आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH 'D'
BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

Sr. No.	ITA No. and Asstt.Year	Appellant	Respondent
1-3	692/Ahd/2011 With CO No.89/Ahd/2011 Asstt.Year 2005-06 AND 2447/Ahd/2011 Asstt.Year 2005-06	DCIT(OSD), Range-1 Ahmedabad	Dishman Pharmaceuticals & Chemicals Ltd. Bhadraj-Raj Chambers Swastik Cross Road Navrangpura, Ahmedabad. PAN : AAACD 4164 D
4	2957/Ahd/2013 Asstt.Year 2006-07	DCIT(OSD), Range-1 Ahmedabad	Dishman Pharmaceuticals & Chemicals Ltd. Bhadraj-Raj Chambers Swastik Cross Road Navrangpura, Ahmedabad.
5	3086/Ahd/2013 Asstt.Year 2006-07	Dishman Pharmaceuticals & Chemicals Ltd. Bhadraj-Raj Chambers Swastik Cross Road Navrangpura, Ahmedabad.	DCIT(OSD), Range-1 Ahmedabad
6	817/Ahd/2011 Asstt.Year 2006-07	DCIT(OSD), Range-1 Ahmedabad	Dishman Pharmaceuticals & Chemicals Ltd. Bhadraj-Raj Chambers Swastik Cross Road Navrangpura, Ahmedabad.
7	773/Ahd/2011 Asstt.Year 2006-07	Dishman Pharmaceuticals & Chemicals Ltd. Bhadraj-Raj Chambers Swastik Cross Road Navrangpura, Ahmedabad.	DCIT(OSD), Range-1 Ahmedabad

Revenue by :	Shri Vasundhara Upmanyu, CIT-DR Shri R.P. Maurya, Sr.DR
Assessee by :	Shri T.P. Hemani, AR with Shri Parimal Parmar, AR

सुनवाई की तारीख/Date of Hearing : 22/03/2018
घोषणा की तारीख /Date of Pronouncement: 23 /05/2018

<u>*आदेश*/O R D E R</u>

<u>PER RAJPAL YADAV, JUDICIAL MEMBER:</u>

In this bunch of 7 appeals, assessee and Revenue are challenging orders of the ld.CIT(A) passed in assessment years 2005-06 and 2006-07. Since common issues are involved, therefore, we heard these appeals together and deem it appropriate to dispose of them by this common order.

2. First we take appeals for the assessment year 2005-06 i.e. ITA No.692/Ahd/2011, CO No.89/Ahd/2011 and ITA No.2447/Ahd/2011.

3. ITA No.692/Ahd/2011 is directed at the instance of the Revenue against order of ld.CIT(A)-VI, Ahmedabad dated 16.12.2010. Assessment order was framed under section 143(3) on 22.12.2008 by the Addl.CIT, Range-1, Ahmedabad. On receipt of notice, the assessee has filed cross-objection in this appeal bearing no.89/Ahd/2011. ITA No.2447/Ahd/2011 is also directed at the instance of the Revenue, but against order of ld.CIT(A) dated 5.7.2011. Proceeding in this appeal has arisen out of an assessment order passed under section 143(3) r.w.s. 147 of the Income Tax Act, 1961 dated 30.12.2010. In other words, assessment was reopened and addition made in re-assessment proceedings travelled to the ld.CIT(A), which have been deleted. The Revenue is aggrieved with those deletions. The grounds of appeal of the Revenue in ITA No.692/Ahd/2011 reads as under:

> *"1. The ld.CIT(A) erred in law and on facts in deleting the addition of Rs.8,65,17,574/- made on account of TPO order under section 92CA(3) of the I.T.Act by rejecting the TNMM selected by the assessee.*
>
> *2. The ld.CIT(A) erred in law and on facts in deleting the addition of Rs.18,45,974/- made on account of miscellaneous expenses."*

4. Brief facts of the case are that assessee has filed its return of income for Asstt.Year 2005-06 on 31.10.2005 declaring a total income at Rs.3,57,62,060/-. The assessee at the relevant time was engaged in manufacturing of bulk drugs, chemicals and intermediates. Case of the

assessee was selected for scrutiny assessment and notice under section 143(2) was issued and served upon the assessee. A perusal of record revealed that the assessee has international transactions in terms of section 92B with its associated enterprises ("AE" for short). Hence, reference under section 92CA of the Act was made to the ld.TPO for determining arm's length price ("ALP" for short) of international transactions between the assessee and its AE. On analysis of details given in form No.3CB, the ld.TPO found the following international transactions undertaken by the assessee:

Sl. No.	***Nature of international transactions***	***Value of transactions***	
		Receipt	*Paid*
1.	*Sales of various products*	*98,32,51,452*	
2.	*Contract Research Services*	*7,39,71,950*	
3.	*Services relating to procurement of raw materials*		*49,65,562*
4.	*Management Services*		*49,92,225*
	Total	*105,72,23,402*	*1,29,57,787*

5. Since adjustments have been made by the TPO with regard to first two transactions, therefore, we will be confining our discussion *qua* these two items. In order to demonstrate that its transactions with its AE are at ALP, the assessee has submitted TP study report wherein it has determined ALP by using Transactional Net Margin Method ("TNMM" for short). However, the ld.TPO was not satisfied with methodology adopted by the assessee and he recorded a finding that the assessee sold various chemicals, active pharmaceutical ingredients to its subsidiaries in US and UK, whereas it has sold similar products to other parties as well at much higher rate. Thus, in the opinion of the TPO, when the internal unrelated party price i.e. internal comparable uncontrolled price ("CUP" for short) are available, then assessee ought to have determined the ALP of its internal transaction by using CUP method instead of TNMM adopted by the assessee. The ld.AO reproduced details in tabular form exhibiting description of items sold by the assessee. Geographical locations of its AE i.e. US, UK and Europe, quantity of items sold, rate at which products sold, internal CUP, difference and total adjustment required to be made. Such details are available on page no.5 and finding of

the ld.TPO and findings of the ld.TPO is also available in the order of theld.CIT(A). On the basis of CUP method, the ld.TPO recommended for making upward adjustment in the price of products sold to these AEs. Similarly, he applied same analogy for making upward adjustment in respect of contract research receipts. The ld.TPO made recommendation for adjustment of Rs.8,65,17,574/- on two items i.e. sale of various products and contract research services. Recommendation made by the ld.TPO have been given effect by the AO in his assessment order dated 22.12.2008.

6. Dissatisfied with the adjustment, assessee carried the matter in appeal before the ld.CIT(A). The assessee has field written submissions contending therein as to why CUP was not an appropriate method for determining ALP of products sold by the assessee. It further contended that the ld.TPO has not recorded any finding as to how TNMM adopted by the assessee was not an appropriate method. Without pointing out fault with the method of assessee, the ld.TPO ought to have not jumped into an alternative method. The assessee has appraised the ld.CIT(A) about essential ingredients of CUP method. It was submitted that this method can only be applied after taking into consideration various factors and material difference arising on account of risk, financial support, marketing support, technical support, geographical presence, ready set up, assets employed and currency fluctuations. According to the assessee adjustment by applying CUP method on account of difference between international transactions and CUP transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market, are difficult to quantify. It was emphasised that the ld.TPO has not made any attempt to make any adjustment on account of factors viz. financial support, marketing efforts, technical support, geographical presence and all other relevant material factors. The assessee, thereafter compiled details in tabular form with regard to upward adjustment of Rs.3,86,01,104/- made on account of sale of various products. Such details have been reproduced by the ld.CIT(A) on page nos.3 to 19 of the paper book. The ld.CIT(A) thereafter accepted contentions and deleted upward adjustment made by the AO on the recommendation of the TPO. Basically, the ld.CIT(A) has relied upon order of his predecessor passed in the assessment year 2002-03, 2003-04 and 2004-05. Finding recorded by the ld.CIT(A) reads as under:

"2.3. I have considered the facts of the case, order passed by transfer pricing officer and appellant's submission. Appellant had various international transactions with associated enterprises (AEs) during the year which were categorized as- sale of products, contract research services, services for procurement of raw material and management services. TPO made adjustments with regard to first two categories. Appellant followed TNMM method for calculating arms length price which was changed by the assessing officer to CUP method and then worked out variation as adjustment. Apart from this, assessing officer made adjustment in contract research services by applying resale margin method. As regards change of method from TNMM to cup, the issue is squarely covered by the orders of my learned predecessors for assessment years 2002 -03, 2003-04 and 2004-05 (covering all appeals prior to this assessment year). The relevant extract of the order for assessment year 2004-05 is quoted below-

"in so far as the method of variation of arms length prices is concerned, the provisions of the act are very clear, in as much as it is the assessee who has a right to choose the best applicable method for the purpose of calculation of arms lengthprices analysts AO finds serious defects in the said method and he fulfils the preconditions prescribed under section 92C (3) of the act. Under the scheme of the act, the AO is required to find out the arms length price based on any of the five methods prescribed under the act. Under the act no particular preferences given to a particular method compared to other methods. it is also mandatory on the part of the AO to give a clear finding as to how to and why the method adopted by the assessee cannot give a true and correct picture of arms lengthprices. Moreover, the AO has to justify and give reasons as to why the method adopted by him is more scientific inaccurate in determining the arm's length price is compared to the method adopted by the assessee. In the facts of the present case, the assessee has adopted transactional net margin method (TNMM for short). The assessee has justify the said method by stating that having regard to the sales of large number products to its associate enterprise, coupled with the fact that it has also sold diversify products to unrelated enterprises and looking to the complexity of the transactions, product diversity and multiplicity of transactions, the said method was only tactical method to determine the arms length prices. Under the said method, assesseefinds the profit before interest and excess and (PB IT) as a percentage of turnover and the same income is being compared with such PB IT of other entities dealing in identical products and having comparable turnovers. As per the report submitted under rule 10 B of the ID rules, the assessee has given comparison of such PBIT with various other concerns and it has demonstrated that such PBIT of the appellant at 26.32% while higher than the average comparable PBIT of such similar entities at 13.33%. The only reason, apart from some general regions, why the AO has rejected the said method was absence of breakup of PBIT between transactions with associated enterprises and unrelated entities. If the PBIT with the associated enterprises is higher than the overall PBIT, the very ground for rejecting the said

TNMM method goes away. Under the circumstances, there was no reasonable ground for changing the method for determining the arm's length prices. Under the circumstances, I hold that there was no justification on the part of the AO in changing the TNMM method is adopted by the assessee in determining the arm's length prices. Accordingly, AO is directed to adopt the TNMM method and not the cup method."

Facts of the appellant's case are similar to assessment year 2004-05 with the only difference in appellant's PBIT at 24.87% as compared to average PBIT of such similar entities at 18.36%. The arguments given by the TPO are similar and therefore this issue is covered by the earlier appellate decision in the appellant's own case in the similar facts and circumstances. Appellant also submitted decision of ITAT Ahmedabad in the case of Schutz Dishman biotech private Ltd (a sister concerns in the similar line of business) for assessment year 2002-03 in ITA number 554/AHD/2006 dated 15 February 2008. The relevant part of the decision is quoted below-

"We find no fault with the TNMM method adopted by the assessee on the above facts of the case. Even the honourable apex court in the case of Morgan Stanley & Co has clearly upheld the adoption of TNMM method as most appropriate method and the relevant particular line from the judgement reads as under-

"as regards income attributable to the P E, we hold that the transactional net margin method was the appropriate method for determining the arm's length price in respect of transactions between Morgan Stanley & Co and MSAS' even the honourable special bench of this tribunal in the case of Aztec software and technology services Ltd has held that the computation of arms length price is effect to exercise. Each case depends on its own facts and circumstances. In many cases where identical or almost similar uncontrolled transaction is areavailable for comparison, determination of arms length price is an easy task. But it is not so in most of the transactions and rarely one is able to locate and identical transaction. In such cases arms length price is determined by taking this survey comparable transaction in comparable circumstances and make suitable adjustment for the differences. Similarly in the present case also the PB IT of the assessee company is exactly similar or nearby with that of the other uncontrolled transactions of unconnected enterprises. The PB IT of the exports is as high as 23.02% as against the overall PB 17- of the assessee company at 20.04%. Even the assessee has compared that PB IT of other independent entities with that of the assessee and demonstrated the application of TNMM methodcorrectly. Accordingly we uphold the TNMM method adopted by the assesseeand reverse the cup method adopted by the revenue."

Respectfully following the above decisions of my learned predecessors in the appellant's own case and jurisdictional 1TAT on the issue of change of method from TNMM to cup in the case of appellant's sister

concerns having identical facts, assessing officer is directed to accept TNMM method as against cup method taken up by TPO. In TNMM method, appellant's margin is higher than average margin of comparable entities and therefore no adjustment can be made on the issue of sales made to associated enterprises.

Even otherwise appellant submitted detailed reasons as to why adjustments made by the TPO are not justified. The reasons given are- difference in quantity sold, different geographical area, difference in timing, frequency of transactions, smallness of difference etc. If all these reasons are considered, there is hardly any material difference calling for adjustment. There are instances where sales to associate enterprises are at higher prices than non-associate enterprise reflecting that sales were made at arm's length prices. In view of the submissions of the appellant, the adjustments made by adopting CUP method will not survive.

As regards adjustments on contract research services, TPO made upward adjustment of RS 4.6 Crores. Out of these adjustment of RS 2.96 crores was made in the case of USA subsidiary and balance in the case of UAE subsidiary. It is a matter of record that the appellant has charged US $ 4000 per month per Full Time Employee (FTE) to its AE for carrying out research activities. The appellant has charged the same rate to Non - AEs which is very much evident from the copy of invoices which are placed on record at pages nos.179 to 182 of Paper Book - II. While appellant received US dollar 11.90 lakhs from these two AEs at the rate of $4000 per men month, appellant also received USdollar 9.55 lakhs from three non- AEs at the same rate of $4000 per men month for contract research work. I find that even if CUP is to be applied for these transactions, the comparable instances of charging price to Non-AEs prove that the transactions are entered into at ALP and therefore no adjustments are called for.

It is also submitted by the appellant that it has entered into arrangement whereby it has carried out contract based research activity. As per the terms and conditions for contract research mentioned by the appellant, the entire risk of outcome of the said research was to be taken by the principals' i.eDishmanFZE and Dishman USA. As per submission, the appellant was to carry out only the research activity, irrespective of the outcome of such research and for that activity, the appellant was to be compensated in terms of men month hours' basis. In other words, the principals are getting the entire contract research work done by the appellant and takes the risk and as a corollary, the rewards too. The bills issued for contract research work for AEs and non-AEs are identical in which man months was the basis of billing. In the absence of formal contracts, the TPO considered these transactions as normal sale ignoring the nature of transactions. Transactions can be entered even without elaborate formal agreement but that will not change the nature of transactions. These transactions cannot be equated with the normal sale transactions just because formal agreement was not entered/ submitted. Even oral arrangement/

agreements are legally recognized. TPO did not find any material or evidence to suggest that these transactions were not contract research services but outright sale. In view of this, the profit margins of the associate enterprises cannot be applied to the appellant as the appellant is only charging on the basis of man months spent on the contract research work without taking risk of outcome. I therefore hold that the appropriate methods, which can be applied for the purpose of determining the arms length price, are the Transaction Net Margin Method (TNMM) or comparable uncontrolled price (CUP) ,discussed inearlier Para, which have been applied by the appellant and as per that no adjustment is called for. Under the circumstances, this addition is not sustained.

In view of the aforesaid discussions, no adjustments to the ALP for any of the transactions entered into by the appellant for the year under consideration is called for and assessing officer is directed to delete the same."

7. The ld.counsel for the assessee at the very outset submitted that the order of the ld.CIT(A) in the assessment years 2002-03, 2003-04 and 2004-05 have been upheld in ITA No.903 & 1234/Ahd/2010 for the Asstt.Year 2002-03. Similarly, order for the Asstt.Year 2003-04 and 2004-05 was upheld in ITA Nos.154, 587, 2180 and 3213(Ahd) of 2007. It is reported in 45 SOT 37. Copy of this order has also been placed on record by the ld.counsel for the assessee.

8. The ld.CIT-DR while impugning order of the ld.CIT(A) submitted that Shri R.I.Patel, CIT-DR has filed written submissions, vide letter dated 26.6.2015. Copy of such submissions under signature of Shri B.Y. Chavan, Jt.CIT (TPO), Ahmedabad are available on record. She relied on these submissions.

9. We have duly considered rival contentions and gone through the record. The ld.TPO has not pointed out defects in TNMM applied by the assessee for demonstrating ALP of its international transactions. Without any reasons, he simply changed method and held that CUP method is more appropriate method for determining ALP of international transaction entered into by the assessee with its AEs. We find that in the Asstt.Years 2003-04 and 2004-05, the Tribunal has accepted that TNMM is the most appropriate method for determining ALP of assessee's transactions with its AE. In the present assessment year, the assessee has compiled the details in tabular form

submitting as to why CUP is not appropriate method. Such details have been reproduced by the ld.CIT(A) and they read as under:

Sr. No.	*Product*	*ALP Adjustment in Rs.*	*Reasons why comparison is not proper*
1	*Ammonium Tributyle Ammonium Chloride*	*10,70,529/-*	*The appellant has sold 9,800 Kgs at average rate of Rs.144.51 to Dishman USA AE. The ld. TPO has compiled the identical products sold to various customers in respective countries and has adopted their average rate of Rs.253.47. Details of which given on page no. – of Paper Book.* *Reasons for non-comparable are as under :* *(a) <u>Function Performed, Risk Assumed and Assets Employed i.e FAR factors</u> are not taken into consideration while comparing prices charged to AE with non-AE.* *(b) <u>Quantity Factor</u> : The instances taken by the ld. TPO so far as quantity is concerned are at all not comparable, except one, as the Appellant has sold use quantity of 9800 Kgs, whereas comparable quantity is ranging from 22 kgs to 1950 kgs.* *The only comparable instance could be impugned product sold to DDC fine chemicals N.V. situated at Belgium – quantity is 10,000 kgs is at average rate of Rs. 200.97. However, this is also not comparable for the reason of Geographical factor and Function Performed, Employment of Assets and Risk Assumption by AE. Hence, this is also not comparable instance.*

			(c) Geographical Factor :Non AEs are situated at different Geographical area and therefore also they are not comparable. Because of the different geographical locations even the politic risks also vary so also the currency fluctuation risk. *(d) Regularity of Transaction : The appellant submits that even when internal comparison is applied, what can be compared for the purpose of determining the ALP are the regular transactions and not the solitary or isolated transaction with any other third non-EE party. Transaction can either the arena of comparison only if it's a transaction which is a regular transaction. In the facts of the present case, transaction selected by ld. TPO are such isolated or solitary transactions and therefore the very comparison is erroneous or misconceived.*
2 & 3	*Cetrimide BP*	*98,250 and 92,800*	*No comments for the smallness of amount.*
4	*PhenyleTrimethyle Ammonium Chloride*	*5,87,523/-*	*The appellant would like to point out that there is a mistake on the part of ld. TPO in taking average price at Rs. 299.27 instead of Rs. 246.10.* *Summarised table of quantity sold to Non AEs and average price thereof is given hereunder for ready reference to clarify the issue:*

<table>
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<table>
<tr><th>Country</th><th>Qty.</th><th>Avg. Rate</th></tr>
<tr><td>Argentina</td><td>600</td><td>535.67</td></tr>
<tr><td>Australia</td><td>11558</td><td>272.49</td></tr>
<tr><td>Belgium</td><td>81000</td><td>242.42</td></tr>
<tr><td>Iran</td><td>16000</td><td>228.63</td></tr>
<tr><td>Japan</td><td>1600</td><td>303.52</td></tr>
<tr><td>Taiwan</td><td>24</td><td>459.30</td></tr>
<tr><td>UK</td><td>5</td><td>694.35</td></tr>
<tr><td>Total</td><td>110787</td><td>246.10</td></tr>
<tr><td>AE – Europe</td><td>11,100</td><td>246.34</td></tr>
</table>
From the above given table, it is very much clear that the appellant has charged price at Rs. 246.34 to the AE than the average price charged at Rs. 246.10 to Non-AE. Hence, there is no question of making Transfer Pricing Adjustments.
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<tr>
<td>5</td>
<td>PhenyleTrimethyle Ammonium Chloride</td>
<td>5,48,053/-</td>
<td>
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Summarise table of quantity sold to Non-AEs and average price thereof is given hereunder for ready reference to clarify the issue :
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<tr><td>Total</td><td>110787</td><td>246.10</td></tr>
<tr><td>AE – USA</td><td>8280</td><td>233.08</td></tr>
</table>
In the given case, the appellant has charged average price Rs.233.08 to AE whereas average
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<tr><td></td><td></td><td></td><td>price to Non-AE work out to be to Rs. 246.10 which is certainly within limit of 5% and therefore as per 2nd Proviso S. 92C(2)of the Act no transfer pricing adjustment is required to be made.

Without prejudice to above, the appellant submits that in any case the instances are not comparable at all due to quantity and geographical factors</td></tr>
<tr><td>6</td><td>Sodium Picosumlphat</td><td>78,713/-</td><td>No comments for the smallness of amount.</td></tr>
<tr><td>7</td><td>Tetrabutyl Ammonium Bromide</td><td>31,81,642/-</td><td>(a) FAR Analysis : As Above.
(b) Quantity factor : The instances is taken by the ld. TPO is summarised as under :

<table>
<tr><th>Country</th><th>Qty.</th><th>Avg. Rate</th></tr>
<tr><td>Isreal</td><td>28800</td><td>215.82</td></tr>
<tr><td>Japan</td><td>4300</td><td>280.63</td></tr>
<tr><td>Korea</td><td>3500</td><td>433.95</td></tr>
<tr><td>Netherland</td><td>1000</td><td>810.60</td></tr>
<tr><td>USA</td><td>10200</td><td>240.67</td></tr>
<tr><td>Total</td><td>47800</td><td>255.36</td></tr>
<tr><td>AE-Europe</td><td>49054</td><td>190.50</td></tr>
</table>

All five instances are not comparable as there is huge difference in quantity of the product sold to AE and Non-AE.

Even if the near quantity i.e 20,800 taken into consideration then also average rate is Rs. 215.82, which is also for the required to be discounted considering the quantity factor i.e 28,800 Kgs to Non-AE against 49,054 kgs. to AE as well as graphical factors and certainly FAR.</td></tr>
</table>

			(c) Geographical factors : As Above. *(d) Regularity of transaction : As above (1).*
8	*Tetra Butyle Ammonium Bromide*	*1,05,040/-*	*For the smallness of amount it is not considered.*
9	*Tetra Butyle Ammonium Bromide*	*55,21,061/*	*(a) Function Performed, Risk Assumed and Assets Employed i.e FAR factors are not taken into consideration while comparing prices charged to AE with non-AE. Detailed FAR analysis is given below table.* *(b) Quantity factors. The instances taken by the ld. TPO is summarised as under.*

<table>
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<table>
<tr><td>Country</td><td>Qty.</td><td>Avg. Rate</td></tr>
<tr><td>Isreal</td><td>16900</td><td>234.02</td></tr>
<tr><td>Japan</td><td>7040</td><td>251.84</td></tr>
<tr><td>Korea</td><td>2000</td><td>435.60</td></tr>
<tr><td>Total</td><td>25,940</td><td>254.40</td></tr>
<tr><td>AE-Europe</td><td>1,04,625</td><td>201.63</td></tr>
</table>
All three instances are not comparable as there is huge differences in quantity of the product sold to AE and Non-AE. Even if the near quantity i.e.16,900 taken into consideration that also average rate is Rs. 234.02, which is also for the required to be discounted considering quantity factor i.e.16,900kgs. to Non-AE against 1,04,625 Kgs. toAE as well as geographical factors and certainly FAR factors.

(c) Geographical factors. Non- AEs aresituateat different Geographical area and therefore also they are not comparable.
(d) Regularity of transaction : As above (1).
</td>
</tr>
<tr>
<td>10</td>
<td>Tetra Butyle Ammonium Fluoride Thihyderate</td>
<td>6,63,789/-</td>
<td>(a) FAR Analysis : As Above.
(b) Quantity Factor : Only one instance has been taken into consideration by the ld. TPO i.e only 10 Kgs sold to customer in Brazil, whereas the appellant has sold 400 kgs. to AE. Certainly this instance is not comparable looking into huge difference in quantity as well as only one transaction has been entered into by the Appellant with such Non AE.
(c) Geographical factors : As</td>
</tr>
</table>

<table>
<tr><td></td><td></td><td></td><td>(1) Above.
(d) Regularity of transaction : As (1) above.</td></tr>
<tr><td>11</td><td>Tetra Butyle Ammonium Hydrogen Sulphate</td><td>47,18,827</td><td>(a) FAR Analysis : As Above.
(b) Quantity Factor : The instances taken by the ld. TPO has summarised as under :
<table>
<tr><th>Country</th><th>Qty.</th><th>Avg. Rate</th></tr>
<tr><td>Germany</td><td>500</td><td>663.84</td></tr>
<tr><td>Japan</td><td>600</td><td>630.00</td></tr>
<tr><td>Netherland</td><td>1000</td><td>762.65</td></tr>
<tr><td>USA</td><td>100</td><td>962.50</td></tr>
<tr><td>Total</td><td>2,200</td><td>713.10</td></tr>
<tr><td>AE-Europe</td><td>17306</td><td>440.43</td></tr>
</table>
All three instances are not comparable as there is huge difference in quantity of the product sold to AE and Non-AEs.
(c) Geographical factors : As Above (1).
(d) Regularity of transaction : As above (1).</td></tr>
<tr><td>12</td><td>Tetra Butyle Ammonium Hydrogen Sulphate</td><td>24,931</td><td>For the smallness of amount it is not considered.</td></tr>
</table>

<table>
<tr><td>13</td><td>Tetra Ethyle Ammonium Bromide</td><td>1,35,57,000/-</td><td>(a) FAR Analysis : As Above.
(b) Quantity Factor : The instances taken by the ld. TPO has summarised as under :
<table>
<tr><td>Country</td><td>Qty.</td><td>Avg. Rate</td></tr>
<tr><td>Brazil</td><td>63</td><td>608.86</td></tr>
<tr><td>Japan</td><td>100</td><td>650.70</td></tr>
<tr><td>Malaysia</td><td>25</td><td>437.80</td></tr>
<tr><td>USA</td><td>3000</td><td>252.02</td></tr>
<tr><td>Total</td><td>3,188</td><td>273.04</td></tr>
<tr><td>AE-Europe</td><td>1,50,000</td><td>182.66</td></tr>
</table>
All four instances are not comparable is there is huge difference in quantity of the product sold AE and Non-AEs.

Even if nearer quantity is taken into consideration i.e 3000 at average rate ofRs. 252.02, then also it is for the required to be discounted considering huge difference of quantity sold to Non AE and AE i.e 3000 kgs. to non-AE against 1,50,000, as well as geographical factors and FAR Analysis.

(c) Geographical factors : As Above (1).
(d) Regularity of transaction : As above (1).</td></tr>
<tr><td>14</td><td>Tetra Ethyle Ammonium Bromide</td><td>1,05,475/-</td><td>For the smallness of amount it is not considered.</td></tr>
<tr><td>15</td><td>Lidocain</td><td>3,22,720/-</td><td>(a) FAR Analysis : As Above.
(b) Quantity Factor : The instances taken by the ld. TPO has summarised as under :
<table>
<tr><td>Country</td><td>Qty.</td><td>Avg. Rate</td></tr>
<tr><td>China</td><td>1000</td><td>594.68</td></tr>
</table></td></tr>
</table>

<table>
<tr>
<td></td>
<td></td>
<td></td>
<td>
<table>
<tr><td></td><td>800</td><td>701.24</td></tr>
<tr><td>Korea</td><td>200</td><td>688.51</td></tr>
<tr><td>Thailand</td><td>25</td><td>657.28</td></tr>
<tr><td>Total</td><td>2025</td><td>646.81</td></tr>
<tr><td>AE-Europe</td><td>4000</td><td>566.13</td></tr>
</table>
All four instances are not comparable is there is huge difference in quantity of the product sold AE and Non-AEs.
Even if nearer quantity is taken into consideration i.e 1000 at average rate of Rs. 594.68, then also it is for the required to be discounted considering huge difference of quantity sold to Non AE and AE i.e 1000 kgs. to non-AE against 4,000 to AE, as well as geographical factors and FAR Analysis.
(c) Geographical factors : As Above (1).
(d) Regularity of transaction : As above (1).
</td>
</tr>
<tr>
<td>16</td>
<td>Tetra ButyleAmm. Hy.</td>
<td>13,69,800</td>
<td>
(a) FAR Analysis : As Above.
(b) Quantity Factor : The instances taken by the ld. TPO has summarised as under :
<table>
<tr><td>Country</td><td>Qty.</td><td>Avg. Rate</td></tr>
<tr><td>Germany</td><td>500</td><td>743.52</td></tr>
<tr><td>Japan</td><td>300</td><td>635.04</td></tr>
<tr><td>Netherland</td><td>2000</td><td>766.50</td></tr>
<tr><td>Total</td><td>2800</td><td>748.31</td></tr>
<tr><td>AE-Europe</td><td>3000</td><td>291.71</td></tr>
</table>
The appellant has entered into only one transaction with above mentioned Non-AE and therefore they can never be compared with the price charged and in any case there due to quantity, geographical difference,
</td>
</tr>
</table>

<table>
<tr><td></td><td></td><td></td><td>comparison cannot make transfer pricing adjustments.

(c) Geographical factors : As Above (1).
(d) Regularity of transaction : As above (1).</td></tr>
<tr><td>17</td><td>Tetra ButyleAmm. Hy.</td><td>3,53,418</td><td>(a) FAR Analysis : As Above.
(b) Quantity Factor : The instances taken by the ld. TPO has summarised as under :

<table><tr><th>Country</th><th>Qty.</th><th>Avg. Rate</th></tr><tr><td>Germany</td><td>500</td><td>743.52</td></tr><tr><td>Japan</td><td>300</td><td>635.04</td></tr><tr><td>Netherland</td><td>2000</td><td>766.50</td></tr><tr><td>Total</td><td>2800</td><td>748.31</td></tr><tr><td>AE- USA</td><td>1300</td><td>291.71</td></tr></table>
The appellant has entered into only one transaction with above mentioned Non-AE and therefore they can never be compared with the price charged and in any case there due to quantity, geographical difference, comparison cannot make transfer pricing adjustments.

(c) Geographical factors : As Above (1).
(d) Regularity of transaction : As above (1).</td></tr>
<tr><td>18</td><td>Myristyl DBA Chloride Powder</td><td>59,71,613</td><td>(a) FAR Analysis : As Above.
(b) Quantity Factor : Only one instance has been taken into consideration by the ld. TPO i.e only 25 Kgs sold to customer in Egypt, whereas the appellant has sold 24,494.40 kgs. to AE. Certainly this instance is not comparable looking into huge difference in quantity as well as only single transaction has been entered into by the appellant with</td></tr>
</table>

			such Non AE. *(c) Geographical factors : As (1) Above.* *(d) Regularity of transaction : As (1) above.*

Upward adjustment of Rs.4,68,04,255/- in respect of contract research receipts *:*
At the outset the appellant most respectfully submits that in respect of upward adjustment in with regards to transaction in the nature of contract research receipt from Dishman USA Inc is amounting to Rs.2,96,26,763/- is concerned, the same is not at all tenable as the total contacts research receipt with the said entity is only in the sum of Rs. 87,38,550/-. The following table would clarify this aspect :

Nature of transactions	***Amount in Rs.***
Transactions with Dishman USA Inc. in respect of sales of Goods (Ref. page ___ of P/B)	*23,00,00,469/-*
Transactions with Dishman USA Inc. in respect of sales of services (contract research receipts) (Ref. page ___ of P/B)	*87,38,550/-*
Rate difference	*23,87,897/-*
Total transactions with Dishman USA Inc. in respect of sales of Goods and Services	***24,11,26,916/-***

The appellant submits that when the total transactions in the respect of contract research are to the tune of Rs. 87.38 lacs, the question of making adjustment beyond this gross figure of receipt cannot rise and no adjustment in this sum of Rs.296.26 lakhs can be made. The appellant submits that ld. TPO has already made adjustments in respect of transaction of sales of goods by applying the CUP method and the same has been the subject matter of challenge in the earlier grounds. Having done that, it is not open to ld. TPO to once again apply the gross mark up method and make one more addition on this same set of sales with the same AE.If the TPO has chosen a particular method for determining ALP, the same has to be applied uniformly to all the transactions. It is then not open to the TPO to say that if a particular transaction is at ALP in the first chosen method the same has to be realigned and readjusted by applying a different method for deter mining ALP. Once the transaction is at ALP under a particular method the said transaction has to be accepted as a transaction entered into at ALP and the same cannot be disturbed thereafter by applying a different method for determining the ALP."

10. In the written submissions, the ld.TPO has reiterated observation made in the order passed under section 92CA dated 21.10.2008. Apart from the observation of the TPO, it has been contended in the written submissions that the assessee has carried out comparability under TNMM at entity level and not at transactional level. He contended that the assessee has used TNMM on entity basis for computation of ALP for its sales to its subsidiaries. According

to the ld.DR, the assessee ought to have adopted net transactional method instead of profit margin of enterprise as a whole. A reference to the order of the ITAT Mumbai in the case of UCB India P.Ltd. Vs. ACIT, 121 ITD 13 1(Mumbai) has been made.

11. We have gone through these submissions as well as finding of the ld.CIT(A). It is pertinent to observe that the ld.TPO in the order dated 21.10.2008 has not made any such analysis. He has not pointed out the alleged defect as contended in the written submissions. The analogy adopted by the TPO in the order passed under section 92CA is that CUP method is far better method than TNMM. How, TNMM is not applicable on the given set of facts has nowhere been discussed by the TPO in the impugned order. Therefore, the ld.DR cannot improve the case of the TPO at this level. More so when, consistently from the Asstt.Year 2002-03, it has been held that method adopted by the assessee is an appropriate method. In the assessee's own case, this aspect has been accepted upto the level of ITAT. There is no justification for disturbing of that method by taking different opinion from order of the ITAT passed in similar facts of the same assessees. Taking into consideration earlier orders of ITAT passed in assessee's case for the Asstt.Year 2002-03 to 2004-05, we are of the opinion that the ld.CIT(A) has based his finding on the orders of predecessor. There is no independent discussion in this order. Thus, the findings have been upheld by the ITAT, and therefore, we do not see any reasons to deviate ourselves from those finding. Respectfully following the orders of the Tribunal in earlier years, we do not find any merit in this ground of appeal raised by the Revenue. Accordingly, first ground of appeal is rejected.

12. Ground No.2 in the Revenue's appeal is inter-connected with solitary ground taken by the assessee in the CO.

13. Brief facts of the case are that the assessee has claimed misc. expenses to be written off at Rs.19,36,409/-. The AO has disallowed a sum of Rs.18,45,974/- and added to total income of the assessee. On appeal, the ld.CIT(A) has confirmed the disallowance at Rs.15 lakhs on lump-sum basis. Deletion made by the ld.CIT(A) is being challenged by the Revenue in its

ground no.2, whereas addition retained by the ld.CIT(A) is being challenged by the assessee in its CO. The break-up of Rs.18,45,974/- is as under:

a) R&D Expenses : Rs.94,830/-
b) Library A/c. : Rs.17,11,144/-
c) Life Membership to clubs : Rs.40,000/-

14. The ld.counsel for the assessee submitted that as far as disallowance is concerned, Rs.15.00 lakhs is on a higher side. The assessee has written off this expenditure. He further contended if the claim with regard to library books is not being given, then assessee be allowed depreciation on the books. On the other hand, the ld.DR relied upon order of the AO.

15. We have duly considered rival contentions and gone through the record carefully. A perusal of the CIT(A)'s order would indicate that *ad hoc* disallowance was confirmed by the ld.CIT(A) after experiencing non-availability of necessary information. The ld.CIT(A) has observed that the assessee failed to give details about purpose and nature of the expenditure; how these were written off etc. After taking into consideration the finding of the ld.CIT(A), we are of the view that lump-sum addition confirmed by the ld.CIT(A) is little on the higher side, because the assessee has contended that if written off is not allowable, then actual expenses incurred during the year ought to be allowed. In other words, case of the assessee is that by following mercantile system of accounting, it has incurred various expenses, which has been written off in this year. Therefore, to meet ends of justice, assessee deserves a further relief of Rs.5,00,000/-. In other words, addition confirmed by the ld.CIT(A) of Rs.15,00,000/- is restricted to Rs.10,00,000/- (Ten Lakhs) only, and thus the assessee gets a further part relief. Accordingly, this inter-connected ground raised in the appeal of the Revenue and CO of the assessee is partly allowed.

16. Now we take ITA No.2447/Ahd/2011 (Revenue's appeal)

17. In the first ground of appeal, grievance of the Revenue is that the ld.CIT(A) has erred in deleting addition of Rs.2,41,04,933/- which was added by the AO with the aid of section 2(22)(e) of the Income Tax Act.

18. Brief facts of the case are the AO has observed that during the assessment proceedings of A.Y 2006-07, it was seen that Schutz Dishman Bio-tech P.Ltd. ("SDBPL" for short) has given loans to the assesee. Assessee holds 22.3% share holding of SDBPL. Thus, the ld.AO was of the view that loans given to the assessee deserves to be treated as deemed dividend under section 2(22)(e) of the Act. Similarly, the assessee has received loan from B.R. Labs P.Ltd. amounting to Rs.16,03,933/-. Both these loans were treated by the AO as deemed dividend in the hands of the assessee and addition of Rs.2,41,04,933/- was made under section 2(22)(e) of the Act in reassessment order. Dissatisfied with the addition, the assessee carried the matter in appeal before the ld.CIT(A).

19. It contended that similar issue was taken in the hands of SDBPL. Dispute travelled upto the ITAT, and it was held that assessee and SDBPL were maintaining current accounts. These were not in the nature of loans which could be treated as deemed dividend. With regard BR Laboratory, it was contended that it is not a registered share holder of BR Laboratory, and therefore, in view of Special Bench decision of the ITAT in the case of ACIT Vs. Bhaumik Color P.Ltd., 118 ITD 1 (Mum)(SB) such loans are not to be treated as deemed dividend. The ld.consel for the assessee submitted that in the case of SDBPL issue travelled to the Hon'ble High Court in Tax Appeal No.958 of 2015 wherein Hon'ble High Court upheld order of the ITAT by observing that the Tribunal has rightly held that there are large number of adjustment entry in the accounts between two entities; the amounts were not in the nature of deposits, but merely adjustments and section 2(22)(e) of the Act would not be applicable. The ld.counsel for the assessee further drew our attention towards the order of the ITAT passed in the assessee's own case for the Asstt.Year 2003-04 and 2040-05. He placed on record copy of the Tribunal's order in ITA No.2015 & 2125/Ahd/2012. It appears that in these assessment years also there must be some reopening that is why second round of litigation is there. The ld.DR on the other hand relied upon order of the AO. He failed to controvert submission made by the ld.counsel for the assessee.

20. We find that in the Asstt.Years 2003-04 and 2004-05, the Tribunal has considered identical issue in assessee's own case. Following finding of the Tribunal deserves to be noted:

> *"7. The Id. CIT(A) was convinced after verification that the issue is covered by the decision of the First Appellate Authority. The relevant findings of the Id. CIT(A) for A.Y. 2003-04 reads as under:-*
>
> > *"It is not in dispute that appellant had lot of business transactions with M/s Schutz Dishman Biotech Ltd. There were transactions of purchase of raw material as well as temporary accommodation deposits. Assessing officer of M/s Schutz Dishman Biotech Ltd initiated action under section 201 (1) by treating the transaction with appellant company as deemed dividend and the said company was treated as assessee in default for not deducting TDS in assessment year 2004-05 and 2005-06. In both the years, CIT(A)-XXl, Ahmedabad by order dated 28-09-2010 held that transactions entered into by the appellant which its associate concern would not attract the provisions of section 2(22)(e) of the act. And accordingly there would not be any obligation to deduct tax under section 194 and therefore the assessee cannot be treated as the assessee in default within the meaning of section 201(1) of IT act. The relevant extract of the said appeal order in para-six is quoted below-*
> >
> > *"There is large number of debit and credit transactions. Meaning thereby, the appellant has given and received funds as and when required to and from its associate concern. It is not on account whereby loans and advances have been given to the associate concern. It is on account payments in the nature of current adjustment accommodation account wherein there is a movement of funds both ways, on the basis. Unlike transactions of loan and advances, the movement funds is both ways and the same is more in the nature of current account rather than a loan account. Transactions in the nature of loans and advances are usually very few and for a longer duration. In the facts of the present case, the nature of the transaction as in the form of current accommodation, adjustment account and therefore the same is not a transaction in the nature of loans and advances. In absence of any loans and advances, the provisions of section 2 (22) (e) of the act in respect of deemed dividend are not attracted and therefore the question of deduction of tax at source also would not arise."*
> >
> > *Since these transactions between appellant and its associate concern M/s Schutz Dishman Biotech Ltd was there since assessment year 2004-05 onwards and during the year the debit balance in the appellant's account was substantially reduced. Since CIT (A) did not find the transactions between appellant and*

> *its associate concern as loans and advances given, logically the same cannot be loans and advances received by the appellant.*
>
> *It is not in dispute that in the books of the associate concern, there are five accounts relating to various transactions in the name of appellant and six accounts in the name of associate concern in the books of appellant. In these many accounts where a large number of debit and credit entries involving different business transactions. Apart from this, there are certain financial . transactions also in these accounts. The movement of funds was not for any period but was frequent and in both ways. Respectfully following the decision of Id CIJ (appeal) in the case of associate concern holding that transactions are not in the nature of loan and also decisions of jurisdictional ITAJ relied upon by the appellant, the addition on account of deemed dividend cannot survive in this year."*
>
> *Facts relating to the financial transactions with SDBPL are identical to the aforesaid assessment year in which the issue is decided in favour of the appellant. In view of this, by following the appeal order in assessment year 2006-07, addition on account of deemed dividend in respect of financial transactions with SDBPL made by the assessing officer is not confirmed.*

8. A perusal of the aforementioned findings of the Id. CIT(A) shows that he has followed the findings given in A.Y. 2006-07 wherein the First Appellate Authority has followed the decision taken in the case of SDBPL. We find that the appeal of SDBPL travelled up to the Hon'ble Jurisdictional High Court of Gujarat wherein the Hon'ble High Court was seized with the following question of law for consideration;-

> *"Whether on facts and in law the ITAT wax right in cancelling the order passed u/s 201(1) and 201 (A) of the Act, without appreciating that the amount advanced was in the nature of deemed dividend u/s 2(22)(e) of the Act'.'"*

9. And the relevant findings of the Hon'ble High Court reads as under:-

4. It can thus be seen that the Commissioner as a matter of fact found that the payments were not in the nature of current adjustment. There was movement of fund both ways on need basis. The transactions in the nature of loans and advances are usually very few in number whereas in the present case, such transactions are in the form of current accommodation adjustment entries. The Commissioner therefore, held that the transactions were not in the nature of loans and advances. The Revenue carried the matter in appeal. The Tribunal concurred with the view of the. CIT (Appeals) and held that the amounts were not in the nature of Inter Corporate Deposits and were therefore, not to be treated as loans or advances as contemplated in section 2(22)(e) of the Act.

5. The issue is substantially one of appreciation of facts. When the CIT(Appeals) as well as Tribunal concurrently held that looking to large number of adjustment entries in the accounts between two entities, the amounts were not in the nature of loan or deposit, but merely adjustments, application of section 2(22)(e) of the Act would not arise. Consequently, no question of law arises. Tax appeals are dismissed."

21. Respectfully following order of the Tribunal in assessee's own case, we do not find any merit in this appeal. It is rejected.

22. In the next ground of appeal, grievance of the Revenue is that the ld.CIT(A) has erred in deleting addition of Rs.2,78,06,483/- which was added by the AO by making a disallowance under section 40(a)(ia) of the Act.

23. Brief facts of the case are that assessee made payments of professional fees, commission, interest and discharge of certain contractual obligations. It was required to deduct TDS. It has deducted TDS, but paid it belatedly. In other words, TDS between April 2004 and February 2015 due date for payment of the same into government account was 31st March, 2015 while TDS in March, 2005 due date for payment in Government account was on or before the due date of filing the return i.e. 31.10.2005. In other words, the AO was of the view that the TDS from April 2004 to February 2005 ought to have been paid before 31st March, 2005. He therefore disallowed payment/ expenditure incurred by the assessee on which TDS was not deposited. On the other hand, case of the assessee is that section 40(a)(ia) has been amended by Finance Act, 2010 w.e.f 1.4.2005 which contemplates that if an assessee has deposited TDS deducted during the year before the due date of filing of return of income, then no disallowance is to be made. The ld.AO did not accept this contentions, but the ld.CIT(A) has accepted it.

24. On due consideration of the above facts, we find that the issue in dispute is squarely covered in favour of the assessee by the decision of Hon'ble Gujarat High Court in the case of M/s.Farson Fibres s. Ito, Tax Appeal No.1070 of 2010 (Guj) wherein it has been held that if TDS has been deposited prior to the due date of filing of return, then no disallowance has to be made. The ld.CIT(A) has rightly deled the disallowance, and we do not find any error in this ground of appeal. It is rejected.

25. In the result, the appeal of the Revenue is dismissed.

26. Now we take assessment year 2006-07.

27. In this year, the assessee and Revenue are in cross appeals i.e. Revenue's appeal is ITA No.817/Ahd/2011 and assessee's appeal is in ITA No.773/Ahd/2011, against order of the ld.CIT(A) dated 3.1.2011. These appeals have arisen from the proceedings under section 143(3) of the Act.

28. The assessee and Revenue have also filed appeal being ITA No.3086 and 2957/Ahd/2013 against the order of the ld.CIT(A) dated 31.10.2013. These appeals arose from penalty proceedings under section 271(1)(c) of the Act. Penalty order was passed by the AO on 30.3.2012.

29. First we take ITA No.817/Ahd/2011 filed by the Revenue. However, if any ground found to be inter-connected with ground of appeal taken by the assessee, then we will take up those grounds together.

30. In the first ground of appeal, grievance of the Revenue is that the ld.CIT(A) has erred in deleting addition of Rs.15,71,69,588/-.

31. Brief facts of the case are that the assessee has filed its return of income on 31.12.2006 declaring a total income at Rs.9,55,84,979/-. It has international transaction with its "AE". Therefore, a report under section 92E of the Income Tax Act, 1961 relating to international transactions was submitted in Form No.3CEB. The ld.AO has made reference to the TPO for determination of arm's length price (ALP for short) of international transactions undertaken by the assessee with its AE. The ld.TPO vide its order dated 29.9.2009 recommended upward adjustment of Rs.15,71,69,588/- on account of sale price to the international transactions entered into by the assessee with its "AE". Accordingly, an addition of this amount has been made to the total income of the assessee. Dissatisfied with the addition, the assessee carried the matter in appeal before the ld.CIT(A). The assessee has filed written submissions before the ld.CIT(A) which has been reproduced by the ld.CIT(A) on page 2 to 17 of the impugned order. The ld.CIT(A) thereafter observed that issue in dispute is squarely covered in favour of the assessee by

the order of his predecessor as well as by the order of the ITAT in assessee's own case. Following this order, the ld.CIT(A) has deleted the adjustment made by the AO on the basis of recommendation of TPO. The finding of the ld.CIT(A) reads as under:

> *"Respectfully following the above decisions of my learned predecessors in the appellant's own case and jurisdictional ITAT on the issue of change of method from TNMM to cup in the case of appellant's sister concerns having identical facts, assessing officer is directed to accept TNMM method as against cup method taken up by TPO. In TNMM method, appellant's margin is higher than average margin of comparable entities and therefore no adjustment can be made on the issue of sales made to associated enterprises.*
>
> *Even otherwise appellant submitted detailed reasons as to why adjustments made by the TPO are not justified. The reasons given are- difference quantity sold, different geographical area, difference in timing, frequency of transactions, smallness of difference etc. If all these reasons are considered, there is hardly any material difference calling for adjustment. There are instances where sales to associate enterprises are at higher prices than non-associate enterprise reflecting that sales were made at arm's length prices. In of the submissions of the appellant, the adjustments made by adopting method will not survive. Accordingly the adjustments made under the transfer pricing provisions are deleted."*

32. With the assistance of the ld.representatives, we have gone through the record. It is pertinent to observe that the assessee is engaged in the business of bulk drugs and fine chemicals. It had entered into various international transactions with its "AE" for sale of bulk drugs and fine chemicals. The assessee has bench marked its international transactions by adopting TNMM method. The TPO did not accept this method as most appropriate method and observed that the assessee should have supported its transactions at ALP for following CUP method as most appropriate method. We have discussed this issue while dealing with the appeal of the Revenue in the assessment year 2005-06 in the earlier part of this order. We have specifically observed that this issue has been come up for consideration starting from assessment year 2002-03 and consistently it has been held that since TNMM adopted by the assessee is most appropriate method, its international transactions ought to be valued for the purpose of bench marking by adopting TNMM method. If that method is being adopted then the profit level indicator is 23.59% as compared average profit of similar entity at 18.46%. Thus, the ld.CIT(A) has

observed that ALP of the assessee in respect of 14 international transactions, with regard to which upward adjustments were recommended by the TPO were to be considered at arm's length. It is also pertinent to observe that like in the assessment year 2005-06, the assessee has explained as to why comparison made by the AO *qua* each transactions entered with AE was not proper. Such comparative analysis has been noticed by the CIT(A) on page nos.11 to 17 of the impugned order. For the sake of brevity of repetition, we do not want to take cognizance of those comparative analysis. We have gone through it, and we are of the view that if TNMM is being adopted as most appropriate method, for bench marking of international transaction, then assessee's transactions are at ALP. After taking into consideration the finding of the ld.CIT(A), we do not find any merit in this ground of appeal. It is rejected.

33. Ground No.2. In this ground of appeal, grievance of the Revenue is that the ld.CIT(A) has erred in directing the AO to take correct figure of gratuity provision.

34. Brief facts of the case are that in the statement of income the assessee had disallowed a sum of Rs.93,34,526/- as the provisions for gratuity. It had filed a letter dated 1.12.2009 and submitted that though in the statement of income it had made disallowance of Rs.93,39,526/-, but the actual amount of provision of current year is of Rs.20,60,905/-. The assessee has submitted certificate from chartered accountant. However, the ld.AO did not accept this claim the assessee. On appeal, the ld.CIT(A) accepted the claim of the assessee and observed that the amount which is disallowable is provision made during the year and not opening balance. According to the ld.CIT(A) it is not a fresh issue. The AO should have considered the correct amount for disallowance. The ld.CIT(A) also observed that disallowance of opening balance cannot be made.

35. With the assistance of the ld.representatives, we have gone through the record. It appears that while filing return of income the assessee has included an amount for additions in the total income. When it realized the provision made for gratuity for the year under consideration, then it had filed an

application and submitted to the AO that current year's claim only Rs.20,69,905/-. This amount could be disallowed. The ld.CIT(A) has rightly appreciated the controversy and has rightly directed that AO that only for the provision made in the current year could be disallowed and not opening balance. Therefore, after looking into the finding of the ld.CIT(A), we do not find any error in it. This ground of appeal is rejected.

36. Ground no.3: Grievance of the Revenue is that the ld.CIT(A) has erred in directing the AO to allow correct figure of depreciation.

37. Brief facts of the case are that the assessee has claimed depreciation of Rs.13,67,45,462/- in the return of income. During the assessment proceedings, it has made a revised claim at Rs.14,15,32,235/-. This claim was disallowed by the AO by observing that the assessee failed to file revised return of income. The ld.AO has made reference to the decision of Hon'ble Supreme Court in the case of Goetze India Ltd. The ld.CIT(A) has observed that it was the duty of the AO to determine the correct amount of depreciation available to the assessee. He further observed that as per *Explanation* 3 to section 32(1)(i), the AO has to assess upon correct amount of depreciation on the assessee.

38. With assistance of the ld.representatives, we have gone through the record carefully. It was not a fresh claim made by the assessee. Thus, the ld.AO has erred in not considering the claim of the assessee. The ld.CIT(A) has rightly observed that the claim of the depreciation as made by the assessee, and it was for the AO to compute the correct figure of depreciation admissible to the assessee. The ld.CIT(A) has directed the AO to grant correct amount of depreciation. There could not be any fault to this finding, hence this ground of appeal is rejected.

39. Ground No.4: In this ground of appeal, grievance of the Revenue is that the ld.CIT(A) has erred in deleting addition of Rs.3,10,423/- out of misc. expenses claimed by the assessee and disallowed by the AO.

40. This ground of appeal is inter-connected with ground nos.23 and 24 of the assessee's appeal i.e. ITA No.773/Ahd/2011. We take all these grounds together.

41. The assessee had debited the following amounts:

a) Library books	:	Rs.14,84,530/-
b) Club Membership fees	:	Rs.40,000/-
c) R&D Expenses	:	Rs.94,830/-
d) Deferred Revenue Expenses:		Rs.1,91,063/-

42. The ld.AO has disallowed the claim of the assessee. However, on appeal, the ld.CIT(A) has allowed the claim of the assessee partly. On *adhoc* basis, the ld.CIT(A) has confirmed an addition of Rs.15 lakhs. An identical issue came up before us in the assessment year 2005-06. We have confirmed expenses in principle. Following our observation in the assessment year 2005-06, we modified the order of the ld.CIT(A) and restricted the disallowance to the expenditure of Rs.10 lakhs. The Ground nos.23 and 24 of the assessee's appeal are partly allowed, whereas the ground no.4 raised by the Revenue is dismissed.

43. Ground No.5: In this ground of appeal, grievance of the Revenue is that the ld.CIT(A) has erred in deleting the addition f Rs.81 lakhs which was added by the AO with the aid of section 2(22)(e) of the Act by upholding that loans obtained from SDBL is to be treated as deemed dividend. Such transaction was not considered as of taking loan, rather it was considered as business transaction because both parties were maintaining current account wherein loans are being taken consistently. This issue has been examined in the assessment years 2005-06 wherein we have followed the orders of the ITAT in earlier years in the case of SDBL. Even the Hon'ble High Court has confirmed the order of the ITAT in tax appeal no.958 and 959 of 2015. Section 2(22)(e) of the Act is not applicable on the transactions between these two parties. Considering our finding in the Asstt.Year 2005-06, we do not find any merit in this ground of appeal. It is rejected.

44. Ground No.6 and 7: These grounds are inter-connected with ground nos.26 and 27 taken by the assessee in its appeal i.e. ITA No.773/Ahd/2010.

45. The issue involved in all these grounds relates to computation of correct figure for the grant of deduction under section 10B of the Act.

46. Brief facts of the case are that in the return of income, the assessee has claimed deduction under section 10B of the Act at Rs.33,19,35,229/- in respect of EOU units at Bavla and Naroda. The assessee has submitted audit report inform No.56G of the Act. On analysis of the returns and documents, the ld.AO as of the view that the assessee is not entitled for deduction under section 10B on some of the items. Accordingly, he made adjustments and reduced deduction by a sum of Rs.10,21,60,135/-. In other words, the ld.AO has computed the deduction at Rs.22,97,75,094/-. Six points which have been considered by the AO for making adjustment in the computation of deduction are as under:

i) Unrealised export excluded from the export turnover;
ii) Other income not considered for eligible deduction u/s 10B ;
iii) Custom Duty allocated on the basis of raw material imports in EOUs and Non-EOU ;
iv) Packing expenses and packing material expenses allocated in proportion to quantum of sales in EOUs and Non-EOU ;
v) Clearing and Forwarding exports expenses allocated in proportion to quantum of sales in EOUs and Non-EOU ;
vi) Allocation of Administrative and Interest expenses in proportion to. total sales in EOUs and Non-EOU.

47. Out of the above six points, the assessee is challenging order of the ld.CIT(A) on issue no.1 and 2 whereas Revenue is challenging order of the CIT(A) on issue nos.3 to 6.

48. With the assistance of the ld.representatives, we have gone through the record carefully. There is no dispute with regard to the proposition that assessee is entitled for grant of deduction under section 10B of the Act. The dispute relates to quantification of the deduction. First we take the issue agitated by the Revenue in its grounds of appeal. In the first fold of grievance, the Revenue has contended that the AO has rightly allocated custom duty on the basis of raw-material imports in EOU and non-EOU units.

The AO was of the view that custom duty paid by the assessee and debited in the accounts ought to be allocated on the imports made for the EOU units. The ld.CIT(A) after making a detailed analysis held that there was no custom duty on the imports made required to be consumed in EOU units. If that be a fact, then how the AO could allocate such amount to such units ? The assessee has been maintaining separate books of accounts and debited actual expenditure in each unit. Therefore, the ld.CIT(A) is justified in holding that custom duty which is not incurred by the assessee on the imports of raw-material meant for EOU units cannot be allocated. We do not any merit in this fold grievance raised by the Revenue. It is rejected.

49. Next three fold grievances are common. The grievance of the Revenue in these folds of grievances relates to allocation of expenditure incurred towards packing material, clearing and forwarding expenses, administrative and interest expenses. It is pertinent to observe that where mixed accounts and common management is there, then certain overhead expenses required to be allocated at the level of HO, but if an assessee is maintaining separate books accounts and demonstrate all expenditure incurred by it; identifiable and allocatable, then on estimate basis such expenditure cannot be allocated on the basis of turnover or quantum of sales. The ld.CIT(A) has observed that accounts of the assessee were audited. It has maintained separate accounts. The AO did not pin-point specific defects in the expenditure debited by the assessee. In other words, if the AO is able to lay his hand on a particular expenditure, which is meant for EOU units, but debited either to the HO or in non-EOU units, then probably he would be justified in allocating expenditure on estimated basis. But no such exercise has been carried out by the AO, therefore, we do not find any merit in this ground of appeal. Grounds of appeal raised by the Revenue in this connection are rejected.

50. As far as first fold grievance of the assessee is concerned, the ld.AO has excluded unrealized exports from export turnover. The ld.CIT(A) confirmed his action.

51. The ld.counsel for the assessee submitted that no doubt unrealized export has been excluded from the export turnover, then simultaneously these

amount should be excluded from the total turnover while computing the eligible amount for grant of deduction under section 10B.

52 We find force in this contention, because if an item does not fall in export turnover, then it is to be excluded from total turnover also. We direct the AO to exclude unrealized exports from the export turnover as well as from total turnover for computing deduction admissible under section10B of the Act.

53. In the next fold grievance, assessee has pleaded that the ld.CIT(A) has erred in not including other income in the eligible profit for deduction under section 10B. The ld.counsel for the assessee at the very outset submitted that this issue is squarely covered in favour of the assessee by the order of Special Bench of the ITAT in the case of Maral Overseas Ltd. Vs. CIT, 136 ITD 177. He further contended that ITAT, Ahmedabad has followed this decision in the case of Sonic Technology P.Ltd. rendered in ITA NO.2665 & 2720/Ahd/2011. On the other hand, the ld.DR relied upon the orders of the ld.CIT(A).

54. We have duly considered rival submissions and gone through the record. We find that Special Bench of ITAT in the case of Maral Overseas Ltd. (supra) has considered this issue. The ld.AO has been harping upon the decision of Hon'ble Supreme Court in the case of Liberty India Ltd. Vs.CIT, 317 ITR 218 in coming to the conclusion that other incomes viz. sale of scrap etc. are not to be considered as derived from export activities. It is pertinent to observe that in the case of Sonic Technology P.Ltd. the assessee has claimed deduction after including interest income, sale of scrap, sundry balance written off, exchange rate fluctuations and incremental turnover and disbursement of subsidy from the government. These items were held to be eligible for grant of deduction under section10B of the Act. The ITAT in the case of Sonic Technology has further observed that order of the Special Bench Indore Bench has been upheld by the Hon'ble Delhi High Court. Discussion made by the ITAT *qua* this issue reads as under:

> *"11. We also find that the decision of Special Bench of Tribunal in the case of Maral Overseas Ltd. (supra) was upheld by Hon'ble Delhi High Court in the case of Hritnik Export Pvt. Ltd.(ITA No. 219/2014 & 239/2014 order dated 13.11.2014) wherein Hon'ble High Court dismissed the appeal of Revenue by holding as under:-*

By way of these appeals, the Revenue has challenged the orders passed by Income Tax Appellate Tribunal (Tribunal, for short) dated 11th September, 2013 and 24th October, 2013 relating to assessment years 2008-09 and 2009-10, respectively. Tribunal has followed the decision of their Special Bench in the case of Maral Overseas Ltd. versus Additional Commissioner of Income Tax decided on 20th March, 2012, in which it has been held:-

"78. Section 10B sub-section (1) allows deduction in respect of profits and gains as are derived by a 100% EOU. Section 10B(4) lays down special formula for computing the profits derived by the undertaking from export. The formula is as under :-

Profit of the business of the Undertaking X <u>Export turnover</u>

Total turnover of business carried out by the undertaking

79. Thus, sub-section (4) of section 10B stipulated that deduction under that section shall be computed by apportioning the profits of the business of the undertaking in the ratio of turnover to the total turnover. Thus, not-with-standing the fact that sub-section (1) of section 10B refers the profits and gains as are derived by a 100% EOU, yet the manner of determining such eligible profits has been statutorily defined in sub-section (4) of section 10B of the Act. As per the formula stated above, the entire profits of the business are to be taken which are multiplied by the ratio of the export turnover to the total turnover of the business. Sub-section (4) does not require an assessee to establish a direct nexus with the business of the undertaking and once an income forms part of the business of the undertaking, the same would be included in the profits of the business of the undertaking. Thus, once an income forms part of the business of the eligible undertaking, there is no further mandate in the provisions of section 10B to exclude the same from the eligible profits. The mode of determining the eligible deduction u/s 10B is similar to the provisions of section 80HHC inasmuch as both the sections mandates determination of eligible profits as per the formula contained therein. The only difference is that section 80HHC contains a further mandate in terms of Explanation (baa) for exclusion of certain income from the ''profits of the business'' which is, however, conspicuous by its absence in section 10B. On the basis of the aforesaid distinction, sub- section (4) of section 10A/10B of the Act is a complete code providing the mechanism for computing the ''profits of the business'' eligible for deduction u/s 10B of the Act. Once an income forms part of the business of the income of the eligible undertaking of the assessee, the same cannot be excluded from the eligible profits for the purpose of computing deduction u/s 10B of the Act. As per the computation made by the Assessing Officer himself, there is no dispute that both these incomes have been treated by the Assessing Officer as business income. The CBDT Circular No. 564 dated 5th July, 1990 reported in 184 ITR (St.) 137 explained the scope and ambit of section 80HHC and the mode of determination of profits derived by an assessee from the export of goods. I.T.A.T., Special Bench in the case of International Research Park Laboratories v. ACIT, 212 ITR (AT) 1, after following the aforesaid Circular, held that straight jacket formula given in sub-section (3) has to be followed to determine the eligible deduction. The Hon'ble Supreme Court in the case of P.R. Prabhakar; 284 ITR 584 had approved the . A.Y. 2007-08 principle

laid down in the Special Bench decision in International Reserarch Park Laboratories v. ACIT (supra). In the asses see's own case the I.T.A.T. in the preceding years, after considering the decision in the case of Liberty India held that provisions of section 10B are different from the provisions of section 80IA wherein no formula has been laid down for computing the eligible business profit.

80. In view of the above discussion, question no. 2 is answered in affirmative and in favour of the assessee. Accordingly, the assessee is eligible for claim of deduction on export incentive received by it in terms of provisions of section 10B(1) read with section 10B(4) of the Act."

The aforesaid view is in consonance with the decision of this Court dated 1st September, 2014 passed in ITA 438/2014, Commissioner of Income Tax-VII versus XLNC Fashions in which this court has held as under :-

"Deduction under Section 10B of the Income Tax Act, 1961 (Act, in short) is to be made as per the formula prescribed by Sub-Section (4), which reads as under:

"10B. Special provision in respect of newly established hundred per cent export- oriented undertakings-

....

....

(4) For the purposes of sub-section (1), the profits derived from export of articles or things or computer software shall be the amount which bears to the profits of the business of the undertaking, the same proportion as the export turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the undertaking".

Sub-section (4), therefore, is the special provision which enables the assessee to compute the profits derived from the export of articles or things or computer software. We do not see any conflict between Sub-section (1) and Sub-section (4) to Section 10B, as Sub- section (1) states that deduction of such profits and gains as are derived by a hundred percent export-oriented undertaking from the export of articles or things or software would be eligible under the said Section. Sub- section (1) is a general provision and identifies the income which is exempt and has to be read in harmony with Sub-section (4) which is the formula for finding out or computing what is eligible for deduction under Sub-section (1). Neither of the two provisions should be made irrelevant and both have to be applied without negating the other. In other words, the manner of computing profits derived from exports under Sub-section (1), has to be determined as per the formula stipulated in Sub-Section (4), otherwise Sub-section (4) would become otise and irrelevant.

The issue in question in this appeal which pertains to the Assessment Year 2009-10, relates to duty draw back in the form of DEPB benefits. As per Section 28, clause (iii-c), . A.Y. 2007-08 any duty of customs or excise repaid or repayable as drawback to a person against exports under

Customs and Central Excise Duties Draw Back Rules, 1971 is deemed to be profits and gains of business or profession. The said provision has to be given full effect to and this means and implies that the duty draw back or duty benefits would be deemed to be a part of the business income. Thus, will be treated as profit derived from business of the undertaking. These cannot be excluded.

Even otherwise, when we apply Sub-section (4) to Section 10B, the entire amount received by way of duty draw back would not become eligible for deduction/exemption. The amount quantified as per the formula would be eligible and qualify for deduction/exemption. The position is somewhat akin or close to Section 80HHC of the Act, which also prescribes a formula for computation of deduction in respect of exports.

In view of the aforesaid, we do not find any merit in the present appeal and the same is dismissed."

Karnataka High Court in Commissioner of Income Tax, Central Circle versus Motorola India Electronics (P) Ltd., ITA No. 428/2007, decided on 11.12.2013, reported as [2014] 46 taxmann.com 167 (Karnataka) has also taken a similar view, wherein it has been held:-

"By Finance, Act, 2001, with effect from 01.04.2001, the present Sub-section (4) is substituted in the place of old Sub-section (4). No doubt Sub-section 10(B) speaks about deduction of such profits and gains as derived from 100% EOU from the export of articles or things or computer software. Therefore, it excludes profit and gains from export of articles. But Sub-section (4) explains what is says that profits derived from export of articles or things or computer software shall be the account which bares to the profits of the business of the undertaking and not the profits and gains from export of articles. Therefore, profits and gains derived from export of articles is different from the income derived from the profits of the business of the undertaking. The profits of the business of the undertaking includes the profits and gains from export of the articles as well as all other incidental incomes derived from the business of the undertaking. It is interesting to note that similar provisions are not there while dealing with computation of income under Section 80HHC. On the contrary there is specific provisions like Section 80HHB which expressly excludes this type of incomes. Therefore, in view of the aforesaid provisions, it is clear that, what is exempted is not merely the profits and gains from the export of articles but also the income from the business of the undertaking."

In view of the aforesaid position, the appeals have to be dismissed. We order accordingly.

12. We thus find that the decision of Special Bench of Tribunal in the case of Maral Overseas (supra) wherein the ratio that once on income forms part of the business of the income of the eligible undertaking of the Assessee, the . A.Y. 2007-08 same cannot be excluded from the eligible profits for the purpose of computing deduction u/s. 10B of the Act, has been upheld by Hon'ble Delhi & Karnataka High Courts in the case of Hritnik Exports Pvt. Ltd. & Motorola India Electronics Pvt. Ltd.”

55. Respectfully following the above, we allow second fold of grievance raised by the assessee in its ground no.27 and direct the AO to include this other income in the eligible profit for the purpose of grant of deduction under section 10B of the Act.

56. In view of the above discussion, we do not find any merit in the appeal of the Revenue. It is dismissed.

57. Now we take appeal of the assessee i.e. ITA No.773/Ahd/2011.

58. Ground nos.1 and 2 taken by the assessee are inter-connected. The assessee had prior period income of Rs.46,50,648/-. It has debited prior period expenditure of Rs.43,11,114/-. It has adjusted both these amounts. A net differential amount of Rs.3,39,534/- has been credited to profit & loss account. The ld.AO has appreciated these facts and taxed prior period income of Rs.46,50,648/- offered by the assessee during this assessment year. He did not allow deduction of alleged prior period expenditure of Rs.43,11,114/-. This view of the AO has been confirmed by the ld.CIT(A). Thus, in ground nos.1 and 2 the assessee has pleaded that prior period expenditure of Rs.43,11,114/- be allowed to it as deduction and in case it is not allowable, then alternatively, it has pleaded that net differential amount of Rs.3,39,534/- be only taxed out of prior period income.

59. With the assistance of the ld.representatives, we have gone through the record carefully. The ld.AO while assessing prior period income of Rs.46,50,648/- has observed that since it is taxable income offered by the assessee itself, an item has to be included in the total income of the assessee on the principles of taxability on accrual or receipt basis. This has been offered by the assessee on receipt basis. Therefore, it is to be taxed, with regard to the allowance of prior period expenditure, the ld.AO has observed that such item cannot be allowed because it is not ascertainable whether this expenditure has been crystallized in the current year or not. According to the AO, bills and vouchers were not produced by the assessee. On appeal, the ld.CIT(A) confirmed the view point of the AO by observing that set off prior period expenditure against prior period income could be granted if the such expenditure was incurred for earning such income. In this way, the ld.CIT(A)

concurred with the AO. The ld.counsel for the assessee in support of its contentions relied upon the judgment of Hon'ble Gujarat High Court in the case of Saurashtra Chemicals reported in 213 ITR 523 (Guj). He also relied upon the judgment of Hon'ble Supreme Court in the case of CIT Vs. Excel Industries Ltd., 358 ITR 295 (SC). On the strength of the Hon'ble Supreme Court's decision, it was contended that in every year the assessee has prior period expenditure as well as income because in such a big organization quantification of certain expenditure and their crystallization always remained depended upon many circumstances, and sometime they crystallised in the subsequent period. The AO ought to have followed the principle of consistency and allowed the deduction of such prior period expenditure. On the other hand, the ld.DR relied upon the orders of the Revenue authorities below.

60. We have duly considered rival contentions. We find that income of the assessee is being assessed at entity level. All the expenditure debited under different heads cannot be decided *qua* a specific receipt. Once the assessee has been offering income of prior period as an entity, then its prior period expenditure cannot be disallowed simply by observing that it is not ascertainable whether this expenditure was incurred for earning a particular receipts offered under the head prior period income. To our mind, if an assessee is offering prior period income, then the expenditure which was incurred under different heads ought to be set off against that income. Therefore, we are of the view that net differential amount of Rs.3,39,534/- ought to be assessed as income of the assessee. We allow both these grounds of appeal for statistical purpose and direct the AO to allow set off prior period expenditure against prior period income and only net income is to be added to the total income of the assessee.

61. Ground Nos.3 to 5: These grounds are inter-connected with each other. Grievance of the assessee is that the ld.CIT(A) has erred in confirming addition of Rs.4,76,876/- which was added by the AO with the aid of section 14A r.w. Rule 8D of the Income Tax Rules.

62. Brief facts of the case are that the assessee has shown dividend income of Rs.3,53,08,748/- which has been claimed as exempt income under section 10(34) of the Income Tax Act. The assessee did not offer any expenditure for

disallowance under section 14A. The ld.AO thereafter found interest expenditure debited by the assessee at Rs.7,28,42,748/-. The ld.AO calculated disallowance as per Rule 8D and made addition of Rs.4,76,876/-. Before the ld.CIT(A) it was contended that Rule 8D is applicable from the assessment hear 2008-09 as held by the Hon'ble Bombay High Court in the case of Godrej & Boyce Vs. CIT. The ld.CIT(A) agreed to this proposition of the assessee, but observed that since the assessee has not offered any expenditure for disallowance under section 14A, therefore, some disallowance has to be made. In this way, the ld.CIT(A) has confirmed the disallowance made by the AO.

63. With the assistance of the ld.representatives, we have gone through the record carefully. The ld.counsel for the assessee pointed out that investment at the year-end are of Rs.1,203.72 lakhs whereas the assessee has interest free funds available at Rs.17,154.34 lakhs. The assessee has relied upon the judgment of the Hon'ble Gujarat High Court in the case of CIT Vs. Torrent Power Ltd., 363 ITR 474 (Guj), CIT Vs. Suzlon Energy Ltd., 354 ITR 630 (Guj) and judgment of Bombay High Court in the case of CIT Vs. Reliance Utilities & Power ltd., 313 ITR 340. On the other hand, the ld.DR relied upon the order of the Revenue authorities below.

64. As far reliance of the assessee on the judgment of the Hon'ble Gujarat High Court and Hon'ble Bombay High Court are concerned, proposition laid down in these judgments are not in dispute. The proposition in the decisions is if an assessee has interest free funds then no disallowance for interest expenditure in making investment, which would result exempt income be made. This proposition was accepted by the ld.CIT(A) itself. The ld.CIT(A) further accepted that in this year disallowance cannot be made with help of Rule 8D, because it was not applicable in the assessment year 2006-07. It has been made applicable from the assessment year 2008-09. The ld.CIT(A) thereafter examined the facts and observed that dividend income of Rs.3,53,08,748/- has been earned by the assessee which is exempt from tax. Therefore, some administrative expenditure or some other expenditure must be attributable for earning such exempt income. On an estimate basis, the ld.CIT(A) has upheld disallowance of Rs.4,76,876/-. After taking into

consideration these facts, we are of the view that the ld.CIT(A) though changed reasoning, but confirmed disallowance of same amount. Once investment was made by the assessee, then it was not required to be continuously monitor it and administrative expenditure could not be estimated at this magnitude which has been worked out by the AO with help of Rule 8D. To our mind, ends of justice would be met, if an *adhoc* disallowance of Rs.3,00,000/- be sustained for earning of tax free income. We allow this ground of appeal partly and confirm the addition to the extent of Rs.3,00,000/-.

65. Ground Nos.6 to 9: In these grounds of appeal, grievance of the assessee is that the ld.CIT(A) has erred in confirming addition of Rs.3,17,294/-.

66. Brief facts of the case are the ld.AO has made reconciliation of income reflected in the TDS certificate with the income shown in the accounts. He found that the assessee has income of Rs.2,89,521/- from Travel Mat Services P.Ltd. and Rs.27,773/- under the head job work income. On the basis of TDS certificate, he worked out a sum of Rs.3,17,294/-. This income was not included by the assessee, hence when it was confronted by the AO vide order sheet entry dated 24.12.2009, the assessee has admitted this income and agreed for addition. Accordingly, the ld.AO made addition. Appeal to the CIT(A) did not bring any relief to the assessee.

67. Before us, the ld.counsel for the assessee contended that it be remitted to the file of the AO for verification. In case such income has been offered in subsequent year, then addition for this year deserves to be deleted. Since the assessee itself admitted the income before the AO such admission must be after verification of the facts. The assessment order was passed on 26.2.2010. The assessee is not sure if it was offered and whether it has been taxed in subsequent year or not. Therefore, for making a roving inquiry and verification, we do not find it necessary to remit this issue to the file of AO. Thus, grounds no. 6 to 9 are dismissed.

68. Ground Nos.10 and 11. : In these grounds of appeal, grievance of the assessee is that the ld.CIT(A) has erred in confirming addition of

Rs.2,40,940/- under section 43B of the Act. The finding recorded by the ld.CIT(A) including reproduction of the AO's finding reads as under:

> *"6. The ground No. 5 of concise ground of appeal is against addition of Rs. 2,40,940/- u/s 43B of the Act.*
>
> *6.1 The A.O. has stated in the assessment order dated 26.02.2010, which is as under:*
>
> > *"As per 3CD report ESIC outstanding on March 2006 is Rs. 1,96,709/- whereas, as per the groupings of 1he Balance Sheet provided by the assessee, ESIC payable as at the year end works out to be Rs.4,53,004/- of which the opening balance was Rs.65,209/-. In this regard, the assessee contended that the difference reported in 3CD report and as shown in the groupings of accounts would be on account of Employees' contribution. However, as per the 3CD Report, Employees' Contribution outstanding as on 31.03.2006 is only Rs.15,355/-. Hence, the difference Rs.2,40,940/- (Rs.453004 -Rs. 196709 - Rs. 15355) remains unexplained. This amount is accordingly added u/s 43B. Penalty u/s.271(1)(c) for furnishing inaccurate particulars of income is separately initiated."*
>
> *6.2 The appellant has submitted in its written submission which is as under:*
>
> > *"The Appellant submits that there is no outstanding balance of ESI and whatever balance was outstanding as at 31st March, 2006 the same were deposited in due date and therefore no addition can be made in this regard. Therefore, the Appellant submits that addition made by the Id. AO is required to be deleted."*
>
> *6.3 I have considered the facts of the case, assessment order and appellant's submission. Appellant was not able to explain the discrepancy. It has just made the statement that the outstanding balance was deposited before due date. However assessing officer found that there was difference in figures reported in 3CD report and groupings of accounts which appellant was not able to reconcile. Appellant could not substantiate the explanation given by it. In the absence of proper explanation, addition made by the AO is confirmed."*

69. With the assistance of the ld.representatives, we have gone through the record. As observed in the earlier grounds of appeal, assessment order was passed on 26.2.2010. More than 8 years have expired when hearing in this appeal was taken place. If the assessee is unable to pin-point the facts whether these amounts have been paid in subsequent year and on actual

payment basis deduction under section 43B has been allowed in subsequent years or not. We cannot keep the issue alive endlessly. It was for the assessee to place on record specific information *qua* specific ground. We do not find any error in the finding of the ld.CIT(A), hence, these grounds are rejected.

70. Ground no.12: Grievance of the assessee is that the ld.CIT(A) has erred in confirming addition of rs.2,86,051/-.

71. It emerges out from the record that the assessee has made payment for purchase of some machinery. However, it could not purchase machinery and wrote off such advance for purchase of machinery in the accounts. The ld.CIT(A) disallowed the claim of the assessee on the ground that it was a capital loss and not a revenue loss in nature.

72. Before us, the ld.counsel for the assessee contended that the assessee is not required to demonstrate whether debts have actually become bad or not. In support of his contention, the ld.counsel for the assessee relied upon the judgment of the Hon'ble Supreme Court in the case of T.R.F. Ltd. Vs. CIT, 323 ITR 397 (SC). The ld.DR on the other hand relied upon the order of the CIT(A).

73. We have duly considered rival submissions and gone through the record. A perusal of the finding of the ld.CIT(A) recorded in para 7.3 would show that the assessee itself admitted before the ld.CIT(A) that this amount is not allowable under section 36(2) of the Act. In other words, it could not be claimed as bad debt written off. The assessee alternatively claimed it has business loss under section 28 of the Act. The ld.CIT(A) has observed that a business loss could be allowed to the assessee if it has suffered in normal course of running business, and it should not be in the nature of capital loss. The ld.CIT(A) further observed that the loss should be proved as irrecoverable. Judgment of Hon'ble Supreme Court in the case of TRF Ltd. (supra) will be applicable on bad debts written off. Here the claim of the assessee was admitted to be not related to bad debts, but to a loss and the ld.CIT(A) further observed that it was in the nature of capital loss, which cannot be allowed to it.

74. After going through the finding of the ld.CIT(A) we do not find any merit in this ground of appeal. Judgment of the Hon'ble Supreme Court is not applicable on the given facts. Hence, this ground of appeal is rejected.

75. Ground Nos.13 to 14: In these grounds of appeal, grievance of the assessee is that the ld.CIT(A) has erred in confirming disallowance of Rs.1,12,01,869/- under section 40(a)(i) of the Act.

76. Brief facts of the case are that the assessee has debited following expenditure in the profit & loss account:

Sr.NO.	Particulars	Amount
a)	Professional service expenditure paid to four parties mentioned on page no.14 of the AO order	6,70,674
b)	Reimbursement of Administrative Services to Dishman Europe Ltd.	81,02,625/-
c)	Reimbursement of Insurance & Foreign Travel Expenditure to Dishman Europe Ltd.	24,28,570/-
	Total	1,12,01,869/-

77. The ld.AO has observed that the assessee has remitted the above amount to non-resident without deducting TDS under section 195 of the Act, and therefore, this deserves to be disallowed to the assessee. Dissatisfied with the disallowance, the assessee carried the matter in appeal and filed written submissions which has been reproduced by the ld.CIT(A) on page nos.33 to 36 of the impugned order. The explanation given by the assessee *qua* this items and reproduced by the ld.CIT(A) is worth to note. It reads as under:

> *"10.2 In so far as items (b) and (c) relating to. "Reimbursement of Expenses" concerned; the appellant submits that this payment is made to non-residents who has incurred some expenditure for and on behalf of the assessee. The term "Reimbursement" has not been defined in the Act and hence its meaning has to be understood as in common parlance. As per Black's Law Dictionary the term "reimburse" means to pay back, to make restoration, to repay that is expended, to indemnify or make whole. As per the Concise Oxford Dictionary the term "reimburse" means repay (a person who has expended money) or repays (a person's expenses).*

10.3 The above definitions make it clear that a pure reimbursement should not constitute a reward or compensation paid for a service rendered. Hence, a mere reimbursement of expenses cannot be construed as a "fee" for services rendered since what is achieved by a reimbursement is a mere repayment of what has been already spent and is not a reward or a compensation for services rendered. TDS on expenses/costs reimbursed to a non-resident do not give rise to any chargeable income in the hands of a non-resident and going literally by the above principle section 195 should not get attracted for reimbursements. In addition to the payment for services received from a non-resident, the Indian '" entity generally under the terms of the contract also reimburses at actual expenses like insurance, travel, lodging, boarding etc. incurred by such foreign entity for provision of the services.

10.4 In such situations, the Courts have generally held that as there is no income element embedded in such pure reimbursements duly supported by bills etc. and contractual liability to bear them being of the resident, they are not taxable in the hands of the non-resident. Bombay High Court has in the case of CIT vs. Tata Engineering and Locomotive Co. Ltd. (245 ITR 823) held that no part of expenses of foreign technician deputed by a foreign company could be treated as payment in lieu of fees and was not liable to deduction of tax at source. In the case of CIT vs. Industrial Engg. Projects (P) Ltd. (202 ITR 1014) the Hon'ble Delhi High Court has held that reimbursement of expenses does not constitute income and accordingly not taxable. In this case, the assessee had an agreement with the foreign company to render certain services for a minimum fee of Rs. 1.2 lakhs per year. The agreement also provided that certain costs or expenses could be reimbursed. The court found that no excess amount over and above expenses incurred was received. It held that the reimbursement of expenses could not be regarded as revenue receipts. Following the above decision, reimbursement of actual expenses were held not to be 'income' in case of Clifford Chance, United Kingdom (82 ITD 106) (Mumbai ITAT). In another case, Bombay Tribunal in the case of Arthur Anderson (unreported) held that where the reimbursement is of actual expenses supported by bill no fox should be deducted. In Mahindra & Mahindra Ltd. vs. DC/T- [2005] 1 SOT896 (Mum), the ITAT held, after reviewing the case laws in the matter, that TDS u/s 795 is not required when the assessee directly incurred travelling and hotel expenses on Foreign Technicians and the same were not reimbursed to the foreign parties or the foreign technicians. In the case of CIT vs. Dunlop Rubber Co. Ltd., reported in 142 ITR 493 (CaL), the assessee company had paid its share of costs and expenses in relation to sharing the fruits of research and development as cost for impairing the information. The Hon'ble Calcutta High Court held that the amount received by the foreign company from the Indian company did not constitute income assessable under the Act. The assessee therefore submits that provisions of S. 195 on such reimbursement of expenditure are not attracted at all.

10.5 In so far as item (a) relating to professional service is concerned, the appellant submits that this payment is made to non-residents who

do not have any Permanent Establishment (PE) in India and the compensation is paid for events occurring outside India therefore the same cannot be said to be from any business connection in India. The appellant submits that the said payments are exempt from tax in view of the CBDT Circular No. 786, dated 7th February, 2000. The relevant portion of which reads as under:

"The deduction of tax at source under section 195 would arise if the payment of commission to the non-resident agent is chargeable to tax in India. In this regard attention to CBDT Circular No. 23, dated 23rd July, 1969, is drawn where the taxability of 'Foreign Agents of Indian Exporters' was considered along with certain other specific situations. It had been clarified then that where the nonresident agent operates outside the country, no part of his income arises in India. Further, since the payment is usually remitted directly abroad it cannot be held to have been received by or on behalf of the agent in India. Such payments were therefore, held to be not taxable in India. The relevant sections, namely, section 5(2) and section 9 of the Income-tax Act, 1961, not having undergone any change in this regard, the clarification in Circular No. 23 still prevails. No tax is therefore deductible under section 195 and consequently, the expenditure on export payable to a non-resident for services rendered outside India becomes allowable expenditure".

The appellant submits that the Circular issued by the Board is binding on the Assessing Officer in the light of the decision of the Supreme Court in the case of UCO Bank v. CIT [1999] 237 ITR 889 (104- Taxman 547). The appellant therefore submits that provisions of 3. 195 on such payments of sales commission are not attracted at all.

10.6 The appellant most respectfully submits that the main objection of the Id. AO was that the said expenditure is required to be added u/s 40(a)(i) of the Act as per the Karnataka High Court decision in the case of Samsung Electronics Ltd. Because the appellant has not made any application u/s 195(2) of the Act.

11.1 During the course of assessment proceedings, the Appellant vide letter dated 13[11/2009 (pi refer page no. 137 of Paper Book) submitted and explained to the Id. AO that the Appellant Company has debited Rs.8 I, 02,6221- -towards Administrative Services expenses and this expenditure was incurred on the salary, travelling and other expenditure of one of the Senior Associates Dr. Henk Pluim who is responsible for procurement, chemical development, technology up gradation, R&D etc. It was also explained that the payment was made by Dishman Europe Ltd. to Dr. Henk Pluim which was reimbursed by the Appellant to Dishman Europe Ltd and debited under the head Administrative services expenditure. The Appellant vide letter dated 01/12/2009 also submitted and explained to the Id. AO that the entire expenditure of Dr. Henk Pluim was borne by Dishman India, Dishman USA and Dishman UK on the basis of services rendered by him and devotion of his time to all these three companies. It was also explained

that the Group Chairman has finalized the allocation of expenditure considering the performance of service and devotion of time of Dr. Henk Pluim. However, the Id. AO did not appreciate this factum of the case and referred to letter dated 09/12/2009 (pi. refer page no.263-264) wherein the Appellant has mentioned that for subsequent year, the Appellant has allocated such expenditure to Dishman India, Dishman UK and Dishman USA in proportion to 40:40:20. Accordingly the Id. AO adopted the same for the year under consideration and made addition of Rs.31,13,104/-. The Appellant, in this connection submits that when for the year under consideration, the expenditure has already been allocated on the basis of advice given by the Group Chairman considering the efforts, services and devotion of time of Dr. Henk, then ,"" the action of Id. AO in adopting the mechanism for allocation of such expenditure for subsequent year is incorrect. The Appellant submits that in subsequent year Dr. Henk had provided services in proportion to 40:40:20 to Dishman India, Dishman USA and Dishman UK but that does not mean that the same mechanism should be applied for the year under consideration when the Group Chairman has allocated such expenditure. Hence, the Appellant submits that this alternate addition is also required to be deleted."

78. The ld.CIT(A) did not accept the contentions of the assessee and confirmed addition.

79. Before us, the ld.counsel for the assessee contended that both authorities have based their finding on the decision of Hon'ble Karnataka High Court in the case of Samsung Electronics, 320 ITR 209. This decision has been reversed by the Hon'ble Supreme Court in the case of GE India Technology, 327 ITR 456. He further relied upon CBDT Circular No.786 dated 7.2.2000 and order of the ITAT in the case of ACIT Vs. Best Roses Biotech P.Ltd., ITA No.283/Ahd/2013.

80. We have duly considered rival contentions and gone through the record. A perusal of the breakup of this expenditure would indicate that expenditure incurred by the assessee could be divided into three categories viz. (a) payments towards professional service charges, (b) reimbursement of administrative services to Dishman Europe Ltd., and (c) reimbursement of insurance and foreign ravel expenditure to Dishman Europe Ltd. Before making an analysis of this expenditure, we would like to take into consideration decision of Hon'ble Supreme Court in the case of GE India Technology (supra). Hon'ble Supreme Court has propounded in this decision

that a person can be held liable to deduct TDS while making payment to a non-resident if the payments made by him consists of some element of income chargeable to tax under the provisions of Income Tax Act, 1961. The ld.Revenue authorities were of the view that if the assessee has been making payment to a non-resident then either it should take a certificate from the AO under section 195(2) or deduct TDS on such payments. For this view, they are harping upon the decision of Hon'ble Karnataka High Court in the case of Samsung Electronics (supra). However, the Hon'ble Supreme Court did not concur with this view of Hon'ble High Court and observed that expression "chargeable under the provisions of the Act" is being employed under section 195(1) and if element of income is involved in the payments made by the assessee only then the TDS has to be deducted. Keeping in view this decision in mind, let us examine the nature of payment made by the assessee.

81. Let us take first category of payment made towards professional charges. According to the assessee, non-resident was not having any permanent establishment in India or any business connection. Thus, such sum is not taxable in India and no question of deducting TDS would arise. Reference to circular no.786 dated 7.2.2000 is being made. The AO failed to bring on record any material showing that recipient is taxable in India. With regard to other two items i.e. reimbursement of administrative charges and reimbursement of insurance and foreign travel expenses are concerned, these expenses have been reimbursed to Dr.Henk Pluim who was responsible for procurement, chemical development and technological upgradation etc. These amounts have been calculated on the basis of services rendered and time devoted by him to three concerns viz. Dishman UK, Dishman India and Dishman USA. The AO was of the view that allocation of expenditure was on higher side. He also observed that in subsequent year such expenses have been allocated amongst these concerns in the ratio of 40:40:20 based on advice given by the group chairman. On the basis of that ratio, the ld.AO has allocated this expenditure in this year also and worked out allowance expenditure out of Rs.81,02,622/- debited under the head "Administrative services". He observed that it should be allowed at Rs.49,89,517/-. A perusal of the assessment order would indicate that the ld.AO has assigned two reasons for making disallowance, viz. (i) non-deduction of tax, and (ii) higher

allocation of expenditure in the hands of the assessee which were incurred on Dr.Henk Pluim. As far as first party is concerned, these are simply reimbursement of administrative expenses incurred by Dr.Henk Pluim outside India. They did not involve any element of income and TDS was not required to be deducted. As far as second party is concerned, the ld.AO failed to bring any material on record to justify the administrative expenses required to be incurred for availing services of Dr.Henk. It is totally in the domain of the businessman and the AO cannot dictate terms how much salary and other expenses are necessary for availing the services. This disallowance made by the AO is not sustainable. The ld.CIT(A) ought to have not confirmed disallowance made by the AO. We allow this ground of appeal and delete addition of Rs.1,12,01,869/-.

82. Ground Nos.20 and 21: In these grounds assessee is aggrieved by the action of the ld.CIT(A) in confirming disallowance of additional depreciation on plant and machinery of Rs.2,93,19,329/-.

83. Brief facts of the case are that the assessee has filed its return of income on 31.12.2006. It has claimed depreciation of Rs.13,67,45,462/- on block of assets. However, vide letter dated 24.12.2009 it filed a revised claim of depreciation wherein it has increased an amount of Rs.14,15,32,235/-. In addition to the above increased depreciation, the assessee has claimed additional depreciation on plant & machinery installed during the year of Rs.2,93,19,329/-. This claim of additional depreciation has been rejected by the AO on the ground that the assessee did not file revised return and it could not claim enhanced depreciation. Dissatisfied with the action of the AO, the assessee carried the matter in appeal before the ld.CIT(A). It has relied upon the following decisions in supports of its claim:

i) CIT Vs. M/s.Jai Parabolic Springs Ltd., 306 ITR 402;
ii) Chicago Pneumatic India ltd. Vs. DCIT, 15 SOT 252 (Bom);
iii) JCIT Vs. Hero Honda Finlease Ltd., 115 TTJ 0752 (Del);
iv) Asheesh Securities Ltd. Vs. DCIT, 297 ITR 317 (Del);
v) Moser Bear India Ltd. Vs. JCI, 108 ITD 80 (Del);
vi) SNC Lavalin/Acres Inc. Vs. ACIT, 15 SOT 1 (Del);
vii) Kisan Discretionary family Trust Vs. ACIT, 113 TTJ 918 (Ahd)

84. The ld.CIT(A) also did not accept claim of the he assessee and observed that the assessee should have filed revised return.

85. With the assistance of the ld.representatives, we have gone through the record. In the judgment referred by the assessee before the ld.CIT(A) it has been held that decision of Hon'ble Supreme Court in the case of Goetze India puts a bar upon the power of the AO for maintaining any fresh claim if no revised return was filed. However, for appellate authorities, Hon'ble Supreme Court has not put any bar, and if a particular item is going to affect taxability of the assessee, then the appellate authorities would be justified in entertaining such claim. Details of assets are not in dispute. It has already claimed regular depreciation on these assets. The only question was whether additional depreciation could be allowed or not. Thus, the ld.CIT(A) ought to have entertained this claim of the assessee and ought to have decided the issue on merit. Taking into consideration all these aspects, we allow this ground of appeal for statistical purpose and restore this issue to the file of the AO for fresh adjudication The ld.AO shall decide this issue on merit whether additional depreciation as claimed by the assessee is admissible or not. These ground of appeal are allowed for statistical purpose.

86. Ground No.22: In this ground of appeal, grievance of the assessee relates to confirmation f disallowance of depreciation on electrical installation amounting to Rs.1,00,938/-. The ld.counsel did not press this ground of appeal, hence, rejected.

87. Ground Nos.23 and 24: In these grounds of appeal grievance of the assessee relates to disallowance of misc. expenses to the tune of Rs.15,00,000/- out of Rs.18,10,423/-.

88. We have taken up this ground of appeal while considering the Revenue's appeal.

89. Ground No.25: In this ground of appeal grievance of the assessee is that the ld.CIT(A) has erred in confirming addition of Rs.28,01,598/-.

90. The ld.CIT(A) has taken cognizance of the finding recorded by the AO on this issue and also written submissions made by the assessee. For appreciating the controversy, we deem it appropriate to take note of the finding of the ld.CIT(A) on this issue, which reads as under:

> "*12.1 The A.O. has stated in the assessment order dated 26/02/2010 which is as under:*
>
> *" Perusal of the 3CD Report shows that the auditor has worked out the effect of deviation of valuation prescribed under section 145A, at a negative figure of Rs 28,01,598/- which has been claimed as deduction by the assessee in its computation of income. The assessee was requested to explain how this figure could at all be negative, because at the most, the effect could be nil but never negative.*
>
> *In this regard, as per order sheet entry dated 09.12.2009 on record, could not explain the basis of this working by Us auditor. It was contended that this amount had been worked for raw material only. As regards finished goods it was explained that as regards the the excise duty on closing stock of finished goods as on 31/03/2006, the assessee has paid the excise duty thereon in the subsequent Financial Year 2006-07 before the date due for filing the Income tax, returns. In this regard certificate of the CA was also produced and placed on record.*
>
> *As can be seen from above, that the assessee could not substantiate its claim for deduction u/s 145A of Rs 28,01,598/-as worked out by the auditor. Accordingly the same is added back. Penalty u/s.271(l)(c) for furnishing inaccurate particulars of income is separately initiated."*
>
> *1 2.2 The appellant has submitted in its written submission which is as under:*
>
> *"In this connection, the Appellant most respectfully submits that as per the guidelines issued by Institute of Chartered Accountant's of India, the Appellant can have either "inclusive method" for accounting entries with regard to MODVAT or "exclusive method". It is explained that in the "inclusive method", the purchase of raw material debited in the books of accounts is inclusive of the corresponding MODVAT element. It is submitted that if the Appellant is following this method then the closing stock has to be valued inclusive of MODVAT element. On the other hand, in the "exclusive method" the cost of raw material debited in the purchase account is net of MODVAT element. In this system, the Appellant have a separate account for accounting for the excise duty payable and the MODVAT credit available to it. The Appellant submits that if the Appellant is following this method of accounting then the closing stock has to be valued exclusive of MODVAT element. It is however, explained that in either of the methods adopted as above, the profit of the Appellant would not change. It is, therefore, submitted that as the method adopted by the Appellant had not resulted into any*

reduction in the income of the Appellant, there was no justification in the Learned Assessing Officer making addition of Rs.28,01,598/-. It is therefore, submitted that the addition made by the Id. AO u/s 145A is required to be deleted. The Appellant also relies on Jurisdictional Ahmedabad Tribunal Order in the case of M/s Alpanil Industries bearing ITA No. 169 & 170/Ahd/2005, wherein under identical facts, the Hon'ble Bench has deleted 'addition u/s 145A made by the Id. AO. Copy of the said order is enclosed on page no.223 to 244 of written submission. Please refer paras 8 to 12 pages 225 to 234 of written submission."

2.3 I have considered the facts of the case, assessment order and appellant's submission. Appellant claimed the MODVAT from the computation of total income however assessing officer found that such claim cannot be negative. It is not in dispute that assessing officer did not make addition on account of this but rejected the appellant's claim of deduction which appellant was not able to substantiate. Therefore the judicial decision relied upon by the appellant is not relevant which relates to addition on this account. If appellant is making any claim in the computation of income, the onus to prove and substantiate it is on the appellant. Since appellant was not able to furnish required details and substantiate its claim, assessing officer is justified in rejecting the appellant's claim. In view of this, this ground is dismissed.”

91. The ld.counsel for the assessee while impugning the above finding submitted that there is no impact on taxability whether the assessee follows exclusive or inclusive method of accounting, hence no additions is called for under section 145A. He relied upon the judgment of the Hon’ble Gujarat High Court in the case of ACIT Vs. Narmada Chematur Petrochemicals, 327 ITR 369 (Guj). On the other hand, the ld.DR relied upon the orders of the AO.

92. We have duly considered rival contentions and gone through the record carefully. In the case of Narmada Chematur Petrochemicals (supra), Hon’ble High Court has observed that closing stock has to be valued at the option of the assessee i.e. at the cost or market price, whichever is lower. Duty of central excise on the goods manufactured i.e. assessable goods manufactured by the assessee does not form part of manufacturing cost. It can be termed as post manufacturing cost, and therefore, until and unless it is entered on one side as an item of cost, it cannot be taken as component of value of closing stock on the other side. True purpose of crediting the value of unsold stock is to balance the cost of those goods entered on the other side of the account. Now question is, how this judgment is applicable on the facts of the assessee before us. The assessee itself has worked out a negative figure of

Rs.28,01,598/-. But it is unable to explain how this figure has come. The ld.CIT(A) has observed that once the assessee has been claiming deduction, then it is for the assessee to explain. We have reproduced the finding of the AO, written submissions of the assessee before the ld.CIT(A) and we are unable to draw any conclusion from this half-baked facts. It is quite difficult to arrive at firm conclusion and how to apply decision of the Hon'ble High Court. Therefore, we deem it appropriate to set aside this issue to the file of the AO. The assessee shall file complete details with working and its impact as to how it has worked out negative figure of Rs.28,01,598/-. In view of the above, we allow this ground of appeal for statistical purpose.

93. Ground Nos.26 and 27: We have already taken up these two grounds along with ground no.6 and 7 of the Revenue's appeal. Hence, they are treated as allowed for statistical purpose.

94. Ground Nos.28 and 30. These grounds are general in nature and do not call for recording any specific finding, hence dismissed.

95. We now take ITA No.2957/Ahd/2013 (Revenue's appeal) and ITA No.3086/Ahd/2013 (Assessee's appeal).

96. These are cross-appeals at the instance of the assessee and Revenue against order of the ld.CIT(A) dated 31.10.2013. Sole issue involved in both the appeals relates to whether the assessee deserves to be visited with penalty under section 271(1)(c) of the Act. If yes, then what should be quantum of penalty.

97. Brief facts of the case are that the assessee has filed its return of income on 31.12.2006 declaring total income at Rs.9,55,84,979/-. The assessment order was framed under section 143(3) on 26.2.2010 determining taxable income at Rs.38,49,01,339/-. The ld.AO has made various additions for arriving at the above taxable income of the assessee. Dissatisfied with the assessment order, the assessee carried the matter in appeal before the ld.First Appellate authority who vide order dated 3.1.2011 partly deleted the addition. A notice under section 274 r.w.s 271(1)(c) of the Act was issued on 26.2.2010 inviting explanation of the assessee as to why penalty under section 271(1)(c)

of the Act be not imposed upon the assessee for concealing particulars of income or furnishing inaccurate particulars of income. The ld.AO has considered the following items of additions for imposing penalty under section 271(1)(c) of the Act:

Add: Prior Period income	*46,50,648/-*
Add: Disallowance u/s.14A	*4,76,876/-*
Add: Income as per TDS certificate less shown	*3,17,294/-*
Add: Unexplained ESIC Outstanding u/s.43B	*2,40,940/-*
Add: Sundry balances written off for capital goods	*2,86,051/-*
Add: Non deduction of TDS u/s.40(a(ia)	*1,12,01,869/-*
Add: Impact of section 145A claimed as deduction	*28,01,598/-*
Add: Misc. expenses written off	*15,00,000/-*
Add: Disallowance u/s.10B	*6,56,59,970/-*

98. After hearing the assessee, he imposed penalty of Rs.3,03,77,454/- for furnishing inaccurate particulars of income. Dissatisfied with the penalty order, the assessee carried the matter in appeal before the ld.CIT(A) who partly deleted penalty. The ld.CIT(A) has summarized his order as under:

> *"3.3 To sum-up levy of penalty with reference to the following disallowances/additions is upheld.*
>
> *(1) Addition on account of non-reconciliation of TDS and income.*
> *(2) Addition of ESIC outstanding*
> *(3) Disallowance of sundry balances written off*
> *(4) Disallowance of MODVAT u/s.14A*
>
> *Penalty levied with reference to the following balance disallowances/additions is cancelled.*
>
> *(1) Addition of prior period income*
> *(2) Disallowance /s.14A*
> *(3) Disallowance u/s.40(a)(ia)*
> *(4) Disallowance of miscellaneous expenses*
> *(5) Disallowance of deduction u/s.10B*
> *AO is directed to re-compute the penalty accordingly. These grounds of appeal re partly allowed."*

99. Thus, Revenue is aggrieved *qua* items on which penalty has been deleted by the ld.CIT(A) whereas the assessee in its appeal impugning confirmation of penalty by the ld.CIT(A).

100. With the assistance of the ld.representatives, we have gone through the record carefully. Section 271 (1)(c) of the Income Tax Act, 1961 has direct bearing on the controversy. Therefore, it is pertinent to take note of the section.

> "271. Failure to furnish returns, comply with notices, concealment of income, etc.
>
> (1) The Assessing Officer or the Commissioner (Appeals) or the CIT in the course of any proceedings under this Act, is satisfied that any person
> (a) and (b)** ** **
> (c) has concealed the particulars of his income or furnished inaccurate particulars of such income.
> He may direct that such person shall pay by way of penalty.
> (i)and (Income-tax Officer,)** ** **
> (iii) in the cases referred to in Clause (c) or Clause (d), in addition to tax, if any, payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or fringe benefit the furnishing of inaccurate particulars of such income or fringe benefits:
>
> Explanation 1- Where in respect of any facts material to the computation of the total income of any person under this Act,
>
> (A) Such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the CIT to be false, or
> (B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him, then, the amount added or disallowed in computing the total income or such person as a result thereof shall, for the purposes of Clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed."

101. A bare perusal of this section would reveal that for visiting any assessee with the penalty, the Assessing Officer or the Learned CIT(Appeals) during the course of any proceedings before them should be satisfied, that the assessee has; (i) concealed his income or furnished inaccurate particulars of income. As far as the quantification of the penalty is concerned, the penalty imposed under this section can range in between 100% to 300% of the tax sought to be evaded by the assessee, as a result of such concealment of income or furnishing inaccurate particulars. The other most important features of this

section is deeming provisions regarding concealment of income. The section not only covered the situation in which the assessee has concealed the income or furnished inaccurate particulars, in certain situation, even without there being anything to indicate so, statutory deeming fiction for concealment of income comes into play. This deeming fiction, by way of *Explanation* I to section 271(1)(c) postulates two situations; (a) first whether in respect of any facts material to the computation of the total income under the provisions of the Act, the assessee fails to offer an explanation or the explanation offered by the assessee is found to be false by the Assessing Officer or Learned CIT(Appeal); and, (b) where in respect of any fact, material to the computation of total income under the provisions of the Act, the assessee is not able to substantiate the explanation and the assessee fails, to prove that such explanation is bona fide and that the assessee had disclosed all the facts relating to the same and material to the computation of the total income. Under first situation, the deeming fiction would come to play if the assessee failed to give any explanation with respect to any fact material to the computation of total income or by action of the Assessing Officer or the Learned CIT(Appeals) by giving a categorical finding to the effect that explanation given by the assessee is false. In the second situation, the deeming fiction would come to play by the failure of the assessee to substantiate his explanation in respect of any fact material to the computation of total income and in addition to this the assessee is not able to prove that such explanation was given bona fide and all the facts relating to the same and material to the computation of the total income have been disclosed by the assessee. These two situations provided in *Explanation* 1 appended to section 271(1)(c) makes it clear that that when this deeming fiction comes into play in the above two situations then the related addition or disallowance in computing the total income of the assessee for the purpose of section 271(1)(c) would be deemed to be representing the income in respect of which inaccurate particulars have been furnished.

102. In the light of the above, let us examine each item of additions made by the AO for visualizing the fact whether the assessee deserves to be visited with penalty on such an addition or not. First we take items of addition on which penalty has been deleted by the ld.CIT(A).

103. First item is addition of Rs.46,50,000/-. It is pertinent to observe that the assessee has prior period income of Rs.46,50,648/-. It has claimed prior period expenditure which have been crystallized during this year against this income at Rs.43,11,114/-. It has credited net income of Rs.3,39,534/-. The ld.AO did not allow prior period expenditure, but assessed prior period income. While dealing with this issue in the quantum appeal, we have granted set off prior period expenditure against prior period income. Thus addition has not been confirmed by us in the quantum appeal discussed in the upper part of this order, hence, no penalty under section 271(1)(c) can be imposed upon these items.

104. We find that sub-clause (iii) of section 271(1)(c) provides mechanism for quantification of penalty. It contemplates that the assessee would be directed to pay a sum in addition to taxes, if any, payable him, which shall not be less than , but which shall not exceed three times the amount of tax sought to be evaded by reason of concealment of income and furnishing of inaccurate particulars of income. In other words, the quantification of the penalty is depended upon the addition made to the income of the assessee. Since basis for visiting the assessee with penalty has been extinguished by deleting the addition by us for the reasons stated by hereinabove in the quantum appeal, therefore, there cannot be any penalty upon the assessee under section 271(1)(c) of the Act, and accordingly, we uphold the order of theld.CIT(A) on this issue.

105. Next item is with respect to addition of Rs.15.00 lakhs out of misc. expenses. The assessee has claimed expenditure of Rs.18,10,423/- under various heads viz. library books, club membership fees, R&D expenses and deferred revenue expenses. Expenditure of Rs.14,84,530/- was claimed towards library books as revenue expenditure. On an *ad hoc* basis, a disallowance of Rs.15 lakhs has been confirmed. We have partly confirmed disallowance of Rs.10 lakhs on *ad hoc* basis. The assessee has disclosed complete facts with regard to the above books, and alternatively claimed that depreciation on books be provided to it in case this expenditure is disallowed. Considering *ad hoc* disallowance, we are of the view that this is not an item

which could be alleged that the assessee has intentionally furnished inaccurate particulars of income. The dispute between the assessee and the Revenue relates to whether expenditure incurred on books should be allowed as capital expenditure or revenue expenditure. Since the assessee failed to substantiate its explanation, therefore, *adhoc* disallowance was confirmed. But assessee does not deserve to be visited with penalty on this item. The ld.CIT(A)has rightly deleted the penalty.

106. Next item on which penalty has been deleted by the ld.CIT(A) relates to quantification of deduction admissible under section 10(B) of the Act. There is no dispute with regard to the fact that the assessee is entitled for deduction under section 10(B) of the Act. It has claimed deduction under section 10(B) of the Act at Rs.33,19,35,229/- which has been restricted by the AO at Rs.22,97,75,094/-. A disallowance of Rs.10,21,60,135/- was made. As discussed in the quantum appeal, disallowance has been made on account of following reasons viz. (a) unrealized export excluded from the export turnover, (b) other income not considered for eligible deduction under section 10(B), (c) custom duty allocated on the basis of raw-material imposed in EOU and non-EOU, (d) packing expenses and packing material expenses allocated in proportion to quantum of sales in EOUs and Non-EOU, (e) clearing and forwarding exports expenses allocated in proportion to quantum of sales in EOU and non-EOU, and allocation of administrative and interest expenses in proportion to total sales in EOU and Non-EOUs. The ld.CIT(A) has considered this issue in the penalty order as under:

> *"In the return of income appellant had claimed deduction u/s.10B of Rs.33,19,35,229/- in respect of EOU at Bavla and Naroda. In the assessment order, an amount of Rs.10,21,60,135/- (out of the said claim) was disallowed. In the appellate order this disallowance was reduced to Rs. 6,56,59,670/-. Penalty u/s.271(1)(c) was levied with reference to the amount confirmed by the CIT(Appeals). Subsequent to the appellate order dtd.03.01.2011 and impugned penalty order dtd.30.03.2012, order u/s.155 dtd.18.04.2013 was passed by the A.O. by allowing further deduction u/s.10B of Rs.3,01,00,015/-. The further deduction was allowed accepting the contention of the appellant that it had realized export debtors to the extent of Rs.l6,28,59,717/- (out of the outstanding debtors of Rs.17,52,50,303/-) within four years from the end of the previous year. In the written submission reproduced above, the Id. A.R. contended that deduction u/s.10B was claimed on the basis of the certificate of the Chartered Accountant in Form No.56G;*

thus, the claim was bonafide and appellant could not be said to have furnished inaccurate particulars or concealed income. In support thereof he relied on the cases cited at 147 TTJ 67 (Delhi), 136 ITD 177 (Indore Special Bench) and Ahmedabad Tribunal's decision in Kadam Exports Pvt. Ltd. Vs. ITO in ITA No.2890/A/2011.

The deduction u/s.10B was claimed on the basis of the certificate of CA in No.56G. The disallowance made in the assessment order was reduced by order u/s.155 by the AO. All the necessary details in support of the claim were very much placed on record by the appellant. The disallowance confirmed by the CIT(Appeals) was with reference to the unrealized export turnover, which came to be rectified later by the AO u/s.155 and other items not considered for eligible deduction (since they were held to have not been derived from the EOU). Thus, it cannot be said that appellant furnished any inaccurate particulars of the deduction claimed or concealed any particulars. In the case relied on by the Id. A.R. of ACIT Vs. DSL Software Ltd. (147 TTJ 67) (Delhi) (2012), it was held as under: -

> *"In terms of provisions of sec. 10A(5) and 80HHE(4) deduction under these sections is not admissible unless assessee furnishes in the prescribed form, along with the return of income, report of an accountant, as defined in Explanation below sub-section (2) of section 288, certifying that deduction has been correctly claimed in accordance with the provisions of these sections. The assessee had given all the particulars of income and had disclosed all facts to the AO in relation to claim for deduction u/s. 10A & 80HHE of the Act. He had discharged the onus cast on it in terms of explanation 1 to sec. 271(l)(c) of the Act. Disallowance of claim for deductions u/s.WA & 80HHE in relation to unrealized exports or disallowance of an estimated amount, having recourse to provisions of sec. 14A the Act cannot be considered as concealment of income or furnishing inaccurate particulars thereof, especially when all the relevant particulars were disclosed before the AO. Mere erroneous claim in absence of any concealment or furnishing of inaccurate particulars is no ground for levying penalty, especially when there is nothing on record to show explanation offered by assessee was not bona fide or any material particulars were concealed or furnished inaccurate. Order of CIT(A) Upheld."*

It is also seen that in the case of CIT Vs. KAS Movie (P) Ltd. [2012] 207 Taxman 183 (Mag.) (Delhi), it was held that where claim of assessee for deduction u/s.80HHF was rejected on the ground that basic condition for claim of deduction U/S.80HHF was not satisfied by the assessee, levy of penalty u/s.271(l)(c) was not called for. Further, in the case of Geeta Prings (P.) Ltd. Vs. Asstt. CIT [2012] 247 CTR 620 (Guj.), it was held as under: -

> *"the assessee had made full disclosure about the claim. The claim was also certified by the chartered accountant. Necessary*

declarations in the prescribed forms were made, May be, in the case of the assessee, such claim on merits was not granted. However, this did not mean that the assessee had concealed any income. Further, the issue ultimately at any rate was debatable since one High Court has already held in favour of the assessee.

When no information as given in return was found to be incorrect, penalty could not be imposed."

Keeping in view the facts of the case and the above stated case laws, I am of the view that impugned part disallowance of the deduction claimed u/s.10B does not attract the penal provisions of Section 271(l)(c). Penalty levied with reference to the said disallowance is not sustainable."

107. Further, in the quantum appeal, we have observed that unrealized export turnover excluded from the eligible profit for grant of deduction under section 10(B) ought to be excluded from the total turnover. We have directed the AO to re-calculate the deduction admissible to the assessee, after this exercise. The ld.CIT(A) in quantum appeal further did not concur with the contention of the AO that custom duty ought to be re-allocated on the basis of raw-material imports in EOU and Non-EOU units. We have confirmed action of the ld.CIT (A) by holding that in EOU units no custom due was payable, and therefore, there is no requirement of re-allocating custom duty in EOU units from Non-EOU units. Thus, this addition has not been upheld by the Tribunal, and therefore, penalty *qua* this item could not be imposed upon the assessee.

108. Similarly, in this very order, we have rejected ground no.7 in Revenue's quantum appeal by holding that expenditure from non-EOU units ought not to be allocated to EOU units for the purpose of deduction under section 10(B). On an analysis all these records would indicate that the ld.CIT(A) has appreciated the controversy in right perspective and held that on the adjustment made in the eligible deduction under section 10(B) the assessee does not deserves to be visited with penalty. This ground of appeal raised by the Revenue is rejected.

109. Ground no.3 and 4 in the Revenue's appeal related to visiting the assessee with penalty with regard to the adjustment made in the amount of deduction admissible under section 10(B) of the Act. We do not find any reasons to interfere in the finding of the ld.CIT(A) because the assessee has

not furnished any inaccurate particulars of income *qua* this claim for deduction under section 10(B). Hence, adjustment has been made simply for the reasons that the assessee has included unrealized export in the eligible deduction on the basis of certificate of the chartered accountant. Therefore, we do not find any merit in the appeal of the Revenue. It is dismissed.

110. As far as appeal of the assessee is concerned the first item on which penalty has been confirmed is addition of Rs.28,01,598/-. This addition has been made with the aid of section 145A of the Act.

111. We have already set aside this issue to the file of the ld.CIT(A) while dealing with grounds raised by the assessee in its quantum appeal, hence, penalty cannot be imposed on this item.

112. Next item on which penalty has been challenged is on addition of Rs.3,17,294/-. This addition was made by the AO on the ground that on reconciliation of income reflected in TDS certificate, the assessee has not offered any income of Rs.3,17,349/-. The case of the assessee is that this amount has been offered in subsequent years because it was not realized in this year. Though on the basis of credit taken in the TDS certificate, addition has been made, but it is pertinent to observe that in every assessment year, the assessee has been offering prior period income. Thus, possibility of its reconciliation in subsequent year cannot be ruled out. The assessee cannot be deserved to be visited with penalty on this addition.

113. Next item relates to addition of Rs.2,40,940/-. According to the AO as per 3CD reort, ESIC outstanding at the end of year was shown at Rs.1,96,709/- whereas as per the groupings of balance sheet, ESI outstanding payable was of Rs.4,53,004/-. The AO made addition of differential under section 43B of the Act. The case of the assessee is that in From No.3CD report outstanding was shown at Rs.1,96,709/-. This amount has been added back. Therefore, the AO ought to have not taken cognizance of other amounts. On due consideration of the facts, we are of the view that on account of some difference of opinion, with regard to accounting entry this addition has been made. In the Form 3CD the assessee has shown

outstanding of Rs.1,96,709/- and this amount has been added back because it was not actually paid to ESIC account. Other amount mentioned for making addition is available in the balance sheet and not in 3CD report. There must be some communication gap or some reconciliation required, but it cannot be said that the assessee has furnished inaccurate particulars of this item. The ld.CIT(A) is not justified in confirming penalty. Penalty is accordingly deleted.

114. Next item on which the assessee has been visited with penalty relates to the addition of Rs.2,86,051/-. The assessee has made payment of certain advances for purchase of machinery. It did not purchase machinery and could not realize the advance paid by it. It claimed as bad debts. The ld.CIT(A) has observed that it is capital loss and it cannot be claimed under section 36(2) of the Act. On due consideration of the above facts, we are of the view that the assessee has disclosed complete particulars of item and claimed it on the ground that was a business loss, because it could not recover the money given to the suppliers. The difference of opinion between the assessee and the Revenue is whether it was a revenue expenditure or capital expenditure. The Revenue disallowed the claim by it, treating it as a capital expenditure. Considering the stand of the assessee, it cannot be said that assessee has furnished inaccurate particulars of income. Therefore, no penalty is imposable on this addition also.

115. In the result, we allow appeal of the assessee and delete penalty confirmed by the ld.CIT(A), whereas the appeal of the Revenue is devoid of any merit, hence dismissed.

116. In combined result, all appeals of the Revenue are dismissed. Assessee's CO No.89/Ahd/2011 is partly allowed. Assessee's appeal in ITA No.3086/Ahd/2013 is allowed and ITA No.773/Ahd/2011 is partly allowed.

Order pronounced in the Court on 23rd May, 2018 at Ahmedabad.

Sd/-	Sd/-
(AMARJIT SINGH)	(RAJPAL YADAV)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Ahmedabad; Dated 23 /05/2018