. The ground Nos. 7 & 8 raised by the assessee are challenging the action of the ld. CIT(A) in confirming the disallowance of deduction u/s.10B of the Act with respect to gain on account of hedging of foreign exchange contracts of Rs.3,62,54,209/-.

6.1. We have heard rival submissions and perused the materials available on record. We find that assessee is engaged in the business of export of agro chemicals and pharma. The volume of export turn over

contributed 82% of the total turnover of the assessee company. The assessee company was experiencing that the realization of the export proceeds was resulting in loss on account of contribution in foreign exchange rates due to timing difference. Accordingly, the management of the assessee company, in order to mitigate the risk on account of contribution of foreign exchange, formulated the policy of foreign exchange risk management for the assessee company. This policy was framed within the framework provided by Reserve Bank of India (RBI) regulations stipulated from time to time. The RBI had already formulated framework of regulations allowing exporters to enter into hedging contracts in order to mitigate risk of foreign exchange fluctuation. The assessee company has earned net income of Rs.3,62,54,209/- on account of foreign exchange rate fluctuation arising out of hedging of forward contracts with the bank. We also find that the assessee had made factual submissions before the lower authorities that during the period March 2007 to November 2007, day by day, rupee was becoming stronger when compared to US dollar. The assessee also pointed out that the entire foreign exchange gain to Rs.3,62,54,209/- represents realized gain by the assessee. We find that both the lower authorities had observed that the foreign exchange gain realized by the assessee is not derived out of export of articles outside India and hence, they are not eligible for deduction u/s.10B of the Act. We are unable to comprehend ourselves to accept to this contention of the lower authorities in view of the fact that the foreign exchange gain is only an after effect or outcome of the export of articles made by the assessee and this gain is nothing but amounts realized due to timing difference and would effectively form an integral part of the export sale price itself. We hold that the forex gain realized by the assessee in the instant case would have to be treated as business income emanating from export of articles and thereby eligible for deduction u/s.10B of the Act. This issue is no longer res integra in view of

the Co-ordinate Bench decision of this Tribunal in the case of Tech Mahendra Business Service Ltd., vs. PCIT in ITA No.1326/Mum/2014 dated 15/09/2021. The operative portion of the said judgement is reproduced as under:-

> *"8.The ground Nos. 14-16 raised by the assessee is with regard to treatment of forex gain and re-valuation of foreign currency held in EEFC account and consequently its eligibility to claim deduction u/s.10A of the Act.*
>
> *8.1. We have heard rival submissions and perused the materials available on record. During the course of assessment proceedings, the assessee was asked to furnish the break-up of foreign exchange gain credited in the profit and loss account amounting to Rs.13,31,38,000/- for which deduction u/s.10A of the Act was claimed by the assessee. The assessee was also asked to explain the reasons for claiming such deduction. The assessee furnished a reply vide letter dated 07/02/2013 that it was maintaining Exchange Earners Foreign Currency (EEFC) bank account in foreign currency for the purpose of enabling its import payments and export receipts and avoid consequential foreign exchange fluctuations thereon. The balance in foreign currency lying in the said EEFC account as on the balance sheet date had to be re-stated by the assessee company in accordance with Accounting Standard Standard-11 issued by Institute of Chartered Accountants of India (ICAI). Pursuant to such re-translation of foreign currency into Indian currency as on the balance sheet date, the assessee earned exchange gain of Rs.5,00,32,074/- which was credited in the profit and loss account and deduction u/s.10A of the Act claimed for the same. The assessee also earned exchange gain on dollar sales of Rs.6,51,34,757/- which was duly credited in the profit and loss account and deduction u/s.10A of the Act claimed for the same. The ld. AO observed that the aforesaid two exchange gains does not fall within the ambit of the expression "derived" used in Section 10A of the Act. Hence, the assessee is not eligible for deduction u/s.10A of the Act for the same. This action of the ld. AO was upheld by the ld. DRP.*
>
> *8.2. We find that this issue is also no longer res-integra in view of the decision of this Tribunal in assessee's own case for A.Y.2011-12 in ITA No.766/Mum/2016 dated 30/06/2021 wherein it was held that the action of the lower authorities in placing reliance on the decision of the Hon'ble Jurisdictional High Court in the case of CIT vs. Shah Originals reported in 327 ITR 19 (Bom) was totally misconceived as the said decision was rendered in the context of deduction claimed u/s.80HHC of the Act whereas in the present case, the assessee has*

> *claimed deduction u/s.10A of the Act, wherein deduction is available on the profits derived by the assessee on the entire profits and gains derived by the undertaking engaged in the business of export of articles or things. This Tribunal had also placed reliance on the decision of the Hon'ble Karnataka High Court in the case of CIT vs, Motorola India Electronics Pvt. Ltd., reported in 46 Taxmann.com 167 wherein it was held that what is exempted is not merely the profits and gains of the export of articles but also the income from the business of the undertaking. Proceeding further, the Hon'ble High Court also observed that export profits kept in the EEFC account are the income of the business undertaking, hence the assessee would be entitled for deduction u/s.10A of the Act for the same. Respectfully following the aforesaid decision, the ground Nos. 14-16 raised by the assessee are hereby allowed."*

6.2. We also find that this forex gain though not granted deduction u/s.10B of the Act by the ld.AO has been taxed by the ld.AO as business income. This has not been reversed by the ld. CIT(A). Hence, in view of provisions of Section 10B(4) of the Act and respectfully following the judicial precedents, we hold that forex gain realized by the assessee in the instant case would be eligible for deduction u/s.10B of the Act. Accordingly, the ground Nos. 7 & 8 raised by the assessee are allowed.

7. The next issue to be decided in this appeal is as to whether the disallowance u/s.14A of the Act would exceed exempt income.

7.1. We have heard rival submissions and perused the materials available on record. We find that assessee has claimed dividend income of Rs.19,59,039/- which is claimed as exempt u/s.10(34) of the Act. No disallowance of expenses are voluntarily made by the assessee u/s.14A of the Act for earning this exempt income. The ld. AO computed the disallowance by applying the computation mechanism provided in Rule 8D(2) of the Rules and made disallowance as under:-

(i)	Under Rule 8D(2)(ii)	-	Rs.1,39,67,890/-
(ii)	Under Rule 8D(2)(iii)	-	Rs. 26,06,350/-
	Total disallowance u/s.14A	-	Rs. 1,65,74,240/-
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7.2. The ld. CIT(A) in principle upheld the disallowance made u/s.14A of the Act by applying the Rule 8D (2) of the Rules but directed the ld. AO to exclude foreign investments while computing disallowance thereon. Against this order of the ld. CIT(A), we find Revenue has not preferred any appeal and only the assessee has preferred the appeal on the ground that disallowance cannot exceed exempt income. We find that this issue is no longer res integra in view of the decision of the Hon'ble Supreme Court in the case of Maxopp Investments reported in 402 ITR 640 wherein it has been held that disallowance u/s.14A of the Act cannot exceed exempt income. The ld. AO is hereby directed to restrict the disallowance u/s.14A of the Act only to the extent of exempt income. Accordingly, the ground No.9 raised by the assessee is allowed.

8. The ground No.11 raised by the assessee is challenging the disallowance made u/s.14A of the Act while computing book profits u/s.115JB of the Act. The facts relevant for adjudication of this ground is already detailed by us in ground No.9 above. We find that the Special Bench of Delhi Tribunal in the case of Vireet Investments reported in 165 ITD 27 had categorically held that the computation mechanism provided in Rule 8D(2) of the Rules cannot be imputed in Clause (f) of Explanation 1 to Section 115 JB (2) of the Act. However, the actual expenses debited in the profit and loss account is required to be identified by the ld.AO as relatable to earning of exempt income. For this purpose, we deem it fit to set aside ground No.11 to the file of ld. AO for denovo adjudication and decide the same in the light of decision of Special Bench of Delhi Tribunal in the case of Vireet Investment decision reported in 165 ITD 27.

Accordingly, the ground No.11 raised by the assessee is allowed for statistical purposes.

9. The ground No.10 raised by the assessee is seeking claim of carry forward of losses in respect of Non-EOU units is consequential to ground No.1 & 2 adjudicated hereinabove. We have already held that losses incurred in Non-EOU units cannot be adjusted with profits of 10B eligible units. We have already further held that losses incurred in non-EOU units should be independently eligible to be carried forward to subsequent years in accordance with law. Accordingly, we direct the ld. AO to re-compute the eligible amount of carry forward of losses for each year and decide the correct figures accordingly, in accordance with law. Accordingly, the ground No.10 is allowed for statistical purposes.

10. In the result, appeal of the assessee for A.Y.2008-09 in ITA No.5387/Mum/2012 is allowed for statistical purposes.

Let us take up the appeal of the assessee for A.Y.2009-10 in ITA No.5388/Mum/2012.

11. The ground No. 1 raised by the assessee for A.Y.2009-10 is identical to ground Nos. 1 & 2 raised by the assessee for A.Y.2008-09 and the decision rendered in A.Y.2008-09 shall apply mutatis mutandis for ground No.1 of A.Y.2009-10.

12. The ground Nos. 2,10 & 11 raised by the assessee for A.Y.2009-10 are general in nature and does not require any specific adjudication.

13. The ground No.3 raised by the assessee for A.Y.2009-10 is identical to ground No.4 raised by the assessee for A.Y.2008-09 and hence, the

decision rendered in A.Y.2008-09 shall apply mutatis mutandis for A.Y.2009-10 also.

14. The ground No.4 raised by the assessee for A.Y.2009-10 is identical to ground Nos. 5 & 6 raised by the assessee for A.Y.2008-09 and hence, the decision rendered in A.Y.2008-09 shall apply with equal force for A.Y.2009-10 also.

15. The ground No.5 raised by the assessee for A.Y.2009-10 is identical to ground No.9 raised by the assessee for A.Y.2008-09 and hence, the decision rendered in A.Y.2008-09 shall apply mutatis mutandis for A.Y.2009-10 also.

16. The ground No.6 raised by the assessee is new wherein the assessee has challenged that the ld. CIT(A) had erred in not deciding the ground raised before him regarding the allocation of expenditure between EOU and non-EOU units. We find that this issue is already covered by the decision of this Tribunal in assessee's own case for A.Y.2006-07 in ITA No.5385/Mum/2012 dated 31/03/2021. The relevant operative portion of the judgement is reproduced below:-

> *3. The Ground No. 2 raised by the assessee is challenging the action of the ld CITA in confirming the allocation of Rs.27,92,178/- of Head Office Expenditure to Non-EOU units for the purpose of determining division wise profitability.*
>
> *3.1. We have heard the rival submissions and perused the materials available on record. We find that the assessee company is engaged in the business of manufacturing and export of agro chemicals & drug intermediates. The assessee is having the following manufacturing units :-*
>
> - *MAHAD – Manufacturing agrochemicals*
> - *TALOJA – Manufacturing agrochemicals in an Export Oriented Unit (EOU) and claiming deduction u/s 10B of the Act*

- *PANOLI – Manufacturing pharma products of lactam & cydohexidine in an Export Oriented Unit (EOU) and claiming deduction u/s 10B of the Act*
- *PANOLI – Manufacturing agrochemicals for local markets in Non-EOU*
- *BANGALORE – Manufacturing pharma products for export in an Export Oriented Unit (EOU) and claiming deduction u/s 10B of the Act*
- *BANGALORE (R&D) - Company is doing Research & Development (R&D) in Non-EOU for in-house pharma products*
- *DOMBIVALI – Company is having incineration plant which is non-operational for last 3 years*
- *BANGALORE (Non-EOU) – In this plant, Company does solvent recovery process for its Bangalore (EOU) and it was purchased in September 2005*

3.2. We find that the assessee company had while submitting its return of income computed the taxable income of EOU for which deduction u/s 10B of the Act was claimed and separately computed taxable income for other Non-EOU units. We find that the assessee had disclosed net taxable income of Rs. 3,09,61,809/- which was set off against the carried forward business losses of earlier years and ultimately declared NIL income in the return of income. We find that the Head Office Expenses of the assessee were allocated amongst various industrial undertakings on the basis of average gross block of assets, turnover and manpower employed. Accordingly, the allocation of head office expenses made by the assessee are as under:-

Taloja	*35.84%*
Mahad	*18.21%*
Panoli	*13.79%*
R&D	*4.63%*
Bangalore EOU	*27.53%*

3.3. We find that the ld AO without finding fault with the workings of the assessee and without passing a speaking order, directly proceeded to allocate the head office expenses on the basis of turnover as under:-

Mahad	*Rs 3,05,39,860.37*
Taloja	*Rs 5,99,73,967.17*
Panoli Non EOU	*Rs 2,30,97,963.36*
Panoli EOU	*Rs 77,75,378.24*
Bangalore EOU	*Rs 4,62,66,133.29*
R & D	*Rs 78,63,136.46*

	Rs 17,55,16,438.90
	==========

3.4. We find that the assessee before the ld CITA had pleaded that expenditure at CBD office are not in relation to specific unit as it is incurred as a common expenditure for all the units as a whole. Accordingly, such expenditure has been allocated by the assessee on the basis of certain scientific ratio i.e average of gross block of the units, sales of the units and manpower employed in the respective units. The same basis was followed by the assessee consistently since so many years which had been accepted by the revenue in the past. It was pleaded that the ld AO simply allocated the CBD expenses on the basis of turnover , by ignoring the criteria of gross block of assets and manpower employed in the respective units without any basis. The assessee tried to justify its basis of allocation by stating that all the units are though operational but at a different level of age of operationality and that the adoption of turnover criteria would be lopsided as certain units are capital intensive and labour intensive. Therefore, the assessee company had adopted the balanced approach by taking the average of gross block of assets, turnover and manpower employed in the respective units for the purpose of allocation of common expenses. It was pleaded that the result of the allocation of common expenses on the basis of turnover had resulted in the reduction in the profit of EOU unit of Rs 27,92,178/- and consequently resulted in reduction of loss of Non EOU unit by the same amount. Despite these contentions, the ld CITA simply upheld the action of the ld AO without giving any independent findings. We find that since the allocation basis of common expenditure has been rejected by the lower authorities without any basis and by totally ignoring the various contentions raised thereon in respect of each of the behaviour of various units and the past assessments framed in the hands of the assessee u/s 143(3) of the Act. The copies of various assessment orders passed in the case of the assessee in earlier years are as under:-

Asst Year 2002-03 – 143(3) dt 18.2.2005 – Pg 227 of Paper Book
143(3) rws 147 dt 31.12.2009- Pg 235 of paper book

Asst Year 2003-04 – 143(3) dt 10.1.2006 – Pg 245 of Paper Book
143(3) rws 147 dt 31.12.2009 – Pg 249 of Paper book

Asst Year 2004-05 – 143(3) dt 23.2.2006 – Pg 258 of Paper Book
143(3) rws 147 dt 31.12.2009 – Pg 261 of paper book

Asst Year 2005-06 – 143(3) dt 31.12.2007 – Pg 276 of Paper Book

> *Hence, we are inclined to grant relief to the assessee by applying the principle of consistency and in the absence of change in facts during the year under consideration. Accordingly, the reduction in profit of EOU unit of Rs. 27,92,178/- and consequential reduction of loss of Non EOU unit by the same amount is hereby reversed and relief is granted to the assessee. Accordingly, the Ground No. 2 raised by the assessee is allowed.*

16.1. Respectfully following the aforesaid decision, the ground No.6 is allowed.

17. The ground No.7 raised by the assessee for A.Y.2009-10 is consequential to ground No.4 decided hereinabove. Accordingly, the ground No.7 is allowed.

18. The ground No.8 is consequential to ground No.1 raised for A.Y.2009-10 above. Accordingly, the ground No.8 is allowed.

19. The ground No.9 raised by the assessee for A.Y.2009-10 is identical to ground No.11 raised by the assessee for A.Y.2008-09 and hence, the decision rendered in A.Y.2008-09 shall apply mutatis mutandis for A.Y.2009-10 also.

20. In the result appeal of the assessee for A.Y.2009-10 is allowed for statistical purposes.

Let us take up the appeal of the revenue for A.Y.2009-10 in ITA No.5372/Mum/2012.

21. The grounds raised by the Revenue are identical to grounds 1 & 2 raised by the assessee for A.Y.2008-09 and hence, the decision rendered

thereon for A.Y.2008-09 shall apply mutatis mutandis for ground Nos. 1-3 raised by the department for A.Y.2009-10.

22. In the result, appeal of the Revenue is dismissed.

23. TO SUM-UP

ITA NO.	**AY**	**APPEAL BY**	**RESULT**
5387/Mum/2012	**2008-09**	**Assessee**	**Allowed for statistical purposes**
5388/Mum/2012	**2009-10**	**Assessee**	**Allowed for statistical purposes**
5372/Mum/2012	**2009-10**	**Revenue**	**Dismissed**

Order pronounced on 23/08/2022 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(RAHUL CHAUDHARY)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 23/08/2022
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Sr. Private Secretary / Asstt. Registrar)
ITAT, Mumbai