

**In the Income-Tax Appellate Tribunal,
Delhi Bench 'D', New Delhi**

**Before : Shri Amit Shukla, Judicial Member And
Shri L.P. Sahu, Accountant Member**

**ITA Nos. 2935, 2936 & 2937/Del/2015
Assessment Years: 2008-09, 2009-10 & 2010-11**

Ozone Pharmaceutical Ltd., C/o M/s. RRA TAXINDIA, D-28, South Extension, Part-I, New Delhi PAN- AAACO 0056H (Appellant)	vs.	Addl. C.I.T., Range-13, New Delhi. (Respondent)
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**ITA Nos. 3770, 3771 & 3772/Del/2015
Assessment Years: 2008-09, 2009-10 & 2010-11**

Addl. C.I.T., Range-13, New Delhi. (Appellant)	vs.	Ozone Pharmaceutical Ltd., 1-LSC, Block A-3, Janakpuri, New Delhi. (Respondent)
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Assessee by	S/Sh. Rakesh Gupta & Somil Aggarwal, Adv.
Revenue by	Sh. Surender Pal, Sr. DR

Date of Hearing	25.02.2019
Date of Pronouncement	15.04.2019

ORDER

Per Bench:

The aforesaid cross appeals filed by the assessee and the Revenue are directed against separate orders of Id. CIT(A)-7, New Delhi all dated 03.03.2015 for the assessment years 2008-09, 2009-10 and 2010-11

respectively. The grounds raised by both the parties in their respective appeals read as under :

Grounds raised by assessee :

A.Y. 2008-09:

1. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in not allowing the statutory claim of deduction u/s 80IC of Rs.56,78,153/- pertaining to Guwahati Unit and has further erred in restricting the deduction to the extent of Rs.4,90,68,559/- instead of Rs.5,47,46,712/- as claimed by the assessee and that too by recording incorrect facts and findings and without giving adequate opportunity of hearing.*
2. *That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in not allowing the statutory claim of deduction u/s 80IC of Rs.56,78,153/- pertaining to Guwahati Unit and has further erred in restricting the deduction to the extent of Rs.4,90,68,559/- instead of Rs.5,47,46,712/- as claimed by the assessee is bad in law and against the facts and circumstances of the case.*
3. *Without prejudice to the above ground and having regard to the facts and circumstances of the case, deduction u/s 80IC should have been allowed on the amount of income assessed by Ld. AO.*

A.Y. 2009-10:

1. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in not allowing the statutory claim of deduction u/s 80IC of Rs. 1,09,81,936/- pertaining to Guwahati Unit and has further erred in restricting the deduction to the extent of Rs. 1,64,93,324/- instead of Rs.2,74,75,260/- as claimed by the assessee and that too by recording incorrect facts and findings and without giving adequate opportunity of hearing.*
2. *That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in not allowing the statutory claim of*

deduction u/s 80IC of Rs.1,09,81,936/- pertaining to Guwahati Unit and has further erred in restricting the deduction to the extent of Rs. 1,64,93,324/- instead of Rs.2,74,75,260/- as claimed by the assessee is bad in law and against the facts and circumstances of the case.

3. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not deleting the disallowance of Rs.10,55,810/- fully as made by Ld. AO u/s 14A read with Rule 8D and has further erred in sustaining the disallowance to the extent of Rs.1,55,707/- under Rule 8D(2)(iii) of Income Tax Rules, 1962.*

4. *That in any case and in any view of the matter, action of Ld. CIT(A) in not deleting the disallowance of Rs.10,55,810/- fully as made by Ld. AO u/s 14A read with Rule 8D and has further erred in sustaining the disallowance to the extent of Rs. 1,55,707/- under Rule 8D(2)(iii) is bad in law and against the facts and circumstances of the case.*

5. *Without prejudice to the above ground and having regard to the facts and circumstances of the case, deduction u/s 80IC should have been allowed on the amount of income assessed by Ld. AO.*

A.Y. 2010-11:

1. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in reducing the claim of deduction u/s 80IC to the extent of Rs.34,70,235/- instead of Rs. 1,45,58,026/- as claimed by the assessee in its return of income and that too by recording incorrect facts and findings and without giving adequate opportunity of hearing and in violation of principles of natural justice.*

2. *That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in reducing the claim of deduction u/s 80IC to the extent of Rs.34,70,235/- instead of Rs.1,45,58,026/- as claimed by the assessee is bad in law and against the facts and circumstances of the case.*

3. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. AO in*

disallowing a sum of Rs. 18,24,490/- on account of interest of FNCR which was to be paid to the bank on the accrual basis as per law.

4. *That in any case and in any view of the matter, action of Ld. CIT(A) in confirming the action of Ld. AO in disallowing a sum of Rs. 18,24,490/- on account of interest of FNCR is bad in law and against the facts and circumstances of the case.*

5. *That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in not deleting the disallowance of Rs.14,54,111/- fully as made by Ld. AO u/s 14A read with Rule 8D and has further erred in sustaining the disallowance to the extent of Rs. 1,09,400/- under Rule 8D(2)(iii) of Income Tax Rules, 1962.*

6. *That in any case and in any view of the matter, action of Ld. CIT(A) in not deleting the disallowance of Rs.14,54,111/- fully as made by Ld. AO u/s 14A read with Rule 8D and has further erred in sustaining the disallowance to the extent of Rs. 1,09,400/- under Rule 8D(2)(iii) is bad in law and against the facts and circumstances of the case.*

7. *Without prejudice to the above ground and having regard to the facts and circumstances of the case, deduction u/s 80IC should have been allowed on the amount of income assessed by Ld. AO.*

2. From the aforesaid grounds of appeal, it emerges out that the assessee has challenged sustenance of following additions by the ld. CIT(A) in all the three assessment years under consideration :

	<u>2008-09</u>	<u>2009-10</u>	<u>2010-11</u>
Deduction u/s. 80IC	56,78,153	1,09,81,936	1,10,87,971
Deduction u/s. 14A	-	10,55,810	1,09,400
Disallowance of intt. On FNCR	-	-	18,24,490

Grounds Raised by Revenue:**A.Y. 2008-09:**

1. On the facts and in the circumstances of the case, the Ld CIT(A) has erred in deleting the addition of Rs. 1,11,55,261/- made by the AO on account of 'sales promotion expenses' without appreciating the facts that the assessee failed to submit the details material with evidence and the bills/vouchers relating to sales promotion expenses were not furnished in full.

2. On the facts and in the circumstances of the case, the Id CIT(A) has erred in deleting the disallowance of depreciation of Rs.82,200/- claimed at a higher rate of 60% on UPS by assessee company without appreciating the facts that since UPS cannot be treated as a part of computer since the technology which goes into making UPS is not developing so rapidly to make it obsolete in the short span, it can be treated as 'plant and machinery'.

3. On the facts and in the circumstances of the case, Id CIT(A) has erred in deleting the disallowance of out of foreign travelling expense Rs.7,69,757/- without appreciating the facts that there was no direct nexus of the expenditure incurred with the business of the assessee company and addition that the expenses were incurred for excursion and its travel to France and no material evidence was available for showing business in USA and or China.

A.Y. 2009-10:

1. On the facts and in the circumstances of the case, the Ld CIT(A) has erred in deleting the addition of Rs.1,22,37,690/- made on account of "Sales Promotion Expenses" without appreciating the facts that the assessee failed to submit the details materials with evidence and bills/vouchers relating to sales promotion expenses were not furnished in full.

2. On the facts and in the circumstances of the case, the Id CIT(A) has erred in law in deleting the disallowance of Rs.9,00,103/- out of total disallowance of Rs.10,55,810/- made by Assessing Officer u/s 14A r.w.r 8D(2(ii) by ignoring the mandatory provisions of sub-rule 8D r.w.s.14A of the Income tax Act, 1961.

A.Y. 20010-11:

1. On the facts and in the circumstances of the case, the Ld CIT(A) has erred in deleting the addition of Rs. 13,86,656/- since the assessee is not entitled to claim deduction u/s 80IC on the products which are being manufactured by other company without appreciating the facts that the assessee has failed to submit the details material with evidence.

2. On the facts and in the circumstances of the case, the Id CIT(A) has erred in deleting the addition of Rs. 1,21,42,231/- on account of 'Sale promotion expenses' without appreciating the facts that the assessee company has failed to submit the details material with evidence and the bills /vouchers relating to sale promotion expenses were not furnished in full.

3. On the facts and in the circumstances of the case, the Id CIT(A) has erred in deleting the addition of Rs. 52,20,590/- made on account of 'Sale promotion expenses' claimed in the name of sister concerns without appreciating the facts that the assessee company has not established that the expenditure on sale promotion with reference to the fair market value of services for which the payment has been made to sister concern of the assessee company.”

3. The Revenue by way of aforesaid grounds, has challenged the impugned orders for deletion of following additions in all these years under consideration :

	<u>2008-09</u>	<u>2009-10</u>	<u>2010-</u>
<u>11</u> Sales Promotion Expenses	1,11,55,261	1,22,37,690	1,21,42,231

Sales Promotion Expenses

in name of sister concern	-	-	52,20,590
Excess Depreciation On UPS	82,200	-	-
Foreign Travel Expenses	7,69,757	-	-
Deduction u/s. 14A	-	9,00,103	-
Deduction u/s. 80IC	-	-	13,86,656

4. For the sake of convenience and brevity, we first take up the appeals of the assessee. The first issue common in all the appeals of assessee is with respect to deduction u/s. 80IC. We take up the facts from appeal for A.Y. 2008-09, which are similar to other appeals barring the amount of additions.

5. The brief facts of the issue are that the assessee is engaged in the manufacturing of Allopathic medicines. The assessee claimed deduction u/s. 80IC on a sum of Rs.5,47,46,712/- on manufacturing profit derived from EPIP, Amingaon, Gauhati Assam and the taxes were paid only on book profit declared u/s. 115JB of the IT Act. In the assessment proceedings, the Assessing Officer noticed the deduction claimed by assessee u/s. 80IC, inter alia, included a sum of Rs. 56,78,153/-, which was shown in the profit and loss account as other income under the Guwahati Unit, the details of which are given in the assessment order. The Assessing Officer referring to the provisions of section 80IC and relying on various case laws observed that the deduction u/s. 80IC is available only from the profits and gains derived from manufacture or produce of an article and thing by the undertaking and not on the other income including interest income as declared by the assessee in the profit and loss account. The Assessing Officer, accordingly, disallowed the deduction of Rs.56,78,153/- and restricted the claim of assessee u/s. 80IC to

Rs.4,90,68,559/-. Similar disallowances on the identical reasoning were also made to the tune of Rs.1,09,81,936/- & Rs.1,10,87,971/- respectively for the assessment years 2009-10 and 2010-11. In appeal, the ld. CIT(A) confirmed the action of the Assessing Officer on the premise that the aforesaid incomes were not linked with the manufacturing activity and are not derived from the manufacturing activity of the undertaking. He also relied on several decisions on the issue.

6. Before us, the ld. counsel for the assessee, reiterating the submissions made before the ld. CIT(A), submitted that the aforesaid amounts pertain to the business activities of the assessee carried out at Guwahati and as such the denial of deduction u/s. 80IC on such incomes is not justified. However, the ld. AR of the assessee further submitted in his written synopsis on this issue as under :

In this regard, it is respectfully submitted that deduction under section 80IC of the Act has been disallowed in respect of the 'other incomes' of the appellant, however, it includes interest subsidy, insurance subsidy and similar incomes which are inextricably linked to the business of the appellant and are eligible for deduction u/s 80IC as held in the decision of Hon'ble Supreme court of India in case of CIT vs. Meghalaya Steels Ltd. 383 ITR 217(SC) dated 09.03.2016, It is pertinent to submit that Hon'ble Apex Court in the aforesaid decision have considered their lordships earlier decision in the case of Liberty India vs. CIT (2009) 317 ITR 218 (SC) and accordingly, it is submitted that since the aforesaid judgment was not available when the orders of the lower authorities was passed, issue raised in these grounds may please be restored for examination in the light of decision of Hon'ble Supreme court of India in case of CIT vs. Meghalaya Steels Ltd. 383 ITR 217 (SC). Further, reliance is placed on the

written submission reproduced in the order of Ld.CIT (A) on page 5-6 of the appellate order.

7. The ld. DR, on the other hand, supporting the orders of the authorities below, submitted that the ld. authorities below are justified in disallowing the impugned deduction which was not in consonance with the provisions of section 80IC of the Act. Therefore, the decision reached by the ld. authorities below based on various judicial pronouncements does not call for any interference.

8. Having considered the rival submissions and perused the entire material available on record, we find that the ld. authorities below have mainly based their conclusions on the basis of decision of Hon'ble Supreme Court in the case of Liberty India vs. CIT (2009) 317 ITR 218. The contention of the assessee has been that the claim of assessee u/s. 80IC included interest subsidy, insurance subsidy and similar incomes which are inextricably linked to the business of the assessee and therefore, the deduction u/s. 80IC is available to the assessee on such income in view of the decision in the case of CIT vs. Meghalaya Steels Ltd. (supra) where the Hon'ble Court has given due consideration to their earlier decision in the case of Liberty India vs. CIT (supra). This recent decision of Hon'ble Apex Court was not available at the time of assessment proceedings. As per submissions of the assessee, the subsidies in respect of insurance, interest and sales tax remission were given by the Assam Government which are incidental to the business of the

assessee. Besides, the assessee has also given the details of income allocated to its Head Office as under :

Profit on sale of assets	Rs.99,765/-
Misc. Bal. W/off	Rs.5,02,061/-
Cheque Dishonour charges	Rs.4,49,941/-
Interest income	Rs.2,50,053/-
Misc. receipts	Rs.1,70,578
Penalty interest income	Rs.2,99,791/-
Tax remission Assam Account	Rs.9,11,729/-
Testing charges Income	<u>Rs.28,81,625/-</u>
	<u>Rs.54,65,328/-</u>

A perusal of the assessment order, as also contended on behalf of the assessee, we find that the Assessing Officer has not examined these incomes as detailed above. In presence of all these facts, and in view of our aforesaid discussion, we think it appropriate to restore this issue to the file of Assessing Officer to decide the same afresh after examining all the details of income and in the light of recent decision of Hon'ble Supreme Court in the case of CIT vs. Meghalaya Steels Ltd. (supra). Needless to say, the assessee shall be given reasonable opportunity of being heard. Accordingly, Grounds Nos. 1 & 2 in all the three appeals of the assessee for A.Yrs. 2008-09, 2009-10 and 2010-11 are allowed for statistical purposes. Ground No.3 raised in A.Y. 2008-09 is misconceived as no disallowance of expenditure is made during this year.

9. The second issue involved in appeals of assessee for A. Yrs. 2009-10 and 2010-11 is with respect to disallowance u/s. 14A . The brief facts of the issue are that the assessee had made investment in shares of Rs. 3.14 crores in

equity, units of mutual funds and preference share capital of companies in A.Y. 2009-10 and of Rs. 85,15,314/- in A.Y. 2010-11, out of which the assessee earned dividend income of Rs.2,775/- and Rs.1606/- respectively. Since the assessee had earned exempt income out of aforesaid investments, the AO observed that the assessee was required to disallow expenditure in relation to such investment, the income from which does not form part of the total income. The contention of the assessee has been that since all the above investments were made out of deployment of internal accruals of the company, i.e. own funds, no expenditure was incurred by the assessee for earning exempt income, as no borrowed funds were utilized in such investments. The AO, however, concluded that the assessee has made substantial investment for maintenance of which, it is essential to incur expenditure. He accordingly disallowed expenditure u/s. 14A, as noted above, after calculating the same as per formula prescribed u/r. 8D of the IT Rules. In appeal before the Id. CIT(A), the first appellate authority, after considering detailed written submissions of the assessee, deleted the disallowance calculated u/r. 8D(2)(ii), but confirmed the disallowance calculated u/r. 8D(2)(iii) in both the years, thereby giving relief to the assessee of Rs. 9,00,103/- and Rs.13,44,711/- respectively for the A.Yrs. 2009-10 and 2010-11.

10. The Id. AR, reiterating the submissions made before the Id. CIT(A), further submitted a written synopsis stating that the disallowance should be limited to the extent of exempt income in view of the decision of Delhi High Court in *Joint Investment vs. CIT*, 372 ITR 694. It was also submitted that in

case disallowance out of expenses incurred relating to the unit eligible for deduction u/s. 80IC is sustained, deduction u/s. 80IC may be allowed with regard to the enhanced profit as per CBDT Circular No. 37/16 dated 02.11.2016.

11. The ld. DR, on the other hand, supporting the orders of the Assessing Officer, submitted at the outset that the ld. CIT(A) was not justified in giving partial relief to the assessee without considering the findings reached by the Assessing Officer on this score. It was submitted that in order to make investment and to manage it, it requires high skilled personnel and decisions and therefore, management expenditure incurred in such investments cannot be ruled out. The assessee had failed to the details to substantiate its contention that only own fund was utilized in the investments. The assessee has also paid interest during the year, therefore, the AO has rightly disallowed expenditure u/s. 14A by applying the provisions of Rule 8D.

12. We have heard the rival submissions and have gone through the entire material on record. We noted from the order of the ld. CIT(A) that the assessee had invested in shares etc., income from which does not form part of the total income. It is also noticed from assessee's submissions made before CIT(A) that assessee has also earned Rs.28,73,189.85 as profit from partnership firm, namely M/s. Ozone Architectural Products from investment of Rs.1,83,87,130/- in A.Y. 2009-10. The share of profit from firm falls u/s. 10 and exempt from tax. This fact has not been considered by the ld. CIT(A) while

examining the contention of the assessee that he had earned exempt income only to the extent of Rs.2,725/-. However, the assessee has not declared in his written submission before the CIT(A) nor before us whether said exempt income was received by the assessee in A.Y. 2010-11 or not. Once, the assessee had earned substantial exempt income out of investments made in the partnership firm, the contention of the assessee that he had earned exempt income of Rs.2725/- is nothing but misleading one.

13. Adverting to the calculations made u/r. 8D(2)(ii), we find that the assessee had substantial mixed funds comprising of internal and external funds to take care of the impugned investments. Therefore, the Id. CIT(A) was justified to delete the disallowances made as per Rule 8D(2)(ii). However, while going through the calculation of disallowance made u/r. 8D(2)(iii) by the AO, it is not clear whether average value of investment taken pertains to such investment, from which the assessee had earned exempt income or not. It is also not clear whether the investment made in the partnership firm for earning exempt income is considered in it or not. In presence of these facts, this issue also deserves to be remitted back to the Assessing Officer for deciding the same afresh after examining true facts and figures of investments, as narrated above and after considering the decision of Hon'ble Jurisdictional High Court in the case of Joint Investment vs. CIT, 372 ITR 694 (Del). While deciding this issue, the AO shall also consider the alternative plea of the assessee that in case disallowance out of expenses incurred relating to the eligible unit for deduction u/s. 80IC is sustained, the assessee is entitled to deduction u/s. 80IC with regard to the enhanced profit as per CBDT Circular

37/2016 dated 2nd November, 2016. Accordingly, grounds Nos. 3 & 4 for A.Y. 2009-10 and 5 & 6 for A.Y. 2010-11 are allowed for statistical purposes. Ground No. 5 in A.Y. 2009-10 and Ground No.7 in A.Y. 2010-11 also stand decided as per our above discussion.

14. The last issue involved in assessee's appeal for A.Y. 2010-11 is disallowance of interest on FCNR. On this issue, the contention of the assessee as made in the written synopsis is that the assessee is maintaining books on mercantile basis and the interest on FCNR loan was paid on 09.08.2010, i.e., before due date of filing of return of income and accordingly, this amount may be allowed as per section 43B of the Act and necessary directions may be given for verification by the Assessing Officer. He also sought relief as per CBDT Circular No. 37/2016 dated 02.11.2016 in case any disallowance with respect to eligible unit is sustained.

15. The ld. DR supported the orders of the lower authorities.

16. After hearing both the sides and perusing the record, we find that as per assessee the interest on FCNR was paid on 09.08.2010 before filing the return of income (date of filing of return mentioned in asst. order as 31.03.2012) and as such, this amount is allowable u/s. 43B of the Act. This fact requires verification at the stage of AO. In case the contention of the assessee is found correct, then this amount would be allowable u/s. 43B of the Act and in case it

is found otherwise, the AO shall examine the disallowance on the anvil of CBDT Circular No. 37/2016 dated 02.11.2016, as contended by the assessee also in alternate. Accordingly, this issue is also restored to the file of AO to decide it afresh after giving reasonable opportunity of hearing to the assessee. Accordingly, ground No. 3 for A.Y. 2010-11 is also allowed for statistical purposes.

17. In the result, all the appeals of assessee are allowed for statistical purposes.

18. Now, we come to the appeals of Revenue. The first common issue involved in all the three years is with respect to deletion of additions made on account of Sales Promotion Expenses of Rs.1,11,55,261/-, Rs.1,22,37,690/- and Rs.1,21,42,231/- respectively. We first take up the appeal for A.Y. 2008-09.

19. The brief facts of the issue are that the assessee company has two units – one at Baddi and other at Guwahati. Gauhati unit of the assessee company is engaged in the business of manufacturing of medicines and that of Baddi is in manufacturing and sale of medicines. The profits derived by the assessee from its Guwahati units are eligible for deduction u/s. 80IC of the IT Act. In the assessment proceedings, the AO noticed that the assessee had debited Rs.14,87,36,813/- under the head sales promotion and incentives in the PL

account. On being asked for information and details alongwith justification of these expenses, the assessee submitted the details of Sale Promotion expenses where TDS was applicable. It was also stated that these expenses consist of many heads and are booked in thousands of accounts. It was also stated that it is not possible to attach copies of all the accounts and that incurring of these expenses is imperative to ascertain continuous growth of the company. The AO was not satisfied with the assessee's reply and observed that bills/vouchers relating to sales promotion expenses were not furnished fully. He, therefore, made lump sum disallowance of 7.5% of such expenses claimed, amounting to Rs. 1,11,55,261/-. In appeal, the Id. CIT(A) deleted the addition after considering detailed submissions made and various case laws cited by the assessee. The Id. CIT(A) while deleting the impugned addition stated that the AO has not pointed out any specific expenditure which were not vouched of genuine.

20. The Id. DR supported the order of the AO and submitted that complete bills and vouchers were not produced before the AO and some of the expenditure were also incurred in cash. Mere tax deduction at source does not prove actual expenditure incurred for the business purposes.

21. The Id. AR of the assessee, on the other hand, reiterated the submissions made before the Id. CIT(A) and supported the impugned order. He also submitted written synopsis before us, stating that the expenditure is wholly and exclusively for the purpose of business and identical disallowance was

made in assessee's own case in A.Y. 2006-07 and the Tribunal deleted the disallowance. In alternate, it was submitted that in case disallowance out of expenses incurred relating to the unit eligible for deduction u/s. 80IC is sustained, deduction u/s. 80IC may be allowed with regard to the enhanced profit as per Circular No. 37/2016 dated 02.11.2016.

22. After hearing both the parties we find that before the Id. CIT(A), it was emphatically submitted by the Id. Counsel for the assessee that complete books of accounts along with complete bills and vouchers were produced before the AO. However, on perusal of the assessment order, it reveals that the AO has categorically averred that complete bills/vouchers were not produced. It was also stated before the Id. CIT(A) that the assessee has brought complete accounts alongwith complete bills/vouchers and requested the CIT(A) to verify at his own or to get them verified from the AO. But while deleting the entire addition, the findings recorded by Id. CIT(A), nowhere demonstrate that the impugned expenditure were verified by the Id. CIT(A) from bills/vouchers alleged to have been produced before him or any remand report was called for from the Assessing Officer so as to get them verified. This was incumbent upon the Id. CIT(A) to call for the remand report of the AO, particularly when the AO had observed non-production of complete bills/vouchers in the assessment proceedings. Therefore, deletion of addition made by the Id. CIT(A) does not appear justified for want of verification. We, accordingly, remit this issue back to the file of AO for deciding it afresh after making proper and thorough verification of the expenditure from the books of assessee as well as from bills and supporting vouchers thereof. The assessee is

required to furnish complete books of account and bills/vouchers before the AO for verification. The AO is also directed to examine the alternative contention of assessee that in case disallowance out of expenses incurred relating to the unit eligible for deduction u/s. 80IC is sustained, then the deduction u/s. 80IC may be considered with regard to enhanced profit as per Circular No. 37/2016 dated 02.11.2016. Needless to say, the assessee shall be given reasonable opportunity of being heard. In view of our this discussion, ground No. 1 in A.Y. 2008-09 and 09-10 and ground No. 2 in A.Y. 2010-11 are allowed for statistical purposes.

23. Regarding next issue involved in appeal for A.Y. 2008-09, we find that the AO has made addition of Rs.82,200/- on account of excess depreciation claimed @ 60% by the assessee on computer UPS. This issue stand already decided by Hon'ble Jurisdictional High Court in the case CIT vs. BSES Rajdhani Powers Ltd. dated 31.08.2010 in ITA No. 1266/2010. Respectfully following the decision of Hon'ble Court, we do not find any justification to interfere with the order of ld. CIT(A) on this count. Accordingly, ground No. 2 in appeal for A.Y. 2008-09 is dismissed.

24. Ground No. 3 relates to foreign traveling expenditure of Rs.7,69,757/- incurred by Managing director Shri S.C. Sehgal along with Mr. Praveen Kumar Ms. Neeta, employee of the company. The AO disallowed these expenditures on the premise that the assessee failed to establish any business exigency in

this regard. The ld. CIT(A) deleted the addition on the reasoning that the AO did not specify the expenditure without any bill/voucher.

25. The ld. DR submitted that since the assessee failed to prove any business exigency to conduct foreign travel with other employees, the AO was justified to disallow the same.

26. The ld. AR, on the other hand, reiterated the submissions made before the ld. CIT(A) and supported the impugned order. In alternate, it was submitted that in case these expenditures are disallowed, the assessee's enhanced profit for eligible unit may be considered for deduction u/s. 80IC as per CBDT Circular No. 37/2016 dated 02.11.2016.

27. After considering the submissions of both the parties, we find substance in the contention of assessee. It is not the case of the AO that the impugned expenditure were not supported by any evidence or were not open for verification. Secondly, the submissions made before the ld. CIT(A) were also that the assessee had invested in M/s. Ozone Research Frontier Ltd. in USA, in which research in respect of protein sequence was being carried out and also visited China to attend the Trade Fair. These submissions of assessee do not stand controverted by the ld. DR. Therefore, it cannot be said that the aforesaid visits were made for the purpose other than business. We, therefore, reject this ground.

28. The next issue involved in appeal of Revenue for A.Y. 2009-10 is with regard to deletion of disallowance u/s. 14A amounting to Rs.9,00,103/-. This issue is covered by our decision on ground No. 3 & 4 of assessee's appeal for A.Y. 2009-10, whereby the impugned issue has been restored back to the file of AO. Accordingly, the present issue also stands remitted back to the AO on the similar terms. Thus, ground No. 2 of Revenue's appeal for A.Y. 2009-10 stands allowed for statistical purposes.

29. In Revenue's appeal for A.Y. 2010-11, ground No. 1 pertains to deletion of addition of Rs.13,86,656/- made on account of deduction u/s. 80IC. In the assessment proceedings, the AO noticed that the assessee had disclosed total sales of Rs.55,54,17,290/- from its Gauhati Unit and claimed deduction on profits u/s. 80IC at Rs.1,45,58,026/-. The AO further noticed that the assessee had purchased medicines of Rs.5,29,03,667/- from M/s. Ozone Ayurvedics. In this regard, the assessee submitted written reply as under :

"We have purchased various kind of medicines for Rs.5,29,03,667/- from M/s. Ozone Ayurvedics which are exclusively manufactured medicines for our company. Such as IITIS eye Wanish Cream, Wanto Capsules which are of Ayurvedic in nature and we sell them through our company."

In view of the above explanation of the assessee, the AO observed that the above purchase of Aurvedic medicines were not manufactured by the assessee's undertaking, but were made as a result of trading activities, on

which no deduction is available u/s. 80IC. Accordingly, the deduction u/s. 80IC was disallowed on proportionate profit. In appeal, the Id. CIT(A) deleted the addition after considering the detailed submissions of the assessee.

30. While the Id. DR supported the order of the AO, the Id. AR of the assessee reiterated the submissions made before the Id. CIT(A) and relied on the findings of first appellate authority.

31. We have heard both the parties and perused the entire material on record. The submissions made before the Id. CIT(A) on behalf of the assessee on this issue read as under :

GROUND NO. 4 and 5 - Deals with the grievance of the appellant against the action of the Ld. AO in further reducing the deduction claimed by the assessee u/s 80IC by an amount of Rs.13,86,656/- on the ground that deduction cannot be allowed on trading activity carried on by the appellant company for the medicines purchased from its sister concern M/s Ozone Ayurvedics as trading activity is not eligible for deduction u/s 80IC of the Act.

In this regard, it is respectfully submitted that Assessee Company is engaged in manufacturing of medicines as well as in trading of medicines. Assessee Company claims deduction u/s 80IC on the profits earned by its manufacturing unit situated at Guhawati. Besides having its manufacturing unit in Guwahati, Assessee Company is also engaged in business of trading in medicines. For the purposes of trading, appellant company makes purchases from different parties and in turn books sales of these medicines in its trading unit only. It is submitted that 80IC unit of the appellant company does not make any purchases for trading and is engaged in the manufacturing of medicines only. Ld. AO inadvertently presumed that purchases made from M/s. Ozone Ayurvedics (an

associated concern of the assessee company) of Rs. 5 Crores are for Guwahati Unit, and these are sold from Guwahati Unit only, whereas, the fact is that these medicines were purchased by the assessee company in the trading units only and has no concern with the purchases made by the Guwahati Unit, which is also evident from the raw material purchases shown in the Profit & Loss Account of Guwahati Unit which is only for a sum of Rs.7,24,02,774/-. It is submitted that purchases made from M/s Ozone Ayurvedics (sister concern of the appellant company) is for the items which are not manufactured by the appellant company as those items are got manufactured by M/s Ozone Ayurvedics only and are traded by the appellant company. Since these items are not sold by M/s Ozone Ayurvedics to any third party, as such, no comparison can be made with any other party for similar products as no such product is made by any other party. Since 80IC unit has not made any purchases of any such product and has also not made any trading thereof the addition has been made by Ld. AO under a misconception. Therefore, Ld. AO made the addition under a misconception. Therefore, the addition made of Rs. 13,86,656/- considering proportionate basis on the sales made by the 80IC unit is contrary to facts when no such sales include any such item which has been directly sold from the 80IC unit. Since no purchases are made for any trading purpose by 80IC unit, the addition made on mere presumptions and on surmises may kindly be directed to be deleted.

PB 18 is copy of the Profit and Loss A/c of Guwahati Unit which reveal that no purchases have been made by the Guwahati unit.

PB 5 is copy of the computation of income which shows that deduction u/s 80IC has been claimed by the assessee company only on profits of the Guwahati unit.

32. On the strength of above submission, the assessee has claimed that the AO while disallowing the deduction u/s. 80IC, has wrongly treated the above purchases and sales of manufactured medicines by the eligible unit of Guwahati, whereas the fact is that the aforesaid purchase and sales were made in the trading unit of assessee and not in the account of eligible unit of

assessee. This fact needs verification at the stage of Assessing Officer. In case the above purchase and sales of manufactured medicine is found to have been made by assessee's trading unit, no disallowance can be made on the profit of eligible unit on this count, but if it is found otherwise, the AO shall be at liberty to decide the issue in accordance with law, as it is an admitted fact that the impugned purchases and sale pertain to the Ayurvedic Medicines which were not manufactured by assessee, but by its sister concern M/s. Ozone Ayurvedics. Accordingly, this issue is remitted back to the AO for deciding it afresh in the light of above verification. Needless to say, the assessee shall be given reasonable opportunity of being heard.

33. The last issue involved in appeal of the Revenue for A.Y. 2010-11 is with respect to Sales Promotion Expenses in the name of sister concern amounting to Rs.52,20,590/- made by the AO and deleted by the Id. CIT(A). The brief facts relating to this issue are that in the assessment proceedings, the AO noted that the assessee had claimed sales promotion expenses in the profit & loss account to the tune of Rs.16,18,96,408/-, out of which a sum of Rs.5,22,05,896/- had been paid to the following parties, which are relatives as per section 40A(2)(b) of the IT Act :

(i).	M/s. Ozone Ayurvedics	3,75,02,642/-
(ii).	M/s. Fourth Dimension Media P. Ltd.	1,17,76,015/-
(iii).	M/s. Fourth Dimension IMC P. Ltd.	25,51,988/-
(iv).	M/s. Ozone Mission	3,75,251/-

		5,22,05,896/-

The assessee was asked to justify the genuineness of expenses and whether the expenses are at Arm's length. In response, the assessee submitted that they had purchased magazines from M/s. Fourth Dimension Media Pvt. Ltd. at market rate and payments to other parties also on comparable market rates, therefore, the provisions of section 40A(2)(b) are not applicable in this case. The AO being not satisfied with the reply of assessee, concluded that the assessee failed to prove the payments made to the sister concerns are not in arm's length. He, therefore, disallowed a lump sum expenditure to the tune of Rs. 52,20,590/- representing to 10% of the total payments as noted above by invoking the provisions of section 40A(2)(b). In appeal before the Id. CIT(A), the assessee filed a written submission stating as under :

GROUND NO. 7:

This ground is against the action of Ld. AO in making a disallowance of a sum of Rs.52,20,590/- by invoking provisions of section 40A(2)(b) on the ground that assessee has claimed sales promotion expenses in the name of its sister concerns.

Assessee company has incurred an expenditure of Rs. 16,18,96,408/- on sales promotion expenses. Out of this Rs. 12,82,16,537/- are claimed in respect of Guhawati unit. In case assessee would have made excess payment to its associated concerns it would mean that assessee has claimed excess expenses in Guhawati unit and meaning thereby the profits of Guhawati unit shall be reduced. First of all it is submitted that the addition made of Rs.52,20,590/- may first be reduced on pro rata basis which works out $(Rs.52,20,590 \times RS.12,82,16,537/-) / RS.16,18,96,408/- = Rs. 41,34,533/-$ in respect of Guhawati unit. Whereas, the fact is that no excess payment of any nature is made in respect of these expenses incurred which is evident from the following fact and evidences placed in the paper book.

Respectfully submitted that assessee company incurred an expenditure on advertisement, purchase of magazines, and designing work and made payment to its Associated concerns as under:-

In this regard, it is further submitted that items purchased by the appellant company from its associated concern are not sold by these associated concerns to any other party.

1) M/s Ozone Ayurvedics - Rs.3,75,02,642/-.

Items purchased from M/s Ozone Ayurvedics are either the items of sales promotion or the items for trading which are exclusively for the assessee company. No such items purchased either as sample or for trading or for sales promotion are sold by M/s Ozone Ayurvedics to any third party.

2) M/s Fourth Dimension Media Pvt. Ltd. - Rs.1,17,76,015/-

Fourth Dimension Media Pvt. Ltd. published magazines for the products manufactured by the assessee company. These magazines are sold in the market but market sales are very nominal. Whereas bulk purchases are made by the assessee company since these materials (magazines) are purchased by the assessee company for promoting its sales as it contains advertisement materials and describes the products manufactured by the assessee. For this reason, assessee purchased bulk magazines and these are at lesser price as compared to price at which these are sold to other vendors who purchases these magazines in small quantities. Therefore, without appreciating these facts the addition made by Ld. AO @ 10% in an ad hoc manner is contrary to law and without appreciating the facts of the case.

PB 92 - 118 are copies of bills evidencing the rates at which magazines have been sold to appellant company and to third parties by M/s Fourth Dimension. In view of above submissions, it is humbly prayed the provisions of section 40A(2)(b) are not applicable in the case of the appellant company.

3) M/s Fourth Dimension IMC Pvt. Ltd. - Rs.25,51,988/-

From this company, assessee gets some designing work done for its products. Since this work is got done in house from associated concern in

order to keep the secrecy of the business no comparable rates could be made available as no work is got done from outside of this very nature.

In view of the above submissions made, since assessee has not incurred any expense and has not inflated the expense in any manner and further Ld. AO has not brought any contrary material on record to disprove the contentions of the appellant company, the addition made in the ad hoc manner may kindly be directed to be deleted.

4) M/s Ozone Mission - Rs. 3,75,251/-

Assessee company gets incense sticks (aggarbattis) which is also a sales promotion item and no trading is done either by the appellant company or by M/s Ozone Mission in these items. These items are purchased by the assessee at best available price and there cannot be any comparable Figures.

It is respectfully submitted that to prove contrary that assessee had paid any excess amount more than the market price of any item is for the Ld. AO to prove. No disallowance can be made just on presumptions and whims and surmises and just for the purpose that the same have been purchased by the assessee from its sister concern, that too when no such item is available in the open market and it has been exclusively manufactured as per the specifications and formula of the appellant company.

In view of the above, the disallowance made at 10% in an ad hoc manner is contrary to law and facts of the case and may kindly be directed to be deleted.

PB 54 - 55 is assessee's letter dated 08-03-2013 filed before Ld. AO giving submissions on the above aspect.

Without prejudice to the above submissions, it is respectfully submitted that if disallowance of expenses u/s 40A(2)(b) is confirmed then we may please be allowed deduction u/s 80IC vis- a-vis that amount.

The ld. CIT(A), after considering the aforesaid written submissions deleted the addition, observing that the expenditure incurred was neither excessive nor unreasonable having regard to the fair market value of services for which payments were made. It was also observed that all the correspondence and details of professional charges paid were given to the AO and copies of TDS, returns and statement of account were shown. Therefore, treating the impugned expenditure to have been incurred for the purpose of business, the ld. CIT(A) deleted the addition.

34. The ld. DR supported the order of the AO and submitted that the assessee failed to prove that the payment made for services/goods were at arm's length, which was the primary onus of the assessee not being discharged. Therefore, the AO was justified to make the adhoc addition. The case law relied by assessee is not applicable.

35. The ld. AR on the other hand, reiterated the submissions made before the CIT(A) and submitted that the ld. CIT(A) has rightly deleted the addition after considering the written submissions of the assessee. It was further submitted that the onus to prove that the impugned expenditure were excessive or unreasonable was on the Assessing officer, which he failed to discharge while making the adhoc addition. Reliance is placed on the decision in the case of S.K. Engineering vs. JCIT, 103 ITD 97 (Bang. Tribunal) and ACIT vs. Bombay Real Estate Developers Co. Pvt. Ltd. (64 DTR 137) and Anurag Agarwal vs. ACIT, ITA No. 497/Agra/2015. In alternate, the ld. Counsel

submitted that in case any addition is sustained on this head, the enhanced profit of eligible unit may be considered for deduction u/s. 80IC in terms of Circular No. 37/2016 dated 02.11.2016.

36. We have considered the rival submissions and have gone through the material on record and we find substance in the contention of the assessee that once, the AO alleges that the impugned payments to related entities were not in arm's length, the onus was on the AO to prove the same, which he failed to discharge. It is not in dispute that the impugned payments were made for sales Promotion of the assessee company. In the instant case, the AO has failed to bring any material on record to prove that such expenditure made by the assessee are excessive or unreasonable as contemplated u/s. 40A(2)(b) of the Act. The assessee had produced complete details with respect to these payments before the AO, as noted by the Id. CIT(A) in the impugned order. We, therefore, do not find any justification to interfere with the decision of Id. CIT(A) while deleting this addition u/s. 40A(2)(b). It is however, stated that the payments made by assessee to its associate concerns worth Rs.5,22,05,896/- were included in the total sales promotion expenses of Rs.16,18,96,408/- claimed by the assessee, of which 7.5% has already been disallowed by the AO for want of proper bills/vouchers etc. and that issue has been remitted back by us to the AO for fresh decision. Therefore, while deciding that issue, the AO is directed to reduce this payment of Rs.5,22,05,896/- from the total Sales Promotion expenses of Rs.16,18,96,408/- and then if any disallowance is made with respect to the eligible unit of assessee, the resultant enhanced profit of such eligible unit

may be considered for deduction u/s. 80IC. Accordingly, this ground of Revenue is dismissed.

37. No other issue is involved in all these appeals.

38. In the result, the appeals of assessee are allowed for statistical purposes and those of Revenue are partly allowed for statistical purposes.

Order pronounced in the open court on 15.04.2019.

Sd/-

(Amit Shukla)
Judicial member

Sd/-

(L.P. Sahu)
Accountant Member

Dated: 15.04.2019

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Copy of order forwarded to:

(1) *The appellant*

(3) *Commissioner*

(5) *Departmental Representative*

(2) *The respondent*

(4) *CIT(A)*

(6) *Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi