IN THE INCOME TAX APPELLATE TRIBUNAL (VIRTUAL COURT)
"D" BENCH, MUMBAI

BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA.NO. 7167/MUM/2017 (A.Y: 2009-10)

M/s. Macleods Pharmaceuticals Ltd., 304, Atlanta Arcade Marol Church Road Andheri East, Mumbai -4000059 **PAN: AAACM4100C**	v.	Dy. CIT – 10(2)(2) Room No. 264, 2nd Floor Aayakar Bhavan, M.K. Road Mumbai - 400020
(Appellant)		**(Respondent)**

Assessee by	**:**	**Shri Ashok Bansal**
Department by	**:**	**Shri Bharat Andhale**
Date of Hearing	**:**	**16.06.2021**
Date of Pronouncement	**:**	**14.09.2021**

O R D E R

PER C.N. PRASAD (JM)

1. This appeal is filed by the assessee against order of the Learned Commissioner of Income Tax (Appeals) -17, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 17.10.2017 for the A.Y: 2009-10.

2. Assessee has raised following grounds in its appeal: -

"1. The authorities below erred in law as well as on facts in reopening the assessment under section 148 which was completed

under section 143(3) without appreciating the facts that appellant had made true and complete disclosure of all facts during original assessment.

2. The authorities below erred in law as well as on facts in reopening the assessment under section 148 solely on the basis of report from MVAT department.

3. The authorities below erred in law as well as on facts in making addition/sustaining addition as alleged bogus purchase of Rs. 50,18,436/- without appreciating the evidence put forth by the appellant.

4. The authorities below erred in law as well as on facts in allocating/sustaining allocation of Research & Development Expenses incurred by the appellant amongst the different manufacturing unit of the appellant."

3. In the first two grounds of appeal assessee has challenged reopening of assessment u/s. 147 of the Act, in the third ground assessee challenged the order of the Ld.CIT(A) in sustaining the disallowance made towards bogus purchases and in the fourth ground confirming the action of the Assessing Officer in allocating Research and Development (hereinafter for short "R & D") expenditure incurred by the assessee amongst different manufacturing units, by the Ld.CIT(A) was challenged.

4. Briefly stated the facts are that, assessee which is in the business of manufacturing of pharma products e-filed its return of income on 30.09.2009 declaring NIL income under normal provisions of the Act and book profits at ₹.94,54,57,100/- u/s.115JB of the Act. The assessment was completed u/s.143(3) of the Act on 25.08.2011 computing the income

at NIL under normal provisions of the Act after allowing the deductions u/s.80IB, 80IC and 80G of the Act and book profits at ₹.94,62,35,833/- u/s. 115JB of the Act.

5. Subsequently, the Assessing Officer issued notice dated 22.03.2014 u/s.148 of the Act and reopened the assessment for the reason that the assessee company has entered into non-genuine purchase transactions with M/s. Shah Trading Company & Dhulee Enterprise to the tune of ₹.47,49,464/-, thereby income chargeable to tax has escaped assessment. Assessee objected for reopening of assessment stating that there is no tangible material available for reopening of assessment. However, the Assessing Officer completed the re-assessment u/s. 143(3) r.w.s. 147 of the Act on 10.02.2015 determining income at ₹.11,94,55,730/- under normal provisions of the Act after allowing deductions u/s. 80IB, 80IC and 80G of the Act and book profits at ₹.94,62,35,833/- u/s. 115JB of the Act.

6. While completing the re-assessment Assessing Officer treated purchases of ₹.47,79,464/- made by the assessee from M/s. Shah Trading Company & Dhulee Enterprise as non-genuine for the reason that the

notices issued u/s. 133(6) of the Act were returned unserved and the assessee has also not produced the party for verification.

7. Secondly, the Assessing Officer allocated the R & D expenses to various manufacturing units of the assessee as he was of the view that the R & D expenditure incurred by the assessee is inextricably linked with the business of the assessee and also products manufactured in the units entitled for deduction u/s. 80IB and u/s. 80IC of the Act. The objections of the assessee that R & D activities are not directly related to its manufacturing units as the R & D is working on future products and future innovation and launches and not for the present products manufactured by the manufacturing units, were rejected.

8. On appeal, the Ld.CIT(A) sustained reopening of assessment u/s.147 of the Act, the disallowance made towards non-genuine purchases and also the action of the Assessing Officer in allocating the R&D expenditure among various units of the assessee.

9. Ld. Counsel for the assessee arguing on merits submitted that the alleged non-genuine purchases of ₹.48 lakhs (being sales promotion expenses) is just about 1% of the sales promotion expenses incurred by

the assessee during the year amounting to ₹.41 Crores. Ld. Counsel for the assessee submitted that to prove the genuineness thereof, the assessee has furnished before the Assessing Officer and the Ld.CIT (A) and also before us in the paper book, ledger account of the party, purchase orders, invoices, delivery challans, debit note raised, dispatch challans and lorry receipts. It is submitted that the Assessing Officer has chosen not to enquire with any of the recipients of the material or the transporters to verify the genuineness and has also disregarded the fact that about 84% of the book profits are deductions u/s. 80IB/80IC and there is no logical reason for the assessee to indulge in a non-genuine purchases. The Ld. Counsel for the assessee placing reliance on the following judgements submits that where assessee had submitted purchase bills, transportation bills, confirmed copy of accounts and VAT Registration of sellers as also their Income-tax Return and payment was made through cheques, impugned purchases could not be disallowed.

a) *PCIT v. M/s Mohammad haji Adam & Co. ITA no. 1004 of 2016 (Bombay HC).*
b) *CIT v. Odeon Builders (P.) Ltd [2019] 110 taxmann.com 64 (SC)*

10. Coming to allocation of R & D expenses among various manufacturing units of the assessee the Ld. Counsel for the assessee submits that the assessee during the year incurred ₹.38.35 Crore

expenditure on Research and development. As provided deduction @150% was claimed u/s. 35 of the Act by the assessee amounting to ₹.57.53 Crores. The assessee is duly registered with the Department of Science & Technology, Government of India and that department regularly and thoroughly audits the expenditure each year. Learned Counsel for the assessee submits that the assessee has been availing of the deduction since A.Y 2003-04 continuously and the assessments were completed u/s 143(3) of the Act accepting the deduction claimed by the assessee without any allocation of R & D expenses among the manufacturing units of the assessee. It is submitted that there are different divisions/manufacturing plants of the business viz. first 80IB Units (30% deduction allowable under section 80IB) Daman Phase 1 (Premier, Kabra, Dhanlaxmi), second 80IC unit Baddi (100% deduction allowable under section 80IC), third Non 80IB/80IC units (Nil deduction) Daman phase II (Premier), Palghar, Saregam, R& D division at Andheri east, Mumbai and Head Office. It is submitted that as a part of corporate policy, assessee is committed to spend about 5% of its gross revenues on R & D for the purpose of developing new ideas and drugs. The assessee company maintains separate accounts of each unit including its R & D unit and it is also regularly audited by Department of Scientific and industrial

Research (DISR). It is submitted that Assessee's R & D unit is housed in a separate building very far away from its manufacturing units and is independent unit. Since its inception, the assessee has not been allocating any of its R & D expenses to the manufacturing units and the same have been consistently accepted by the departments in assessments u/s.143(3), even for the year under consideration the Assessing Officer had accepted the same in original assessment made u/s 143(3) dated 25.08.2011. It is submitted that now during the reassessment proceedings without any cogent material, the Assessing Officer is precluded from changing his own predecessor's opinion on this issue.

11. Learned Counsel for the assessee submitted that in the reassessment, the Assessing Officer has allocated the R & D expenditure of ₹.57.53 Crores to various units of the assessee rejecting his own predecessor's opinion. It is submitted that due to the allocation, the deductions under sections 80IB & 80IC have been reduced from ₹.62.26 Crores (in the original assessment) to ₹.50.79 Crores and the details are as under: -

Name of the Unit/deduction available	held in Original assessment (Rs.)	In reassessment proceedings (Rs.)	Disallowance/ Reduction in deduction (Rs.)
80IB Units Phase I (claim 30% deduction)	Total deduction was available Rs. 79.05 Cr. including both the divisions but the same was restricted to 62,25,55,342/- as per availability of total income	3,35,25,000/-	The combined disallowance u/s section 80IB/80IC including is Rs. 11,46,21,342/
80IC unit Baddi (claim 100% deduction)		47,44,09,000/-	
Total	62,25,55,342/-	50,79,34,000/-	11,46,21,342/-

11.1 Learned Counsel for the assessee submitted that the Assessing Officer 's action is wrong on the following counts:

11.2 The assessee has been availing of the deduction since A.Y.2003-04 continuously and even in year under consideration in the original assessment order passed on 25.08.2011 the Assessing Officer had accepted the assessee claiming the deduction of R & D expenses. The Assessing Officer in her reassessment order at para 5.6 herself had accepted that the issue was discussed in the original assessment, thereafter without any cogent material, the Assessing Officer had changed her mind. While computing the profits and gains of the concerned undertaking, only expenses relating thereto can be deducted. In other words, the expenses must be incurred, for and on behalf of the concerned undertaking. The expenses attributable to any other unit or the head

office expenses which have no relevance to the industrial undertaking cannot be deducted in respect of the said undertaking while computing the profits and gains of the undertaking. The units 80IB phase 1 and 80IC unit Baddi are specific undertakings and income and expenses which are derived from them are only to be considered for the calculation of profit and loss from the specific undertakings and there might be income and expenses which are attributable to the those undertaking but not derived from the undertaking are not to be considered for calculation of profit and loss or accounts.

12. Ld. Counsel for the assessee submits that the Hon'ble Supreme Court, in Sterling Foods [1999] 104 Taxman 204 (SC), Pandian Chemicals Ltd 2003 262 ITR 278 SC and in Cambay Electric Supply Industrial Co. Ltd [1978] 113 ITR 84 (SC), ruled repetitively and conclusively that the phrase 'derived from' is narrower than the phrase 'attributable to' and in fact, in the original assessment order at para 7.3 deals with the disallowance of incomes relatable to the industrial undertakings and following the above cited judgements disallowances have been made which have been confirmed in the impugned assessment also. This has been discussed in the original assessment order in paras 7.4 and 7.5. It is submitted that on exactly similar grounds and conversely, the items of expenditure have

to be so intricately weaved with the industrial undertakings that they qualify to be called as derived from the undertakings as against attributable to the undertakings.

13. Learned Counsel for the assessee further submitted that Research & Development activities are not directly related to its manufacturing units as the R&D division is working on future products and future innovation and launches and not present products manufactured by the manufacturing units. Hence the impugned R&D expenditure had no relevance to the working of qualifying undertakings. It is submitted that R&D expenses are on futuristic research and the result of research is always uncertain. None of the items of research was forming part of qualifying undertakings. None of the qualifying undertaking thus benefits from the present research. Research in the field of biotech or bulk drugs will be wholly unrelated even for theoretical reckoning, from impugned qualifying undertakings. It is submitted that details of products manufactured by the units and products on which R&D is undertaken were on records and which are completely independent from each other. It is submitted that the ratio of judgement of Hon'ble Bombay High Court in the case of Zandu Pharmaceutical Works Limited [350 ITR 366] applies squarely to the assessee's case.

14. Ld. Counsel for the assessee also placed reliance on the following decisions in support of his submissions: -

(i). *Bush Baoke Allen India Limited v. ACIT [2005] 273 ITR 152 (Mad.)*
(ii). *International Flavors & Fragrances India Ltd v. DCIT [142 of 2005] Madras HC.*
(iii). *Bush Baoke Allen India Limited v. ACIT [TA 548 of 2004] (Mad.)*
(iv). *Vanaz Engineers Limited [ITA No. 34 &35/PN/1989]*
(v). *Ponds India Limited [ITA No. 2047/Mad/88]*
(vi). *Wockardt India Limited [3991/Mum/2005]*
(vii). *Wockardt India Limited [71/Mum/2007]*
(viii). *FDC Limited v. ACIT 8(1) [6569/Mum/2009]*

15. Learned Counsel for the assessee further submitted that the Ld.CIT(A) has dismissed the assessee's appeal by holding that the Zandu Pharmaceutical Works Limited (supra) is distinguishable and by saying that the Research is general in nature and the benefit of the same is derived by all the qualifying units also. It is submitted that the facts of above mentioned are judgement of Hon'ble High Court in the case of Zandu Pharmaceutical Works Limited (Supra) and assessee case are totally same and squarely applicable.

16. In so far as reopening of assessment is concerned Learned Counsel for the assessee submitted as under: -

> *"A no possible change in total income or tax payable even if the reason for reopening of assessment happens to be valid and the department adds it to assessee's income (Section 152(2) of the IT Act 1961):*

i) In this respect provisions of Section 152 can be referred to usefully. Section 152(2) provides that the proceedings U/s 147 shall be dropped on the assessee showing that he had been assessed on an amount or to a sum not lower than what he would be rightly liable for even if the income alleged to have escaped assessment had been taken into account.

ii) The original assessment resulted in deductions u/s 80IB and 80IC allowed to the extent of Rs. 79 Crores, However, since the Gross Total Income was only Rs. 62.25 Crores, the deductions were restricted to the tune of Rs. 62.25 Crores. Thus, there was a buffer of Rs. 16.75 Crores. In other words, there would be no change in the total income, tax payable or future MAT entitlement even if there were additions up to Rs. 16.75 Crores. Bogus purchases amounting to Rs. 48 Lakhs is given as the reason for the reopening. It is abundantly clear that there would be no change to assessee's total income or tax payable even if the amount of alleged bogus purchases is sustained as an addition.

iii) Since reopening is an unusual and extraordinary event, especially when the earlier assessment was completed U/s 143(3) by an Additional Commissioner and was reopened by a Deputy Commissioner (without any approval from his superior authorities), the reopening is, to say the least, highly baffling and does not stand to reason.

B. Reopening on the basis of insufficient and sketchy information:

i) The placing of selling dealer's name in the list of suspicious dealers on the MAHAVAT website has been, erroneously or mischievously, turned by the department into the dealer being a proven Hawala Dealer,

ii) The assessment order vaguely mentions, in para 4.1 that: "This list is a result of the evidenced gathered during the course of investigation, search and surveys by the Sales-tax authorities". It is not known if the selling dealers, specifically, was subjected to search or survey or not.

iii) The selling dealer has not given any general statement, leave apart a statement naming the assessee.

iv) The amount of alleged bogus purchases has been added to assessee's income on the basis of notice u/s 133(6) having returned by the postal authorities with a remark 'left', (para 4.4 of the assessment order). The copy of bills and challans of the selling dealer were supplied to the assessing officer and the same clearly mention the selling dealer's mobile number and mail ID. However, no efforts were made by the assessing officer to contact him. Further, the assessing officer did not even went through the income tax return of the selling dealer and is also silent about the fate of TDS deducted from the payments made to the selling dealer by his customers (including TDS amounting to Rs. 98,456 deducted by the assessee).

C. Reopening on the basis of Audit observation:

A conjoint reading of A and B above brings us to the real reason behind the reopening. The assessing officer is under receipt of audit objection vide No. 1TRA/LAP IX/Pharma review 2014-15/DCIT 8(2)/AQ No 35 Dated 04/08/2014 according to which the assessee ought to have been allowed deductions U/Ss 80IB & 80IC amounting to Rs. 50.79 Crores as against Rs. 62.25 Crores being the amount allowed as deductions in the assessment u/s 143(3). Incidentally, in the impugned assessment u/s 147, the assessing officer has allowed deduction exactly to the tune of Rs. 50.79 Crores, the amount suggested by the audit party.

It is a trite law that reopening of assessment u/s 147 is not lawfully allowed if it is on the basis of audit objection.

D. No failure to disclose fully and truly all material facts/change of opinion:

- No authority is empowered to review its own order. It can be "reviewed/ revised/ modified" by his superior authority alone, in general, and an authority in particular that has been given specific power under any particular Act of law. Under the IT Act, 1961, this power specifically vests in CIT (PCIT) u/s 263. AO cannot doubt his predecessor AO for his considered finding and have a different opinion on a particular matter. CIT v. Kelvinator of India (2010) 320 ITR 561 (SC) is

one of the crucial judgment as regards to the Change of opinion. The reassessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons.

- Order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving premium to an authority exercising quasi-judicial function to take benefit of its own wrong. [Full Bench of Delhi High Court in the case of Commissioner of Income-tax-VI, New Delhi v. Usha International Ltd. [2012] 25 taxmann.com 200(Delhi)(FB)]"

17. Ld. DR vehemently supported the orders of the authorities below.

18. We have heard the rival submissions, perused the orders of the authorities below. On a perusal of the Assessment Order we find that Assessing Officer treated purchases of ₹.47,79,464/-, increased by 4% VAT at ₹.1,91,178/- and further ₹.47,794/- as commission for arranging such purchases, aggregating to ₹.50,18,436/- for the reason that notices issued u/s. 133(6) of the Act were returned and the assessee could not produce the party for verification. We observe that the assessee furnished copies of invoices from M/s. Shah Trading Company and Dhulee Enterprise, delivery challans showing receipt of material by assessee in its locations, copies of purchase orders issued by the assessee in the name of M/s. Shah Trading Company and Dhulee Enterprise, Transport receipt

with packing list showing dispatch of items to various locations of the assessee. Assessee also submitted that it had made genuine purchases from M/s. Shah Trading Company and Dhulee Enterprise and all these purchases were promotional items with assessee's brand names printed on the items for distributing to various sales representative for onward delivery to clinics, Doctors and retailers. The items purchased were portable weighing scales which are typically used in clinics and hospitals. We observe from the Assessment Order that the notices issued u/s.133(6) of the Act were returned unserved and the Assessing Officer treated these purchases as non-genuine as the assessee could not produce the party. It is the contention of the assessee that due to lapse of time as the transaction has happened six years back the assessee was unable to produce the party for verification. It is not in dispute that sales have been accepted as genuine from out of these purchases. When the sales have been accepted as genuine the entire purchases cannot be treated as non-genuine. The Hon'ble Gujarat High Court in the case of Bholanath Polyfab Pvt. Ltd [355 ITR 290] held that when the assessee made purchases and sold the finished goods as a natural corollary not the entire amount covered under such purchases would be subject to tax but only the profit element embedded therein. Similar view has been taken by the Hon'ble

Gujarat High Court in the case of CIT *v.* Simit P. Seth [356 ITR 451]. Simply because the parties were not produced the entire purchases cannot be added as held by the Bombay High Court in the case of CIT *v.* Nikunj Eximp [216 Taxman.com 171]. However, at the same time keeping in view the nature of business of the assessee and the fact that the assessee is making some local purchases without any transportation bills, lorry receipts etc, the possibility of making purchases in gray market on cash cannot be ruled out. Taking the totality of facts and circumstances into consideration and following the decision of the Hon'ble Gujarat High Court in the case of CIT *v.* Simit P. Seth (supra), we direct the Assessing Officer to restrict the disallowance/addition to 12.5% of the non-genuine purchases of ₹.47,79,464/- only for the assessment year under consideration i.e. A.Y. 2009-10 and compute the income accordingly.

19. Coming to allocation of R & D expenses, the assessee contended before the lower authorities that its Research and Development activities are not directly related to its manufacturing units as the research and development divisions is working on future products and future innovation and launches and not for the present products manufactured by the assessee in its units. It was contended that Research and development

expenditure had no relevance to the working of qualifying undertakings. Further, R & D expenses are on futuristic research and the result of research is also uncertain. It was also contended that none of the items of the research was forming part of qualifying undertakings and none of the qualifying undertakings thus benefit from the present research. It was also contended that research in the field of biotech or bulk drugs will be wholly unrelated even for theoretical reckoning from impugned qualifying undertakings. Details of products manufactured by the units and products on which R & D is undertaken were on records which shows that they are completely independent from each other. Assessee placed reliance on the Zandu Pharmaceuticals Works Ltd., *v.* CIT [350 ITR 366] and various other decisions in support of his contention that R & D expenditure incurred in head office cannot be allocated to the units. We observe from the Assessment Order that the Assessing Officer predominantly stating that R & D expenditure incurred by the assessee is inextricably linked with the business of the assessee including the business relating to products which are manufactured in the units for which deduction u/s. 80IB and 80IC were claimed. However, nothing has been brought on record to suggest that the R & D expenditure incurred by the assessee benefitted the existing units where claims u/s. 80IB and

80IC were made. We observe that when the details of products manufactured by the units and products on which R & D is undertaking by the assessee were placed on record before the Assessing Officer to show that they are completely independent from each other, the Assessing Officer completely failed to bring on record that R & D expenditure in fact benefited the existing units and thereby it is necessary to allocate the R & D expenditure among 80IB and 80IC units and non 80IB and 80IC units on the basis of percentage of sales on respective units to the total sales. We further observe that even after allocation of expenses among 80IB eligible and non-eligible units the taxable income from the assessment under consideration remained the same as the tax was assessed under book profits u/s. 115JB of the Act and not under normal provisions of the Act.

20. Almost identical issue has come up before the Hon'ble Jurisdictional High Court in the case of Zandu Pharmaceuticals Works Ltd., *v.* CIT (supra) wherein the Hon'ble Bombay High Court held that unless expenditure incurred on research and development work relates to units eligible for deduction under section 80-IA, same cannot be apportioned to the said units. While holding so the Hon'ble Bombay High Court held as under: -

"9. There is no dispute that the assessee is entitled to the benefits of the provisions of sections 80HH, 80-I and 80-IA. Section 80-I provides that where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking, there shall be allowed., in computing the total income of the assessee, a deduction from such profits and gains an amount equal to twenty per cent, thereof. Section 80-IA provides that where the gross total income of an assessee includes any profits and gains derived from any business of an industrial undertaking, there shall be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount specified therein. Section 80HH provides that whether the gross total income of an assessee includes any profits and gains derived from an industrial undertaking, there shall be in accordance with law and subject to the provisions of the section be allowed in computing the total income of the assessee a deduction from such profits and gains of an amount equal to 20 per cent, thereof.

10. While computing the profits and gains of the concerned undertaking, only expenses relating thereto can be deducted. In other words, the expenses must be incurred, for and on behalf of the concerned undertaking. The expenses attributable to any other unit or the head office expenses which have no relevance to the industrial undertaking, cannot be deducted in respect of the said undertaking while computing the profits and gains of the undertaking.

11. In CIT v. Sterling Foods [1999] 237 ITR 579/104 Taxman 204 (SC); following question was considered by the Supreme Court (Page 581):

> *"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the receipt from the sale of import entitlements could not be included in the income of the assessee for the purpose of computing the relief under section 80HH of the Income-tax Act, 1961?"*

12. The question, therefore, was converse to the one before us. The Supreme Court held as under (page 584):

> *"Crude petroleum is refined to produce raw naphtha. Raw naphtha is further refined, or cracked to produce the said products. This is not controverted. It seems to us to make no difference that the appellants buy the raw naphtha from others. The question is to be judged regardless of this, and the question is whether the intervention of the raw naphtha would justify the finding that the said products are not 'derived from refining crude petroleum'. The refining of crude*

petroleum produces various products at different stages. Raw naphtha is one such stage. The further refining, or cracking, of raw naphtha results in the said products. The source of the said products is crude petroleum. The said products must, therefore, be held to have been derived from crude petroleum.

We do not think that the source of the import entitlements can be said to be the industrial undertaking of the assessee. The source of the import entitlements can, in the circumstances, only be said to be the Export Promotion Scheme of the Central Government whereunder the export entitlements become available. There must be, for the application of the words 'derived from', a direct nexus between the profits and gains and the industrial undertaking. In the instant case, the nexus is not direct but only incidental. The industrial undertaking exports processed seafood. By reason of such export, the Export Promotion Scheme applies. Thereunder, the assessee is entitled to import entitlements, which it can sell. The sale consideration therefrom cannot, in our view, be held to constitute a profit and gain derived from the assessee's industrial undertaking."

13. The Supreme Court held that there must be for the application of the words "derived from" a direct nexus between the profits and gains and an industrial undertaking. Sections 80-I and 80-IA also use the expression derived from". If there must be a direct nexus between the profits and gains and an industrial undertaking, it must follow equally that there must be a direct nexus between an industrial undertaking and the expenses which are sought to be apportioned/attributable to it. Expenses which do not relate to an industrial undertaking/unit under consideration and they relate to other units or to the head office of the assessee, cannot be taken into consideration while computing the deduction under the said provisions.

14. Ms. Khan's reliance upon a judgment of the Division Bench of the Madras High Court in Bush Boake Allen (India) Ltd. v. Asstt. CIT [2005] 273 ITR 152 is well founded. In that case, the assessee claimed a deduction under sections 80HH and 80-I. The Assessing Officer allocated certain expenditure on research and development pertaining to the Chittoor unit. It was submitted by the assessee that the amount so included did not pertain to the Chittoor unit inasmuch as the research and development undertaken at the Madras unit had no connection with the products manufactured in the Chittoor unit. The Chennai High Court held that the question had not been dealt with by the authorities. It was held that the apportionment of the

expenses on the activities of the research and development to the Chittoor unit merely on the presumption that the products manufactured at the Chittoor unit also had the benefit of the research made at the Chennai R & D department, was not proper. It was further held that the authorities had proceeded on the presumption that any technology about new flavours and essences would automatically be utilized in the Chittoor unit without examining whether the R & D carried out in Chennai s of use to the unit at Chittoor. The matter was, therefore, remanded to ascertain whether the R & D undertaken related to the products manufactured in the Chittoor unit.

15. We are in respectful agreement with the judgment, the basis of which is that unless the expenditure incurred on the R & D work relates to the undertaking/unit in question, the same cannot be apportioned to it.

16. Mr. Suresh Kumar submitted that any research and development activity carried out by the head office would automatically ensure to the benefit of the units/industrial undertakings. He submitted that the head office itself does not manufacture any medicines, the benefit of the research and development would be utilized for manufacturing the products and the products would obviously be manufactured by the units.

17. The submissions proceeds on an erroneous basis and does not take into consideration the facts of the case at all. As we noted earlier, in the present case, the said R & D activities were in relation to the new drugs. There is nothing to indicate that in the event of the assessee deciding to commercially exploit the benefits of the R & D work, the products would be manufactured by the said units. The fallacy in the submissions proceeds on the hypothetical basis that the said products would be manufactured by each of the units or any one of them.

18. The fallacy also arises on account of an erroneous presumption that the benefit of any R & D activity can only be exploited by an enterprise utilizing the same in its manufacturing activities. That is not so. An enterprise in always assign the benefit thereof to a third party. It can always grant a licence in respect of any patent or design to a third party. In that event, the other units would not derive any benefit in respect thereof. The resumption of a nexus between the R & D activities and the units is not well founded."

21. Following the above decision, we hold that the allocation of R & D expenditure by the Assessing Officer among 80IB and 80IC units and non 80IB and 80IC units on the basis of percentage of sales of respective units to the total sales is baseless and totally unwarranted. Thus, we direct the Assessing Officer to recompute the income under normal provisions of the Act without any allocation of R & D expenditure among 80IB/80-IC and non 80IB/80IC units.

22. As we have dealt with the issue on merits, we are not inclined to go into the technicalities of reopening of assessment at this stage which nothing but academic exercise.

23. In the result, appeal of the assessee is partly allowed as indicated above.

Order pronounced on 14.09.2021 as per Rule 34(4) of
ITAT Rules by placing the pronouncement list in the notice board

Sd/-	Sd/-
(S. RIFAUR RAHMAN)	**(C.N. PRASAD)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai / Dated 14/09/2021
Giridhar, Sr.PS

<u>Copy of the Order forwarded to</u>:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum