आयकर अपीलीय अधिकरण "के" न्यायपीठ मुंबई में।

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

श्री अमित शुक्ला,न्यायिक सदस्य **एवं**
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष ।

BEFORE SHRI AMIT SHUKLA, JM AND SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./I.T.A. No. 994/Mum/2016
(**निर्धारण वर्ष /** Assessment Year: 2010-2011)

WATSON PHARMA PRIVATE LTD. 21-22, Kalpataru Square Kondivita Lane Off Andheri Kurla Road Andheri East Mumbai 400 059	**बनाम/** Vs.	**ASSTT. COMMISSIONER OF INCOME TAX-11(3)(2)** Aaykar Bhawan, M.K. Road, Mumbai 400 020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACW-6074-D		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri Paras Savla, AR
प्रत्यर्थी की ओर से/**Respondent by**	:	Ms. Malathi Shridharan (CIT)

सुनवाई की तारीख / **Date of Hearing**	:	11/01/2017
घोषणा की तारीख / **Date of Pronouncement**	:	31/01/2017

आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member)

1. The captioned appeal by assessee for Assessment Year 2010-11 assails the order of Assistant Commissioner of Income Tax-11(3)(2) [AO], Mumbai dated 27/01/2016 passed u/s 143(3) r.w.s. 144C(13) by raising as many as twelve grounds of appeals. Ground No. 1 is general in nature. Ground Nos. 2 to 7 are withdrawn by the Ld. Counsel for assessee [AR] during proceedings before us since these issues have been settled by way of *'Advance Pricing Agreement' [APA]* dated 31/05/2016 entered into by assessee with the Central Board of Direct Taxes. Ground No. 11 is not pressed and the same is dismissed as *'not pressed'*. Hence, the only effective grounds are Ground Nos. 8,9,10 & 12 which we shall take up one by one in the succeeding paragraphs.

2. Facts, in brief, are that the assessee was engaged in the business of production of pharmaceuticals products in a number of formulations. It e-filed its return of income for impugned Assessment Year [AY] on 03/11/2011 declaring total income of Rs.15,63,24,518/- which was picked up for scrutiny assessment u/s 143(3). Since Transfer Pricing [TP] issues were involved, the matter was referred to Addl. CIT, Transfer Pricing-4(3) [TPO] u/s 92CA(1) on 25/06/2013 for computation of Arm's Length Price [ALP] of international transactions. Transfer Pricing Officer suggested TP adjustment of Rs.77,90,61,152/- vide order dated 29/01/2015 which were incorporated in the draft assessment order dated 27/03/2015. The draft assessment order was sent to Dispute Resolution Panel [DRP] for its directions u/s 144C(5). After hearing objections of assessee, DRP issued its directions u/s 144C(5) on 15/12/2015 and pursuant to the same, final assessment order dated 27/01/2016 was passed by AO wherein total income was determined at Rs. 110,97,53,730/-. The order of the AO has been assailed before us.

3. AO noted that the assessee was having two units eligible for deduction u/s 10B namely *formulation unit at Goa [Goa-10B eligible unit]* and *Active Pharmaceuticals Ingredients unit at Ambernath [Ambernath EOU-10B eligible unit]*. It also had other units / business incomes which were not eligible for Section 10B deduction. The assessee included *'Site Transfer Income'* of Rs. 11,62,21,565/- as part of eligible profits of the eligible undertaking and claimed deduction u/s 10B thereupon. Before AO, the assessee explained the nature of these expenses as follows:

> *"Site Transfer Income – The drugs manufactured by Watson Pharma Pvt. Ltd. (WPPL) have United States Food and Drugs Administration (US FDA) permission and are approved to be sold in USA. As per the requirements of the US FDA regulations, the facilities utilized for the manufacturing of the drugs / goods that would be sold in the USA, is also required to possess the US FDA recognition / certification. If a US FDA ANDA holder which has US FDA permission to manufacture in USA, want to get the same manufactured from any other site / country and sell the same in the US market, then it is necessary that the ANDA holder in USA (before commencing the commercial production of such goods in such other site/country) shows to the satisfaction to US FDA authorities that the particular product can be manufactured at that new division by complying with the same standard of quality, stability and safety. The entire activity involving such a change of site for manufacturing of the pharmaceutical product sale in the US market is called as* ***'Site Transfer Activity'.***
>
> *Whenever any new product is added to the portfolio, the assessee has to undertake above steps. The expenses incurred in the site transfer activities are recovered along with mark up from AE. The income from these activities are undertaking specific, therefore income from site transfer activities are an integral part of business income, for computing profits of the business eligible for deduction u/s 10B."*

Treating the same as 'not an income derived from exports', AO rejected the contentions of the assessee and proposed addition thereof in the draft assessment order. DRP relying on the directions of DRP in assessee's own case for immediately preceding year, affirmed the same. The same has been assailed before us as Ground No.8.

4. Further, the assessee suffered Net Loss of Rs.10,53,20,730/- from its *Ambernath EOU-10B* eligible unit and made inter-source adjustment thereof from income of non-eligible units whereas it claimed full deduction of Rs.35,11,14,202/- u/s 10B against income

earned from *Goa-10B* eligible unit. AO denied the inter-source adjustment on the premises that as income from unit was exempt from tax and hence loss there-from could not be adjusted from non-eligible units. DRP, following the judgment of Hon'ble Delhi High court *in CIT V KEI Industries Ltd. (2015 373 ITR 574),* affirmed the same. The same has been assailed before us as Ground No.9.

5. The Ld. Counsel for Assessee [AR], first of all, drew our attention to the fact that the matter of *'site transfer charges'* arose in assessee's own case in immediately preceding year and the Hon'ble Tribunal in ITA No.1922/Mum/2015 order dated 30/11/2016 has already settled the same in assessee's favour. A copy of the order has been placed before us. Per *Contra*, the Ld. DR contended that the impugned income did not arise out of exports activity but rather an independent activity. The assessee recovered certain costs with some mark up from its AE and therefore, the income was not derived from exports and hence was not eligible for Section 10B deduction.

6. We have perused the rival contentions and relevant material including the cited Tribunal decision in assessee's own case. A perusal of para-34 of the cited order of co-ordinate bench of tribunal reveals that this issue, *in fact*, has been settled in favour of assessee where the bench has observed that 'Site Transfer Income' is a part of business income earned by assessee and is eligible for deduction while computing deduction u/s 10B of the Income Tax Act. There being no change in facts or circumstances, following the same, we are inclined to hold that this income shall be eligible for deduction u/s 10B. This ground of assessee's appeal succeeds.

7. Regarding inter-source adjustment of loss of eligible units from non-eligible units, the Ld. AR placed reliance on the latest decision of Apex court in *CIT Vs. Yokogawa India Ltd. (Civil Appeal No. 8498 of 2013) judgment dated 16/12/2016* to contend that Section 10B is a deduction provision and not an exemption provision and hence the assessee could make inter-source adjustment of loss of eligible units from non-eligible units while simultaneously

claiming full deduction of profits of eligible units. This contention could further be fortified by the decision of Hon'ble Bombay High court in *Hindustan Unilever Limited Vs DCIT (2010 325 ITR 102)* where in similar situation, the Hon'ble court held that assessee was entitled to claim deduction u/s 10B in respect of profits of three eligible units and loss of fourth eligible unit could be set off against normal business income. Hence, any income arising from eligible units could get full deduction whereas the losses sustained in eligible units could be set off by way of inter-source adjustment from other non-eligible units and there is no impediment or restriction in any manner in this regard. A copy of the relevant judgments has been placed before us. The Ld. DR placed reliance on the stand of lower authorities.

8. We have heard rival contentions and perused relevant material including cited case laws. We note that the lower authorities have rejected the claim of the assessee by following Hon'ble Delhi High Court judgment in *KEI Industries Ltd. (supra).* This judgment has been assailed by assessee before apex court vide SLP No. 18157/2015 where it has been tagged with civil appeal no. 8923 of 2013 vide order dated 16/07/2015. The bunch of appeal has finally been disposed off along-with Civil Appeal No. 8498 of 2013 titled as *'CIT & Anr.Vs. Yokogawa India Ltd.'* order dated 16/12/2016. Hence, in nutshell, the order of Hon'ble Delhi High Court relied upon by revenue got merged with the above-said order of the Apex court. We find that this decision applies to Section 10A as well as Section 10B both provisions being *pari materia.* We extract the relevant final observations of the Apex Court as follows:-

> *"17. If the specific provisions of the Act provide [first proviso to Sections 10A(1); 10A (1A) and 10A (4)] that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous Circular of the department (No.794 dated 09.08.2000)understood the situation, it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in Sections 70, 72 and 74 of the Act would be premature for application. The deductions under Section 10A therefore would be prior to the commencement of the exercise to*

be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. The somewhat discordant use of the expression "total income of the assessee" in Section 10A has already been dealt with earlier and in the overall scenario unfolded by the provisions of Section 10A the aforesaid discord can be reconciled by understanding the expression "total income of the assessee" in Section 10A as 'total income of the undertaking'. For the aforesaid reasons we answer the appeals and the questions arising therein, as formulated at the outset of this order, by holding that though Section 10A, as amended, is a provision for deduction, the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV of the Act and not at the stage of computation of the total income under Chapter VI.

Therefore, it becomes crystal clear that the Section 10B is a deduction provision and its stage of deduction would be immediately after the stage of determination of its profits and gains. This stage is much prior to aggregation of income and set off of losses under chapter VI. Respectfully following the ratio of Apex court, we are inclined to hold that the assessee shall be eligible to get full deduction u/s 10B with respect to profits from eligible units and the stage of deduction would be immediately after computation of profit from this eligible unit. Resultantly, the loss of eligible-units could be set off from other business incomes by way of inter-source adjustment, there being no restriction in this regard. We direct so. This ground of assessee's appeal succeeds.

9. Ground No. 10 is related with addition of Rs.9,087/- on account of inconsistency between Form 26AS and the books of accounts of the assessee. AO noted that the assessee short accounted the above amount in its books of account and added the same to the income of the assessee. No serious arguments have been raised before us in this respect and hence we see no reason to interfere with the findings of the lower authorities. This ground of assessee's appeal is dismissed.

10. Ground No.12 assails levy of interest u/s 234B. The same being mandatory and consequential in nature and hence require no interference on our part. This ground is dismissed.

11. In nutshell, the appeal of the assessee stands partly allowed.

Order pronounced in the open court on 31st January, 2017

Sd/-	**Sd/-**
(Amit Shukla)	**(Manoj Kumar Aggarwal)**
न्यायिक सदस्य / **Judicial Member**	लेखा सदस्य / **Accountant Member**

मुंबई **Mumbai;** दिनांक **Dated : 31.01.2017**
PS:- Pooja K.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**