IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 205 OF 2014

Commissioner of Income Tax 10 } Appellant
versus
M/s. Zydus Nycomed Healthcare }
Pvt.Ltd. } Respondent

Mr. Arvind Pinto for the appellant.

Mr. V. Sridharan – Senior Advocate with Mr. S. Sriram and Mr. Balkrishna V. Jhaveri for the respondent.

CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.

DATED :- FEBRUARY 24, 2017

P.C. :-

1. This is a Revenue's appeal challenging the order passed by the Income Tax Appellate Tribunal dated 26th June, 2013.

2. Mr. Pinto appearing for the Revenue raises two contentions and submits that they give rise to substantial questions of law. He would submit that they are pressed by the Revenue in the facts of the respondent assessee. There was a joint venture company of two entities named in para 5.1 at page 3 of the appeal paper book. Subsequently, the name of the foreign company was changed to Altana AG. For the year under consideration, namely,

the assessment year 2006-07, the respondent assessee claimed exemption under section 10B of the Income Tax Act, 1961 in the sum of Rs.103.49 crores. During the course of audit of the returns, the assessing officer noted that in the financial year relevant to assessment year 2003-04, there was a change in the shareholding of the company, where the beneficial interest of the foreign company was transferred to another company. Hence, sub-section (9) of section 10B, prior to its amendment came into operation and the benefit of sub-section (1) of section 10B could not have been availed of. The Commissioner, the first appellate authority was approached by the assessee against this finding of the assessing officer of denial of exemption under section 10B and the assessing officer's order was upheld. The first appellate authority opined that the assessee was not eligible for the exemption, as the purported transfer of 1.5% shares to Altana AG was full of discrepancies and a deliberate attempt was made escape the rigors of sub-section (9) of section 10B. That is how the aggrieved assessee approached the tribunal.

3. Mr. Pinto would submit that the first appellate authority and the assessing officer were right for the simple reason that the assessee company produced a register of share transfer and minutes of the Board meeting. Those were examined by the

assessing officer. The procedure for transfer was not followed properly. The proposal was to split a share certificate as per the request from the German company. The request was accepted by the assessee and the share certificate was split in the two certificates. Then, a further request was received to transfer 3,00,000 equity shares to Altana Pharma AG. That request was considered and approved. This was a transaction which the assessing officer questioned and on the ground that this is a conscious, deliberate and desperate attempt to transfer 1.5% (3 lakh) equity shareholding back to Altana Pharma AG only to get out of the clutches of section 10B(9) of the Income Tax Act, 1961. That is how Mr. Pinto would submit that the appeal raises substantial questions of law.

4. We are unable to agree for the simple reason that the entire records were placed before the tribunal. As a last fact finding authority, it examined them and came to the conclusion that the share pattern at the end of each financial year, namely, 31st March, 2000 to 31st March, 2003 reveals that the non-resident share holder in the assessee company was the German company. That German company changed its name to Altana Pharma AG. After the change in name of that company, it decided to transfer the share holding to its 100% subsidiary. The financial interest,

however, was retained by the said Altana Pharma AG through its 100% subsidiary. That is why, after the transfer of the share holding to its subsidiary by M/s. Altana Pharma AG, it was advised that if this transaction is interpreted to mean that there was a change of more than 51% of the share holding in the assessee company, then, on account of that transfer, the assessee may come in difficulty and the benefit of section 10B would not be available to the assessee. That is why to maintain the ratio, a request for splitting up the share certificate was granted. This is also questioned by the assessing officer, but at one stage, the assessing officer was called upon to submit a report. That was on remand of the matter from the first appellate authority, namely, the Commissioner of Income Tax (Appeals). The tribunal perused the contents of the remand report and arrived at the conclusion that the share has been transferred before March, 2003, interim dividend has been received by the transferree. That was verified from the bank statement of Altana Pharma AG. If the assessing officer verified these documents, accepted them by observing that they are in order, then, the tribunal concluded that there was no reason to hold that any change of ownership occurred. Hence, on facts, it concluded that there is no change in ownership to the detriment of the assessee company. That is how sub-section (9) of section 10B on facts was not attracted. Once we come to this conclusion and a pure finding of fact, which cannot be termed as perverse or vitiated by an error apparent on the face of the record is recorded, then, the appeal does not raise any substantial question of law. Once this was the question and essentially projected, then, we need not admit the appeal. As far as the question at para 6.1 is concerned, that is on the construction of section 10B and we do not think that the said question arises in the backdrop of the tribunal's order impugned in this appeal and in the facts and circumstances peculiar to the assessee's case. We, therefore, leave that question open for a decision in an appropriate case. The other question at para 6.2 and proposed is only on facts and for the reasons recorded above, the same cannot be termed as a substantial question of law. Hence, the appeal fails. It is dismissed. There would be no order as to costs.

(B.P.COLABAWALLA, J.) **(S.C.DHARMADHIKARI, J.)**