आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'सी', मुंबई ।

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

सर्वश्री आर.सी.शर्मा, लेखा सदस्य **एवं** श्री संजय गर्ग, न्यायिक सदस्य

BEFORE SHRI R.C.SHARMA, ACCOUNTANT MEMBER
& SHRI SANJAY GARG, JUDICIAL MEMBER

आयकर अपील सं./**ITA No.5053 to 5057/Mum/2013**

(**निर्धारण वर्ष** / Assessment Years :2004-05, 2005-06, 2006-07, 2008-09 & 2009-10)

DCIT(TDS)-2(2), Room No.703, 7th Floor, Smt. K.G.Mittal Ayurvedic Hospital Building, Charni Road, Mumbai-400002	Vs.	M/s Pfizer Limited, Pfizer Centre, Patel Estate, S.V.Road, Jogeshwari (West), Mumbai-400102
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AAACP 3334 M**		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

AND

आयकर अपील सं./**ITA No.2450/Mum/2014**

(**निर्धारण वर्ष** / Assessment Year :2009-10)

ACIT (TDS)-2(2), Room No.703, 7th Floor, Smt. K.G.Mittal Ayurvedic Hospital Building, Charni Road, Mumbai-400002	Vs.	M/s Pfizer Limited, Pfizer Centre, Patel Estate, S.V.Road, Jogeshwari (West), Mumbai-400102
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AAACP 3334 M**		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

AND

Cross Objection No.141/Mum/2015

(**निर्धारण वर्ष** / Assessment Year :2009-10)

M/s Pfizer Limited, Pfizer Centre, Patel Estate, S.V.Road, Jogeshwari (West), Mumbai-400102	Vs.	ACIT (TDS)-2(2), Room No.703, 7th Floor, Smt. K.G.Mittal Ayurvedic Hospital Building, Charni Road, Mumbai-400002
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : **AAACP 3334 M**		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

राजस्व **की ओर से** /Revenue by : Shri S.Pandian
निर्धारिती **की ओर से** /Assessee by : Shri Kirit Kamdar

सुनवाई की तारीख / **Date of Hearing :** **29/02/2016**
घोषणा की तारीख/**Date of Pronouncement** **25/05/2016**

आदेश / O R D E R

PER BENCH:

The above titled appeals by the revenue for A.Y.2004-05, 2005-06, 2006-07, have been preferred against the common order dated 30-3-2013 of the learned Commissioner of Income-Tax (Appeals) (hereinafter referred to as 'CIT(A)'), whereas appeals by the revenue for A.Y.2008-09 & 2009-10 have been preferred against the separate orders of CIT(A) dated 30-3-2013. However, the revenue has also preferred appeal for A.Y.2009-2010 against another order dated 30-1-2014 of CIT(A). The assessee has also filed cross objection against the order of CIT(A) dated 31-1-2014.

2. Since the facts and issues involved in all the appeals are identical, hence, the same were heard altogether and are being disposed off by this common order. Since the identical grounds have been taken by the revenue in all its appeals, hence, for the sake of convenience, we take the ITA No.5053/Mum/2013 as a lead case. The revenue has taken as many as 10 grounds of appeal.

3. Ground Nos.1 to 3 are relating to non-deduction of tax at source on year end provision.

4. Brief facts relating to the issue under consideration are that the assessee is engaged in the business of manufacturing and trading of pharmaceuticals, chemicals and animal health products. A survey under section 133A of the Act was conducted by the AO at the premises of the assessee on 8th September, 2008 and it was found that assessee had not deducted TDS in respect of accrued liabilities for which provisions were made in the profit and loss account. As a result of which, the proceedings

u/s.201(1)/201(1A) were initiated against the assessee. During the course of the proceedings u/s.201(1)/201(1A) submissions were made by the assessee from time to time. Pursuant to the same and after considering the assessee's submissions, the AO passed the impugned orders u/s.201(1)/201(1A) of the Act raising demands of tax u/s.201(1) and interest u/s.201(1A) of the Act in respective assessment years under consideration.

5. Being aggrieved by the order of AO, assessee preferred appeal before the CIT(A). The assessee submitted before the CIT(A) that these expenses were mere estimations and had been reversed in the subsequent year. Hence, there was no requirement of tax deduction at source in respect thereof. The assessee further stated that the year-end provisions were made purely on an estimation basis to ensure compliance with the provisions of the Companies Act, 1956 and for determination of book profits. That at that stage the parties to whom the expenses pertain to, were not known/identifiable. Thus, tax deduction at source mechanism could not be put into practice until identity of the person in whose hands it was includible as income, can be ascertained. In view of the above, the assessee submitted that withholding tax provisions under the Act would not be applicable on the year end provisions in the present cases. Ld. CIT(A) after considering the submissions of the assessee and further relying and following the order of the Tribunal in the assessee's own case for the assessment year 2007-08, dated 31-10-2012, decided the issue in faovur of the assessee, thereby deleting the demands raised by the AO on this issue. The revenue, thus, has come in appeal before us in relation to above issue.

6. At the outset, ld. AR of the assessee has stated that the issue of non-deduction of tax on year-end and provision is not involved, so far as the A.Y.2004-05 and 2005-06 are concerned. He, however, has stated

that this issue is involved in the assessment year 2006-07 to A.Y.2009-2010. But the department without application of mind has taken this issue for A.Y.2004-05 and 2005-06 also, since a common order has been passed by the CIT(A) in relation to A.Y.2004-05 to A.Y.2006-07. He has further invited our attention to the order of the Tribunal dated 31-10-2012 for the A.Y.2007-08 in assessee's own case, wherein the Tribunal while relying upon another decision of coordinate bench of the Tribunal in the case of IDBI Vs. ITO, 107 ITD 45 (Mum), has held that since the payee is not identifiable at the time of making of provision and further the entire provision has been written back in the next year and the actual amounts paid/credited were subjected to TDS as and when the liability was crystalised or the payments were made and even when the assessee himself had disallowed the entire amount in the computation of income upon which no TDS was deducted, in that event proceeding u/s.201(1) and the levy of interest u/s.201(1A) was not justified. Relevant observation made by the Tribunal for the sake of convenience are reproduced as under :-

> 11. In view of the above decision of coordinate bench, since the payee is not identifiable in this case also at the time of making provision, no TDS need to be made on the above amount. Further the entire provision has been written back in the next year and the actual amounts paid/credited were subjected to TDS as per the detailed statements filed before the authorities on which there is no dispute. Therefore, assessee is following the provisions of TDS as and when the amounts are paid/credited to respective parties.
>
> 12. As already explained and evidenced from the computation of income as well as the orders of AO in the assessment proceedings, the entire provision has been disallowed under section 40(a)(ia) and section 40(a)(i). Once the amount has been disallowed under the provisions of section 40(a)(i) on the reason that tax has not been deducted, it is surprising that AO holds that the said amounts are subject to TDS provisions again so as to demand the tax under the provisions of section 201 and also levy interest under section 201(1A). We are unable to understand the logic of AO in considering the same as covered by the provisions of section 194C to 194J. Assessee as stated has already disallowed the entire amount in the computation of income as no TDS has been made. Once an amount was disallowed under section 40(a)(i)/(ia) on the basis of the audit report of the Chartered Accountant, the same

> amount cannot be subject to the provisions of TDS under section 201(1) on the reason that assessee should have deducted the tax. If the order of AO were to be accepted then disallowance under section 40(a)(i) and 40(a)(ia) cannot be made and provisions to that extent may become otiose. In view of the actual disallowance under section 40(a)(i) by assessee having been accepted by AO, we are of the opinion that the same amount cannot be considered as amount covered by the provisions of section 194C to 194J so as to raise TDS demand again under section 201 and levy of interest under section 201(1A). Therefore, assessee's ground on this issue are to be allowed as the entire amount has been disallowed under the provisions of section 40(a)(i)/(ia) in the computation of income on the reason that TDS was not made. For this reason alone assessee's grounds can to be allowed. Considering the facts and reasons stated above assessee's grounds are allowed.
>
> 13. Assessee has raised one more contention that interest under section 201(1A) should be levied till the date of payment and not till the date of order. Anyhow this issue became academic in nature, as we have already held that demand under section 201 cannot be raised once the entire amount has been disallowed in the computation of income under section 40(a)(i) and 40(a)(ia). In view of this even though the contention is correct being a legal issue, there is no need for adjudicating the matter as the grounds raised have been held in favour of assessee. AO is directed to delete the said demand so raised. Appeal is accordingly allowed."

7. Since the facts and issues involved are identical in the appeals under consideration, hence, respectfully following the above findings of the Tribunal given in assessee's own case, the grounds No.1 to 3 in the appeals of the revenue relating to disallowance made on account of non-deduction of TDS on year-end and provision are hereby dismissed.

8. Ground Nos.4 to 8 are relating to non-deduction of tax at source on purchase of traded goods and packing material. We find that this issue is also covered by the decision of Tribunal in assessee's own case for the assessment year 2007-08, wherein the Tribunal has decided the issue in favour of the assessee observing as under :-

> *14. As briefly stated above, AO raised demand on 1.purchase of traded goods, 2.purchase of packing material and 3.clinical trials. The order of the CIT (A) on the three issues are as under:*
>
> *1. Finished/Traded Goods:*

"11. I have carefully considered the facts of the case, various agreements with third party, submission and legal propositions made by the Appellant. From the agreement it is clear that the assessee has exercised right for quality specification and quality control as agreed by the third party. This is common practice in pharma industries, wherein the purchaser of traded goods purchases goods only when it is up to their quality requirement. Further from the agreement it is clear that all other right and Obligation is with the seller of traded goods and the property in goods passes after it is delivered to the door step of the appellant. It is also a fact that no raw material is supplied by the appellant (purchaser) to the manufacturers. The manufacturing activities are also carried out by the manufacturers in their own premises. The manufacturers have also paid excise duties VAT/sales tax as applicable on the goods manufactured/sold. After going through the agreement and its various clauses and facts of the case in its entirety, it is concluded that the contract with the various parties are contract for purchases of traded goods and not of the works contract. I have also noted that the above issue is covered in the favour of the Appellant by the decision of Mumbai Tribunal in case of Novartis HealthCare Pvt. Ltd. v. ITO 29 SOT 425 (Mum) and Glenmark Pharmaceuticals Ltd. v. ITO (TDS) 30 SOT 19 (Mum) wherein the Hon'ble tribunal on identical facts has held that TDS is not required to be deducted on purchase of traded goods.

Based on the above, I am of the opinion that the provisions of Chapter XVII·B of the Act cannot be said to be applicable on purchase of finished/traded goods Accordingly, there is no default on the part of tile Appellant in complying with the provisions of Chapter XVII-B of the Act while making payment for purchase of finished/traded g0o.dS without deducting tax at source This ground of appeal is allowed in favour of the appellant".

2.Purchase of Packing Material:

"13. I have perused the facts of the case as well as the submissions of the appellant. I am of the opinion that this ground is covered in favour of the Appellant by the decision of jurisdictional High Court in the case of BDA Ltd vs. Income Tax Officer (TDS) 281 ITR 99 (Bom.) wherein the Hon'ble High Court has held that TDS is not required to be deducted under section 19cC on purchase of packing material.

Based on the above, I am of the opinion that the provisions of Chapter XVII-B of the Act cannot be said to be applicable on purchase of packing material. Accordingly, there is no default on the part of the Appellant in complying with the provisions of Chapter XVII-B of the Act while making payment for purchase packing material without deducting tax at source. In the result this ground is allowed".

3.Clinical Trials

"15. I have gone through the facts of the case and submissions of the appellant. As far as the appellant's contention that the above expenditure of `.11,35,14,000/- includes an amount of `.3,66,90,204/- on which TDS is not deductible on the following grounds:

a) Purchase of various materials.
b) Expenditure on food and travelling
c) Availability of tax exemption certificate
d) Payment of regulatory fees.

Prima facie TDS is not deductible on all the four items mentioned above. However, this particular break up has not been provided to AO. I therefore, direct AO to verify the above break up given by the appellant. If the above break up of expenditure given by the appellant is found to be correct, then I hold no TDS is required to be deducted on the above payments. AO is directed accordingly".

With regard to balance expenditure amount of `.7,68,21,907/- is concerned, the appellant has deducted TDS of `.42,45,914/- on the same. However, it is seen that payment in question is in the nature of professional fees. In order to carry out clinic trial, the person who carries out the trial must possess medical qualification and the person should be highly qualified and should possess technical expertise. Therefore, payment made in this respect is nothing but fees for professional/technical services. Accordingly, I hold that the above payment of `.7,68,21,907/- is a payment to professional fees, therefore, tax should have been deducted as per provisions of section 194J. Therefore, the action of AO is confirmed so far as the applicability of section 194J is concerned. However, AO is directed to calculate TDS liability under section 194J. Whatever TDS liability comes under section 194J credit for taxes paid of `.42,45,914/- is to be allowed and balance amount needs to be recovered from the appellant. This ground of appeal is disposed off accordingly".

15. After considering the rival contentions and perusing the order of the CIT (A), we are of the opinion that there is no need to differ from the order of the CIT (A). The learned CIT (A) has followed the principles established by the Hon'ble High Court in the case of BDA Ltd vs. Income Tax Officer (TDS) 281 ITR 99 (Bom.) and CIT vs. Glenmark Pharmaceuticals Ltd, 324 ITR 199. Since the issues are crystallized in favour of assessee by the orders of the jurisdictional High Court, respectfully following the same we affirm the order of the CIT (A)."

9. Respectfully following the above findings of the Tribunal in the own case of assessee, we affirm the order of the CIT(A) on this issue.

10. Ground Nos.9&10 relate to the levy of interest u/s.201(1A). Since we have dismissed the ground of revenue with regard to disallowance made on account of non-deduction of TDS on the above issues, therefore, no interest is required to be levied u/s.201(1A) of the Act.

11. Now, coming to the cross objection of the assessee, the assessee in his cross objection has stated that two separate orders were passed by the AO u/s.201 r.w.s.40(a)(ia) relating to A.Y.2009-2010. The first order was dated 25-3-2011 and the second order was dated 29-3-2011. The contention of ld. AR has been that the issue and the amounts involved relating to non-deduction of TDS at source on the year-end provisions was the same and, hence, the subsequent order dated 29-3-2011 was not sustainable and was *void ab inito*. Ld. CIT(A) rejected the above contention of assessee holding that there was difference in the amounts mentioned in the order dated 25-3-2011 and in the order dated 29-3-2011 on which the TDS was required to be deducted as per the AO. The ld. AR has submitted that the said difference was on account of short deduction of TDS, which was considered by the AO as a part of the year end provisions in the order dated 29-3-2011 u/s.201(1) r.w.s.40(a)(ia) of the Act and the same was considered while passing the order dated 25-3-2011 u/s.201(1)/201(1A) of the Act. Therefore, two separate orders could not have been passed in the case of one assessee on the same issue.

12. We have already deleted the additions made by the AO u/s.201(1) r.w.s.40(a)(ia) and in view of this, since both the appeals of revenue for A.Y.2009-2010 have been dismissed, hence, cross objection

filed by the assessee, is rendered academic in nature and is hereby dismissed as the same having become infructuous at this stage.

13. In the result, appeals of the revenue as well as cross objection of the assessee i.e. CO.No.141/Mum/2015 are dismissed.

Order pronounced in the open court on this 25/05/2016.

Sd/-	**Sd/-**
(आर.सी.शर्मा**)**	**(**संजय गर्ग**)**
(R.C.SHARMA)	**(SANJAY GARG)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated 25/05/2016

प्र.कु.मि/pkm, नि.स/ PS

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), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

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