आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।

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

BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A. No. 3472/Mum/2013
(**निर्धारण वर्ष /** Assessment Year : 2006-07)
आयकर अपील सं./I.T.A. No. 832/Mum/2013
(**निर्धारण वर्ष /** Assessment Year : 2008-09)

Abbot India Limited,, 3/4,Corporate Park, Sion Trombay Road, Mumbai – 400 071.	बनाम/ v.	Assistant Commissioner of Income Tax- Circle – 2(1), Aayakar Bhavan, Maharshi Karve Road, Mumbai – 400 020.
स्थायी लेखा सं./PAN : AAACB5170B		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by	Shri Madhur Agarwal
Revenue by :	Shri Morya Pratap

सुनवाई की तारीख /**Date of Hearing : 06-06-2016**
घोषणा की तारीख /**Date of Pronouncement : 24-08-2016**

आदेश / O R D E R

PER RAMIT KOCHAR, Accountant Member

These two appeals filed by the assessee company for the assessment years 2006-07 and 2008-09 are directed against two separate orders of the learned Commissioner of Income Tax (Appeals)-4, Mumbai (Hereinafter called "the CIT(A)") and learned CIT(A)-15 respectively , dated 15-2-2013 and 6-11-2012 respectively, the appellate proceedings before the learned CIT(A) arising from the two separate assessment orders dated 15-11-2011 and 25-01-2012 respectively passed by the learned Assessing Officer (hereinafter called "the AO") for the assessment year 2006-07 u/s 143(3) read with Section 147 of the

Income Tax Act,1961 (Hereinafter called "the Act") and for the assessment year 2008-09 u/s 143(3) r.w.s 144C(3) of the Act.

2. The grounds of appeal raised by the assessee in ITA No. 3472/Mum/2013 for the assessment year 2006-07 in the memo of appeal filed with the Income Tax Appellate Tribunal, Mumbai (hereinafter called "the Tribunal") reads as under:-

> "1:0 Re.: Validity of re-assessment proceedings:
>
> 1:1 The Commissioner of Income-tax (Appeals) has erred in upholding the re-opening of the Appellant's assessment u/s. 148 of the Income-tax Act, 1961.
>
> 1:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject the re-opening of assessment u/s. 148 was in excess of jurisdiction and the Commissioner of Income-tax (Appeals) ought to have held as such.
>
> 1:3 The Appellant submits that the proceedings u/s. 148 of the Act were not in accordance with law and consequently ought to be struck down.
>
> Without prejudice to the foregoing:
>
> 2:0 Additional depreciation on vaporizers claimed as a deduction u/s. 32(1)(iia):
>
> 2:1 The Commissioner of Income-tax (Appeals) has erred in upholding the disallowance of a sum of Rs. 25,77,616/- being the additional depreciation claimed by the Appellant on vaporizers installed at hospitals.
>
> 2:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, it is entitled to claim additional depreciation in terms of section 32(1)(iia) of the Income-tax Act, 1961 and the stand taken by the Assessing Officer in this regard is misconceived, erroneous and incorrect and ought to be struck down and the Commissioner of Income-tax (Appeals) ought to have held as such.
>
> 2:3 The Appellant submits that the Assessing Officer be directed to grant additional depreciation on the vaporizers as claimed by it and to re-compute its total income accordingly.

3:0 Re.: Computation of deduction u/s. 80 - IB of the Income - tax Act, 1961:

3:1 The Commissioner of Income-tax has erred in upholding the action of the Assessing Officer in reducing the deduction u/s. 80 - IB of the Income-tax Act, 1961 to Rs. 3,40,71,018/- as against the deduction of Rs. 3,69,32,082/- claimed by the Appellant in its return of income and granted to the Appellant in terms of the original assessment order.

3:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject it is entitled to a deduction of Rs. 3,69,32,082/- in terms of section 80 - IB of the Income-tax Act, 1961 and the stand taken by the Assessing Officer in this regard is erroneous and ought to be struck down and the Commissioner of Income-tax (Appeals) ought to have held as such.

3:3 The Appellant submits that the Assessing Officer be directed to grant the deduction of Rs. 3,69,32,082/- u/s. 80 -IB of the Income-tax Act, 1961 and to re-compute its total income accordingly.

4:0 Re.: General:

4:1 The Appellant craves leaves to add, alter, amend , substitute and/or modify in any manner whatsoever all or any of the foregoing grounds of appeal at or before the hearing of the appeal."

3. The brief facts of the case are that the assessee is engaged in the business of manufacturing and trading of medicinal and pharmaceutical products, insulin and its formulations. Manufacturing activities were carried out at Goa plant. Assessment was framed u/s 143(3) of the Act whereby certain additions were made and the total income was determined at Rs. 84,04,90,479/- as against the returned income of Rs. 82,97,07,654/-. The case was reopened by issuing notice u/s 148 of the Act on 8th march, 2011 on the following reasons:-

"(i) The assessee' has claimed depreciation of Rs. 45,10,828/- @35% of Service equipments where as the assessee was eligible to

claim depreciation of Rs. 19,33,211/- by that the assessee has claimed additional depreciation of RS.25,77,617/-

(ii) Deduction under Section. 80IB allowed by AO is excess by 26,70,803/- as entire expenses on scientific research of Rs. 95,36,877/- should be deducted from the profits as direct expenses instead of 6.65% on the basis of sales ratio taken in assessment under Section. 143(3)".

4. Additional Depreciation: The assessee imports reagents from its parent company namely , Sevorane and Isoforane. These re-agents are administered with the help of Vaporizers and are used as anaesthetic at hospitals. In order to sell its reagents, the assessee installs vaporizers at the hospitals free of cost. However, the assessee retains the ownership of vaporizers and claims depreciation on the same. The assessee also has a manufacturing unit at Goa where it manufactures drugs like Digene, Pediasure etc. However, no reagent is manufactured at this facility. The assessee has claimed additional depreciation as per provisions of section 32(1)(iia) of the Act aggregating to Rs. 45,10,828/- and on perusal of the details of additions during the year made in the block of plant and machinery on which the additional depreciation was claimed, the A.O. observed that the assessee has claimed an amount of Rs. 25,77,617/- as additional depreciation on Vaporizers. Since these vaporizers were related purely to the trading activity of the assessee, the assessee was asked to explain why the additional depreciation claimed should not be disallowed.

The assessee submitted that the assessee is engaged in the business of manufacture or production of pharma products. New machinery or plant has been acquired and installed after 31st March, 2005 i.e. during the financial year 2005-06. The assessee submitted that the machinery in question was

not used before its installation . The said vaporizers are installed in hospitals/medical institutions and the assessee continues to be the owner of the said vaporizers. It was submitted that the machinery is not installed in any office premises or any residential accommodation, including accommodation in the nature of a guest house. It is not office appliances or road transport vehicles and the actual cost is never allowed as a deduction under any provisions of the Income Tax Act, 1961. Thus, in nutshell the assessee submitted that as per the provisions of section 32(1)(iia) of the Act, the assessee is entitled for additional depreciation as provided under the Act. The assessee relied on the decision in the case of Bajaj Tempo Ltd. v. CIT (1992) 196 ITR 188(SC).

The A.O. rejected the contentions of the assessee holding that provisions of section 32(1){iia) of the Act, clearly shows that the additional depreciation is allowed to an assessee engaged in the business of manufacture or production of any article or thing. The assets or plant and machinery acquired by it for the purpose of enhancing its trading business should not get the benefit of additional depreciation. The A.O. also held that the, provisions of the relevant section also clearly state that any plant and machinery installed in any office premises or any residential accommodation, including accommodation in the nature of a guest house, shall not be allowed the benefit of additional depreciation. It was also pointed out that the additional depreciation is meant for promotion of manufacturing and production activity only. The service equipments are installed by the assessee at the hospitals , hence additional depreciation is not available. The A.O. held that the vaporizers were installed at the hospital and hospitals are nothing but in the nature of temporary sales office of the assessee, hence, no additional depreciation is allowable on these service equipments. The AO observed that the case law relied on by the assessee in the case of Bajaj Tempo Ltd. v. CIT (supra) is not applicable as the same pertains to the period prior to assessment year 2006-07. The Section

32(1)(iia) of the Act was drastically changed w.e.f. 01.04.2006 . The ratio in law as existed prior to the assessment year 2006-07 do not apply to the case of the assessee in the year under consideration i.e. assessment year 2006-07. Moreover, the case law is not applicable as the assessee which is primarily engaged in trading activity and only a part of its business relates to manufacturing and production activity, hence, additional depreciation claimed on vaporizers amounting to Rs. 25,77,616/- was disallowed and added to the total income of the assessee by the AO vide assessment order dated 15.11.2011 passed by the AO u/s 143(3) r.w.s. 147 of the Act .

5. Aggrieved by the assessment order dated 15.11.2011 passed by the A.O. u/s 143(3) r.w.s. 147 of the Act , the assessee company filed its first appeal before the ld. CIT(A).

6. Before the ld. CIT(A) the assessee reiterated the submissions as were made before the A.O. hence the same are not repeated here. The assessee submitted that no such conditions have been imposed u/s. 32(1)(iia) of the Act that the vaporizers do not in any way promote the manufacturing or production activity of the assessee. The assessee submitted that the only requirement is that the assessee should be engaged in the business of manufacturing which was satisfied by the assessee. In support, the assessee relied on the decision of the Hon'ble supreme Court in the case of Vikrant Tyres Ltd. v. ITO, 247 ITR 821 (SC) and in the case of Ahmed G.H. Ariff v. CWT, 76 ITR 471, 478 (SC). It was submitted that new plant or machinery acquired need not have operational connectivity to the article or thing that was manufactured and in support the assessee also relied on the decision in the case of CIT v. Hi tech Arai Ltd. (2010) 321 ITR 477 and CIT v. Texmo Precision Castings (2010) 321 ITR 481. The assessee submitted that the only requirement to be met under the provisions of the Act is that the plant and machinery should not be installed in the office premises or residential/guest

house accommodation which clearly indicates that it is not necessary that plant and machinery should be installed in factory only to be eligible for additional depreciation. The assessee submitted that hospital cannot be considered as office of the assessee and the vaporizers installed at various hospitals and medical institutions enable the hospitals / medical institutions to perform induction and maintenance of general anesthesia. The assessee submitted that it is entitled for claim of deduction of additional depreciation u/s. 32(1)(iia) of the Act. The assessee relied upon the decision of Hon'ble Supreme court in the case of Bajaj Tempo Limited v. CIT (1992) 196 ITR 188 (SC) to contend that incentive provisions in the taxing statute are to be liberally construed.

The ld. CIT(A) observed that the assessee is engaged in two types of business one is simple trading i.e. import of medicines and their local sales and the other business is of manufacturing at Goa Unit. The vaporizers are useful for promoting the sale of imported medicines and they have no relationship with the manufacturing activity of the product. These vaporizers are not located on the factory or business premises of the assessee. The language of clause (iia) of sub section (1) of section 32 clearly suggests that the plant and machinery which is acquired and installed after 31st March, 2005 should be located and relate to the manufacturing and or production unit as the provision is to encourage the manufacturing activity and not to encourage mere trading activity therefore the contentions of the assessee were rejected by the learned CIT(A) and the findings of the A.O. was upheld vide appellate order dated 15-02-2013.

7. Aggrieved by the appellate order dated 15-02-2013 of the ld. CIT(A), the assessee is in appeal before the Tribunal.

8. The ld. Counsel for the assessee at the outset submitted that the Tribunal in assessee's own case in ITA No. 8428/Mum/2011 for the assessment year 2007-08 vide orders dated 30th October, 2015 has decided this issue in favour of the assessee and hence the issue is squarely covered in assessee favour in assessee's own case by the order of the Tribunal.

9. The ld. D.R., on the other hand, relied on the orders of authorities below.

10. We have considered the rival contentions and also perused the material available on record including the Tribunal order. We have observed that the assessee has claimed additional depreciation u/s 32(1)(iia) of the Act on vaporizers which are installed in the hospital/medical institutions and which are continued to be owned by the assessee. We find that the Tribunal in assessee's own case in ITA No. 8428/Mum/2011 for the assessment year 2007-08 vide orders dated 30th October, 2015 has decided the issue in favour of the assessee. The relevant findings of the Tribunal are as under:-

> ***"Ground No. 2 Disallowance of additional depreciation claimed by the assessee***
>
> *4. The Ld. DRP of this issue is held as under:-*
>
> *The DRP has carefully considered the facts of the case and we are of the view that the AO's order should not be interfered with. The plain reading of the provision of Sec. 32(1)(iia) clearly shows that additional depreciation is allowed to an assessed engaged in the business of manufacturing or production of an article or thing. The assessee here is involved purely in trading activity and the asset or plant or machinery acquired by it for the purpose of enhancing its trading business should not get the benefit of additional depreciation. The vaporizers are not even distinctly related to its manufacturing activity, hence this ground is rejected.*

5. The Ld. AR submitted that admittedly vaporizers have been purchased by the assessee. It is also an admitted fact that the assessee is engaged in manufacturing activities. The Ld. AR submits that the assessee has engaged in manufacturing activates and since vaporizers are not installed at its office premises, the sum is qualified for additional depreciation. The Ld.AR placed his relevance on;

1. CIT vs. Diamines and Chemicals Ltd. reported in 109 DTR(Guj) 62.

2. CIT vs. VTM Ltd. reported in (2009) 319 ITR 336(Mad).

6. The Ld. DR relies on the order of DRP.

5. We have perused the orders passed by the authorities below, the submission by both the parties and the judgments relied upon by the ld.AR. before we start with our observation, Section 32(1)(iia), as it stood at the relevant assessment year, is under;

Depreciation.

32• (1) In respect of depreciation of-

(iia) in the case of any new machinery or plant (other than ships and aircraft), which has been acquired and installed after the 31st day of March, 2005, by an assessee engaged in the business of manufacture or production of any article or thing or in the business of generation or generation and distribution of power, a further sum equal to twenty per

cent of the actual cost of such machinery or plant shall be allowed as deduction under clause (ii) :

***Provided** that no deduction shall be allowed in respect of-*

(A) any machinery or plant which, before its installation by the assessee, was used either within or outside India by any other person; or

(B) any machinery or plant installed in any office premises or any residential accommodation, including accommodation in the nature of a guest-house; or

(C) any office appliances or road transport vehicles; or

(D) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head 'Profits and gains of business or profession" of anyone previous year;

7. The Delhi Bench of the Tribunal in the case of DCIT v Cosmo Films Ltd., bearing ITA No. 2831/Del/2007, inter-alia had the occasion to examine the provisions relating to the grant of additional depreciation. The Tribunal held therein that, the assessee would be able to claim the additional depreciation. While doing so, the Tribunal referred to the speech of Finance Minister while inserting the relevant provisions, when it was stated that this clause was inserted to provide an incentive for fresh investment in industrial sector.

8. It observed that this provision has been directed towards encouraging industrialization by allowing additional benefit to the tax payers setting up new industrial undertakings/making more investment in capital goods.

Thus, these are incentives aimed to boost new investments in setting up and expanding the units.

9. In the facts of the present case the assessee has installed vaporizers amounting to RS.35,58,040/- at its hospitals. The Revenue has not disputed the fact that, the assessee is not engaged in manufacturing activities, carried on at Goa plant. The assessee provides health care solutions through its fair marketing arms being primary care, specialty care, neuroscience and hospitals care. As far as the application of Sec. 32(1)(iia) of the Act as concern, the assessee is required satisfy the stipulated conditions in order to claim additional depreciation. We observe that in para 23.2 of the final order passed by the Id.AO, the factual position in respect of the machinery, has been provided vis-avis the conditions U/S.321(iia) of the Act. The Id.AO, has disallowed the additional depreciation only on the ground that the assessee has been into trading activity. Apart from the manufacturing activity carried on by the assessee, it also provides health care solutions. The vaporizers, purchased by the assessee are retained by the assessee itself.

10. In our considered opinion, section32(1)(iia) does not state that setting up of a new machinery or a plant, which was acquired and installed after 31.03.2005, should have an operational connectivity to the article or thing that was already being manufactured by the assessee. Therefore the reasoning of the Id.AO that the vaporizers, has nothing to do with the manufacturing of articles etc., is totally not germane to the specific provision contained in section 32 (1) (iia) of the Act.

11. In the light of the above that discussion, we hold that the assessee is eligible for additional depreciation on vaporizers u/s.32(1) (iia) of the Act."

Respectfully following the above-stated decision of the co-ordinate Bench of this Tribunal in assessee's own case in ITA No. 8428/Mum/2011 for the assessment year 2007-08 , we allow this ground raised by the assessee. We order accordingly.

11. Computation of deduction u/s 80 IB of the Act.

The assessee has claimed an amount of Rs. 3,69,32,082/- as deduction u/s 80-IB of the Act being 30% of the profits of Goa unit. The assessee is engaged in the manufacturing and trading of pharmaceutical and related products, with the manufacturing unit located at Goa. This is the 10th year of claim u/s 80IB of the Act with the assessment year 1997-98 being the first year of claim. The assessee has also challenged the reopening which was rejected by the A.O. . The A.O. observed that the entire expenses relates to implementation and standardization of manufacturing process and as such the entire expenses should be deducted from the profits as direct expenses. It was observed that the business of trading activity in pharmaceutical products does not involve any scientific research expenditure since the assessee is merely purchasing the goods and selling them subsequently. The assessee is also carrying out manufacturing activity at Goa which requires Research and Development expenses(R & D), which should have been allocated in totality to the said unit. The AO held that, however, the assessee has allocated R&D expenses in accordance with sales turnover on prorate basis and due to failure on the part of the assessee to furnish complete details of unit-wise

expenditure which has led to escapement of income by claim of excessive deduction and hence deduction to the extent of Rs. 3,40,71,018/- is allowable u/s 80IB of the Act as against claim of Rs. 3,69,32,082/- made by the assessee u/s 80IB of the Act, vide assessment order dated 15.11.2011 passed by the AO u/s 143(3) r.w.s. 147 of the Act .

12. Aggrieved by the assessment order dated 15.11.2011 passed by the A.O. u/s 143(3) r.w.s. 147 of the Act , the assessee has filed its first appeal before the ld. CIT(A) which was rejected by the ld. CIT(A).

Before the ld. CIT(A) the assessee reiterated the submissions what was made before the A.O. and submitted that the assessee has incurred expenditure of Rs. 95,36,877/- under the head research and development towards establishing new technical capabilities, import substitution and new vendor development, optimization, standardization and improvements of products and manufacturing process and technical evaluation of the shelf products, to ensure quality and stability. It was submitted that the expenses were not incurred to earn income but with the objects of optimization, standardization and improvements of products and manufacturing processes and reduce costs and hence the same were not apportioned /allocated while computing profits and gains derived of Goa unit eligible for deduction u/s. 80IB of the Act. During the course of assessments proceedings the details of research and development expenditure incurred were called for and the same were furnished by the assessee vide assessee's letter dated 12th November, 2009. In nutshell,, the assessee submitted that the R&D expenses being common cost were incurred by the assessee for its business as a whole and not merely pertaining to its Goa unit but overall business and the unit eligible for deduction was allocated on the basis of sales ratio . It was submitted by the assessee that ,however, the A.O. misdirected himself by allocating the entire expenses to the Goa unit and as such by holding that the entire expenses

should be deducted from the profits of the Goa eligible unit as direct expenses while computing deduction u/s 80IB of the Act. The ld. CIT(A) rejected the contention of the assessee and held that no research is required for trading activities hence expenses on research relates to manufacturing unit only. The ld. CIT(A) held that the assessee has to prove if such expenses were incurred by filing detailed evidence but the assessee failed to do so. Hence, the claim of the assessee that research expenses were required to be allocated in the ratio of turnover to trading activity and manufacturing is not having any basis and accordingly the ld. CIT(A) rejected the claim of the assessee vide appellate orders dated 15-02-2013.

13. Aggrieved by the appellate order dated 15-02-2013 passed by the ld. CIT(A), the assessee filed second appeal before the Tribunal.

14. Before the Tribunal, the ld. Counsel for the assessee submitted that the A.O. in the original assessment proceedings u/s 143(3) read with Section 143(2) of the Act, the AO has discussed this issue in detail in the assessment order darted 26th November, 2009 passed u/s 143(3) of the Act whereby the complete details were submitted before the A.O. and the A.O. allowed the deduction based upon the ratio of turnover to trading activity. The relevant portion of the assessment order is reproduced below:-

> "20. As indicated, Assessee Company is engaged in manufacturing and trading of pharmaceutical and related products, with the manufacturing unit located at Goa. For the year under consideration, assessee has claimed a deduction of Rs.3,69,32,082/- u/s. 80-IB of the Income-tax Act, and the claim is made @ 30% on Total Profit of Rs.12,31,06,938/- being the profit attributable to Goa unit. This is the 10th year of claim u/s. 80-IB with A.Y.1997-98 being the first year of claim.

21. While claiming the deduction u/s.80-IB on profits of Goa unit, the assessee has submitted the Certificate in Form 10CCB dt.22.11.2006 as certified by the Chartered Accountant. Along with the certificate, assessee has also furnished a Balance sheet and' Profit & Loss Account prepared separately for the Goa unit, which has been carved out of the Balance sheet and the Profit & Loss Account of the Company. While preparing the Profit & Loss Account for Goa unit, it was indicated that certain expenditures are allocated on actual basis where certain indirect expenses are allocated on prorate basis and the basis for this purpose is stated to be the percentage of the turnover /sales of the Goa unit, to that of the Company.

22, Details of expenses pertaining to Goa unit vis-a-vis the Company as a whole, are as under:

Particulars	Goa Unit	Total entity(Incl. Goa unit)
Sales	322,545,639	4,851,012, 404
Other income	3,243,004	164,955,484
	325,788,644	5,015,967,889
Less: Manufacturing and other exp.		
Raw and packing material consumed	90,377,319	90,377,319
Other conversion material	2,620,167	3,669,538
Purchase and finished goods	-	3,518,878,752
Wages and salaries	11,127,493	258,520,420
Electricity	9,083,138	26,138,022

Fuel and oil	854,951	854,951
Water	889,474	915,691
Repairs and maintenance	10,821,727	25,449,679
Depreciation	12,596,406	40,072,847
Other direct expenses	6,516,856	8,159,447
	154,887,530	3,973,036,666
Profits of Goa Unit-after direct exp	170,901,113	1,042,931,222
Less: <u>Indirect expenses</u>		
Advertising Exp.	14,776,991	121,446,231
Selling expenses	20,939,065	118,429,259
Distribution Exp.	10,391,041	71,086,363
Administration Exp	6,538,032	79,944,933
Interest charges	13,882	1,068,406
Other indirect expenses	52,659,010	55,582,228
		447,557,419
	<u>118,242,103</u>	
Profits of Goa unit-after indirect expenses		<u>595,373,804</u>
Add: <u>Closing stock</u>		
Work-in-progress	3,635,548	3,635,548
Finished goods	34,469,011	800,484,874
		804,120,422
	38,104,559	
Less: <u>Opening Stock</u>		
Work-in-progress	3,372,864	3,372,864

Finished goods	27,750,709 31,123,573	469,439,393 472,812,257 926,681,968
Add: Book depreciation Less: Tax depreciation	125,223,088 12,596,406	40,072,847 22,913,289
Profits of Goa unit	14,712,556	943,841,526
30% of eligible profits	123,106,938 **36,932,082**	

23. Basis of allocation of expenses shown:

#	Expenses	Nature	Basis
1	Interest	Indirect expenses	Sales ratio
2	Advertising	Indirect expenses	Actuals
3	Selling	Indirect expenses	Sales ratio
4	Distribution	Indirect expenses	Sales ratio
5	Manufacturing	Indirect expenses	Actuals
6	Depreciation	Indirect expenses	Actuals

24. While preparing the Profit & Loss Account for Goa unit, 'Expenses on Scientific Research Rs..95,36,877/- are not apportioned to Goa Unit. It was submitted that the company doesn't have its established R&D Centre as such for conducting scientific research. Research and development activity mainly comprises of: indigenizing technical know-how, implementation and standardization of manufacturing process as per the defined standards, process modification for all products, ensuring prescribed quality standards for all products, vendor development, verification of processes followed for all products, verifying quality standards of products manufactured for all

products, import substitution, cost reduction in potential areas, addressing complaints in terms of improvement in packaging, quality improvement in respect of all products of the Company.

25. Since there is no method of maintaining these expenses on unit basis, it is reasonable and meaningful to apportion such expenses on scientific research to the manufacturing unit of the Company at Goa. The expenses under the head scientific research Rs.95,36,877/- are therefore to be apportioned to Goa manufacturing unit – in the ratio of sales turnover between Goa Unit vis-a-vis total turnover of the company. The working is as under :-

Goa Unit sales Rs.32,25,45,639/-

Total sales of assessee Rs. 4,85,10,12,404/-

Ratio == 32,25,45,639 X 100 / 4,85,10,12,404 = 6.65%

26. Accordingly, share of such expenses related to Goa unit is quantified 6.65% of Rs·95,36,877/-, which works out to Rs.6,34,202/- based on prorate basis.

27· On these lines of discussion and findings, the income that is eligible for deduction u/s 80-IB in the case of Goa unit, is re-worked as under, for computing the taxable income of the Company.

Total income as computed in certificate in Form No.
10CCB 12,31,06,938

Less: Scientific Research expenses apportioned to Goa unit	6,34,202
Revised Total Income for Goa Unit	12,24,72,736
Eligible deductions u/s.80-IB @ 30%	3,67,41,821

The ld. Counsel drawn our attention to the assessment order vide paper book page 58 to 66 filed with the Tribunal and submitted that allocating the entire R&D expenses towards Goa manufacturing unit is nothing but a change of opinion which is not permissible under law. The ld. Counsel submitted that detailed reply was submitted during the course of assessment proceedings. He also drew our attention to the various replies submitted by the assessee during the course of assessment proceedings which are placed in the paper book pages 17 to 57 whereby detail reply was submitted with respect to the claim of deduction 80IB of the Act. It was also submitted that this is the 10th year of the claim and the Revenue has allowed the claim for last 9 years and now the same cannot be denied without disturbing the original allowability of the claim. It was submitted that it is merely a change of opinion which is not permissible. The ld DR relied upon the orders of the authorities below.

15. We have considered the rival contentions and also perused the material placed on record. The assessee is engaged in the business of manufacturing and trading of medicinal and pharmaceutical products, insulin and its formulations. Manufacturing activities were carried out at Goa by the assessee company. The assessee has incurred expenditure of Rs. 95,36,877/- towards research and development which is stated to be incurred towards implementation and standardization of manufacturing process including establishing new technical capabilities, import substitution and new vendor development , optimization , standardization and improvements of products and manufacturing processes and technical evaluation of off the shelf products, to ensure quality and stability. The assessee has allocated R &

D expenses amongst manufacturing and trading activities based upon the sales ratio as the said R&D is stated to be not directed specifically towards manufacturing unit at Goa and being common costs were incurred for its business as a whole . Based upon this , the assessee has made claim of deduction of Rs. 3,69,32,082/- u/s 80IB of the Act with respect to the Goa unit as profit derived from Goa unit. The A.O. has allowed the claim of the assessee for this year vide assessment orders u/s 143(3) of the Act dated 26th November, 2009 whereby detailed enquiry was made by the A.O. before allowing the claim of the assessee. The Revenue has reopened the assessment by invoking the provisions of section 148 of the Act within a period of four years wherein the original assessment was framed u/s 143(3) of the Act, whereby the Revenue is attempting to allocate the entire R&D expenditure of Rs. 95,36,877/- to the Goa unit in the re-opened proceedings on the contention that the R & D was directed towards manufacturing unit while the assessee contentions from beginning being that the same is common cost towards establishing new technical capabilities, import substitution and new vendor development, optimization, standardization and improvements of products and manufacturing process and technical evaluation of the shelf products, to ensure quality and stability and that the expenses were not incurred to earn income but with the objects of optimization, standardization and improvements of products and manufacturing processes and reduce costs and hence the same were not apportioned /allocated by the assessee while computing profits and gains derived of Goa unit eligible for deduction u/s. 80IB of the Act. . It is also the contention of the learned counsel for the assessee that this is the tenth year of claim u/s 80IB of the Act wherein the Revenue has allowed the claim u/s 80IB of the Act in the last nine years which included this claim of deduction of R & D computed based on allocation between manufacturing unit at Goa as well trading activities which was accepted by the Revenue in preceding years. In our considered view the assessee has made claim u/s 80IB of the Act which was allowed by the

Revenue after detailed enquiry wherein the assessee duly submitted the detailed explanation as to manner of computing deduction u/s 80IB of the Act which was accepted by the Revenue after scrutiny while framing original assessment u/s 143(3) of the Act and no fresh tangible material has come into possession of the Revenue which has live link/ nexus with the formation of belief that income has escaped assessment warranting re-opening of the concluded assessment , has been brought on record by the Revenue to disturb the claim of the assessee which was earlier accepted in original assessment proceedings u/s 143(3) r.w.s. 143(2) of the Act after detailed scrutiny rather it is a case of change of opinion which is not permissible in proceedings u/s 147/148 of the Act as the powers of re-opening the concluded assessment , u/s is to 're-assess' and not to 'review' the concluded assessments. The reference is made to the decision of Hon'ble Supreme Court in the case of CIT v. Kelvinator of India Limited (2010) 320 ITR 561(SC). The assessee has made a claim of deduction u/s 80IB of the Act on the basis that the same was common costs which should be allocated between Manufacturing and trading activities based on the ratio of sales turnover which was accepted by the Revenue after detailed scrutiny in original assessment proceedings u/s 143(3) of the Act which culminated into assessment order dated 26.11.2009 passed by the AO u/s 143(3) of the Act. Although the reopening has been done within a period of 4 years but still the same is not permissible in the instant case as the concluded assessment has been re-opened merely due to change of opinion. Hence the addition is ordered to be deleted. We order accordingly.

Assessee's appeal in ITA 832/Mum/2013 for the assessment year 2008-09

16. The grounds of appeal raised by the assessee in ITA No. 832/Mum/2013 for the assessment year 2008-09 in the memo of appeal filed

with the Income Tax Appellate Tribunal, Mumbai (hereinafter called "the Tribunal") reads as under:-:

"1:0 Re.: Non-consideration of the revised return of income filed for the year:

1:1 The Commissioner of Income-tax (Appeals) has erred in not adjudicating on the ground of appeal raised before him vis-a-vis non consideration of the revised return of income by erroneously holding that the representative of the Appellant has agreed that they would take up the matter with the Assessing Officer.

1:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject the ground of appeal raised by the Appellant vis-a-vis non consideration of the revised return of income ought to have been adjudicated on by the Commissioner of Income-tax (Appeals).

1:3 The Appellant submits that the Assessing Officer be directed to consider the revised return of income filed by the Appellant for the year and to re-compute its total income accordingly.

2:0 Re.: Non-allowance of the share buy - back expenses:

2:1 The Commissioner of Income-tax (Appeals) has erred in not specifically directing the Assessing Officer to grant a deduction for the share buy-back expenses as claimed by the Appellant.

2:2 The Appellant submits that considering the facts and circumstances of the case and the law prevailing on the subject, it is entitled to a deduction of share buy-back expenses incurred by it and the Commissioner of Income-tax (Appeals) ought to

directed the Assessing Officer to recompute its total income after granting a deduction for the said share buy-back expenses.

2 : 3 The Appellant submits that the Assessing Officer be directed to grant the Appellant a deduction for the share buy-back expenses as claimed and to re-compute it's total income accordingly.

3:0 Re: Additional disallowance u/s. 14A

3:1 The Commissioner of Income-tax (Appeals) has erred in confirming the additional disallowance u/s. 14A of the Income-tax Act, 1961 made by the Assessing Officer by applying the provisions of Rule 8D of the Income-tax Rules, 1962.

3:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject no further disallowance u/s. 14A of the Income-tax Act, 1961 is called for and the stand taken by the Assessing Officer is incorrect and the Commissioner of Income-tax (Appeals) ought to have held as such.

3:3 The Appellant submits that the Assessing Officer be directed to delete the additional addition so made u/s. 14A r.w.r 8D and to re-compute its total income accordingly.

4:0 Re.: Additional depreciation on vaporizer claimed as a deduction under section 32(1)(iia)

4 : 1 The Commissioner of Income-tax (Appeals) has erred in confirming the disallowance of Rs. 53,32,399/- being the

additional depreciation U/S 32(l)(iia) claimed by the Appellant on vaporizers installed at hospitals.

4:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, it is entitled to claim additional depreciation on the vaporizers in terms of section 32(1)(iia) of the Income-tax Act, 1961 and the stand taken by the Assessing Officer in this regard is erroneous, misconceived and ought to be struck down.

4:3 The Appellant submits that the Assessing Officer be directed to grant additional depreciation on the vaporizers as claimed by it and to re-compute its total income accordingly. "

The assessee has also raised following additional grounds of appeal before the Tribunal and prayed for its admission being legal ground:

ADDITIONAL GROUND OF APPEAL

"Deduction in respect of advance payment of sales tax made in A.Y. 2007-08.

(i) On facts and in the circumstances of the case and in law, the Appellant submits that since deduction in respect of advance payment of sales tax amounting to Rs. 40,39,333/- made in AY 2007-08 has been disallowed in the said year, the same ought to be granted for the captioned A.Y. for which it pertains."

17. The assessee prayed for the admission of the additional ground by contending that the assessee paid sales tax in advance of Rs. 40,39,333/- in the previous year relevant to the assessment year 2007-08 for the period from

1st April 2007 to 31st March 2008 and claimed the same as deduction for the assessment year 2007-08 u/s 43B of the Act which deduction was disallowed by the AO on account of being advance payment of sales tax vide assessment orders dated 30-09-2011 passed u/s. 143(3) of the Act read with the Section 144C(13) of the Act passed for the assessment year 2007-08. The assessee contended that appeal was filed with the Tribunal wherein the assessee did not press this ground considering that the same ought to have been allowed in the year to which it pertains i.e. assessment year 2008-09. Thus, it was prayed that the said ground be admitted as it is purely a legal ground and also otherwise serious prejudice will be caused to the assessee as the assessee will be denied of the legitimate deduction under the provisions of the Act to which it is legally entitled . The Ld. DR submitted that this issues needs verification by authorities below.

We have considered the contention of both the parties and we are of the considered view that in the interest of substantial justice this additional ground deserves to be admitted and we hereby order the admission of the said additional ground raised by the assessee.

In this additional ground raised by the assessee wherein it was submitted that the payment of sales tax in advance amounting to Rs. 40,39,333/- was made in the previous year relevant to the assessment year 2007-08 while the sales tax pertained to the period from 01-04-2007 to 31-03-2008 and claim of deduction was made u/s. 43B of the Act in the assessment year 2007-08 which was denied by the Revenue, it was submitted that the AO disallowed the same while framing the assessment order for assessment year 2007-08 as being advance payment of sales tax pertaining to the period 01-04-2007 to 31-03-2008 i.e. assessment year 2008-09 . It was submitted that the matter was disposed of by the Tribunal while deciding the assessee’s own appeal in ITA No. 8428/Mum/2011 for the assessment year 2007-08 vide orders dated

30th October, 2015 wherein the assessee did not pressed the said ground. The relevant finding of the Tribunal is as under:-

> *"The Ld.AR submits that Ground no. 1 to be not pressed, relating to the disallowance of advances sales tax claimed as deduction. We therefore dismiss the grounds of appeal."*

The Ground No 1:0 raised by the assessee in assessee's appeal in ITA No. 8428/Mum/2011 for assessment year 2007-08 which was dismissed by the Tribunal as set out above, read as under:

"1:0 Advance sales tax paid claimed as deduction:
1:1 The Assessing Officer / the Dispute Resolution Panel has erred in not granting a deduction for an amount of Rs. 40,39,333/- being sales tax paid in advance during the year- for the period 01 April 2007 to 31 March 2008.

1:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, the advance sales tax paid is allowable as a deduction u/s. 43B of the Income-tax Act,1961 and the stand taken by the Assessing Officer in this regard is erroneous and not in accordance with law.

1:3 The Appellant submits that the Assessing Officer be directed to delete the disallowance so made by him and to re-compute its total income accordingly.

Without prejudice to the foregoing:

1:4 The Appellant submits that considering the facts and circumstances of its case and specifically in view of the facts that a deduction has not been granted in respect of the sales tax paid in advance during the year under consideration, a deduction ought to be granted to it for the sales tax in the year to which said sales tax pertains viz. the Assessment Year 2008-2009."

Thus, it was submitted that this sales liability paid in advance pertained to the assessment 2008-09 , which was paid in advance in the previous year relevant to the assessment year 2007-08 and should be allowed to the assessee in the impugned assessment year 2008-09.

18. The ld. D.R. submitted that the matter needs verification and it should be set aside to the file of the A.O. for verification of the claim of the assessee on merits.

19. We have considered the rival contentions and also perused the material available on record. We find that the assessee is stated to have made payment of Rs. 40,39,333/- as sales tax paid in advance in the previous year relevant to the assessment year 2007-08 while the said sales tax liability paid in advance pertained to the previous year relevant to the assessment year 2008-09.. The assessee has not pressed the ground of appeal before the Tribunal in assessee's own case for the assessment year 2007-08 in ITA No. 8428/Mum/2011 for the assessment year 2007-08 and the same was dismissed by the Tribunal vide orders dated 30th October, 2015. In our considered view this issue needs to be set aside to the file of the A.O. and the A.O. shall verify the claims and contentions of the assessee and allow the same on merits in accordance with law. Needless to say the assessee may be granted sufficient opportunity of being heard in accordance with principles of natural justice and the assessee shall be allowed to file relevant evidences

and explanations in accordance with law to support its claim and contentions .We order accordingly.

20. Ground No. 4 pertains to the claim of deduction towards additional depreciation on vaporizer claimed as deduction u/s 32(1)(iia) of the Act. We have already adjudicated this ground while deciding the assessee's appeal in ITA No. 3472/Mum/2013 for the assessment year 2006-07 in the foregoing paragraphs of this order. Hence, our above decision in ITA No. 3472/Mum/2013 for the assessment year 2006-07 as contained in preceding para's shall apply mutatis mutandis to the assessee's appeal in ITA No. 832/Mum/2013 for the assessment year 2008-09 wherein the facts are identical.

21. Coming to ground No. 1 & 2, the assessee has challenged the non-allowance of the share buy-back expenses. The assessee has filed revised return of income whereby the assessee has claimed deduction on account of buy-back expenses on shares. The assessee has claimed as revenue expenditure an amount of Rs. 23,38,849/- towards buy back expenses by filing revised return of income within the prescribed period of time as stipulated u/s 139(5) of the Act which was not considered by the ld. CIT(A). The assessee contended that in the original return of income filed with the Revenue the assessee erroneously disallowed the claim of deduction on account of buy-back expenses on shares incurred during the year. The assessee revised its return of income and claimed an amount of Rs. 23,38,849/- as deduction towards buy-back expenses on shares in the revised return of income filed with the Revenue. The revised return of income was not considered by the A.O. as well as by the ld. CIT(A). The original return of income was filed on 29th September, 2008 which is the due date of filing the return of income while the revised return of income was filed on 31st March, 2010 which was within a period of one year from the end of the

assessment year i.e. the said revised return was filed within prescribed time as stipulated under u/s 139(5) of the Act. The ld. CIT(A) dismissed the grounds raised by the assessee before him on the ground that the assessee has stated that the assessee shall take up this issue with the AO and hence the grounds raised by the assessee were dismissed by learned CIT(A). We find that the issue regarding allowability of the claim of buy back expenses as deduction while computing income of the assessee has been considered by the Tribunal while disposing of the appeal in ITA No. 8428/Mum/2011 for the assessment year 2007-08 vide orders dated 30th October, 2015 in assessee's own case whereby the Tribunal allowed the claim of the assessee. The order of the Tribunal is placed on record at page 62-71/paper book filed with the Tribunal. The Tribunal in the said order held as under:

> *"16. In the present case we observe that the assessee undertook the exercise of buy back as the shares of the company were not traded in the stock market. Instead of increase in the share capital , the buy back, resulted in decrease in the funds. In these circumstances , the assessee has not earned any enduring benefit because of the buy back. The expenditure incurred thus did not result in bringing in to existence any asset.*
>
> *17. In view of the above discussions we hold the expenses incurred by the assessee for buy back, to be a revenue expenditure, allowable u/s. 37(1) of the act."*

22. The ld. D.R. submitted that the matter may be sent back to the file of the A.O. for examination.

23. We have considered the rival contentions and also perused the material available on record including the Tribunal order. We have observed that the

assessee has incurred buy-back expenses on shares amounting to Rs. 23,38,849/-. The assessee has stated to have not claimed the same as deduction in its original return of income filed with the Revenue. The assessee has revised its return of income within time prescribed by law u/s. 139(5) of the Act whereby the said claim was raised by the assessee. The authorities below have not considered the claim of the assessee. The Tribunal in assessee's own case for the assessment year 2007-08 adjudicated the matter in ITA No. 8428/Mum/2011 vide orders dated 30th October, 2015 in assessee's favour. The relevant findings of the Tribunal are as under:-

*"**Ground N 0.3 Disallowance of expenses for buy back of shares claimed by the assessee.***

12. During the year under consideration, the assessee had paid back 807360, fully paid up equity shares of RS.10 each, at a premium of Rs.640/- per share. Consequently the paid up equity share capital stood reduces. For this buy back, the assessee incurred expenses amounting to Rs. 1,11,38,780/-. The assessee has disallowed the expenses in its original return of income. However on re examination the assessee filed a revised statement of income and the said expenditure was shown considered for deduction u/s.37(1) of the act.

13. The Id. AR submitted that the entire buy back was undertaken to provide an easy exit to its existing share holders, since the shares of the company were not actively traded on the stock exchange. He further submitted that the expenses incurred for the buyback of shares IS an allowable expenses u/s.37(1) of the act. The Id. AR relied upon;

• CIT vs. Selan Exploration Technology Ltd., reported in 188 Taxman 1(Del.)
• Deccan Chronical Holdings Ltd., vs. DCIT, reported In 41 CCH 96(Hyd.Trib.)
• ACIT vs. Britannia Industries Ltd., in ITA no. 1789/ Kol/2008.

14. The above judgments lay down that, in the event of buy back of shares, if there is no permanent change in the capital structure of the company, and, such purchases are effected from the free reserves available with the company, which otherwise would have been available for distribution by way of dividends etc., would not give rise to a benefit of enduring nature to the assessee.

15. On the contrary, the Id. DR relies on the order of the DRP.

16. In the present case we observe that the assessee undertook the exercise of buy back, as the shares of the company were not traded in the stock market. Instead of increase in the share capital, the buy back, resulted in decrease in the funds. In these circumstances, the assessee has not earned any enduring benefit because of the buy back. The expenditure incurred thus did not result in bringing in to existence any asset.

17. In view of the above discussion we hold the expenses incurred by the assessee for buy back, to be a revenue expenditure, allowable u/s.37(1) of the act.
In the result, the assessee's appeal is allowed."

In our considered view, this matter needs to be restored to the file of the A.O. for verification of the claims and contentions of the assessee to have incurred expenses of Rs.23,38,849/- towards expenses for buy back of shares and then to decide the claims and contentions of the assessee in the light of decision of the Tribunal in assessee's own case for the assessment year 2007-08 in ITA No. 8428/Mum/2011 vide orders dated 30-10-2015. Needless to say proper and adequate opportunity of being heard shall be provided by the AO to the assessee in accordance with the principles of natural justice in accordance with law and the assessee shall be allowed to submit relevant evidences and explanation in defense of its claim. We order accordingly.

24. Ground No. 3- Disallowance u/s 14A of the Act read with rule 8D of Income Tax Rules, 1962. It was observed by the A.O. from the details submitted by the assessee that the assessee has earned an amount of Rs. 7,89,49,266/- as dividend from mutual fund and has claimed the same as exempt u/s 10(35) of the Act. The total investment of the assessee in dividend yielding assets as on 31st March 2008 was around Rs. 157.23 crores. The assessee had disallowed an amount of Rs. 2,21,411/- u/s 14A of the Act. The A.O. required the assessee to explain as to why the relatable expenses to the exempt income should not be computed as per section 14A read with Rule 8D of the Income Tax Rules, 1962. In reply, the assessee submitted that the assessee has already disallowed an amount of Rs. 2,21,411/- u/s 14A of the Act. The contention of the assessee was not found acceptable to the A.O. and the A.O. computed the disallowance to the tune of Rs. 78,95,352/- u/s. 14A of the Act computed as under , vide assessment order dated 25.01.2012 passed u/s. 143(3) r.w.s. 144C(3) of the Act:

Particulars		Amount
Direct expenses (A) As given by		2,21,411

the assessee)		
Indirect interest expenses debited to P&L account	180798	
Opening investment yielding exempt income	1464444580	
Closing investment yielding exempt income	1572357753	
Average investments	**15128401166**	
Opening total assets	3150717817	
Closing total assets	3550269794	
Average total assets	3350493805	
Indirect interest attributable to exempt income (B)		81935
0.5% of Average investments (C)		7592006
Total expenses attributable to exempt income (A+B+C)		78,95,352

Aggrieved by the assessment order dated 25.01.2012 passed by the A.O. u/s. 143(3) read with Section 144C(3) of the Act, the assessee filed first appeal before the ld. CIT(A) and submitted that the assessee arrived at Rs. 2,21,411/- as disallowance u/s 14A of the Act by allocating a part of employees expenses and administrative expenses for earning of tax free income. It was submitted that the investments in mutual funds units were made out of surplus funds which were temporarily available and that the assessee are having no borrowed funds which is clear from the Balance Sheet for the year. It was submitted that the unsecured loans amounting to Rs.76,28,092/- appearing in the balance sheet for the year entirely pertains to deferred sales tax liability under the Maharashtra Government Package Scheme of Incentives, 1988. It was submitted that the investment in the mutual funds were and by large static and no direct and indirect expenditure was incurred to earn the exempt dividend income. It was submitted that it was not having any borrowed funds and if at all disallowance is to be made, the same should be restricted to Rs. 2,21,411/-. The assessee submitted that the AO erroneously has considered Rs.2,21,411/- as direct expenses incurred

for the earning of tax free income which income represents the amount of indirect expenses worked out by the assessee by allocating the proportion of employees cost and administrative expenses. The assessee debited the interest expenses to the P&L account of Rs. 1,80,798/- which consist of interest on delayed payment of TDS amounting to Rs. 80,206/-, interest on sales tax amounting to Rs. 75,790/-, interest on inter-company loans amounting to Rs.7,222/- and interest on security deposits taken from stockist amounting to Rs. Rs.93,370/-, totalling to Rs. l,80,798/- which clearly shows that there were dues payable to the Government, deposits received from the stockist and hence cannot/ought not be considered for the purpose of computation of disallowance in terms of Rule 8D of the Income Tax Rules, 1962. It was submitted that provision does not allow the AO to apply the method prescribed by Rule 8D of Income Tax Rules, 1962 without considering whether the claim made by the assessee is correct, the satisfaction of the AO should be recorded on objective basis having regard to the accounts of the assessee. The assessee relied upon the decision of Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Ltd. Vis. DCIT (2010) 234 CTR I (Bom). The assessee submitted that it has suo motu disallowed a sum of Rs.2,21,411/- u/s. 14A of the Act in the return of income filed with the Revenue by allocating proportion of employee expenses and administrative expenses which can be said to be incurred for the purposes of earning tax free income. It was submitted that no other expenses have been incurred for purposes of earning tax free income . The assessee has also furnished a break-up of expenditure incurred under the head manufacturing, administrative and selling expenses aggregating to Rs 108.80 crores as per the schedule 14 of the Annual Report and it has been stated that none of these expenditure are pertaining to the earning of tax free income. It was also submitted that 100% of the investment as on 31st March, 2008 amounting to Rs.157.23 crores, are in mutual funds and no investment is made in equity shares, hence, the disallowance is not called for. The assessee submitted that

Mutual Funds themselves charge administrative fees for the management of the investments , which are deducted from the Net Asset Value (NAV) of the units. The assessee also submitted that the AO has not recorded any satisfaction vis-à-vis the incorrectness of the claim in respect of expenditure in relation to income which does not form part of the total income. In support, the assessee has relied upon the following decisions:-

“1. CIT vis. Hero Cycle Ltd. (2009) 17 DTR 281.
2. Mindas Investment vis. DCIT (2010iTIOL·699·ITAT-Del),
3. Maxopp Investment Ltd. vis. CIT (ITA No. 687/2009),
4. DCIT v. Jindal Photo Ltd, (ITA No.4539/DeI.12010),
5. Yatish Trading Co. (P) Ltd. (2011) 9 taxrnan.com 164.
6. Multi Commodity Exchange of (India) Limited vs. DCIT (ITA No. 1050/M/2010

7. Cl'I' vs. Walfort Share and Stock Brokers Pvt. Ltd. (2010) 326 ITR 1
8. Auchtel Products Ltd. vs.. ACIT (ITA No. 3I 85/Mum/2011)

The ld. CIT(A) considered the submission of the assessee whereby he observed that the assessee had made huge investments totalling to Rs. 157.23 crores against which it has earned an income of Rs. 7,89,49,266 which is not forming part of the total income of the assessee, hence, the provisions of section 14A of the Act is clearly applicable in respect of disallowances of corresponding expenditure debited by the assessee in its P&L A/c. The ld. CIT(A) observed that the assessee in its return of income has disallowed an expenses of Rs. 2,21,411/- u/s 14A of the Act, therefore it cannot be said that there were no cost/expenses attributable to earning the exempt income which is forming part of the total income. The assessee contended that the A.O. had not identified any expenditure which was directly or indirectly

relatable to earning of dividend and as such the A.O. cannot made any disallowance. The ld. CIT(A) observed that the Hon"ble High Court in the case of Godrej & Boyce Mfg. Co. Ltd. (supra) held that the Rule 8D of Income Tax Rules, 1962 is applicable from the assessment year 2008-08 hence the A.O. is duty bound to work out the disallowance u/s 14A. The ld. CIT(A) observed the assessee has contended that it has sufficient own funds and that the investments are made out of internal accruals. It was observed by the learned CIT(A) that the A.O. has considered the disallowance worked out by the assessee at Rs. 2,21,411/- as direct expenses attributable to earning of exempt income which is not correct as per clause (i) of Rule 8D(2) of the Income Tax Rules, 1962. It was also observed by the learned CIT(A) that huge investment of Rs. 157.23 crores were made by the assessee in investment yielding tax free income and such deployment cannot be there without adequate availability of funds and a machinery to manage the same which activities cannot be done without associated costs and if exact cost cannot be ascertained , principles of apportionment will apply having regards to the accounts of the assessee.The learned CIT(A) also held that the interest actually paid by the assessee is towards payment of TDS, interest on sales tax, interest on inter company loans and interest on security deposit and as such these interest which are directly attributable to a particular income or receipt cannot be disallowed u/s 14A of the Act read with Rule 8D(2)ii) of Income Tax Rules, 1962. Thus, in nutshell the ld. CIT(A) granted relief to the assessee to the tune of Rs. 303,346/- (Rs, 2,21,411 + Rs. 81,935) on account of disallowance made by the AO as per clause (i) and (ii) of the Rule 8D(2) of Income Tax Rules, 1962, and the balance disallowance of Rs. 75,92,006/-was accordingly sustained by the learned CIT(A) u/r 8D(2)(iii) of Income Tax Rules, 1962 read with Section 14A of the Act , vide appellate order dated 06.11.2012 .

25. Aggrieved by the appellate order dated 06.11.2012 passed by the ld. CIT(A), the assessee filed further appeal before the Tribunal.

26. The ld. Counsel for the assessee contended that the assessee had voluntarily disallowed an amount of Rs. 2,21,411/- towards indirect expenses incurred in connection with the earning of exempt income. The A.O. has completed the assessment whereby he had applied rule 8D of the Income Tax Rules, 1962 read with Section 14A of the Act for making disallowance while satisfaction was not recorded that how the disallowance was worked out by the assessee is not correct having regards to the accounts of the assessee. The ld. Counsel submitted that there is no investment in the shares, the entire investment is only in the mutual funds and that too there is no churning of the investment. The assessee has already voluntarily disallowed an amount of Rs. 2,21,411/-in the return of income filed with the Revenue. The A.O. has disallowed an amount of Rs. 78,95,352/- under Rule 8D of Income Tax Rules, 1962 read Section 14A of the Act .The assessee drew our attention to page 20/paper book whereby disallowance of Rs.2,21,411/- was made voluntarily by the assessee in return of income filed with the Revenue. Our attention is also drawn to revised computation of income filed which is placed at page 23/paper book with the revised return of income which is placed at page 25 whereby the similar disallowance was made by the assessee voluntarily. It was submitted that the ld. CIT(A) has given part relief to the assessee whereby the direct expenses of Rs.2,21,411/- considered by the AO u/r 8D(2)(i) of Income Tax Rules, 19962 for disallowance and also disallowance on account of interest component of Rs. 81,935/- u/r 8D(2)(ii) of Income Tax Rules, 1962 was deleted by the ld. CIT(A) and disallowance to the tune of Rs.75,92,006/- was sustained u/r 8D(2)(iii) of Income Tax Rules, 1962 read with Section 14A of the Act. The ld. Counsel submitted that the assessee has sufficient own funds which is more than the investment and no amount of borrowed funds were utilized for making investment in securities

yielding exempt income. The ld. Counsel submitted that the decision of Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Ltd. (supra) is applicable.The assessee drew our attention to the audited financial statements of the assessee and contended that as per Audited Balance Sheet placed at page no 80/paper book, the assessee own fund comprising of share capital and reserves are Rs 250.36 crores as at 31-03-2008 while investments made are to the tune of Rs.157.24 crores. Similarly, it was submitted that the the assessee own fund comprising of share capital and reserves are Rs. 214.68 crores as at 31-03-2007 while investments made are to the tune of Rs.148.44 crores as at 31-03-2007.The assessee drew our attention to schedule of investments being part of audited financial statement placed at paper book page 85 to contend that most of the investments are made in liquid mutual funds. Thus, in nutshell it was submitted that the AO has not recorded satisfaction before invoking rule 8D of Income Tax Rules, 1962 while learned CIT(A) recorded satisfaction before invoking rule 8D of Income Tax Rules, 1962 wherein he held that the assessee has not maintained separate books of accounts from wherein disallowance u/s 14A of the Act can be worked out, the decision of Hon'ble Bombay High Court in Godrej and Boyce Manufacturing Company Limited(supra) is applicable and it was also submitted that the authorities below have not come to conclusion that the expenses disallowed voluntarily by the assessee are not un-reasonable.The assessee relied upon decision of Hon'ble Delhi High Court in the case of CIT v. Taikisha Engineering India Limited (2015) 370 ITR 0338(Del. HC) wherein the Hon'ble Court duly considered the decision in the case of Maxoop Investment Limited v. CIT (2012) 347 ITR 272(Del.HC).

27. The ld. D.R. submitted that the power of CIT(A) is co-terminus with the power of A.O. He has recorded the satisfaction before invoking Rule 8D of Income Tax Rules, 1962. The assessee has not come out with the complete

details and as such the issue can be set aside to the file of the AO for de novo determination of the issue afresh on merits.

28. We have considered the rival contentions and also perused the material available on record. We have observed that the assessee has made an investment of Rs. 157.23 crores mainly in Liquid Mutual Funds , out of which the assessee has earned dividend income of Rs. 7.89 croes during the assessment year which was claimed to be exempt u/s 10(35) of the Act. The assessee came out with the explanation that it has incurred an indirect expenditure amounting to Rs. 2,21,411/- towards earning of afore-stated exempt income and disallowed the same voluntarily in the return of income filed with the Revenue towards indirect expenses in relation to earning of exempt income. The Revenue was not satisfied with the explanation of the assessee and accordingly applied Rule 8D of the Income Tax Rules 1962 read with Section 14A of the Act. However, the AO has not recorded the satisfaction before invoking Rule 8D of Income Tax Rules, 1962 read with Section 14A of the Act . The ld. CIT(A) whose powers are co-terminus with the powers of the AO has recorded the satisfaction that the assesssee has not maintained separate books of accounts for identifying expenses incurred in relation to the earning of exempt income and hence the dis-satisfaction with the amount offered by the assessee for disallowance . The ld. CIT(A) invoked Rule 8D(2)((iii) of Income Tax Rules, 1962 read with Section 14A of the Act to confirm disallowance of Rs.75,92,006/- in the hands of the assessee. Section 14A(2) of the Act contemplates computing disallowance of expenditure incurred in relation to the earning of exempt income having regards to the accounts of the assessee. The learned CIT(A) although recorded satisfaction that the disallowance offered by the assessee of Rs.2,21,411/- cannot be accepted as no proper basis of disallowance was specified by the assessee but went on to apply Rule 8D(2)(iii) of Income Tax Rules, 1962 , while the learned CIT(A) ought to have identify the disallowance at the first instance having

regards to the accounts of the assessee.The assessee also did not came forward with the complete details of expenses incurred in relation to the earning of exempt income. In our considered view, the matter needs to be set aside and restored to the file of the A.O. for de novo determination of the issue on merits after considering the submissions of the assessee having regard to the accounts of the assessee as to the quantum of disallowance to be made u/s 14A of the Act. As such the impugned order of the ld. CIT(A) is set aside and the issue is remitted back to the file of the A.O. for de novo determination of the issue on merits after providing sufficient opportunity of being heard to the assessee and after considering the relevant evidences /explanations submitted by the assessee in its defense. We order accordingly.

29. In the result, assessee's appeal in ITA No 3472/Mum/2013 and ITA No. 832/Mum/2013 are partly allowed as indicated above.

Order pronounced in the open court on 24th August , 2016.
आदेश की घोषणा खुले न्यायालय में दिनांकः . को की गई ।

Sd/-	sd/-
(MAHAVIR SINGH)	(RAMIT KOCHAR)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated **24-08-2016**

व.नि.स./ *R.K.*, Ex. Sr. PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "A" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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