IN THE INCOME TAX APPELLATE TRIBUNAL
"E" Bench, Mumbai

Before Shri Rajesh Kumar, Accountant Member
and Shri Ravish Sood, Judicial Member

ITA No.6141/Mum/2003
(Assessment Year: 2000-2001)

M/s Nicholas Piramal India Ltd. Piramal Healthcare Ltd. (Earlier known as Nicholas Piramal India Ltd), 4th Floor, Piramal Tower Annexe, Ganpatrao Kadam Marg, Lower Parel (W), Mumbai – 400013	Vs.	Addl. Commissioner of Income - tax Range-7(1), Mumbai

PAN – AAACN4538P

(Appellant) **(Respondent)**

ITA No.6392/Mum/2003
(Assessment Year: 2000-2001)

D.C.I.T, Circle-7 (1), 452, Aayakar Bhavan, M.K. Marg, Mumbai.	Vs.	M/s Nicholas Piramal India Ltd. Piramal Healthcare Ltd. 4th Floor, Piramal Tower Annexe, Ganpatrao Kadam Marg, Lower Parel (W), Mumbai – 400013

PAN – AAACN4538P

(Appellant) **(Respondent)**

Appellant by: Shri J.D. Mistry, Senior advocate,
Respondent by: Shri Ronak Doshi, A.R

Date of Hearing: 19.12.2019
Date of Pronouncement: 17.01.2020

O R D E R

PER RAVISH SOOD, JM

The captioned cross appeals filed by the assessee and the revenue are directed against the order passed by the CIT(A)-XXIV, Mumbai, dated 14.07.2003 which in turn arises from the assessment order passed by the A.O under Sec. 143(3) of the Income Tax Act, 1961 (for short 'Act'), dated 28.02.2003 for A.Y 2000-01. We shall first advert to the appeal of the assessee wherein the impugned order has been assailed on the following grounds of appeal before us:

"Ground I

1. The Learned Commissioner of Income Tax (Appeals) XXIV, Mumbai ("the Learned CIT(A)") erred in upholding the action of the Additional Commissioner of Income Tax, Range-7(1), Mumbai ("the ACIT") in disallowing MODVAT by clubbing it to the closing stock value and adding it to the Appellant's taxable income.

2. He failed to appreciate and ought to have held that:

   (a) the valuation of closing stock of raw materials at cost net of MODVAT credit was made by the appellant on the basis of accepted accounting principles, as duly supported by the recommendations of the Institute of Chartered Accountants of India;

   (b) the appellant's method of valuing stock net of MODVAT enables a correct and proper determination of the cost of stocks and the profits of the year;

   (c) since the purchases were booked by the appellant net of MODVAT it was only fair, proper and correct that the stocks also be valued at cost net of MOD VAT;

   (d) valuing the stocks at cost (including MODVAT element) when purchases are booked net of MODVAT is incorrect, unjustified and contrary to accepted accounting principles and practices relating to stock valuation;

   (e) the appellant consistently having followed the present method of stock valuation, the revenue was not adversely effected in any way;

4. The appellant prays that no adjustment is called for to stock valuation on account of MODVAT Excise Duty Credit and that the valuations of stocks done by the appellant be held as proper valuations.

Without Prejudice to above

GROUND II:

1. The Learned CIT (A) erred in upholding the action of the ACIT in increasing u/s. 145A of the Income Tax Act, 1961 ("the Act") the value of closing stock by Rs.45,58,000/- on account of MOD VAT, without proportionately increasing the value of the opening stock.

2. He failed to appreciate that:

   (i) The purpose of section 145A is to ensure that the value of opening and closing stock reflects the correct value.

   (ii) Once the value of the closing stock is increased by adding to it the MODVAT element, by the same principle the value of opening stock should also be increased otherwise it would result into distortion of the profits of the year.

(iii) The Institute of Chartered Accountants of India in its guidelines on Tax Audit u/s.44AB has stated that if any adjustment is required to be made in the closing stock the effect of the same should be given in the opening stock also.

3. The Appellant, therefore, prays that the ACIT be directed to increase even the value of opening stock to the extent of MODVAT and to adjust the effect of net increase /decrease in value of stock while determining the total income for the year under consideration.

GROUND III:

The Appellants crave leave to add to, alter or amend any of the aforesaid grounds as they may be advised from time to time."

2. Also, the assessee had raised an additional ground of appeal which reads as under:

"GROUND I

1. The Learned Commissioner of Income Tax (Appeals) - XXIV, Mumbai ("the CIT(A)") erred in restricting the disallowance u/s. 14A at 2% of the gross exempt income instead of deleting the entire disallowance being alleged expenses attributed for earning tax-free income.
2. He further erred in holding that some administrative expenses were bound to be incurred for earning such tax-free income.
3. He failed to appreciate and ought to have held that:

(i) The investment were made out of own funds i.e. capital and reserves and not out of borrowed funds; and

(ii) Where no expenditure has been actually incurred, no estimation can be made to disallow expenditure for earning exempt income.

4. The Appellant therefore prays that the disallowance of alleged expenses attributed at 2% of the gross exempt income be deleted."

3. Briefly stated, the assessee company which is engaged in the business of manufacturing and sale of pharmaceuticals had filed its return of income for A.Y 2000-01 on 30.11.2000, declaring a total income of Rs.nil. Further, the 'book profit' under Sec.115JA of the Act was shown at Rs.13,54,86,010/-. Subsequently, the assessee revised its return of income on 18.03.2002, declaring its total income at Rs.nil and the 'book profit' under Sec. 115JA at Rs.13,51,56,008/-. The revised return of income filed by the assessee company was processed as such under Sec. 143(1)(a) of the Act. Thereafter, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act.

4. During the course of the assessment proceedings the A.O inter alia made the following additions/disallowances in the hands of the assessee:

Sr. No.	Particulars	Amount
1.	Addition to the value of 'closing stock' under Sec.145A	Rs. 45,58,000/-

2.	Disallowance under Sec. 14A	Rs. 39,08,450/-
3.	Disallowance of the assesses claim of depreciation on assets acquired on amalgamation of Piramal Holdings Ltd. & Boehringer Manheim India Ltd. [Rs.22,28,68,220/- (-) Rs.11,08,48,442/-]	Rs.11,20,19,778/-
4.	Disallowance of expenditure incurred on closure of factory at Thane	Rs. 28,92,000/-
5.	Re-characterization of software development expenditure as capital expenditure, leading to consequential disallowance/addition	Rs. 1,16,79,995/-
6.	Disallowance of voluntary retirement scheme expense	Rs. 8,40,96,000/-
7.	Disallowance of membership fees	Rs. 3,03,500/-
8.	Declining of 'set off' of brought forward 'long term capital loss' on priority basis as against the short term capital gains, before 'set off' of the same against the Long term Capital gain.	…

On the basis of his aforesaid observations the A.O assessed the income of the assessee company under the normal provisions at Rs.15,83,05,481/-. Also, the 'book profit' of the assessee under Sec. 115JA was reworked at Rs.13,51,56,008/-.

5. Aggrieved, the assessee assailed the assessment order before the CIT(A). On the basis of necessary deliberations, the CIT(A) observed that the issue pertaining to disallowance of depreciation of Rs.22,28,68,220/- in respect of the assets acquired by the assessee on amalgamation from M/s Piramal Holdings Ltd. (for short 'PHL') and M/s Boehringer Manheim India ltd. (for short 'BMIL') was covered by the orders passed by his predecessor in the assese's own case for the preceding year viz. A.Y. 1997-98, 1998-99 & 1999-2000. Accordingly, the CIT(A) directed the A.O to allow the depreciation that was claimed by the assessee on the assets of PHL and BMIL as per the observations which were recorded by his predecessor while disposing off its appeals for the preceding three years. As regards the disallowance under Sec. 14A of the Act that was worked out by the A.O at 5% of the amount of the exempt dividend income, the CIT(A) following the order passed by his predecessor in the assese's own case for the immediately preceding year viz. A.Y. 1999-2000, directed the A.O to adopt a similar approach and restrict the disallowance to 2% of the exempt dividend income of Rs. 7,81,69,000/- that was earned by the assessee during the year under consideration. As regards the disallowance of the "Thane factory" closure expenses of Rs.28,92,000/-, the CIT(A) relied on the order passed by his predecessor in the assese's own case for A.Y. 1998-99 and directed the A.O to vacate the said disallowance. As regards the re-characterisation of the software expenses as a 'capital expenditure' by the A.O, which had led to a consequential disallowance/addition of Rs.1,16,79,995/-, the CIT(A) drawing support from the order passed by his predecessor in the assese's own case for A.Y. 1997-98 directed the A.O to allow the computer software expenses as a revenue expenditure. Insofar, the disallowance of VRS

expenditure of Rs.8,40,96,000/- was concerned, it was observed by the CIT(A) that a similar disallowance of VRS expenditure by the A.O in the assesse's own case for A.Y 1998-99 was on appeal vacated by his predecessor and allowed as a revenue expenditure, vide his order dated 22.05.2001. As such, the CIT(A) adopting the same reasoning directed the A.O to delete the disallowance of Rs.8,40,96,000/- that was made by the A.O on account of VRS expenditure. As regards the disallowance of club membership fees of Rs. 3,03,500/-, the CIT(A) taking cognizance of the fact that the issue was squarely covered in favour of the assessee by the judgment of the Hon'ble High Court of Bombay in the case of Otis Elevator Company India Ltd. Vs. CIT (1992) 195 ITR 682 (Bom), directed the A.O to vacate the said disallowance. On the issue pertaining to the raising of the value of the 'Closing stock' by an amount of Rs. 45,58,000/- on account of MODVAT, the CIT(A) not finding favour with the contentions advanced by the assessee upheld the said disallowance. As regards the claim of the assessee that the A.O had erred in declining the assesse's claim for 'set off' of the b/forward 'long term capital loss' first against the Short Term Capital Gain (STCG) before the same was adjusted against the Long Term Capital Gain (LTCG), the CIT(A) being of the view that the aforesaid claim of the assessee was in conformity with the provisions of Sec.74 of the Act, hence directed the A.O to accept the same. On the basis of his aforesaid deliberations the CIT(A) partly allowed the appeal.

6. That both the assessee and the revenue being aggrieved with the order of the CIT(A) have carried the matter in appeal before us. Before proceeding any further, we shall first deal with the admission of the additional 'ground of appeal' that has been raised by the assessee before us. On a perusal of the additional 'ground of appeal', we find that the assessee had assailed before us the part sustaining of the adhoc disallowance under Sec. 14A of the Act by the CIT(A). Although, the assessee had assailed the aforesaid disallowance in its "Ground of appeal No. II(1)" before the CIT(A), however, it had inadvertently omitted to challenge the same in the original 'grounds of appeal' that were filed in its appeal before us. On the basis of the aforesaid facts as the assessee had inadvertently omitted to assail the disallowance under Sec. 14A in its appeal before us, therefore, the additional 'ground of appeal' raised by it is admitted.

7. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. The ld. Authorized Representative (for short 'A.R') for the assessee at the very outset of the hearing of the appeal submitted that majority of the issues involved in the present cross-appeals were covered either by the orders of the ITAT/High Court in the assesse's own case, or otherwise. In support of his aforesaid claim, the ld. A.R had filed a 'Chart' wherein the respective issues which had been assailed by the parties before us, alongwith the basis as per which the same were claimed to be covered is stated.

8. Per contra, the ld. Departmental Representative (for short 'D.R') relied on the orders of the lower authorities. However, the ld. D.R. did not controvert the claim of the counsel for the assessee that certain issues in the present cross-appeals were covered in favour of the assessee.

9. We shall first advert to the addition of Rs. 45,58,000/- made by the A.O to the 'closing stock', which thereafter had been sustained by the CIT(A). In the course of the assessment proceedings it was observed by the A.O that as per the tax 'audit report' the assessee had followed a non-inclusive method of accounting for MODVAT with regard to inventory, purchases and sales. It was the claim of the assessee before the A.O, that the aforesaid treatment had no impact on its profit. However, it was observed by the A.O that the unutilised balance of MODVAT credit of stock-in-trade was reflected in the 'balance sheet' of the assessee company as an 'asset' amounting to Rs.45.58 lacs. It was observed by the A.O, that as per Sec.145A the unutilised MODVAT was required to be included in the value of the 'closing stock'. Observing, that the assessee had failed to substantiate its claim that there would be no effect on its profit for the year under consideration due to non-inclusion of the amount of MODVAT in the value of its 'closing stock', the A.O declined to accept the same and raised the value of the 'closing stock' by an amount of Rs.45.58 lacs. On appeal, it was submitted by the assessee that as it was consistently following the method of neither adding the MODVAT for accounting the consumption nor for valuing the 'closing stock', therefore, the said method for valuation which was consistently being followed by it could not have been rejected. It was further submitted by the assessee, that as it had not included the excise duty element in its purchase and consumption, therefore, the same could not form part of its 'closing stock'. Alternatively, it was

submitted by the assessee that the value of 'opening stock' may be proportionately increased by adopting the same reasoning that was applied by the A.O for increasing the value of the 'closing stock' on account of MODVAT element. However, the aforesaid claim of the assessee was declined by the CIT(A). Observing, that the addition on account of the MODVAT element had to be mandatorily included in the value of the 'closing stock' in view of the provisions of Sec.145A, the CIT(A) upheld the view taken by the A.O. Also, the CIT(A) declined to accede to the claim of the assessee regarding a proportionate increase in the value of the 'opening stock', for the reason, that nothing in the said regard was provided in Sec.145A of the Act. As such, the CIT(A) upheld the addition of Rs.45,58,000/- that was made by the A.O.

11. We have given a thoughtful consideration to the aforesaid issue before us. On a perusal of Sec.145A, we find that the same was inserted by the Finance (No.2) Act, 1998 w.e.f 01.04.1999. It provided that the valuation of purchase and sale of goods and inventory for the purpose of determining the income chargeable under the head "profits and gains of business or profession" shall be in accordance with the method of accounting that was regularly employed by the assessee and would be further adjusted to include the amount of any tax, duty, cess etc paid or incurred by the assessee to bring the goods to the place of its location as on the date of valuation. As such, the aforesaid statutory provision provided that the amount of tax, duty, cess etc. is liable to be included in the value of purchase, sales, opening and closing stock. We find substantial force in the claim of the ld. A.R that it would not be appropriate to include the closing MODVAT in the figure of the 'closing stock' without modifying the figures of purchase, sale and opening stock. Our aforesaid view is fortified by the judgment of the **Hon'ble High Court of Bombay** in **CIT VS. Mahalaxmi Glass Work (P) Ld. (2009) 318 ITR 116 (Bom)** and that of the **Hon'ble High Court of Delhi** in **CIT Vs. Mahavir Aluminium Ltd. (2008) 297 ITR 77 (Del)**, as well as the order of a coordinate bench of the **Tribunal i.e ITAT, Mumbai bench "D**" in **R.R. Kable Ltd. Vs. Addl. CIT-7(2), Mumbai (2012) 25 taxman.com 559 (Mum).**

12. We find that it is the claim of the ld. A.R that irrespective of whether the assessee follows Inclusive or Exclusive method of valuation of stock, the amount of unutilised MODVAT shall have no bearing on the profits of the assessee. In sum and substance, it is the claim of the ld. A.R that irrespective of whether the assessee follows Inclusive or Exclusive method of

valuation of stock the amount of unutilised MODVAT credit will have no impact on the profits of the assessee.

13. On the basis of his aforesaid submissions, it is the claim of the ld. A.R that the deviation on the profit of the year on account of method of valuation prescribed under Sec. 145A would work out at Rs.nil. We have given a thoughtful consideration to the aforesaid claim of the ld. A.R and find substantial force in the same. In fact, we find that a similar issue had came up before us in the assesse's own case for A.Y. 2009-10 viz. Piramal Healthcare Ltd. Vs. DCIT-7(1), Mumbai [ITA No. 1257/Mum/2014, dated 30.09.2019]. In the aforesaid case, the matter was restored by us to the file of the A.O to verify the claim of the assessee that deviation on the profit of the year on account of method of valuation prescribed under Sec. 145A would work out at Rs. nil. Accordingly, in the backdrop of the facts involved in the case before us, we are of the considered view that the matter in the same terms is required to be restored to the file of the AO for verifying the claim of the assessee that irrespective of whether it follows Inclusive or Exclusive method of valuation of stock, the amount of unutilised MODVAT shall have no bearing on its profits for the year under consideration. Needless to say, the A.O in the course of the 'set aside' proceedings shall afford a reasonable opportunity of being heard to the assessee, who shall remain at a liberty to furnish documentary evidence and/or working to substantiate its aforesaid claim. Accordingly, the matter is restored to the file of the A.O to give effect to our aforesaid observations. The **Ground of appeal No. 1** raised by the assessee is allowed for statistical purposes.

14. We shall now advert to the disallowance made by the A.O under Sec. 14A of 5% of the exempt dividend income of Rs. 7,81,69,163/-, therein leading to a consequential addition of Rs.39,08,450/- in the hands of the assessee. On appeal, the CIT(A) taking cognizance of the view taken by his predecessor in the assesses own case for A.Y. 1999-2000, had restricted the said disallowance to 2% of the amount of exempt dividend income. It is the claim of the ld. A.R that no disallowance under Sec. 14A was called for in the case of the assessee.

15. We have given a thoughtful consideration and are unable to persuade ourselves to subscribe to the same. In the assesses own case for A.Y.1999-2000, the A.O had worked out the disallowance under Sec. 14A at 5% of the amount of the exempt dividend income, which thereafter was scaled down by the CIT(A) to 2% of the exempt income. On further appeal, the

order of the CIT(A) was upheld by the Tribunal, vide its order passed in DCIT, Circle-7(1) Vs. M/s Nicholas Piramal India Ltd. ITA No. 5065/Mum/2003, dated 30.09.2019 (copy of the order placed on record). The ld. A.R had not been able to establish that the facts pertaining to the aforesaid disallowance in its case for the immediately preceding year viz. A.Y 1999-2000 were distinguishable as against that for the year under consideration. On the basis of the aforesaid facts, we are of the considered view that the disallowance under Sec. 14A in the case of the assessee for the year under consideration viz. A.Y. 2000-01 had rightly been restricted by the CIT(A) to 2% of the exempt dividend income of Rs.7,81,69,000/- that was earned by the assessee during the year under consideration. The **additional** g**round of appeal** raised by the assessee is dismissed.

16 The appeal of the assessee is partly allowed in terms of our aforesaid observations.

ITA No. 6392/Mum/2003
A.Y. 2000-01
(Department's Appeal)

17. We shall now advert to the appeal filed by the revenue. The revenue has assailed the impugned order on the following grounds of appeal before us:

> "1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in accepting the assessee's device of not claiming depreciation in respect of assets taken over on amalgamation of Piramal Holding Ltd. and M/s Boehringer Mannheim India Ltd. (BMIL), ignoring the omission of the provisions of Section 34 (1) of the Act w.e.f 1.4.1988 relying on the Supreme court judgement in the case of Mahindra Mills reported in 243 ITR 56 which pertains to the period prior to the omission of the section.
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> 2. On the fact and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting disallowance of expenditure on closure of Thane Factory of Rs.28,92,000/-.
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> 3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of software development expenses of Rs. 1,16,79,995/- and erred in deleting that the same are of revenue in nature as against the finding of the AO that the same had resulted in a benefit of an enduring nature and is therefore capital in nature.
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> 4. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in allowing VRS expenses of Rs.8,40,96,000/- as revenue expenses even though expenditure on VRS resulted in enduring benefit of the assessee and therefore constituted expenditure of capital nature.
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> 5. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in deleting the disallowance of Rs. 3,03,500/- on account of membership fees following the decision in the case of M/s. Otis Elevators Ltd., though the department has not accepted the decision of Bombay High Court.

6. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in directing the AO that the brought forward long term capital loss is to be first adjusted against the short term capital gain before the same is adjusted against the long term capital gain and also erred in holding that the same is in accordance with the provision of Sec. 74 of the I. T. Act 1961 although the provisions of Sec. 74 do not prescribe any such precedents to short term capital gain over long term capital gain for the purpose of setting off of brought forward capital loss.

7. The appellant prays that the order of CIT(A) on the above grounds be set aside and that of the AO be restored. The appellant craves leave to amend or alter any ground or add a new ground that may be necessary."

18. We shall take up the respective additions/disallowances which had been vacated by the CIT(A) and had been assailed by the revenue in its present appeal before us. We shall first take up the claim of the revenue that the CIT(A) was in error in directing the A.O to allow depreciation as claimed by the assessee on the assets of PHL and BMIL. As is discernible from the records, BMIL had merged with the assessee company on 01.04.1996. The assessee had claimed depreciation on the assets so acquired on the basis of their W.D.V as on 31.03.1994. As BMIL had not claimed depreciation on its assets for the A.Ys 1995-96 & 1996-97, therefore, the A.O worked out the W.D.V as on 01.04.1996 as if the depreciation for the A.Ys 1995-96 & 1996-97 was notionally allowed. Also, in respect of the pharma division that was taken over by the assessee from PHL the W.D.V was adopted on the basis of the income-tax records. On appeal, it was observed by the CIT(A) that a similar claim of depreciation that was raised by the assessee in A.Y 1997-98, A.Y 1998-99 and A.Y 1999-2000 was allowed by his predecessor. Accordingly, following the view taken by his predecessor the assesses claim for depreciation was allowed by the CIT(A).

19. Aggrieved, the revenue has assailed the order of the CIT(A) on the ground that he had erred in accepting the claim of depreciation raised by the assessee on the assets taken over on amalgamation of BMIL and PHL, ignoring the provisions of Sec. 34(1) of the Act that were made available on the statute w.e.f 01.04.1988. Per contra, it is the claim of the ld. A.R that the issue herein involved is squarely covered by the order of the Tribunal in the assesse's own case for A.Y 1997-98, A.Y 1998-99, A.Y 1999-2000. Also, it was submitted by the ld. A.R that the Tribunal by drawing support from its earlier orders for the aforementioned preceding years had taken the same view while disposing off the appeal of the revenue for A.Y 2009-10, vide its order passed in ITA No. 1486/Mum/2014, dated 07.05.2019. The ld. A.R had drawn our

attention to the observations of the Tribunal in context of the issue under consideration while disposing off the aforesaid appeals.

20. We have perused the aforesaid orders passed in the assesse's own case by the Tribunal in the aforementioned years, and are persuaded to subscribe to the claim of the ld. A.R that the issue as regards the entitlement of the assessee towards claim of depreciation on the assets taken over on amalgamation of BMIL and PHL is squarely covered in favour of the assessee. The Tribunal while disposing off the appeal of the assessee for A.Y 1998-99 had followed its earlier order for A.Y 1997-98, and had observed that the assesse's claim for depreciation on the assets taken over on amalgamation of BMIL and PHL was found to be in order. The Tribunal while concluding as hereinabove had observed as under:

> "11. Ground No. 3 & 4 raised by the Revenue in its appeal read as under:-
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> > 3. Erred in accepting the assessee's devise of not claiming depreciation in respect of assets taken over on amalgamation of BMIL and MPIL ignoring omission of the provisions of section 34 (1) of the I.T. Act w.e.f. 1-4-1988 relying on the Supreme Court judgment in the case of Mahindra Mill reported in 243 ITR 56 which pertains to the period prior the omission of the section;
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> > 4. Erred in accepting the assessee's devise of not claiming depreciation on the assets of PHL taken over on amalgamation ignoring omission of the provisions of section 34(1) of the I.T. Act w.e.f. 1-4-1988 relying on the Supreme Court judgment in the case of Mahindra Mill reported in 343 ITR 56 which pertains to the period prior the omission of the section."
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> 12. After considering the rival submissions and perusing the relevant material on record, it is observed that an identical issue was involved in assessee's own case for A.Y. 1997-98 and the Tribunal vide its order dtd. 16-05-2012 passed in ITA No. 4602/Mum/2001 has decided the same in favour of the assessee after recording all the relevant facts as well as the submissions of both the sides and decision rendered thereon in para No. 22 to 28 which read as under:-
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> > "22. Gr.No.2 raised by the Revenue reads as follows:
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> > > "2. Erred in a accepting assessee's device of not claiming depreciation ignoring omission of the provisions of Sec. 34(1) of the I.T. Act w.e.f. 01/04/1988 relying on the Hon'ble Supreme Court judgment in the case of M/s. Mahindra Mills Ltd. reported in 243 ITR 56 which pertained to the period prior to the section's omission."
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> > 23. As already seen BMIL merged with the assessee company as per the scheme of amalgamation w.e.f. 1/4/96. The assessee has claimed depreciation on the assets taken over as part of the merger. The AO noticed from the schedule of depreciation furnished by the assessee that depreciation was being claimed on the WDV without adjusting for depreciation allowable for A.Y.s 1995-96 & 1996-97 in the hands of erstwhile BMIL. The erstwhile BMIL did not opt to claim depreciation for the assessment years 1995-96 & 1996-97 although assets have been used in the business carried on by BMIL during those years. The AO was of the view that depreciation is not available to the assessee on the WDV without taking into consideration the allowable depreciation on the use of the assets during the assessment year

1995-96 & 1996-97 by BMIL. Depreciation charge being in the nature of a deduction for wear and tear of the assets, it was mandatory that depreciation is charged to arrive at the correct income for any given year. The AO referred to the decision of the Hon'ble Bombay High Court in the case of M/s. Premier Automobiles Ltd. 206 ITR 001(Bom), wherein it was held as follows:

> "Under section 32 of the Act, the assessee is entitled to allowance of depreciation. It is for him to claim the same. If he does not claim the same or wants to forgo the same, he is free to do so. This judgement does not say anything about carry forward of depreciation which has not been claimed by the assessee in the particular year. So far as the current year's depreciation is concerned, it is for the assessee to claim the same or not to claim the same. If he does not claim it, he loses the depreciation. There is no question of any depreciation allowable for that year and in that event the question of any unabsorbed depreciation of that year will not arise. This decision, however, cannot be carried any further to contend that the assessee is free not to claim depreciation in the year to which it pertains but carry forward the same to the subsequent year or years as it likes."

It was further held that:

> "what section 32 allows an assessee is the deduction by way of depreciation of an asset of an amount calculated as a percentage of the written down value thereof as may be prescribed. It is for the assessee to claim the same and furnish the requisite particulars. If the assessee does not claim the same, it cannot be allowed. But in that case, there will be no depreciation for that year which can be said to be unabsorbed to be carried forward to a subsequent year u/s. 32(2) of the Act. In other words, an assessee who des not claim deduction for the depreciation allowable to him u/s. 32 of the Act in the particular year loses it once for all."

Accordingly, the WDV in respect of the assets belonging to erstwhile BMIL was adjusted (by reduction of the WDV) for the foregone depreciation for A.Y's 1995-96 & 1996-97.

24. On appeal by the Assessee, the CIT(A) held that depreciation on the WDV as claimed by the Assessee on the assets in question should be allowed. The CIT(A) held that the AO was not correct in reading the judgment of the Hon'ble Bombay High Court in the case of Premier Automobiles (supra) as laying down a limitation that notional allowance has to be reduced from the WDV to arrive at the WDV of the subsequent year. The CIT(A) also found that the decision of the Hon'ble Supreme Court in the case of Mahindra Mills Ltd. (supra) clearly lays down the proposition that WDV has to be arrived at only after reducing depreciation actually allowed and in a case where the Assessee has not claimed depreciation it cannot be said that it was notionally allowed. Aggrieved by the order of the CIT(A) the revenue has raised Gr.No.2 before the Tribunal.

25. We have heard the rival submissions. We are of the view that the order of the CIT(A) has to be upheld. The Hon'ble Supreme Court in CIT Vs. Mahendra Mills (2000) 159 CTR (SC) 381 has laid down that the assessee is entitled to exercise his option even through the filing of revised return and that option cannot be denied to him nor can depreciation be thrust on the assessee against his willingness. It was held that until a claim is made for allowing deductions of the nature covered under s. 32 along with necessary particulars, there would hardly be any occasion for the ITO to 'allow' any 'claim'. Two conditions – the making of a claim and the furnishing of particulars – have been read as cumulative conditions by the Hon'ble Supreme Court in Mahendra Mills (supra). If either of the two conditions are not fulfilled the AO cannot force the depreciation allowance on the assessee. It further follows logically that in the absence of a claim by the assessee the allowance cannot be thrust upon him even if the particulars are available to the AO. Therefore, the mere fact that the assessee before us did not make a claim for depreciation places a fetter upon the powers of the AO t allow depreciation.

26. The contention of the Revenue was that after 1st April, 1988, the condition of furnishing the particulars required by sub- sec. (1) and (2) of s. 34 has been done away with and that has altered the effect of the judgment in Mahendra Mills (supra). It is difficult to uphold the contention because not only has the Supreme Court viewed the conditions as cumulative, but more importantly, they have viewed the claim for depreciation as something over which the AO has no control and is the choice of none else than the assessee. It would be proper to understand the judgment as also laying down, impliedly, that if there is no claim of depreciation by the assessee, that should be an end of the matter. Therefore, the judgment also lays down in principle that irrespective of whether the statute requires the furnishing of the particulars are not, if there is no claim for depreciation, it cannot be allowed by the AO. The debate, therefore, as to whether the omission of s. 34(1) and (2) and r. 5AA of the IT Rules would change the position prima facie appears to be academic but since it has been raised and that question has also been answered by Mahendra Mills (supra) we proceed to decide the same. The following observations of the Supreme Court in this regard clinch the issue in favour of the position that despite the omission of the above sub-sections of s. 34 and the rule, still depreciation allowance cannot be thrust upon the assessee in the absence of a claim:

> 'The language of the provisions of ss.32 and 34 is specific and admits of no ambiguity. Sec.32 allows depreciation as deduction subject to the provisions of s. 34. Sec. 34 provides that deduction under section shall be allowed only if prescribe particulars have been furnished. We have seen r. 5AA of the Rules which though since deleted provided for the particulars required for the purpose of deduction under s. 32. Even in the absence of r. 5AA, the return of income in the form prescribed itself requires particulars to be furnished by the assessee and no claim for the depreciation has been made in the return. The ITO in such a case is required to compute the income without allowing depreciation allowance. The circular of the Board, dt. 11th April, 1955, is of no help to the Revenue. It imposes merely a duty on the officers of the Department to assist the taxpayers in every reasonable way, particularly, in the matter of claiming and securing relief. The officer is required to do no more than to advise the assessee. It does not place any mandatory duty on the officer to allow depreciation of the assessee does not want to claim that. The provision for claim of depreciation is certainly for the benefit of the assessee. It if does not wish to avail that benefit for some reason, benefit cannot be forced upon him. It is for the assessee to see if the claim of depreciation is to his advantage. Rather the ITO should advise him not to claim our view in the spirit of the circular, dt. 11th April, 1955. Income under the head 'profits and gains of business or profession' is chargeable to income-tax under s. 28 and that income under s. 29 is to be computed in accordance with the provisions contained in ss. 30 to 43A. The argument that since s. 32 provides for depreciation if has to be allowed in computing the income of the assessee cannot in all circumstances be accepted in view of the bar contained in s. 34. If s. 34 is not satisfied and the particulars are not furnished by the assessee, his claim for depreciation under s. 32 cannot be allowed. Sec. 29 is thus to be read with reference to other provisions of the Act. It is not in itself a complete code.'

27. The Supreme Court has observed that even in the absence of the rule, since the return form itself prescribes particulars to be furnished in support of the claim of depreciation, the allowance can be granted on if the assessee makes a claim and the particulars required in the return form are furnished. The ratio of the observations is that in order to obtain an allowance or deduction, it is necessary for the assessee to make a claim and also support it by necessary particulars or evidence. Therefore, the contention on behalf of the revenue that after the omission of sub- sec. (1) and (2) of s. 34 and r. 5AA w.e.f. 1st April, 1988, depreciation has to be mandatorily claimed cannot be accepted. It is further seen that Expln. 5 to 32 was introduced by the Finance Act, 2002 w.e.f 1-4-02 and it provides as follows:

Explanation 5. – For the removal of doubts, it is hereby declared that the provisions of this sub-section shall apply whether or not the assessee has claimed the deduction in respect of depreciation in computing his total income;

Thus, it can be safely said that omission of section 34 has not affected the assessee's choice to claim depreciation allowance. This choice is, however, expressly taken away by insertion of Explanation 5 in section 32 with effect from 1st April, 2002, from assessment year 2002-03 onwards. In CIT Vs. Sree Senhavalli Textiles (P) Ltd., 259 ITR 77 (Mad), the Hon'ble Madras High Court has held that though after judgment was rendered by the apex Court in CIT Vs. Mahendra Mills (2000) 159 CTR (SC) 381: (2000) 243 ITR 56 (SC), Expln. 5 was inserted in s. 32(1) by the Finance Act, 2001, w.e.f. 1st April, 2002, declaring that 'for the removal of doubts' the provisions of sub-s (1) will apply whether or not the assessee claims deduction in respect of depreciation in computing his total income, that Explanation cannot be regarded as taking away the effect of the judgment of the Supreme Court for the years prior to the date of introduction of the Explanation. The law declared by the Supreme Court cannot be regarded as having merely raised doubts. The interpretation of the relevant provisions of the Act by the apex court settles the law, and unless the subsequent amendment to the statute is expressly given retrospective effect, the law laid down by the apex court will remain the binding law for the period to the amendment. The newly added Explanation takes effect only on and from 1st April, 2002, and will not be applicable for prior ye3ars. If claim made in the original return had been given up in the revised return, there was no obligation to consider the claim for depreciation.

27. The Hon'ble Supreme Court in the case of Mahendra Mills (Supra) had made the following observations:

> "….Allowance of depreciation is calculated on the written down value of the assets, which written down value would be the actual cost of acquisition less the aggregate of all deductions "actually allowed" to the assessee for the past years. "Actually allowed" does not mean "notionally allowed". If the assessee has not claimed deduction of depreciation in any past year it cannot be said that it was notionally allowed to him. A thing is "allowed" when it is claimed. A subtle distinction is there when we examine the language used in section 16 and sections 34 and 37 of the Act. It is rightly said that a privilege cannot be to a disadvantage and an option cannot become an obligation. The Assessing Officer cannot grant depreciation allowance when the same is not claimed by the assessee."

28. In the light of the above observations of the Hon'ble Supreme Court, let us see the decision of the Hon'ble Bombay High Court in the case of Premier Automobiles (Supra). The question before the Hon'ble Court and the circumstances under which it arose were as follows:

> "Whether, on the facts and in the circumstances of the case, the assessee-company could lawfully claim the development rebate in priority to depreciation allowance prescribed under section 32 of the Income-tax Act, 1961, while computing its total income for each of the assessment years 1970-71, 1971-72 and 1972-73?"

As is evident from the question, the controversy related to priority in the matter of set off of unabsorbed depreciation allowance and unabsorbed development rebate. The assessee had substantial amount of unabsorbed depreciation and unabsorbed development rebate which had been carried forward from year to year. The claim of the assessee was that as there was a time limit fixed under the Act for carrying forward of unabsorbed development rebate, it should be set off first against the current year's profit in the respective years and thereafter if any profit is left, the unabsorbed depreciation should be adjusted. According to the Income-tax Officer, under the scheme of the Act, the unabsorbed depreciation had to be adjusted first and then only, if any profits are left, the unabsorbed development rebate can be adjusted. Thus, the question was of priority between carried forward unabsorbed development rebate and unabsorbed depreciation in the matter of set off against the current year's profits. In the light of the above controversy, the Hon'ble Bombay High Court held as follows:

> "Thus, it is clear that what section 32 allows an assessee is the deduction by way of depreciation of an asset of an amount calculated as a percentage of the written down value

> > thereof as may be prescribed. It is for the assessee to claim the same and furnish the requisite particulars. If the assessee does not claim the same, it cannot be allowed. But in that case, there will be no depreciation for that year which can be said to be unabsorbed to be carried forward to a subsequent year under section 32(2) of the Act. In other words, an assessee who does not claim deduction for the depreciation allowable to him under section 32 of the Act in the particular year, loses it once for all. He is not entitled to claim the same in a subsequent year though he will again be entitled in that subsequent year to claim depreciation for that year." (underlining by us for emphasis).
>
> The AO has relied on the underlined portion of the judgment to hold that an assessee who does not claim deduction for depreciation allowable to him under section 32 of the Act in a particular year loses it once for all. The AO has overlooked the fact that the above observation are in the context of priority of claims for development rebate of depreciation under section 32 of the Act. In our view the above observation does not support the case made out by the A.O. We, therefore, uphold the order of the CIT(A) and dismiss the Ground No.2 raised by the assessee".

13. As the issues involved in the year under consideration as raised in ground No. 3 & 4 of the Revenue's appeal as well as all the material facts relevant thereto are similar to that of A.Y. 1997-98, we respectfully follow the order of the co-ordinate Bench of this Tribunal for A.Y. 1997-98 and uphold the impugned order of the ld. CIT(A) giving relief to the assessee on these issues. Ground No. 3 & 4 of the Revenue's appeal are accordingly dismissed."

As the issue involved in the present appeal of the revenue i.e allowability of the assesse's claim of depreciation on the assets taken over on amalgamation of BMIL and PHL is squarely covered by the aforesaid orders of the co-ordinate benches of the Tribunal in the assesse's own case for A.Y 1997-98, A.Y 1998-99, A.Y. 1999-2000 and A.Y 2009-10, we therefore respectfully follow the same. Accordingly, finding no infirmity in the order of the CIT(A) who had directed the A.O to allow depreciation on the assets taken over on amalgamation of BMIL and PHL, as claimed by the asseseee company, we uphold the same to the said extent. The **Ground of appeal No. 1** raised by the revenue is dismissed.

21. We shall now advert to the disallowance by the A.O of the expenditure of Rs. 28,92,000/- that was incurred by the assessee during the year under consideration on closure of its "Thane factory", which thereafter was vacated by the CIT(A). Briefly stated, in August, 1996 the erstwhile BMIL was directed to withdraw four batches of Comsat Forte tablets by the Food & Drug Administration, Maharashtra for alleged presence of Glibenclamide. The said product was manufactured by the assesse's "Thane plant". The entire operation of the "Thane factory" was closed from September, 1996 and the license for the formulations was cancelled on 22.10.1996 by the Joint Commissioner, Food & Drug Administration, Maharashtra. Consequent to the closure of the "Thane plant" certain routine expenses in the nature of staff salary, material costs and other expenses were continued to be incurred. Despite the closure of

the “Thane plant”, the business conducted therefrom was shifted to the company’s other manufacturing locations. The A.O being of the view that expenses for closing down the business were not allowable either under Sec. 37 or any other provisions of law, thus disallowed the same. On appeal, the CIT(A) observed that the closure of the “Thane unit” was a business necessity arising out of a statutory compulsion. It was noticed by him that the business of the assessee was not discontinued but was shifted to other places. As such, it was observed by the CIT(A) that it would take time for the assessee to wind up the operations for which necessary expenses for the time being had to be incurred. In fact, it was observed by the CIT(A) that the expenditure incurred at the place of closed business was part of the business expenditure and it could not be said that the same was nobody’s liability. Also, it was observed by him that his predecessor while disposing off the appeal of the assessee for A.Y 1998-99 had accepted the assesse’s claim and had allowed the aforesaid expenses as a revenue expenditure.

22. We have deliberated at length on the issue under consideration and find ourselves to be in agreement with the view taken by the CIT(A) that the assesse’s claim for deduction of the aforesaid expenses as a revenue expenditure is well in order. In fact, we find that the issue is squarely covered by the order of the **Hon’ble High Court of Bombay** in the assesse’s own case for A.Y 1998-99 in **CIT-7 Vs. Nicholas Piramal (India) Ltd. (2016) 69 taxmann.com 164 (Bom)**. In the said case, the Hon’ble High Court after deliberating on the assesse’s claim of expenses pertaining to closure of its “Thane Unit”, had observed, that the business of manufacturing of drugs at different units constituted single business and closing down of one unit and shifting its activity to other units was an expenditure that was incurred by the assessee for purposes of its business. As the facts leading to the disallowance of “Thane factory” expenses of Rs. 28,92,000/- by the A.O during the year under consideration remains the same as were involved in the aforesaid preceding years, therefore, respectfully following the view taken by the Hon’ble High Court we uphold the order of the CIT(A) in context of the said issue during the year under consideration. Accordingly, finding no infirmity in the order of the CIT(A) who had directed the A.O to delete the aforesaid disallowance of Rs. 28,92,000/-, we uphold the same to the said extent. The **Ground of appeal No. 2** raised by the revenue is dismissed.

23. We shall now take up the claim of the revenue that the CIT(A) was in error in deleting the disallowance of software development expenses of Rs.1,16,79,995/- and had thus erred in concluding that the same being in the nature of a revenue expenditure were to be allowed as a deduction to the assessee. The assessee had incurred an expenditure of Rs. 1,16,79,995/- on purchase of customized application software. Although, the asssessee had capitalized the said amount in its 'books of account', but had claimed the same as an expenditure in its computation of income. The assessee had incurred the aforesaid expenditure on softwares such as Mfg-Pro ERP package version 7.0 together with SCO UNIX system, Windows 95 operating system, Lotus Notes version 4.6 etc. It was the claim of the assessee, that it had migrated to higher versions of these softwares, namely Mfg-Pro Version 9.0, MS Office 2000 operating system and Lotus Notes version R5, for the reason, that the respective vendors had refused to support the older versions of the softwares. However, the A.O holding a conviction that the incurring of the aforesaid one-time expenditure by the assessee had led to an enduring benefit, therefore, he treated the same as a capital expenditure and disallowed the assesse's claim of the same as a revenue expenditure. At the same time, the A.O allowed depreciation @25% on the aforesaid capitalized value of expenditure and worked out the same at Rs. 29,19,999/- [Rs. 1,16,79,995/- X 25%]. Accordingly, the A.O made a net disallowance of Rs. 87,59,996/- [Rs. 1,16,79,995/- (-) Rs. 29,19,999/-] in the hands of the assessee. On appeal, the CIT(A) following the view that was taken by his predecessor while disposing off the appeal of the assessee for A.Y 1997-98, held the software development expenses as a revenue expenditure and vacated the disallowance made by the A.O.

24. We have deliberated at length on the issue under consideration and find that a similar issue had recently came up before a co-ordinate bench of the Tribunal in the assesse's own case for A.Y 2009-10 i.e **Piramal Healthcare Limited (now known as Piramal Enterprise Ltd.) Vs. Dy. CIT-7(1), Mumbai (ITA No. 1257/Mum/2014, dated -07/05/2019)**. The Tribunal while finding favour with the claim of the assessee that the expenses incurred by the assessee on purchase of a software which brought greater efficiency in functioning of its business was allowable as a revenue expenditure had observed as under :

> "11. We have deliberated at length on the issue under consideration and are unable to persuade ourselves to subscribe to the view taken by the lower authorities. We find that the issue that expenses incurred by an assessee on purchase of a software which brought greater efficiency in functioning of its business had been held by the **Hon'ble High Court of Bombay** in the case of **PCIT Vs. Holicin Services (South Asia) Ltd. (2018) 93**

> **Taxmann.com 270 (Bom)**, as allowable as a revenue expenditure. Further, the **Hon'ble High Court of Bombay** in the case of **CIT Vs. Raychem RPG Ltd. (2012) 346 ITR 138 (Bom)** had observed that the expenditure incurred by an assessee on purchase of a software which facilitated its trading operations or enabled the management to conduct its business more efficiently or more profitably would not form part of the profit making apparatus of the assessee and would be allowable as a revenue expenditure. Also, we find that a similar view had also been taken by the **Hon'ble High Court of Delhi** in the case of **CIT Vs. Amway India Enterprises (2012) 346 ITR 341 (Del)**. In the aforesaid case, it was observed by the High Court that the expenditure incurred by the assessee on purchase of software application and payment made for acquiring license to use those applications was to be allowed as a revenue expenditure. In the backdrop of the aforesaid settled position of law, we are of the considered view that as the aforesaid software purchased by the assessee did not form part of its profit making apparatus and only facilitated carrying its business more efficiently, therefore, the same was rightly claimed by it as a revenue expenditure. We thus in terms of our aforesaid observations direct the A.O to allow the software expenses of Rs.14,00,800/- as claimed by the assessee. The **Ground of Appeal No. 1** is allowed."

As the issue involved in the present appeal is squarely covered by the aforesaid order of the Tribunal in the assesse's own case for A.Y 2009-10, therefore, we respectfully follow the same. Accordingly, finding no infirmity in the order of the CIT(A), who had directed the A.O to delete the disallowance of Rs. 1,16,79,995/-, we uphold the same to the said extent. Before parting, we may herein observe that consequent to our aforesaid observation the depreciation of Rs. 29,19,999/- that was allowed by the A.O by treating the aforesaid 'computer software expenses' as a 'capital expenditure' shall resultantly be withdrawn. The **Ground of appeal No. 3** raised by the revenue is dismissed.

25. We shall now take up the issue pertaining to disallowance of Voluntary Retirement Scheme (for short 'VRS') expense of Rs.8,40,96,000/- by the A.O. As is discernible from the orders of the lower authorities, the assessee had debited VRS and related expenses of Rs.849.96 lacs as extraordinary items in its 'Profit and loss account' for the year under consideration, as under:

Particulars	(Rs. In Lacs)
VRS paid by Deonar Office (as per the approved Scheme)	699.5
VRS paid by Corporate Office for Deonar Staff	
Mr. A. Vaidya	2.92
Mr. R. H. Khanna	4.58
Mr.Ramesh Bhalla	4.7
Mr. S.K. Saroj	2.51
Mr. D.R. Palan	4.16
Mrs. Lajja Bhatta	5
VRS Gratuity & Leave Pay	117.5
Total	840.96

On being queried as to why the aforesaid expenses may not be disallowed as the same were incurred for obtaining a benefit of an enduring nature, it was submitted by the assessee that as the said expenses were incurred wholly and exclusively for the purpose of its business,

therefore, it was allowable as a revenue expenditure. Apart from that, it was the claim of the assessee that as Sec. 35DDA which envisaged amortisation of expenditure incurred under Voluntary Retirement Scheme was made available on the statute with prospective effect, vide the Finance Act, 2001 w.e.f 01.04.2001, therefore, no disallowance of the aforesaid expenses pertaining to the year under consideration viz. A.Y. 2000-01 was called for in the hands of the assessee. Also, the assessee submitted before the A.O that the VRS was offered to the employees at its Deonar Unit. It was observed by the A.O that the substantial amount of Rs.840.96 lacs of VRS expenditure that was incurred by the assessee was not a regular expenditure, and in fact was in the nature of an extraordinary expense. It was further noticed by the A.O that the amount paid by the assessee on account of VRS was not paid to the employees for any services rendered by them during the year. As such, the A.O was of the view that the VRS payment was to be understood as a payment to make the employees voluntarily leave the service. Accordingly, the A.O held a conviction that an employer by making VRS payment was able to get rid of unwanted man-power and therein make savings in the wage bills for the subsequent years. On the basis of his aforesaid deliberations, the A.O was of the view that as the VRS payment would bring into existence a benefit of an enduring nature, therefore, the same being in the nature of a 'capital expenditure' could not have been charged to the profit or revenue of any particular year. In the backdrop of his aforesaid deliberations, the A.O after drawing support from certain judicial pronouncements therein concluded that the VRS payment of Rs.840.96 lacs made by the assessee during the year was in the nature of a 'capital expenditure', which was thus not allowable as a deduction while computing income of the assessee.

26. On appeal, the CIT(A) observed that a similar disallowance of VRS expense of Rs.15,25,73,928/- made by the A.O in the assesse's own case for A.Y 1998-99 was on appeal vacated by his predecessor, vide his order dated 22.05.2001. Accordingly, following the view taken by his predecessor the CIT(A) deleted the disallowance of the VRS expenditure of Rs,8,40,96,000/- that was made by the A.O while framing the assessment for the year under consideration.

27. The revenue being aggrieved with the deletion of the VRS expenditure of Rs.8,40,96,000/- by the CIT(A) has assailed the same in appeal before us. It was submitted by

the ld. A.R that the issue involved in the present appeal was squarely covered by the order passed by the Tribunal in the assesse's own case for A.Y. 1998-99 viz. ACIT Vs. Nicholas Piramal (I) ltd. (2014) 147 ITR 675 (Mum). It was submitted by the ld. A.R that the Tribunal in its aforesaid order by following the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Bhor Industries Ltd. (2003) 264 ITR 180 (Bom) had vacated the disallowance of the VRS expenditure made by the A.O, and had concluded that the same was allowable as a revenue expenditure. Per contra, the ld. Departmental Representative (for short 'D.R') could not controvert the aforesaid claim of the counsel for the assessee.

28. We have given a thoughtful consideration to the aforesaid issue before us. As claimed by the ld A.R, the aforesaid issue had came up before the Tribunal in the assesse's own case for A.Y. 1998-99, wherein after necessary deliberations the Tribunal by treating the VRS expenditure of Rs.15,25,73,928/- as a revenue expenditure had upheld the order of the CIT(A) who had deleted the said disallowance. On a perusal of the order of the Tribunal for A.Y. 1998-99, we find that it was observed as under:

> "7. We have heard the arguments of both sides on this issue and also perused the relevant material placed on record. It is observed that this issue is squarely covered in favour of the assessee, inter alia, by the decision of the hon'ble Bombay High Court in the case of CIT v. Bhor Industries Ltd. [2003] 264 ITR 180/128 Taxman 626 wherein it has been held that payments made under the voluntary retirement scheme was the expenditure incurred by the assessee to save expenses and it was not referable to any income yielding asset. It was held that the said expenditure thus should be allowed in its entirety in the year in which it was incurred and the same could not be spread over a number of years. It was also held that the expenditure incurred by the assessee relating to voluntary retirement scheme as well as on account of gratuity was revenue expenditure and the same was allowable as deduction in the year in which it was actually incurred. Respectfully following the said decision of the hon'ble jurisdictional High Court, we uphold the impugned order of the learned Commissioner of Income-tax (Appeals) allowing the expenditure incurred by the assessee on voluntary retirement scheme payments, gratuity payments and the payments on account of other terminal benefits and dismiss ground No. 1 of the Revenue's appeal.

Apart from that, we find that the aforesaid order of the Tribunal had been approved by the **Hon'ble High Court of Bombay** while dismissing the appeal of the revenue in **CIT-7 Vs. Nicholas Piramal (I) Ltd. (2016) 239 Taxman 470 (Bom).** On the basis of the aforesaid facts, we are of the considered view that the issue as regards the allowability of VRS expenditure is squarely covered in the favour of the assessee. Accordingly, finding no infirmity in the view taken by the CIT(A), who we find had rightly vacated the disallowance of VRS expenditure of Rs.8,40,96,000/-, we uphold the same to the said extent. The **Ground of appeal No. 4** filed by the revenue is dismissed.

29. We shall now advert to the disallowance by the A.O of the club membership fees of Rs.3,03,500/-, which was claimed by the assessee as a revenue expenditure. On a perusal of the records, we find that the assessee had paid an amount of Rs.3,03,500/- for obtaining the membership of a club. Observing, that the aforesaid expenditure had resulted into a benefit of an enduring nature, the A.O treating it as a 'capital expenditure' had disallowed the same. On appeal, the CIT(A) observed that as the issue as regards the allowability of the club membership fees as a revenue expenditure was squarely covered by the judgment of the **Hon'ble High Court of Bombay** in the case of **Otis Elevator Company India Ld. Vs. CIT (1992) 195 ITR 682 (Bom)**, therefore, he vacated the said disallowance.

30. Aggrieved, the revenue has assailed before us the deletion of the club membership expenses of Rs.3,03,500/- by the CIT(A). The ld. Departmental Representative (for short 'D.R') relied on the assessment order. It was submitted by the ld. D.R that as the aforesaid expenditure had resulted into an enduring benefit to the assessee, therefore, the same was rightly held by the A.O to be in the nature of a 'capital expenditure'.

31. Per contra, the ld. A.R had relied on the order passed by the CIT(A). It was submitted by the ld. A.R that the issue as regards the allowability of club membership fees as a revenue expenditure was squarely covered by the judgment of the Hon'ble High Court of Bombay in the case of Otis Elevator Compay India Ld. Vs. CIT (1992) 195 ITR 682 (Bom). Also, support was drawn from the judgment of the Hon'ble Supreme Court in the case of CIT Vs. United Glass Mfg. Company Ltd. [C.A. No. 644 of 2012] (SC) and the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Infrastructure Leasing and Financial Services Ltd. [69 taxman.com 20 (Bom)].

32. We have given a thoughtful consideration to the aforesaid issue before us. Admittedly, the assessee had paid an amount of Rs.3,03,500/- for obtaining the membership of a club during the year under consideration. As observed by us hereinabove, the CIT(A) being of the view that the aforesaid expenditure had resulted into an enduring benefit to the assessee, therefore, disallowed the same. We find that the aforesaid issue is squarely covered by the judgment of the **Hon'ble High Court of Bombay** in the case of **Otis Elevator Compay India Ld. Vs. CIT (1992) 195 ITR 682 (Bom)**. In the aforesaid case the Hon'ble High Court had

approved the view taken by the Tribunal that the payment of club membership fees is allowable as a revenue expenditure. Also, we find that a similar view had been arrived at by the **Hon'ble High Court of Punjab and Haryana** in the case of **CIT, Patiala vs. Groz Beckert Asia Ltd. (2013) 351 ITR 196 (P&H)** and that of the **Hon'ble High Court of Karnataka** in **CIT vs. Infosys Technologies (No.1) (2012) 349 ITR 582**. On the basis of our aforesaid observations, we find no infirmity in the view taken by the CIT(A) that the club membership fees of Rs.3,03,500/- paid by the assessee during the year under consideration was allowable as a revenue expenditure. The **Ground of appeal No. 5** raised by the revenue is dismissed.

33. We shall now take up the claim of the revenue that the CIT(A) was in error in directing the A.O that the brought forward 'long term capital loss' was first required to be adjusted against the STCG before the same was adjusted against the LTCG. As is discernible from the assessment order, the A.O while framing the assessment had adjusted the brought forward 'long term capital loss' pertaining to A.Y. 1998-99 against the LTCG for the year under consideration, and thus declined the assesse's claim for seeking priority adjustment of the same against the STCG for the year under consideration. On appeal, the CIT(A) observed that the aforesaid claim of the assessee for adjustment of the brought forward 'long term capital loss' first against the STCG before the same was adjusted against the LTCG was in conformity with the provisions of Sec.74 of the Act. Accordingly, the CIT(A) directed the A.O to accept the aforesaid claim of the assessee.

34. Aggrieved with the aforesaid observations of the CIT(A), the revenue has assailed the same before us. We have given a thoughtful consideration to the aforesaid issue and are unable to persuade ourselves to subscribe to the view taken by the A.O. We find that the aforesaid claim of the assessee for adjustment of the bought forward 'long term capital loss' first against the STCG before the same is adjusted against the LTCG for the year under consideration in no way militates against the provisions of Sec.74 of the Act. As such, finding no infirmity in the view taken by the CIT(A) in context of the aforesaid issue under consideration , we uphold the same. The **Ground of appeal No. 6** raised by the revenue is dismissed.

35. The **Ground of appeal No. 7** raised by the revenue being general in nature is dismissed as not pressed.

36. The appeal filed by the revenue is dismissed in terms of our aforesaid observations.

37. The appeal of the assessee viz. ITA No. 6141/Mum/2003 is partly allowed, and the appeal of the revenue viz. ITA No. 6392/Mum/2003 is dismissed.

Order pronounced in the open court on 17.01.2020

Sd/-	Sd/-
(Rajesh Kumar)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 17.01.2020

Ps. Rohit

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

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

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

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