आयकर अपीलीय अधिकरण, मुंबई "के " खंडपीठ

Income-tax Appellate Tribunal "K"Bench Mumbai

सर्वश्री राजेन्द्र, लेखा सदस्य एवं रविश सूद, न्यायिक सदस्य

Before S/Sh. Rajendra,Accountant Member & Ravish Sood, Judicial Member

आयकर अपील सं./I.T.A./1321/Mum/2014, निर्धारण वर्ष /Assessment Year: 2009-10

Hindustan Unilever Limited Unilever House,B.D. Sawant Marg, Chakala, Mumbai-400 099. **PAN:AAACH 1004 N**	Vs.	Addl. CIT-Range-1(1) Mumbai.

(अपीलार्थी **/Appellant**) (प्रत्यर्थी **/ Respondent**)

आयकर अपील सं./I.T.A./1445/Mum/2014, निर्धारण वर्ष /Assessment Year: 2009-10

DCIT-Range-1(1) Mumbai.	Vs.	Hindustan Unilever Limited Mumbai-400 099.

(अपीलार्थी **/Appellant**) (प्रत्यर्थी **/ Respondent**)

Revenue by: Shri Saurabh Deshpande-DR

Assessee by: Shri Hiten Chander-AR

सुनवाई की तारीख **/ Date of Hearing: 13/10/2017**

घोषणा की तारीख **/ Date of Pronouncement: 05/01/2018**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य ,राजेन्द्र के अनुसार -PER RAJENDRA, AM-

Challenging the order,dtd. 31/12/2013 of Assessing Officer (AO),passed u/s.143(3)read with section 144C(13) of the Act,the assessee has filed the appeal for the above mentioned Assessment Year(AY.).The AO has also challenged the directions of the Dispute Resolution Panel (DRP).We are disposing both the appeals together.Assessee-company,engaged in the business of manufacturing and marketing of fast moving consumer goods,filed its return of income on 25/9/2009, declaring total income of Rs. 9,61,86,80, 724/-.The AO completed the assessment determining the income of the assessee at Rs.11,17,15,69, 050/-.

ITA/Mum/1321,AY.2009-10:

1.First three Gs.OA, raised by the assessee,for the year under appeal,are of general nature. Hence,same are not being adjudicated.

2.First effective ground of appeal(Gs.OA-4to11)is about Transfer Pricing Adjustment of Rs. Rs.3,68,00,000/-.During the assessment proceedings,the AO found that the assessee had entered in to various International transactions(IT.s)with its Associated Enterprises (AE.s). He made a reference to the Transfer Pricing Officer(TPO)to determine the arm's length price (ALP)of such transactions.After receiving the order of the TPO, the AO made an adjustment of Rs.5.09 crores in the draft assessment order. The assessee filed objections before the DRP challenging the proposed adjustments.

2.1. After considering the submissions of the assessee and the order of the TPO,the DRP held that the AO was justified in making TP adjustment for the amount charged for business auxiliary services,that a mark-up of 30.56% was rightly charged in respect of such services as against the mark-up charged by the assessee,that that business auxiliary services rendered by the assessee were functionally comparable with the seven comparable companies,namely Ajcon Global Services Ltd.,Brescon Corporate Advisors Ltd., Epic Energy Ltd.,Sumedha Fiscal Services Ltd ,Integrated Enterprises (India) Ltd. and NIS Sparta Ltd.,that no royalty was payable by the assessee in respect of turnover of Beauty,Make-up preparations, Toilet Soaps and Bathing Bars,that the entire technology required in connection with those products was owned and developed by the assessee,that the AO had rightly determined arm's length at NIL for those transactions,that that the assessee ought to have received royalty of Rs. 26,22,000/- from Nepal Lever Ltd.The DRP further held that the TDS @15% amounting to Rs. 14.08 crores service tax amounting to Rs 7.94 crores and R&D Cess amounting to Rs. 2.49 crores,paid by the assessee,on royalty remitted to Unilever Plc.-under the Technical Collaboration Agreement,between the assessee and the AE-was excessive.It alternatively held that if royalty were to be bifurcated then the tax payment made by the assessee could not be regarded an IT.It also upheld the adjustment,made by the AO,on account of Advertising & Sales promotion expenses amounting to Rs.5,09,00,000/-.The DRP observed that the assessee had not raised any ground about business auxiliary services.

2.2. During the course of hearing before us,it was brought to our notice,by the Authorised Representative(AR)that in the AY.2006-07,the TPO had applied entity level approach for benchmarking the IT.s entered into by the assessee with its AE,that the said approach of entity level benchmarking was accepted by the Tribunal,that the margin shown by the assessee fitted within (+/-)5% i.e. within permissible arm's length range (Para 34 to 36 on page 30 to 31 of ITA/7868/M/2010,dtd.10/12/2012),that the Hon'ble Jurisdictional High Court had upheld the order of the Tribunal.The DR stated that matter could be sent back to the AO/TPO.

2.3. We find that the Tribunal had dealt with all the issues of TP adjustments in detail,that the TPO had benchmarked the IT.s of the assessee at entity level,that the Tribunal found that the benchmarking was within the permissible limit(+/- 5%),that the IT.s were held to be at arm's length,that it was further held that all other adjustments like payment of royalty,receiving of royalty, advertisement and sales promotion and advertisement, adjustment out of R&D cess, payment of service tax,research and innovation development related services and under-

charging for central services were subsumed once assessee's margin at entity level for AE's transactions was at arm's length,that the ITAT had deleted the entire transfer pricing adjustment of Rs 368.79 crores made for that year,that the Hon'ble Bombay High Court dismissed the appeal filed by the departments on this issue of deletion of adjustment of Rs. 3,68,79,26,000/-(ITA No.1873 of 2013-Para 2,Pg.66,Para 3-Pg.68-69,dtd.26/07/2016). Nothing has been brought on record that the facts for the year under consideration are different in any manner,except for the amount involved,from the facts of the last AY.Therefore,following the order of the Tribunal for that year,and the aforesaid judgment of the Hon'ble Bombay High Court for the same year,we decide the effective ground of appeal in favour of the assessee.

2.3.1. Here,we would also like to mention that that the DRP has inadvertently observed that assessee had not taken any ground before it about business auxiliary services,that grounds number 7 raised by the assessee before it dealt with the issue of business auxiliary services.that detailed submissions were made before DRP in that regard.But, as the issue is part of the umbrella of TP adjustment,so,in our opinion,there is no need to adjudicate the issue separately,raised by the assessee.

3.Disallowacne of deductions under sections 80IB,80IC,10A and 10B of the Act,is the subject matter of second effective ground of appeal (GOA-12&13).

3.1. It was brought to our notice that the ITAT had partly allowed the identical issue in favour of the assessee,while adjudicating the appeals for the AY.1985-86 to AY.1997-98 & AY. 2006-07.The AR referred to paragraph 8 of the order for the AY.1996-97(Pg.78 of the PB),paragraph 5 of the order for the AY.1997-98(Pg.88 of the PB)and paras 39 and 40 of the order for the AY.2006-07(Page no.33-34 of the PB).

He further informed that the department had not preferred any appeal against the relief, granted by the ITAT,before the Hon'ble High Court for the AY.2006-07.He stated that while allocating the expenses,the AO had considered unit turnover on gross basis which included excise duty and had total turnover on net basis that was excluding excise duty.The DR left the issue to the discretion of the Bench.

3.2. We direct the AO to decide the issue,after considering the orders of the Tribunal for the AY.2006-07.Second effective ground of appeal is partly allowed.

4.Next effective ground (Gs.OA 14-15)is about Allocation of Research expenses.We find that the issue stands allowed by ITAT.While deciding the appeal,filed by the assessee,for the AY.2006-07(ITA/7868/M/2010-Para 42 Pg.36-37 of the PB),the Tribunal had decided the

identical issue in favour of the assessee. It is also found that the appeal filed by the department against the same was not admitted by the Bombay High Court Therefore, following the order of the ITAT for the AY.2006-07,we decide both the grounds in favour of the assessee.

5.Ground no. 16 pertains to disallowance of provision for retirement pension.We find that the Tribunal had allowed the appeal of the assessee for the AY.s 1991-92 to 1997-98 & AY. 2006-07**[**Para 11 of the order for the AY.1996-97(Pg.83 of the PB), Para 8 of the order for the AY.1997-98(Pg.93 of the PB),and Para 48 the order for the AY.2006-07(Pg 41 of the PB)**]**.It is also found that the department has not preferred any appeal before the Hon'ble High Court for the AY.2006-07, against the relief granted by the Tribunal.Therefore,following the orders of the Tribunal for the earlier AY.s,we decide GOA 16 in favour of the assessee.

6.Disallowance of expenditure, amounting to Rs.2.85 crore,attributable to earning of dividend income, u/s.14A of the Act,is the subject matter of the next ground of appeal.During the assessment proceedings,the AO found that the assessee had earned exempt income of Rs. 54.87 lakhs,Rs.11.58 crores and Rs.32.29 crores u/s.10(15),10(34) and 10(35) of the Act respectively,that it had offered suo-motu disallowance of Rs.19,75,103/-.He applied the provisions of Rule 8D of the Income tax Rules,1962(Rules)to work out the expenditure attributable to exempt income and made a disallowance of Rs.7.72 lakhs under the head 'interest expenditure' and Rs. 2.78 crores under the head '0.5% of average investment'.

6.1. The DRP,after considering the objections of the assessee held that out of the total interest expenditure of Rs.21.78 crores expense to the tune of Rs.20.64 crores,related to export income, should not be considered for working out the disallowance under section 14A of the Act. The AO after considering the disallowance made by the assessee recomputed the disallowance and made an addition of Rs. 2.85 crores.

6.2. Before us,the AR contended that without giving any adverse finding on the amount offered by the assessee suo-motu the AO had made the disallowance,that in the absence of rebutting of assessee's claim of expenses, disallowance under Rule 8D was not sustainable.He relied upon the cases of Godrej & Boyce Manufacturing Company Ltd. (394 ITR 449) (SC), Aditya Birla Finance Ltd.(165 ITD 659)Smartchem Technologies Ltd.(85 taxmann.com 43). The DR stated that the matter could be decided on merits.

6.3. We find that while making the disallowance under section 14A of the Act, the AO/DRP has not dealt with the objections raised by the assessee, that AO has not pointed out as to why the disallowance made by the assessee was not acceptable. In our opinion the provisions of

section 14A read with rule 8D of the Rules cannot be applied mechanically.The AO is supposed to give a clear-cut finding as to how and why the provisions of the section14A are applicable and as to why the disallowance made by the assessee is not acceptable.In the cases of Aditya Birla Finance Ltd.(165 ITD 659);Smartchem Technologies Ltd.(85 taxmann.com 43),the Tribunal has held that the AO,without giving any finding about the suo motu disallow -ance made by the assessee,cannot make any addition u/s.14A r.w.r.8D of the Rules.We are reproducing the relevant part of the order of Aditya Birla Finance Ltd.(supra) and it reads as under:

> *"3.26 So far as, the expression "satisfaction" is concerned, it postulates a bona-fide belief about the incorrectness of the claim of the assessee and existence of objective reason for such belief. Further, this expression also does not mean a purely subjective satisfaction of the Assessing Officer or pretence based on suspicion and conjuncture but must be a belief held in good faith and founded on material that is not irrelevant or arbitrary. In the light of the discussion, we are of the view, the Ld. Assessing Officer cannot reject the claim of the assessee merely because it is not as per Rule-8D. To invoke Rule-8D, the Assessing Officer should provide a justifiable reason for not accepting the claim of the assessee that no expenditure had been incurred for earning the tax free dividend income. In fact, it is apparent from the record/annual accounts of the assessee that no borrowed funds were utilized and the investment made by the assessee is out of its own funds, therefore, the provision cannot be invoked arbitrarily. It is also noted that the assessee suo-moto made the disallowance, wherever, it was suppose to do so. Thus, on this count, we allow this ground of the assessee, more specifically when own funds are much more in excess of the borrowed funds.....*
>
> ***xxxxx***
>
> *3.28. In the light of the foregoing discussion, we find that neither the Ld. Assessing Officer nor the Ld. Commissioner of Income Tax (Appeal) pointed out any defect in the accounts of the assessee, therefore, the ratio laid down in the case of Britania Industries Ltd. vs DCIT (ITA No.390/Kol/2013) order dated 02/03/2016, M/s Raptakos Brett & Co. Ltd. vs Addl. CIT(A) (ITA No.7490/Mum/2013) order dated 10/11/2016 supports the case of the assessee. The ratio laid down in M/s Fedex Finance Pvt. Ltd. vs DCIT (ITA No.1073 and 1067/Mum/2013) and M/s White Water Mass Media vs ACIT (ITA No.2963/Mum/2013) supports the case of the assessee. It is also noted that during assessment proceedings, the report of the accountant, specifying the basis for calculating the amount disallowable u/s 14A of the Act was submitted by the assessee and the Ld. Assessing Officer without rejecting the report mechanically applied Rule-8D and computed the amount of disallowance, which cannot be said to be justified. At best, the disallowance may be restricted as suo-moto made by the assessee. Thus, no further disallowance was required to be made."*

Respectfully following the above two orders of the Tribunal,we decide effective grounds 17-18(Gs.OA 26-28)in favour of the assessee.

7.Next ground of appeal is about CENVAT on closing stock.Before us,the AR argued that the assessee was consistently following exclusive method of accounting,that no adjustment on account of balance lying in cenvat account could be made in the closing stock.But,he fairly conceded that the ITAT,while deciding the appeal for the AY.2006-07 had restored the matter back to the file of AO.The DR left the matter to the discretion of the Bench.

7.1. As There is no difference in the facts for both the AY.s.,so,following the order of the Tribunal for the AY.2006-07(Para 60 at Pg. 51 of the PB),we are directing the AO to decide the issue afresh after affording a reasonable opportunity of hearing to the assessee.Ground no. 19 is allowed,in part.

8.Disallowance of expenses incurred on shifting of office,treating it as a capital expendi - ture,is the subject matter of GOA 20.During the assessment proceedings, the AO found that the assessee has claimed an expenditure of Rs.14.06 crores under the head transitional costs due to consolidation of offices/factories.After considering the submission of the assessee in that regard,he held that in the earlier AY.,the assessee had claimed expenditure of Rs. 18.97 crores,that a sum of Rs. 2.68 crores was added back by the assessee itself while computing its total income. Referring to the orders of his predecessors for the earlier two AY.s he proposed an addition of Rs.14,06,92,000/-to the income of the assessee, in the draft assessment order.

8.1. However, the DRP directed it that rental expenditure of Rs. 9.63 crores was to be allowed as an expenditure and that the balance amount of Rs.4.43 crores was to be added to the income of the assessee.Accordingly,he made an addition of Rs.4,43,40,000/-.

8.2. Before us,the AR argued that the order of the departmental authorities was based on factually incorrect exemptions, that the expenditure was incurred for temporary site before shifting to the new office premises,that the same was to be allowed as revenue expenditure. He relied upon the case of Transwitch India(P.)Ltd.(151TTJ177).The DR argued that assessee had not filed necessary details before the AO/DRP about the expenditure.

8.3. We have heard the rival submissions and perused the material before us.We find that the AO and the DRP has held that the expenditure incurred by the assessee was transactional expense,that the assessee has claimed that expenditure was incurred for a temporary site and that before shifting to the new office premises the assessee had incurred the expenditure. From the order of the AO the factual position is not emerging clearly.Therefore,we are of the opinion that matter needs to be further verified by the AO.In the interest of Justice, we are restoring back the issue to the file of the AO for fresh adjudication.The assessee is directed to file the details of expenditure incurred to prove that same was incurred for shifting the office to a temporary site.It should also file the chronology of shifting of office premises along with the necessary documentary evidences. If the claim made by the assessee is found correct,then the AO should not make any addition to the income of the assessee.Accordingly, we decide the ground in favour of the assessee, in part.

9.Ground no.21 is about incorrect disallowance u/s 36(1)(va)of the Act.Before us,it was

submitted that PF/ESIC dues were paid by the assessee within grace period,that no dis - allowance was called for.The assessee placed reliance on cases of WMI Cranes Ltd (326 ITR 523)and Pruthvi Brokers & Shareholders (349 ITR 336).

9.2. As the payment towards PF/ESIC were made within the grace period,therefore, in our opinion,the AO should not have made any disallowance.Relying upon the cases referred to by the AR and the matter of Ghatge Patil (368 ITR 749)of the Hon'ble Bombay we decide the ground in favour of the assessee.

10. Last ground of appeal is about considering the interest income as income from other sources.While computing the income of the assessee, the AO taxed the interest income (Rs.14, 94, 73, 618/-) under the head income from other sources.

10.1. The assessee filed objections before the DRP.It enquired from the assessee as to why the interest expenditure on export packing credit loan should not be allocated to export dismiss alone.The assessee replied that if it was to be allocated to only one business then interest income should be allocated to all units, that interest income was assessable as business income,that same should be allocated to all the units.The DRP observed that assessee had not demonstrated as to how the earning of interest was allocable to various units.After considering the available material, the DRP held that the assessee had relied on several case laws claiming that interest income was assessable as business income, that the assessee was not into the business of money-lending, that the surplus funds available with it had been kept in various deposits on which interest had been earned, that the interest income was not out of the money-lending business, that same was assessable under the head income from other sources.The DRP relied upon the case of Swani Spices P.Ltd.(332 ITR 288) of the honorable Bombay High Court and held that interest income earned by the assessee was assessable under the head income from other sources.

10.2. Before us,the AR made the same submissions that were advanced before the DRP by the assessee.The DR supported the order of the departmental authorities.

10.3. We find that the DRP had specifically directed the assessee to file justification for treating the interest income as business income, that it had not filed any explanation in that regard. Interest income can be taxed under both the heads i.e. business income or income from other sources depending upon the facts of the case.So,no hard and fast rule can be made in that regard. In the matter under consideration,the DRP has given a finding of fact that assessee was not in the business of money lending,that the surplus funds available with it were kept in various deposits on which interest income had been earned. Nothing has been brought on record that finding given by the DRP is not based on facts. In our opinion,if

surplus available with an assessee earns interest from the deposits made by it, then it cannot be taxed under the head business income. In short, the DRP has rightly observed that the assessee is not in the business of money-lending/earning income from its business.Therefore, in our opinion there is no need to disturb the directions of the DRP. Last ground of appeal is decided against the assessee.

ITA/1445/Mum/14,AY.2009-10:

11. First effective ground of appeal(Gs.AO-1 to 3),raised by the AO,is about TP adjustments. The DRP had directed the AO to delete the TP adjustments on the ground that the variation was within 5% limit of ALP specified.

11.1. We have already observed in the earlier part of our order that in assessee's own case for the AY. 2006-07 the TPO had applied entity level approach for benchmarking the IT.s,that the Tribunal had approved the bechmarking,that it had held that the assessee's margin fitted within +/-5% arm's length range,that the Tribunal deleted the entire TP adjustment made for that year,that the Hon'ble Bombay High Court had dismissed the appeal filed by the department in that regard.In our opinion,the issue of TP adjustment has attained finality.Until and unless the AO brings new facts for making TP adjustment there is no need to discuss the issue in length.As the facts for the year under appeal are identical to the facts for the AY.2006-07,so,we dismiss the first effective ground of appeal raised by the AO.

12. First-non-TP-ground of appeal (GOA-4) is about allocating interest expenses only to units claiming Section 10A & 10B exemption and not to units claiming section 80 IB & 80IC deductions.

12.1. We find that out of total interest expense of Rs.2178 lakhs and expenditure of Rs.2064 lakhs was incurred on export packing credit and export bills discounting,that the interest-expenditure pertained to exports,that the DRP directed to the AO to allocate the same to Section 10A and Section 10 B units. As the units claiming deduction u/s. 80 IB and 80IC were not engaged in exports and therefore no interest could be allocated to those units.While deciding the appeal,filed by the assessee,for the AY.2006-07 the Tribunal held interest could not be allocated to 80IB and 80 IC units.(ITA/7868/Mum/2010/Dtd.10.12.2012).The Hon'ble Bombay High Court(Question no. 2 on Pg. 67 of the paperbook and para 4 on Pg. 69 of the paper book)confirmed the order of the Tribunal.Therefore,we are of the opinion that the directions of the DRP do not require and interference from our side.Confirming its order we decide Ground no. 4 against the AO.

13. Next two grounds are about directions given by the DRP about adjusted value of closing stock.During the assessment proceedings,the AO held that the assessee itself had not claimed the relief about adjusted value of the closing stock in the computation of income filed with Return of Income,that without filing a revised return it could not make any fresh claim. However,the DRP had held that adjusted value for the year would be the value of opening stock in subsequent year.We are of the opinion that the directions of the DRP do not suffer from any legal infirmity.Closing Balance of an year automatically becomes Opening Balance for the later year.Therefore,we are unable to comprehend the logic behind raising the ground. Secondly,the AO as per the judgment of Goetz India cannot entertain a new claim without filing a fresh return of income.But,the appeallate authorities can allow the new claim made for the first time before them,as held by the Bombay High Court in the case of Pruthvi Brokers & Shareholders(349 ITR 336).Considering the above,we decide both the grounds against the AO.

14. Last ground of appeal is about not allocating interest for working disallowance u/s.14A of the Act.While completing the assessment the AO had made 14A disallowance,as stated in the earlier paragraphs of our order.

14.1. Deciding the objections,filed by the assessee,the DRP held that the interest pertained to exports.It directed the AO to allocate the same to Section 10A and Section 10B units.

14.2. Before us,the DR supported the order of the AO and the AR relied upon the directions of the DRP.While deciding the earlier ground of appeal,we have endorsed the views of the DRP that the interest expenses had to be allocated to Section 10A and Section 10B units having direct nexus with exports business.Therefore,in our opinion the DRP had rightly held that same could not be again considered for disallowance u/s.14A of the Act.Last ground is decided against the AO.

As a result, appeal filed by the assessee is partly allowed and the appeal of the AO stands dismissed.

फलतः निर्धारिती द्वारा दाखिल की गई अपील अंशतःमंजूर की जाती है और निर्धारिती अधिकारी द्वारा दाखिल की गई अपील नामंजूर की जाती है।

Order pronounced in the open court on 5th January, 2018.

आदेश की घोषणा खुले न्यायालय में दिनांक 05 जनवरी,2018 को की गई।

Sd/-	**Sd/-**
(रविश सूद /Ravish Sood)	**(राजेन्द्र / RAJENDRA)**
न्यायिक सदस्य / **JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक/Dated : 05 .01.2018.

Jv.Sr.PS.

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

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त

5.DR " K " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अधि.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**

आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai.**