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

BEORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND SHRI AMIT SHUKLA, JUDICIAL MEMBER

ITA No. 1251/MUM/2014
(Assessment Year : 2009-10)

Godrej Sara Lee Ltd.,
(Now amalgamated into Godrej Consumer –
Products Ltd.)
Kalyaniwalla & Mistry,
3rd Floor,Army & Navy Building,
148, M.G.Road, Fort,
Mumbai 400 001.
PAN: AACT 1921C ... Appellant

Vs.

The Addl. Commissioner of Income Tax Range 10(2),
Aaykar Bhavan, Room No.433,
4th Floor, MK Marg,
Mumbai 400 020 .... Respondent

ITA NO.1356/MUM/2014(A.Y. 2009-10)

The Dy. Comm. Of Income Tax ,Range 10(2),
Mumbai. ..... Appellant

Vs.

Godrej Sara Lee Ltd.,
(Now amalgamated into Godrej Consumer –
Products Ltd.)
Kalyaniwalla & Mistry,
3rd Floor,Army & Navy Building,
148, M.G.Road, Fort,
Mumbai 400 001. ..... Respondent

Appellant by : Shri F.V.Irani
Respondent by : Shri N.K.Chand

Date of hearing : 07/07/2015
Date of pronouncement : 18/11/2015

ORDER

PER G.S. PANNU,AM:

The captioned are cross-appeals by the assessee and the Revenue, directed against the order of the Assessing Officer dated 30/12/2013 passed under section 143(3) r.w.s. 144C(13) pertaining to the assessment year 2009-10, which is in conformity with the order passed by the DRP-1, Mumbai dated 30/10/2013. The assessee as well as Revenue has raised the following grounds of appeal:-

Grounds of Assessee's Appeal:-

" 1) The learned DRP erred in confirming the allocation of interest and administrative expenditure aggregating to Rs.14,25,150/- towards the earning of exempt dividend income and thereafter reducing only the net dividend income while computing book profits under Section 115JB of the Act.

2) The learned DRP erred in directing the Assessing Officer to rely on the provisions of Section 14A of the Act and Rule 8D of the Rules while computing the amount liable to be added back to the book profits to be computed under section 115JB of the Act.

3) The learned DRP and the Assessing Officer erred in disregarding the method of allocation consistently adopted by the Appellant and in re-allocating 50% of the following overheads of the non-eligible undertakings of the Appellant, while computing the deduction U/S 80IB/ 80IC of the Act:-

Miscellaneous Expenses

Conveyance and Travelling Expenses

Rent, Rates and Taxes

Advertisement and Publicity

Schemes and Promotions

4) The learned DRP erred in directing the Assessing Office to restrict the claim for depreciation under Section 32 of the Act on computer peripherals @15% as against the rate of 60% claimed by the Appellant.

5) The learned DRP erred in confirming the action of the Transfer Pricing Officer 1 Assessing Officer that the actual sales price and arms length price of each related party transaction are to be compared product wise independently and not on an aggregate country-wise basis for exports made to the AEs.

6) The learned DRP erred in confirming the disallowance of Rs. 20 lacs being the reimbursement of advertisement expenses made by the Appellant Company to its Associated Enterprise during the year.

7) The learned DRP erred in directing the Assessing Officer to make an addition of Rs.6,27,920/- in respect of guarantee commission in respect of the guarantee given on behalf of Godrej Sara Lee (Bangladesh) Pvt. Ltd.

8) The Assessing Officer erred in not following the directions of the learned DRP in respect of provision for diminution in value of investments while computing the book profits."

Grounds of Revenue's appeal:-

"1. On the facts and the circumstances of the case and in law, the Disputes Resolution Panel erred in reducing the Guarantee Commission charged to Associated Enterprise(AE) in Bangladesh to Rs.6,27,920/- as against Rs.14,82,960/- as computed by the Transfer Pricing Officer(TPO) in order u/s.92CA of the Income Tax Act and proposed by the Assessing Officer(AO) in Draft Assessment Order passed ujs.143(3) r.w.s.144C(1) of the Income Tax Act.

1.1 On the facts and the circumstances of the case and in law, the Disputes Resolution Panel erred in rejecting the average yield method adopted by the TPO to determine the credit rating of the AE for computing the Arms Length Price(ALP) of Guarantee Fee charged from the AE on providing the guarantee.

2. On the facts and the circumstances of the case and in law, the Disputes Resolution Panel erred in directing the AO to exclude Bank Charges and Other Financial Charges while computing the expenditure attributable to earning exempt income.

2.1 On the facts and the circumstances of the case and in law, the Disputes Resolution Panel erred in ignoring law that the provision of Rule 8D being Rule 8(D)(2)(i) thereof which clearly directs to include the amount of expenditure directly relating to income which does not form part of total income and that the Bank Charges and Other Financial Charges are directly attributable to earning of exempt income in the instant case."

3. On the facts and the circumstances of the case and in law, the Disputes Resolution Panel erred in directing the AO, without any supportive justification, to not to apply the average rate of profit margin within the 80-IC/80-IE/80-IB eligible Units of Guwahati with that of Pondicherry belonging to the assessee company. Thereby erred in allowing the assessee to claim higher deduction u/s. 80-IC/80-IE/80-IB in respect of 2 Guwahati Units to the extent of Rs.52,79,23,037/- as compared to the products manufactured at Pondicherry Units.

2. The assessee is a company incorporated under the provisions of the Companies Act, 1956 and is, inter-alia, engaged in the business of manufacturing/marketing of mosquito repellent, mats, coils, mat fitting machine, air freshener and trading of hair care and household care products. For the year under consideration, the assessee-company filed its return of income declaring a total income of Rs.52,87,89,996/-, which was subject to a scrutiny assessment. In an assessment finalized under section 143(3) r.w.s. 144C(1) dated 30/12/2013 in accordance with the directions of the DRP dated 30/10/2013, the total income has been assessed at Rs.68,31,94,653/-, after making certain additions/disallowances, which are subject matter of controversy in the cross appeals of the assessee and the Revenue.

3. In so far as Ground of appeal Nos. 1 to 2 of assessee's appeal and Ground of appeal Nos.2 and 2.1 of Revenue's appeal are concerned, they pertain to the issue of disallowance under section 14A of the Act. In brief, the relevant facts are that assessee was found to have earned exempt dividend income, and in the draft assessment order dated 28/02/2013 passed under section 143(3) r.w.s. 144C(1) of the Act, the Assessing Officer applied the provisions of Rule 8D of the Income Tax Rules, 1962 (in short 'the Rules') and computed a disallowance of Rs.17,40,847/-. The DRP vide order dated 30/10/2013 directed the Assessing Officer to reduce the bank charges and other

financial expenses, which are not in the nature of interest, while computing the disallowance under rule 8D(2)(ii) of the Rules. Accordingly, in the final assessment order dated 30/12/2013, the disallowance was scaled down to Rs.14,25,150/-.

4. In this back ground, the Ld. Representative for the assessee submitted that in the preceding assessment year of 2008-09, similar issue came up before the Tribunal and vide order dated 11/3/2015 in ITA No.598/Mum/2013, the matter has been restored back to the file of the Assessing Officer with following directions:-

> *"4. We have considered the rival submissions as well as relevant material on record. The investment as on 31st March 2007 was Rs. 6.74 crores whereas the investment as on 31.03.2008 is Rs. 61.25 crores, therefore, there is an increase in the investment during the year to the extent of Rs. 54.51 crores. We note that this fresh investment of Rs. 54.51 crore is clearly in the two foreign subsidiaries of the assessee and dividend from the foreign company is taxable, therefore, to that extent the DRP has already directed the Assessing Officer to recomputed the disallowance. The issue before us is limited to the extent of disallowance in respect of the investment in the wholly owned Indian subsidiaries. The assessee has raised two contentions in this respect that the investment in question is out of the assessee's own fund and that too in subsidiaries. It is pertinent to note that the fund flow statement filed by the assessee is only regarding the fresh investment made by the assessee during the year which is otherwise excluded for the purpose of disallowance u/s 14A being the investment in foreign companies. It is not clear from the record whether any disallowance was made on account of interest expenditure in the earlier assessment years. Since the investment was made in the earlier assessment years, therefore, the disallowance on account of interest expenditure has to be as per the funds available with the assessee and the finding on the issue of disallowance u/s 14A for the earlier years is relevant for the purpose of deciding this issue for the year under consideration. Similarly, the issue of disallowance on account of administrative expenses has to be decided keeping in view the finding of the earlier assessment years on this account. Accordingly, in the facts and circumstances of the case, we set aside this issue to the record of Assessing Officer to decide this issue afresh by considering the finding of the earlier A.Ys on this issue and further in view of the decisions relied upon by the Ld. Authorized Representative in case of JM Financial Ltd. Vs. Addl. CIT (supra) as well as Garware Wall Ropes Ltd. Vs. Addl. CIT (supra)."*

4.1 It was submitted that, the matter be restored back to the file of the Assessing Officer to be decided afresh in the light of the precedent in assessee's own case for assessment year 2008-09 (supra). The Ld. Departmental Representative has not controverted the factual matrix brought out by the assessee and accordingly the issues raised in Ground of Nos. 1 &2 in the appeal of the assessee are restored to the file of the Assessing Officer to be decided afresh in accordance with the decision of the Tribunal dated 11/3/2015 (supra) for assessment year 2008-09.

5. Regarding the issue in Revenue's appeal in Cross-Ground Nos. 2.& 2.1, the DRP directed the Assessing Officer to exclude bank charges and other financial charges while determining the figure of the interest expenditure for quantifying the disallowance under Rule 8D of the Rules. The Revenue has challenged the aforesaid direction of the DRP. After considering the rival stands, we find no infirmity in the decision of the DRP, which is in conformity with the phraseology of Rule 8D(2)(ii) of the Rules. As a result, the Ground Nos. 2 & 2.1 raised by the Revenue are dismissed.

6. By way of Ground of appeal No. 3, assessee-company has assailed the action of the Assessing Officer in reworking the deductions u/s. 80IB/80IC of the Act by re-allocating certain administrative and selling & marketing expenses of the non-eligible units to the eligible units. It was a common point between the parties that this dispute was a recurring

issue and in the past years the issue had been decided by the Tribunal in favour of the assessee. In the lead case for assessment year 2006-07, the Tribunal vide order dated 22.11.2013 in ITA No. 7369/Mum/2010 held as under:

> *"8. We have considered the rival submissions and also perused the relevant material available on record. It is observed that out of the total overheads of Rs.154.63 crores incurred by the assessee during the year under consideration, overheads to the extent of Rs. 141.91 crores were directly allocated by the assessee to the eligible units being directly attributable to the said segment. The balance amount of overheads to the extent of Rs. 12.72 crores representing the indirect expenses were allocated by the assessee between the eligible business and non-eligible business in the ratio of turnover and this basis adopted by the assessee was accepted by the A.O. except in the case of advertisement & publicity expenses amounting to Rs. 4.23 crores, schemes and promotions expenses amounting to Rs. 0.83 crores, miscellaneous expenses amounting to Rs. 0.72 crores, conveyance and traveling expenses amounting to Rs. 0.47 crores and rent, rate & taxes amounting to Rs. 0.48 crores. As explained by the ld. counsel for the assessee before us, the expenditure on advertisement & publicity and schemes and promotions was incurred mainly to create and promote the brand image for the company's product and this position was accepted even by the A.O. in his order. The, A.O., however, held that the trader normally would never incur expenditure on advertisement and brands of the manufacturer out of the trading profit. He, however, appears to have overlooked the fact that goods procured from the third party were sold by the assessee company as a part of trading activity under the same brand name and the benefit of the said expenditure thus was available equally to the trading segment. Incidentally, the A.O. also impliedly accepted this position while observing in his order that such expenses on advertisement & publicity and schemes have to be allocated to some extent to the non-eligible segment. He, however, held that such allocation could not be very large amount and accordingly re-allocated 50% of the said expenses to eligible unit on adhoc basis. In our opinion, such reallocation made by the A.O. on adhoc basis cannot be sustained having regard to all the facts of the case including especially the fact that the expenditure on advertisement & publicity and schemes was in the nature of selling expenses and the allocation made by the assessee of the said expenses on the basis of turnover was quite reasonable. The allocation so made by the assessee also cannot be said to have resulted in allocation of large amount of expenses to the non-eligible business as alleged by the A.O. since the gross profit ratio as shown by the assessee in the trading segment was 12.92% and even after allocating advertisement, schemes and promotions expenses on the basis of turnover, the profit of trading segment was 6.59%.*

9. Similarly, the other indirect expenses on conveyance and traveling, rate and taxes and miscellaneous were incurred by the assessee during the normal course of its business of selling the finished goods, whether manufactured or procured from third party and since the said expenses were incurred equally for the benefit of eligible business as well as non-eligible business of trading, we are of the view that the basis of turnover adopted by the assessee to allocate the said expenses was more scientific and reasonable. On the other hand, the reallocation of the said expenses made by the A.O. on adhoc basis was not supported or substantiated by him and the same, in our opinion, cannot be accepted as a reasonable basis. In the case of Consolidated Coffee Ltd. v. State of Karnataka (supra) cited by the ld. counsel for the assessee, it was held by the Hon'ble supreme Court that when a bifurcation of expenses is not possible, some reasonable test will have to be adopted and that adoption of the method of apportioning on the basis of gross receipts could not be said to be a perverse method to apply. Keeping in view the decision of Hon'ble Supreme Court in the case of Consolidated Coffee Ltd. v. State of Karnataka (supra) and having regard to the facts of the case, we are of the view that the allocation of expenses made by the assessee between eligible business and non-eligible business for the purpose of computing deduction u/s 80IB/80IC of the Act was reasonable and there was no justifiable reason for the A.O. to disturb the same and make re-allocation on adhoc basis. We, therefore, delete the addition made by the A.O. by restricting the claim of the assessee for deduction u/s 80IB/80IC of the Act by reallocating the common indirect expenses and allow ground No. 1 & 2 of the assessee's appeal."

6.1 The aforesaid decision was followed by the subsequent Benches of the Tribunal for assessment year 2005-06 and 2008-09 vide orders in ITA Nos. 7227/M/2011 and 598/M/2013 dated 19.2.2014 and 11.3.2015 respectively. Following the aforesaid precedents, the issue raised in Ground No. 3 in assessee's appeal is allowed.

7. By way of Ground No. 4, assessee company has assailed the action of the Assessing Officer in allowing depreciation on UPS & Printers @ 15% treating them as Plant & Machinery instead of 60% claimed by the assessee treating them as part and parcel of computers. In assessment year 2008-09, the Tribunal vide order dated 11.3.2015

(supra), allowed the claim of depreciation @ 60% on the cost of UPS & Printers. Following the precedent, ground of appeal raised by the assessee is allowed.

8. By way of Ground No. 5, assessee company has assailed an addition of Rs. 11,72,710/- on account of determination of arm's length price of the exports made to its associated enterprises. The assessee-company had adopted Comparable Uncontrolled Price (CUP) method in order to benchmark its selling prices of exports made to associated enterprises, and it was asserted that the stated selling prices were at arm's length. However, the Transfer Pricing Officer worked out an adjustment of Rs. 11,72,710/- in order to determine the arm's length price because as per the TPO, the selling prices and the arm's length price of each related party transaction was to be compared product-wise independently and not on aggregate country-wise basis for exports made to associated enterprises.

8.1 It was a common point between the parties that similar issue had come up before the Tribunal for assessment year 2008-09 (supra), and the stand of the assessee was upheld in following words:

> *" 25. We have considered the rival submissions as well as relevant material on record. The assessee bench marked its selling price using comparable uncontrolled price (CUP) method. The TPO found that the assessee has aggregated all the exports made to a particular country for the purpose of bench marking against the comparable transactions with unrelated parties in those countries. The TPO held that such bench marking is required to be done for each transaction and for each particular product. Accordingly, the TPO has made the addition of Rs. 14,61,781/- on this account. There is no dispute regarding the most appropriate method applied by the assessee as internal CUP. The only controversy before us is whether the various insecticides products sold by the assessee to its AEs in various countries should be clubbed together for the purpose of bench marking all the transactions being at arm's length and compared with the uncontrolled price. It is pertinent to note that the product sold by the*

assessee are insecticide products in the various forms i.e. coil, liquid-vaporizing products, liquid repellants etc. There is no dispute that some of the products are sold as a package along with the accessories which are necessary for using these insecticide products. For instance a heater is required along with good knight vaporizer as well as mat and, therefore, the product sold in a single package comprising heater along with the liquid vaporizer is sold at a different price then a price of a refilling bottle. Therefore, the vaporizer sold with heater cannot be compared with a refilling vaporizer /refilling bottle. We note that all the products are falling in the category of insecticides and used as complimentary to each others. Some of the products are cheapest versions of insecticide and may be sold by the assessee only for the purpose of marketing strategy to promote other products of the assessee in a particular market. Therefore, all the products are falling in the category of insecticides and used as supplementary to each other then these products may be priced by taking a portfolio approach by the assessee and not considering the profit motive from each and every single product within the portfolio. We note that in the case of Boskalis International Vs. Dy. Director of Income Tax (supra), the Tribunal while considering a similar issue has held in para 11 and 12 as under

> *"11. We have considered the rival submissions as well as relevant material on record. The limited issue before us is whether the lease rental paid by the assessee to its Associated Enterprises in respect of various dredging equipments taken on lease can be recorded as closely linked or continuous transactions which cannot be evaluated separately on individual basis. If a number of transactions are closely linked or continuous in nature and arising from a continuous transactions of supply of amenity or services the transactions can be permitted as closely linked transactions for the purpose of transfer pricing and in terms of Rule 10A(d). Aggregation and clubbing of the closely linked transaction are permitted under the Rules and it is also supported by OECD transfer pricing guidelines. In order to examine whether the number of transactions are closely linked or continuous so as to aggregate for the purpose of evaluation it is to be considered that one transaction is follow-on of the earlier transaction and then the subsequent transaction is carried out and dependent wholly or substantially on the earlier transaction. It can be vice-versa when the earlier transaction has been entered into between parties by keeping in mind that a continuous transaction of similar nature will be entered into between the parties thereafter. Therefore, when the transactions are influenced by each other and particularly in determining the price and profit involved in the transactions then those transactions can safely be regarded as closely linked transactions. The OECD guidelines has referred a portfolio approach as business strategy consisting of tax payers bundling certain transaction for the purpose of earning an appropriate return across portfolio rather than single product. For instance*

some products may be marketed by the tax payer with a low profit or even at loss because they create a demand for other products or related services of the same tax payer that are then sold or provide high profit. Some of the examples given in the OECD guidelines for transfer pricing are the equipment and captive after market consumables such as vending coffee machines and coffee capsules, or printers and cartridges. Thus portfolio approach is business strategy that may need to be taken into account in comparability analysis. Therefore, if two or more transactions between the same parties i.e., the Assessee and its associate enterprise can be said to be closely linked if the transactions are interlinked and terms and condition as well as prices between the parties are determined based on the totality of the transactions and not on individual and separate transactions.

12. In the case in hand the Assessee has taken a number of dredging equipments from more than one associate enterprises. In the business decisions when number of transactions are entered into between two parties then it is a very important and material factor to consider a portfolio approach rather than the individual transaction approach for determination of price of the transactions between the parties. Even otherwise the scheme of Transfer pricing provisions is to avoid Base Erosion and Profit Shifting from one tax jurisdiction to another tax jurisdiction. Therefore, the hiring of various equipments to be used for execution of a project can be aggregated for the purpose of determination of ALP only to the extent of the transactions or to the extent of number of transactions with each associated enterprise. In other words the transactions carried out with different associate enterprises cannot be clubbed or aggregated because they cannot be termed as closely linked or continuous so as to influence the price in aggregate or the profit of the parties arising from these transactions. Hence, in principle we accept argument of the ld.AR that the various dredging equipments hired from the associate enterprises can be aggregated for the purpose of determination of ALP in terms of Rule 10A(d). However, the aggregation of the various transactions is possible only with respect to the transactions which are carried out between the Assessee and each associate enterprise. Since the Assessee has hired these equipments and dredgers from more than one associate enterprise, therefore, the aggregation of the transaction is permitted only in respect of those which are between the Assessee and one enterprise separately. Accordingly AO/TPO is directed to determine the ALP by aggregating the various transactions between the Assessee and each associate enterprise separately and not by clubbing the transactions with all associate enterprises.

26. There is no dispute that if the number of transactions are closely linked or continuous in nature and arising from a continuous transactions of supply or services the transactions can be classified as closely linked

transactions for the purpose of transfer pricing and in terms of Rule 10A(d) of the income Tax Rules. The Aggregation and clubbing of the closely linked transaction are permitted under the Rules and it is also supported by OECD transfer pricing guidelines. Thus the concept of clubbing and aggregating the transaction is based on the premise that such transactions influenced by each other and particularly in determining the price and profit involved in the transactions then such transactions can safely be regarded as closely linked transactions. The OECD guidelines has referred a portfolio approach as business strategy consisting of tax payers bundling certain transaction for the purpose of earning an appropriate return across portfolio rather than single product. The assessee is selling various insecticide products used in the household at various strata of the society and, therefore, the products of the assessee are clearly falling under the one portfolio of same category of product and, therefore, the assessee can have a portfolio approach as a business strategy. A similar view has been taken by the Co-ordinate bench of this Tribunal in the case of Taj Sats Air Catering Ltd. Vs. Additional CIT (supra). In view of the above facts and circumstances of the case as well as from the above discussion, we are of the view considered opinion that all the insecticide products sold by the assessee to its AE in each country shall be clubbed together for the purpose of determining the arm's length price. Accordingly, we decide this issue in favour of the assessee. Consequently, the addition made by the Assessing Officer is deleted."

8.2 Following the aforesaid precedent, the ground No. 5 in the appeal of the assessee is allowed.

9. By way of Ground No. 6, assessee-company has assailed the disallowance of Rs.20,00,000/- representing reimbursement of advertisement expenses by the assessee to its associated enterprise. In brief, the relevant facts are that the assessee company paid Rs. 20,00,000/- to Koninklinjke Douwe Egberts, Netherlands, towards reimbursement of advertising expenses. After considering the submissions of the assessee-company, the TPO observed that the assessee could not substantiate the basis on which the amount was reimbursed to the associated enterprise. He determined the arm's length price of the said payment at 'Nil' on account of non-furnishing of any supporting document. The Assessing Officer passed the draft assessment order in conformity with the order of the TPO. Before the

DRP, assessee raised objections against the proposed disallowance by contending that –(a) it paid the impugned amount as its share in the advertisement expenses incurred at the group level; and (b) the reimbursement of cost was based on assessee-company's proportionate share in net sales value of the global business, in relation to the costs of such services incurred under each of the brands of the group. The DRP affirmed the addition proposed by the Assessing Officer for the reason that the assessee had failed to establish how the price of Rs.20,00,000/- was determined by it as an arm's length price. Additionally, the DRP observed that the assessee company had failed to demonstrate that the amount was incurred wholly and exclusively for the purpose of business and thus, it was disallowable under section 37(1) of the Act also. On the basis of the aforesaid reasons, the Assessing Officer has made an addition of Rs.20,00,000/- in the final assessment order dated 30/12/2013(supra).

9.1 Before us, Ld. Representative for the assessee contended that the impugned sum has been unjustly disallowed. Explaining the factual aspect, it was pointed out that 'Sara Lee' is a world leader in the household and body care business and markets products under various global brands. It was asserted that the group incurs costs globally to develop and market the said brands, and also provides marketing assistance and support concerning the products under the 'Sara Lee' brand. The assessee-company paid Rs.20,00,000/- to Koninklinjke Douwe Egberts, Netherlands as reimbursement on cost to cost basis, and no mark-up was charged.

9.2 Further, it was explained that the expenses incurred by the assessee-company in India for the benefit of the 'Sara Lee' Group was also recovered from the associated enterprise as per actual costs and in this connection assessee-company had received an amount of Rs.55.13 lacs from Koninklinjke Douwe Egberts, Netherlands, towards reimbursement of salary cost, etc. It was therefore, pointed out that the sharing of cost by the group concerns has, in fact, benefited the assessee as there is a excess recovery of Rs.35.13 lacs for the year under consideration.

9.3 On the other hand, Ld. CIT-DR vehemently pointed out that the authorities below have disallowed the claim of the assessee by clearly noticing that the assessee had failed to establish the basis on which the expense was incurred. In nut-shell, Ld. CIT-DR has relied upon the findings of the DRP, which has formed the basis for the disallowance by the Assessing Officer.

9.4 Having considered the rival submissions carefully, we find that the prime reason weighing with the income tax authorities to disallow the impugned sum was failure on the part of the assessee to establish the incurrence of such expenditure wholly and exclusively for the purposes of business. Apart therefrom, the TPO has also recorded a finding that the assessee-company could not substantiate the basis on which the impugned amount of Rs.20.00 lacs has been reimbursed to its associated enterprise, so as to determine as to how the stated expenditure of Rs.20.00 lacs could be considered as an arm's length price. The explanation rendered by the assessee before us is on the

same lines as was made before the lower authorities. In our considered opinion, the explanation rendered by the assessee continues to suffer from the same vices, as has been noted by the income tax authorities. Apart from making bald assertions, there is no cogent material brought on record by the assessee to substantiate the incurrence of the impugned expenditure wholly and exclusively for the purposes of business and, thus, such an expenditure is clearly disallowable in terms of section 37(1) of the Act. On this preliminary aspect itself we uphold the stand of the AO and accordingly, the assessee fails in Ground of appeal No.6.

10. By way of Ground of appeal No.7, the assessee has assailed the action of the AO in making an addition of Rs.6,27,920/- in respect of earning on account of arm's length rate of guarantee commission relating to the guarantee given by the assessee to Citi Bank on behalf of its associated enterprise – Godrej Sara Lee (Bangladesh) Pvt. Ltd.

10.1 In this context, brief facts are that assessee had given guarantee to banks on behalf of its subsidiary in Bangladesh. The subsidiary had raised loans from the bank for which guarantee had been given by the assessee to the constituent branches of the bank in India. The TPO considered such transaction as an international transaction within the meaning of section 92B of the Act. In the computation of income filed, assessee had declared the income from guarantee commission @3%. Accordingly, it was asserted before the TPO that since guarantee commission rate charged by various banks was around 1 to 1.5%, the adjustment made by the assessee @3% on account of guarantee commission was justified and no further transfer pricing adjustment

was called for. It was also explained that the financial guarantee was advanced by the assessee for strategic reasons in furtherance of its business prospects. The TPO, however, differed with the assessee who compared the guarantee commission rate in two different geographical locations, namely, in India and Bangladesh and the difference between the two rates was treated as the benefit to the associated enterprise. Accordingly, the TPO made an addition of Rs.14,82,960/- on this account. In the draft assessment order, the Assessing Officer proposed the aforesaid addition in conformity with the order of the TPO. The assessee raised objections before the DRP, who upheld the stand of the TPO in principle. However, the DRP observed that the TPO ought not to have compared the rate in two different geographically and economically different countries. According to the DRP, the rate of interest prevailing in India should not have been taken into consideration for the fact that the loan in question was availed by the associated enterprise and disbursed in Bangladesh only. Therefore, it directed the AO to rework the addition on this count by considering the rate borne by the associated enterprise in Bangladesh, which resulted in scaling down of the adjustment to Rs.6,27,920/- instead of Rs.14,82,960/- proposed in the draft assessment order. In the final assessment order dated 30/12/2013, an addition of Rs.6,27,920/- has been made. The aforesaid addition is in challenge before us by way of Ground of appeal No.7 in assessee's appeal. In cross appeal, Revenue has also challenged the direction of the DRP in reducing the arm's length price of the guarantee commission from 5.22% proposed in the draft assessment order to 0.94%.

10.2 Since the cross Grounds relate to the same issue, they are being taken up together. In this context, it was a common ground between the parties that the aforesaid issue had come up before the Tribunal in assessee's own case for assessment year 2006-07 and 2005-06 vide orders dated 22/11/2013(supra) and 19/2/2014 (supra) respectively. The Ld. CIT-DR appearing for the Revenue has also not controverted the factual matrix that the issue relating to determination of arm's length price of the guarantee commission has been dealt with by the Tribunal in assessee's own case in assessment years 2005-06 (supra) and 2006-07(supra). As a consequence of the aforesaid, we restore this matter back to the file of the AO, who shall rework the addition on this count, if any, in consonance with the precedents in assessee's own case vide orders of the Tribunal dated 22/11/2013(supra), and 19/2/2014(supra). Thus, the Ground of appeal No.7 in the appeal of the assessee and Ground of appeal No.1 to 1.1 in the appeal of the Revenue are accordingly disposed of.

11. By way of Ground of appeal No.8, the assessee company has assailed the action of the AO in not following the directions of the DRP in respect of Rs.1,24,81,000/- representing Provision of diminution in the value of investment, while computing the book profits under section 115JB of the Act.

11.1 In this context, the brief facts are that before the DRP assessee pointed out that the Assessing Officer erred in not granting deduction of Rs.1,24,81,000/- in respect of the Provision for diminution in value of investment written back while computing the book profit under section 115JB of the Act. The assessee explained before the DRP that the

aforesaid provisions has been accounted and claimed in the year of its creation, being assessment year 2005-06. In the assessment year 2005-06 assessee was in receipt of a notice under section 154 of the Act from the Assessing Officer proposing adding back of such Provision in view of retrospective amendment to the Act. The assessee explained before the DRP that it had made a written communication to Assessing Officer dated 18/02/2010 giving no objection to such adjustment, but the same was pending disposal with the AO. In the aforesaid light, the DRP noted that if the AO was to carry out the amendment under section 154 in the assessment year 2005-06, thereby adding back such Provision, then the consequential effect would have to be given in the instant assessment year, otherwise it would amount to same addition in two assessment years. Therefore, the DRP directed the AO to verify the facts and if the amount was found to be added back in the assessment year 2005-06, then the AO was directed to grant deduction in this year.

11.2 Before us, the grievance of the assessee is that no such verification exercise has been carried out by the AO so as to give effect to the directions of the DRP.

11.3 In our considered opinion, the direction of the DRP is un-exceptional and we find no reason to interfere with it, which is aimed at removing double addition in two assessment years. The AO is hereby directed to verify the factual position in assessment year 2005-06 and if it is found that the claim stands disallowed in assessment year 2005-06, then the AO may grant the deduction in the instant assessment year as per law. Thus, in principle, we affirm the stand of

the DRP on this aspect and direct the Assessing Officer to effectuate the same as per law. Thus, on this aspect assessee succeeds for statistical purposes.

12. The only other ground remaining is Ground of appeal No.3 in the appeal of the Revenue, which arises from the action of the CIT(A) whereby the recomputation of profits of two units manufacturing mosquito repellent mats and liquid located at Guwahati was reworked by the Assessing Officer.

12.1 In this regard, brief facts are that the assessee company has various manufacturing units spread over Assam, Meghalaya, Tamil Nadu, Pondicherry, etc. Some of the manufacturing units are eligible for deduction under section 80-IC/80-IE of the Act @100% and some are eligible for deduction under section 80-IB of the Act @ 30% and some of the units are non-eligible. In this context, the Assessing Officer examined the profit to sale ratio of the different units and found that the profit margin of the two units situated at Guwahati was abnormally high as compared to the profit margin of the units situated at Pondicherry. Therefore, in the draft assessment order dated 28/2/2013, the claim for deduction under section 80-IC of the Act in respect of the two units in Guwahati was allowed to the extent of Rs.8,36,17,721/- as against the claim of Rs.61,15,40,758/- made by the assessee, thereby resulting in the disallowance of the claim under section 80-IC of the Act to the extent of Rs.52,79,23,037/-.

12.2 Before the DRP, the assessee pointed out that the action of the AO was misplaced in as much as the Assessing Officer mistakenly assumed that Guwahati unit was manufacturing mosquito repellent coils, whereas the Guwahati unit was manufacturing mosquito repellent mats and liquid, which was not comparable with the financial results of Pondicherry unit, which was manufacturing mosquito repellent coils. The assessee also pointed out before the DRP that the adjustment was proposed by the Assessing Officer without appreciating the submissions made and by merely following the stand in the assessment year 2008-09. The DRP found that the aforesaid dispute was similar to the assessment year 2008-09 and it upheld the stand of the assessee. As per DRP, on facts, such an addition was not merited. Accordingly, in the final assessment order no such disallowance has been made but Revenue is in appeal against such direction of the DRP.

12.3 After considering the rival stands, we find that the factual findings of the DRP clearly belie the action of the Assessing Officer in partially denying the claim of deduction under section 80-IC of the Act in respect of the two units at Guwahati manufacturing mosquito repellent mats and liquid. Factually speaking, the results of the Guwahati unit could not be compared with the results of the Pondichery unit since the products being manufactured at two places were different. The Pondichery unit was manufacturing mosquito repellent coils, whereas the Guwahati units were manufacturing mosquito repellent mat and liquid and, therefore, the two situations were not comparable. Furthermore, we notice that in the current year the DRP has been guided by the detailed discussions made by it in its

order for the assessment year 2008-09 dated 7/09/2012, a copy of which has also been placed in the Paper Book filed before us at pages 148 to 157. The relevant discussion in the order of DRP reveals that apart from the difference in the products being manufactured, it has also been brought out that the manufacturing process involved in manufacture of mosquito repellent coils is different than the process required for manufacturing mosquito repellent mat and liquid. These factual aspects have not been negated by the Revenue and, therefore, the decision of the DRP cannot be faulted with. Apart from the aforesaid, we have carefully perused the discussion made by the AO in the draft assessment order and find that no specific reason has been propounded to demonstrate that the profits declared in the Guwahati unit was otherwise untrue except by comparing it with the level of profit of the Pondicherry unit, which ostensibly was not manufacturing the same commodity. Under these circumstances, in our view, there is no merit in the ground raised by the Revenue challenging the direction of the DRP for allowing the claim for deduction under section 80-IC of the Act for Guwahati units in accordance with the claim made in the return of income. Thus, Revenue fails on Ground of appeal No.3 also.

13. In the result, whereas the appeal of the assessee is partly allowed, that of the Revenue is dismissed.

Order pronounced in the open court on 18/11/2015.

Sd/-	Sd/-
(AMIT SHUKLA)	(G.S. PANNU)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dated 18/11/2015

Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai

Vm, Sr. PS