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

BEFORE SHRI PRASHANT MAHARISHI, AM AND
MS. KAVITHA RAJAGOPAL, JM

ITA No. 2639/Mum/2018
(Assessment Year: 2011-12)

Dy. CIT, Central Circle-1(2) Mumbai-400 020	Vs.	M/s. Cipla Ltd. 289, Bellasis Road, Mumbai Central, Mumbai-400 008
PAN/GIR No. AAACC 1450 B		
(Revenue)	**:**	**(Assessee)**

ITA No.2732/Mum/2018
(Assessment Year: 2011-12)

M/s. Cipla Ltd. 289, Bellasis Road, Mumbai Central, Mumbai-400 008	Vs.	Dy. CIT, Central Circle-1(2) Mumbai-400 020
PAN/GIR No. AAACC 1450 B		
(Assessee)	:	**(Revenue)**

Assessee by	:	Shri Hemen Chandariya
Revenue by	:	Smt. Mahita Nair

Date of Hearing	:	30.09.2022
Date of Pronouncement	:	23.12.2022

O R D E R

Per Kavitha Rajagopal, J. M.:

These are cross appeals filed by the Revenue and the assessee, challenging the order of the learned Commissioner of Income Tax (Appeals) ('ld.CIT(A) for short), National Faceless Appeal Centre ('NFAC' for short) passed u/s.250 of the Income Tax Act, 1961 ('the Act'), pertaining to the Assessment Year ('A.Y.' for short) 2011-12.

2. As the facts are identical, we hereby pass a consolidated order in both these appeals.

3. The brief facts of the case are that the assessee company is a pharmaceutical company engaged in manufacturing and sale of bulk drugs and pharmaceutical products

(within India as well as outside), by way of Formulations, Tablets & Capsules, Aerosols, Injections/ Sterlite solutions, etc. The assessee company filed its return of income for the impugned year dated 29.11.2011, declaring total income of Rs.320,35,26,593/-. The assessee's case was selected for scrutiny and notice u/s. 143(2) of the Act dated 02.08.2012 and notice u/s. 142(1) of the Act was served upon the assessee company. A survey action u/s. 133A of the Act dated 06.03.2014 was carried out in the case of the assessee company in which the assessee company has offered expenses incurred by way of gifts, freebees, travelling allowance, monetary grants or any advantage in kind from pharmaceutical companies which according to the A.O. was in contravention to the MCI guidelines was disclosed by the assessee, which amounts to Rs.269,57,57,193/-.

4. The Assessing Officer (A.O. for short) passed the assessment order u/s. 143(3) dated 31.03.2015, declaring total income at Rs.712,87,82,100/-.

5. The assessee challenged the said addition before the ld. CIT(A) who had partly allowed the appeal filed by the assessee.

6. Both the assessee as well as the Revenue are in appeal, challenging the order of the ld. CIT(A).

7. The assessee company during the assessment proceeding had submitted the details of its manufacturing plants at Vikhroli, Mumbai, Patalganga & Kurkumbh (Maharashtra), Bangalore (Karnataka), Sikkim, Baddi (Himachal Pradesh), Verna (Goa) and Indore, the details of which are tabulated below for ease of reference:

Sr. No.	Address of unit	Date of commencement of mfg. activity	Items manufactured	Remarks
1	Mumbai Central, Mumbai 400008	1935; Closed in April 1999	No manufacturing of its own mfg. through LLMs	Non 801B unit
2	Hamiedbad, LBS Marg, Vikhroli (W), Mumbai 400083	1942	Formulations	Non 801B unit
3	Virgonagar Old Madras Road Banglore – 560049	2004-05	Bulk drugs	10B Unit (EOU)
4	Virgonagar, Old Madras Road, Banglore - 560049	1976	Bulk drugs and formulations	Non 801B unit
5	Plant no.1 A-33/2, MIDC, Patalganga 410 220, Dist. Raigad	1984	Bulk drugs and formulations	Non 801B unit
6	Plant no.2 A-33/2 MIDC, Patalganga- 410 220, Dist. Raigad.	1991	Bulk drugs	Non 801B unit
7	Plot No.D-7, MIDC Industrial Area, Kurkumbh, Pune	1994	Bulk drugs and formulations	Non 801B unit
8	Plot No.D-7, MIDC Industrial Area, Kurkumbh, Pune	2004-05	Bulk drugs and formulations	80IB unit. (EOU)
9	L 143, 144A, 2001-02 140B, 141. 142, 144, 145, 146,139, 140A, Verna Industrial Estate, Salcotte Verna,Goa.	2001-02	Formulations	80IB eligible unit
10	S. 103, 105, 107 2003-04 to S. 112, L 143/1, 147/3, M-61, M-62, M-63, Verna industrial Estate, Salcotte, Verna, Goa.	2003-04	Formulations	80IB eligible unit
11	Village Malpur Upper, PO. Bhud Nalagarh, Dist. Solan, Baddi 173205, Himachal Pradesh.	2005-06	Formulations	80IC eligible unit
12	Plot No.A/42, MIDC, Patalganga -410220, Dist. Raigad	2006-07	Bulk drugs and formulations	10B unit (EOU)
13	Bommasandra Jigani Link Road, Industrial Area, KIADB 4th Phase, Bangalore 560099	2007-08	Bulk drugs	10B unit (EOU)
14	MIDC Industrial Area, Kurkumbh, Tal Daund, Dist: Pune 413 802.	2007-08	Bulk drugs	10B unit (EOU)
15	Cipla Ltd. (Sikkim Unit) Kumrek, Rangpo, East Sikkim 737132	2008-09	Formulations	801E(2)(i)
16	Cipla Ltd. (Indore Unit I & unit 2) Phase II Sector 3 Pithampur 454775	2010-11	Formulations	10AA

8. The assessee company has also submitted that apart from its manufacturing unit, it also gets manufacturing done through Loan Licensee Manufacturers (LLMs for short) across the country and has also stated that it owned a power plant at Cipla Ltd. (Captive Power Plant) situated at Verna, Goa.

9. The grounds of appeal raised by the Revenue in ITA No. 2639/Mum/2018 are as below:

> *(i) "On the fact and circumstances of the case and in law, the Ld. CIT(A) erred in not confirming the basis adopted by Assessing officer for computing 801B deduction of Rs.149,24,40,574/- as against Rs.427,10,08,471/- claimed by the Assessee as admissible to the eligible units and in holding that the Assessing Officer was not justified in invoking the provisions of section 801B(13) r.w. proviso to section 80LA(8) of the Act, when the assessee was under the obligation of law to adopt the 'market value'for the goods transferred to and from the 801B undertaking.*
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> *(ii) "On the facts and circumstances of the case and in law, the Ld. cIT(A) erred in holding that the assessee is eligible for claiming deduction of Rs.23,42,32,944/ u/s. 80IB of the Act, on the profits derived from the work/manufacturing got done through Lease and License Manufacturers(LLMs). "*
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> *(iii) "On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in holding that miscellaneous sales/processing charge, miscellaneous receipts of Rs.41,84,39,824/- are eligible or computation of profits for the purpose of claiming deduction u/s. 8oIB of the Income Tax Act, 1961. "*
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> *(iv) "On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in allowing allowing the claim of the assessee on the above three grounds without appreciating the fact that appeal u/s. 260A of the Income Tax Act, 1961 has been filed by the department against the order of the Hon'ble ITAT for A.Y. 2010-11, which has been relied upon by the Ld.cIT(A). "*

10. In ground no.1, the Revenue has challenged the ld. CIT(A)'s order in not adopting the basis taken by the A.O. for computing section 80IB deduction of Rs.149,24,40,574/- as against Rs.427,10,08,047/-, claimed by the assessee as 'admissible to eligible unit', wherein the ld. CIT(A) held that the A.O. was not justified in invoking the provisions of section 80IB(13) read with proviso to section 80-IA(8) of the Act, where the assessee was in an obligation to adopt the 'market value' for the goods transferred to and from section

80IB undertaking. It is observed that the assessee has claimed deduction u/s. 80IB, amounting to Rs.42.88 crores for its unit at Verna, Goa, being 30% on the eligible profit of Rs.142.95 crores and for Goa unit 2 set up in F.Y. 2003-04, which was additional claim of deduction u/s. 80IB, amounting to Rs.25.67 crores being 30% of the eligible profit of Rs.85.55 crores. The assessee company has also claimed deduction u/s. 10B of Rs.41.04 crores and Rs.38.64 crores, pertaining to EOU's set up at Bangalore, Kurkumbh, respectively and has also claimed deduction u/s. 80IC of Rs.93.16 crores for its unit at Baddi and had claimed deduction u/s. 80I of Rs.185.44 crores for its unit at Sikkim. It is also observed that the assessee had set up a new SEZ undertaking at Indore in F.Y. 2010-11, which is eligible for deduction u/s. 10AA for which the assessee company has not made any claim during the impugned year as the said unit had declared loss. The A.O. has stated that from the past records of the assessee company, it is observed that while transferring raw materials, intermediates and finalized products from non 80IB/80IC/80IE/10B/10AA units to 80IB/80IC/80IE/10B/10AA units as well as vice versa, the goods are transferred at the rates other than the market rates as on the date of transfer. The A.O. alleges that during the impugned year, the assessee has not adopted the market rate as per the submission of the assessee which has stated that in case of finalized bulk drugs, the domestic market rate will be considered as a first choice based on the assessee's local actual weighted average purchase rate or market quotations or the control price as per the Drug Price Control Order (DPCO) and in the non availability of the domestic market rates, then the import rate based on the actual import weighted average rate/quotation and in the non availability of both, the assessee has considered the weighted average export rate. The assessee further stated that in absence of none of the

rates specified above, the rate arrived at by adding the notional profit margin of 23.10% to the cost of the production as per cost audit report for the relevant year has been considered.

11. Further to this, the assessee has stated that in case of intermediates when the above market price is unavailable, then the market price derived by uniformly apportioning to the cost of the production, the actual profit/loss margin of the final bulk drug based on its market price will be considered. The A.O. has held that the consideration for transferring of goods from non 80IB units to 80IB units and vice versa does not corresponds to the market value of such goods as on the date of transfer. The A.O. has further stated that the assessee has failed to furnish the details of the market value of the said goods on the dates on which the transaction was done. The A.O. has failed to consider the assessee's contention that the assessee's system is not designed to generate the output of the rates/cost on a data on a manual basis, and that it was not practicable to obtain market quotations on a day to day basis and in case of many intermediates, market rates are not available as these are not marketable commodities. The A.O. has failed to consider the above contention of the assessee and has held that the assessee has failed to furnish the market rates of goods as on the date of transfer and owing to the volume and complexities involved in the nature of the transaction by the assessee company, the day to day market rate for each transfer of goods are not possible to be determined between 80IB and non 80IB units. The A.O. by rejecting the assessee's computation of profit and gains of the eligible business, invokes proviso to section 80IA(8) for computation of profits and gains

of eligible units as per the said proviso and works out the net disallowance to Rs.234,68,42,830/-.

12. The ld. CIT(A) by relying on the decision of the Tribunal in assessee's own case for A.Y. 2010-11 in ITA No. 5529/Mum/2012, vide order dated 10.09.2014, has accepted the method adopted by the assessee for computing section 80IB deduction for eligible units. On this basis, the ld. CIT(A) had deleted the addition made by the A.O. and allowed the grounds of appeal filed by the assessee.

13. The Revenue has challenged before us the order of the ld. CIT(A) in not adopting the method of the A.O. and also for not invoking the proviso to section 80IA(8) of the Act. The ld. CIT(A) has rejected the A.O.'s contention that the assessee ought to have adopted the 'market value' for the transfer of goods between 80IB and non 80IB units undertaking.

14. The ld. DR for the Revenue contended that the ld. CIT(A) ought to have adopted the method followed by the assessee and to have considered the market rate for computing the deduction u/s. 80IB of the Act. The ld. DR relied on the order of the A.O.

15. The ld. AR, on the other hand, controverted the same and contended that the issue was covered by the Tribunal's decision in assessee's own case for A.Y. 2010-11 and relied on the principle of consistency. The ld. AR relied on the order of the ld. CIT(A).

16. Having heard the rival submissions and perused the materials available on record. The relevant extract of the said decision is cited hereunder for ease of reference:

> *16. The first ground relates to the grievance that the ld. CIT(A) erred in not confirming the basis adopted by the A.O. for computing 80IB deduction admissible to the eligible unit.*
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> *17. This issue has been decided against the Revenue by the Tribunal in ITA No. 6558/M/2011 for A.Y. 2009-10. The Tribunal has considered this issue at para 32 of its order wherein it has followed the finding given in A.Y. 2008-09 in ITA No. 6299/M/2010. We find that in ITA No. 6299/M/2010, the Tribunal has followed the decisions of the co-ordinate Benche in ITA No. 7412/M/05 for A.Y. 2003-04, ITA No. 4320/M/2006 for A.Y. 2004-05 and ITA No. 4321/M/2006 for A.Y. 2005-06. Respectfully following the findings of the co-ordinate Bench in assessee's own case (supra), ground No.1 of the Revenue is dismissed.*

17. It is observed that this issue has been squarely covered by various decisions of the co-ordinate bench in assessee's own case for the previous years. By respectfully following the above decisions, we find no infirmity in the order of the ld. CIT(A). Hence, this ground of appeal raised by the Revenue is dismissed.

18. Ground no. 2 pertains to the deduction of Rs.23,42,32,944/- u/s. 80IB of the Act on the profits derived from the work/manufacturing done through LLMs. It is observed that the assessee, apart from his own manufacturing units also engages in manufacturing activity through LLMs and the details of the various LLMs were furnished before the A.O. The A.O. is found to have rejected the claim of the assessee for benefit u/s. 80IB/80IC/80IE/10B/10AA pertaining to profit and gains derived from drugs which were manufactured through outsourcing through LLMs. The A.O. in the present case has relied on the order of his predecessor for A.Y. 2009-10 which has held that the assessee was not entitled to deduction on goods manufactured by LLMs.

19. During the assessment proceeding, the statement of Shri Radha Krishnan, Director (Finance) of the assessee company was obtained, in which it was said that the assessee was following LLM method for outsourcing of drug manufacturing activity. The A.O. has inferred that the assessee company was claiming deduction indirectly from its non

eligible unit and through LLMs, as substantial part of manufacturing was carried out, by outsourcing the eligible units, thereby disentitling the assessee for claim of deduction on the entire profit.

20. The assessee was in appeal before the ld. CIT(A).

21. The ld. CIT(A) has allowed this ground of appeal filed by the assessee on the ground that on identical issue, the Tribunal in ITA No. 5529/Mum/2012 in the assessee's own case for A.Y. 2010-11 vide order dated 10.09.2014 has decided the issue in favour of the assessee, holding that the assessee is eligible for deduction u/s. 80IB of the Act on the profits derived from the work/manufacturing activity carried out through LLMs. The ld. CIT(A) also held that no new facts have been brought on record on this issue, in the survey action conducted u/s. 133A of the Act.

22. Having heard the rival submissions and perused the materials available on record. It is observed that on identical issue raised by the assessee in earlier years, the Tribunal has held that the assessee was eligible for claiming deduction u/s. 80IB of the Act for profits derived from outsourcing the manufacturing activities carried out through LLMs. The relevant extract of the said decisions are cited hereunder for ease of reference.

> *18. Ground No. 2 relates to the grievance that the ld. CIT(A) erred in holding that the assessee is eligible for claiming deduction u/s. 80IB of the Income Tax Act, 1961 on the profit derived from the work/manufacturing got done through lease and license manufacturers.*
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> *19. An identical issue was considered by the Tribunal in ITA No. 6299/M/2010 for A.Y. 2008-09 vide ground No.2 of that appeal and has considered this issue at para 17 of its order and decided the ground against the Revenue. The facts and issue being identical, respectfully following the findings of the Tribunal (supra), ground No. 2 is dismissed.*

23. From the above observations and by respectfully following the said decisions, we find no infirmity in the order of the ld. CIT(A). Accordingly, this ground of appeal raised by the Revenue is dismissed.

24. Ground no. 3 of the appeal pertains to the miscellaneous sales/processing charge, miscellaneous receipts of Rs.41,84,39,824/- eligible for computation of profits for claiming deduction u/s. 80IB of the Act. It is observed that the Tribunal has included miscellaneous sales, processing charges, and miscellaneous receipts for claiming deduction u/s. 80IB of the Act. The A.O. has held that the assessee company has been set up for the purpose of manufacturing drugs and pharmaceuticals, section 80IB states that 'profits and gains' derived by such industrial undertaking and the A.O. has interpreted 'attributable to' and 'derived from' and held that the miscellaneous receipts and processing charges are attributable to the business of the assessee company. This issue has arisen in the earlier years and that the Tribunal has decided the same in favour of the assessee. Considering this, the ld. CIT(A) has held that as the same has been covered by the decision of the Tribunal in A.Y. 2010-11, the ld. CIT(A) deleted the addition made on this ground.

24. The ld. DR contended that this ground has been challenged before the Hon'ble Jurisdictional High Court and that the matter was pending adjudication, the ld. DR relied on the decision of the A.O.

25. Having heard the rival submissions and perused the materials on record. We are of the considered opinion that the identical issue has been dealt with by the Tribunal in earlier years in assessee's own case and has decided this issue in favour of the assessee.

26. By respectfully following the above said decision, we find no infirmity in the order of the ld. CIT(A). Hence, this ground of appeal raised by the Revenue is dismissed.

27. Ground no. 4 of the appeal is the general ground, in which the Revenue has contended that the order of the Tribunal in A.Y. 2010-11 relied by the ld. CIT(A) has been challenged before the Hon'ble High Court. This ground of appeal does not require any adjudication and, therefore, dismissed.

28. In the result, the appeal filed by the Revenue is dismissed.

ITA No. 2732/Mum/2018

29. This appeal has been filed by the assessee, challenging the order of the ld. CIT(A) on various grounds.

30. Ground no. 1 of the appeal pertains to the disallowance of Rs.48,13,05,699/- by relying on the CBDT Circular No. 5 of 2012 read with *Explanation* 1 to section 37(1) of the Act, towards expenses incurred by the assessee company for business expenditure on marketing and promotional activity. The assessee contends that the assessee has incurred expenditures for the purpose of marketing and promotional activities such as gifts, travel facility, hospitalization, cash or monetary grant, etc. for the marketing and promotional activities. The lower authorities have relied on the CBDT Circular (supra) which states that the Medical Council of India in excess of powers vested in it under the Indian Medical Counsel (Professional Conduct, Etiquette and Ethics) Regulations, 2002 has imposed prohibition on any medical practitioner or through professional associates from accepting any gift, travel facility, hospitality, cash or monetary grant, etc. from any pharmaceutical and allied health sector industries. The ld. CIT(A) has relied on various decisions which has held that the gifts that are given by the pharmaceutical companies, is

against the public policy and even if it is a genuine transaction, the same cannot be allowed as 'business expenditure' under the provisions of section 37 of the Act. The ld. CIT(A) confirmed the addition made by the A.O., amounting to Rs.48,13,05,699/- under *Explanation* 1 to section 37 of the Act.

31. Having heard the rival submissions and perused the materials available on record. We are of the considered opinion that the said issue raised by the assessee is covered by the latest decision of the Hon'ble Supreme Court in the case of *M/s. Apex Laboratory Pvt. Ltd. vs. DCIT* vide order dated 22.02.2022 (in Special Leave Petition (Civil) No. 23207 of 2019), the relevant portion of which is reproduced below for ease of ready reference:

> *33. Thus, pharmaceutical companies' gifting freebies to doctors, etc. is clearly "prohibited by law", and not allowed to be claimed as a deduction under Section 37(1). Doing so would wholly undermine public policy. The well-established principle of interpretation of taxing statutes – that they need to be interpreted strictly – cannot sustain when it results in an absurdity contrary to the intentions of the Parliament.*

32. By respectfully following the said decision, we are inclined to dismiss this ground of appeal raised by the assessee. Hence, ground no. 1 of the assessee's appeal is dismissed.

33. Ground no. 2 – the assessee has challenged the order of the ld. CIT(A) in restoring the issue of allowability of weighted deduction of clinical trial expenses, amounting to Rs.15,87,70,988/- for Research and Development (R & D) expenditure claimed u/s. 35(2B) of the Act. It is observed that the assessee has claimed for weighted deduction pertaining to expenditure incurred on Scientific Research u/s. 35(2B) of the Act. The assessee is said to have filed a revised application, for rectifying the amount of capital

expenses claimed by the assessee, which was accepted by DSIR but had not taken note of the revised amount of capital expenses claimed by the assessee.

34. The A.O. restricted the amount of the weighted deduction to the amount quantified by the DSIR.

35. The assessee has filed revised application to correct the mistake in the quantification of the capital expenditure on building, amounting to Rs.1.54 lacs and other assets of Rs.2504.12 lacs to be revised to Rs.2575.08 lacs.

36. The assessee preferred an appeal before the ld. CIT(A) seeking for deduction for the expenditure which was excluded from the quantification made by the DSIR and also for taking cognizance of the revised application which was not considered by the DSIR. The ld. CIT(A) has held that if the rectification claimed by the assessee company is accepted by the DSIR, then the assessee is at liberty to file a fresh claim for correction of the amount of deduction as per the revised certificate before the A.O. Further to this, the ld. CIT(A) directed the A.O. to follow the order of the Tribunal in assessee's case for A.Y. 2008-09 with regard to the deduction on clinical trials, by relying on the decision of the Hon'ble Gujarat High Court in the case of *Cadila Health Care Ltd* [2013] (214 Taxman.com 672) t.

37. From the above observation, we find no infirmity in the order of the ld. CIT(A) in setting aside the issue to the file of the A.O. for examining the expenses claimed by the assessee and to be considered in light of the Hon'ble High Court decision is *Cadila Health Care Ltd* (supra), pertaining to the claim of the expenses relating to clinical trials.

The assessee has raised the ground that the ld. CIT(A) has failed to give any finding on the eligibility of expenses incurred on foreign consultancy expenses, building repairs, etc. for weighted deduction u/s. 35(2AB) of the Act. In this regard, we direct the ld. CIT(A) to decide these issues raised by the assessee on merit of the case. Therefore, we remand this issue to the file of the ld. CIT(A) for the limited purpose of considering the eligibility of expenses incurred on foreign consultancy expenses, building repairs, etc. claimed by the assessee for weighted deduction u/s. 35(2AB) of the Act. Hence, this ground of appeal raised by the assessee is partly allowed.

38. The third ground of appeal raised by the assessee pertains to the disallowance of Rs.91,81,989/- u/s. 14A of the Act read with Rule 8D of the Income Tax Rules. It is observed that the lower authorities have made the impugned addition u/s. 14A of the Act following the decision of the ld. CIT(A) for A.Y. 2009-10 in the assessee's case. It is observed that the impugned addition is made as disallowance of interest, amounting to Rs.10,61,109/- and disallowance of other expenses of Rs.81,20,880/-. The assessee submits that the assessee has filed revised Rule 8D computation enclosed in Annexure 5, which may be taken into consideration for computing the disallowance u/s. 14A read with Rule 8D, instead of the computation offered by the assessee filed along with its return of income. We are of the considered opinion that the assessee may be given one more opportunity to furnish the details of revised computation of disallowance u/s. 14A of the Act. Therefore, this issue may be remanded back to the file of the A.O. for adjudication based on the details proposed to be filed by the assessee. Hence, this ground of appeal raised by the assessee is allowed for statistical purpose.

39. Ground no. 4- During the appellate proceeding, the ld. AR for the assessee proposed to not press this ground of appeal raised by the assessee. Hence, this ground is dismissed as not pressed.

40. In the result, the appeal filed by the assessee is partly allowed and the appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 23.12.2022

Sd/-	Sd/-
(Prashant Maharishi)	(Kavitha Rajagopal)
Accountant Member	Judicial Member

Mumbai; Dated : 23.12.2022
Roshani, Sr. PS

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai