

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

INCOME TAX APPEAL (IT) NO. 834 OF 2016

Commissioner of Income Tax – LTU .. Appellant

Versus

M/s. Glenmark Pharmaceuticals Ltd .. Respondent

-
- Mr. Tejveer Singh for the Appellant
 - Mr. Nitesh Joshi a/w Mr. Atul Jasani for the Respondent
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CORAM : AKIL KURESHI &
M.S. SANKLECHA, JJ.

DATE : DECEMBER 10, 2018.

P.C.:

1. This appeal under Section 260A of the Income Tax Act, 1961 (“**the Act**” for short) challenges the order dated 27.2.2015 passed by the Income Tax Appellate Tribunal, Mumbai (“**the Tribunal**” for short). This appeal relates to the Assessment Year 2009-10.

2. The Revenue has urged following questions of law for our consideration:-

- (1) Whether on the facts and circumstances of the case, the Tribunal was correct in deleting the TP adjustment made by TPO to the extent of 3% of the amount of guarantee

given by the assessee on behalf of AE?

- (2) Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in deleting the enhancement of income made by CIT(A) and holding the claim of the assessee of weighted deduction u/S. 35(2AB) on whole R&D expenditure justifiable and at the same time setting aside the issue of allocation of R&D expenses to Baddi unit for computation of deduction u/S 80-IC to the record of Assessing Officer for finding out whether R&D expenditure incurred has any direct nexus to Baddi unit when both these issues are interlinked?
- (3) Whether on the facts and in circumstances of the case and in law, the Tribunal was right in deleting the enhancement of income made by CIT(A) by setting it aside even though the assessee has wrongly claimed double deduction of R&D expenditure of amount Rs. 5,64,26,552/- against both Baddi unit and Maharashtra units?

3. Regarding Question No. (1):-

(a). We note that the impugned order of the Tribunal allowed the appeal of the respondent – assessee holding that Arm's Length Price of corporate guarantee cannot be determined on the basis of the Bank Guarantee. This by following its order dated 13.11.2013 in respect of the same respondent – assessee for the assessment year 2008-09.

(b) Mr. Tejveer Singh, the learned counsel for the Revenue, very fairly points out that being aggrieved by the above order dated 13.11.2013 of the Tribunal for the assessment year 2008-09, Revenue had filed an appeal to this Court being Income Tax Appeal No. 1302 of 2014. The appeal of the Revenue on this issue was dismissed by the order dated 2.2.2017 by this Court as it did not give rise to any substantial question of law.

(c) No distinguishing feature in fact or in law in this appeal from that in Income Tax Appeal No. 1302 of 2014 is shown to us.

(d) Therefore, for the reasons recorded in our order dated 2.2.2017, this question also does not give rise to any substantial question of law. Thus, not entertained.

4. Regarding Question No. (2) & (3):-

(a) The respondent - assessee has units at Baddi in Himachal Pradesh and at Mahape and Sinnar in Maharashtra. So far as the unit in Himachal Pradesh is concerned, it was

entitled to deduction under Section 80-IC of the Act while the units in Maharashtra were entitled to deduction under Section 35(2AB) of the Act.

(b) The respondent assessee while claiming deduction under Section 80-IC of the Act for its Baddi unit, had allocated R&D expenditure to the tune of Rs. 5.64 crores on pro-rata basis of total turnover. Thereafter, on that basis claimed the deduction under Section 80-IC of the Act in its return.

(c) However, during the assessment proceedings, the respondent claimed that there was no R&D facility at Himachal Pradesh unit, thus expenses incurred on R&D facility at Maharashtra unit could not be allocated on pro rata basis to the Himachal Pradesh Unit. Therefore, the deduction under Section 80IC of the Act be given to Himachal Pradesh unit after adding back the above expenses. This was not accepted by the Assessing Officer. On the contrary, by order dated 30.11.2011 pursuant to Section 143(3) of the Act, enhanced the allocation of R&D expenses to its Himachal

Pradesh unit from Rs. 5.64 crores to Rs. 8.46 crores. Thus, reducing the relief under Section 80-IC of the Act.

(d) Being aggrieved by the order of the Assessing Officer, the respondent filed an appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. By an order dated 23.10.2012, the CIT(A) enhanced the profit eligible for deduction under Section 80-IC of the Act to the Himachal Pradesh unit by 50% of Rs. 5.64 crores. However, he enhanced the income by Rs. 5.64 crores (Rs. 8.46 crores less Rs. 2.82 Crores) by disallowing the weighted deduction under Section 35(2AB) of the Act to the units in Maharashtra.

(e) Being aggrieved, the respondent filed further appeal to Tribunal. By the impugned order dated 27.2.2015, the Tribunal found that the CIT(A) proceeded on the wrong assumption of facts as well as on law in respect of deduction under Section 35(2AB) of the Act. This is because the R&D expenditure was incurred in R&D facilities at Maharashtra units duly approved by the Department of Scientific and Industrial Research. It held that merely because the

respondent had allocated the proportionate expenditure to the Baddi unit situated in Himachal Pradesh cannot lead to the conclusion that expenditure on R&D was incurred at or in respect of Baddi unit in Himachal Pradesh. When admittedly, there is no R&D facility at Baddi unit, then there is no question of incurring R&D expenditure relating to Baddi unit. Thus the impugned order held that the withdrawal of the weighted deduction under Section 35(2AB) of the Act is not justified and the appeal of the respondent was allowed. It also noted that merely because the respondent had allocated R&D expenditure on pro rata basis to its Himachal Pradesh unit, it would not operate a bar to raise a claim subsequently, if otherwise it is correct in law. It placed reliance upon the decision of this Court in **Zandu Pharmaceuticals Works Ltd Vs CIT 350 ITR 366 wherein** it has been held that the expenses incurred on R&D work cannot be appropriated to a unit which does not itself incur R&D expenditure. Thus, on the above facts, the Tribunal by the impugned order dated 27.2.2015 set aside the issue of allocation of R&D expenses to the unit in Himachal Pradesh i.e Baddi for computing deduction under Section 80IC of the Act to the Assessing

Officer. This after directing him to give a definite finding as to whether any part of the expenditure for R&D has any nexus to the Baddi unit in Himachal Pradesh and thereafter follow the decision of this Court in Zandu Pharmaceuticals Works Ltd (supra).

(f) The grievance of the Revenue is to the issue being restored to the Assessing Officer with the above directions.

(g) We find that the grievance of the Revenue is not justified. All that the impugned order of the Tribunal did was to follow the binding decision of this Court in Zandu Pharmaceuticals Works Ltd (supra). We note that while following the above decision of this Court, the Tribunal observed as under:-

“..... There is no quarrel on the point that for the purpose of deduction under Section 80IC, the profit of undertaking has to be computed on stand alone basis and only the income as well as expenditure of eligible units are to be taken into account which has direct nexus with the eligible undertaking. The R&D expenditure incurred by the assessee in respect of the R&D facility situated at different undertaking in the State of Maharashtra prima facie has no direct nexus with the Baddi unit. Therefore, even the assessee has allocated the R&D expenditure on pro rata basis of turnover to Baddi unit, the

same will not operate as bar or prohibition for raising a claim if otherwise the subsequent claim raised by the assessee is as per the provisions of the Act. The assessing authority has to assess the correct income to tax under the provisions of the Act and cannot take advantage of any excess income offered by the assessee to tax erroneously.....”

(h) We are informed that consequent to the impugned order of the Tribunal on 31.3.2017, the Assessing Officer passed an order in compliance with impugned order dated 27.2.2015 passed by the Tribunal in respect of assessment year 2009-10.

(i) In the above view, both the questions as proposed does not give rise to substantial question of law. It merely restored the issue for the Assessing Officer to determine facts and apply the law in accordance with the binding decision of this Court in Zandu Pharmaceuticals Works Ltd (supra). Thus, both the questions are not entertained.

5. Accordingly, appeal dismissed. No order as to costs.

[M.S. SANKLECHA, J.]

[AKIL KURESHI, J]