

आयकर अपीलीय अधिकरण,चण्डीगढ़ न्यायपीठ “ए”, चण्डीगढ़  
IN THE INCOME TAX APPELLATE TRIBUNAL,  
CHANDIGARH BENCH ‘A’, CHANDIGARH

BEFORE: SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER  
AND SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA No.242/Chd/2017

निर्धारण वर्ष / Assessment Year : 2007-08

M/s GlaxoSmithKline Asia Pvt. Ltd.,24-25 Floor, One Horizon Centre, Golf Course Road, DLF Phase-5, Gurgaon.	बनाम	The A.C.I.T., LTU, New Delhi Now jurisdiction at DCIT, Circle 4(1), Chandigarh.
स्थायी लेखा सं./PAN NO: AABCS3237R		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ ITA No.219/Chd/2017

निर्धारण वर्ष / Assessment Year : 2007-08

The A.C.I.T., Circle 4(1), Chandigarh.	बनाम	M/s GlaxoSmithKline Asia Pvt. Ltd.,24- 25 Floor, One Horizon Centre, Golf Course Road, DLF Phase-5, Gurgaon. स्थायी लेखा सं./PAN NO: AABCS3237R
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ ITA No.225/Chd/2017

निर्धारण वर्ष / Assessment Year : 2008-09

M/s GlaxoSmithKline Asia Pvt. Ltd.,24-25 Floor, One Horizon Centre, Golf Course Road, DLF Phase-5, Gurgaon. स्थायी लेखा सं./PAN NO: AABCS3237R	बनाम	The A.C.I.T., Circle 4(1), Chandigarh.
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ **ITA No.220/Chd/2017**  
निर्धारण वर्ष / Assessment Year : 2008-09

The A.C.I.T., Circle 4(1), Chandigarh.	बनाम	M/s GlaxoSmithKline Asia Pvt. Ltd.,24- 25 Floor, One Horizon Centre, Golf Course Road, DLF Phase-5, Gurgaon.
स्थायी लेखा सं./PAN NO: AABCS3237R		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ **ITA No.226/Chd/2017**  
निर्धारण वर्ष / Assessment Year : 2009-10

M/s GlaxoSmithKline Asia Pvt. Ltd.,24-25 Floor, One Horizon Centre, Golf Course Road, DLF Phase-5, Gurgaon.	बनाम	The A.C.I.T., Circle 4(1), Chandigarh.
स्थायी लेखा सं./PAN NO: AABCS3237R		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ **ITA No.221/Chd/2017**  
निर्धारण वर्ष / Assessment Year : 2009-10

The A.C.I.T., Circle 4(1), Chandigarh.	बनाम	M/s GlaxoSmithKline Asia Pvt. Ltd.,24- 25 Floor, One Horizon Centre, Golf Course Road, DLF Phase-5, Gurgaon.
स्थायी लेखा सं./PAN NO: AABCS3237R		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ **ITA No.227/Chd/2017**  
निर्धारण वर्ष / Assessment Year : 2010-11

M/s GlaxoSmithKline Asia Pvt. Ltd.,24-25 Floor, One Horizon Centre, Golf Course Road, DLF Phase-5, Gurgaon.	बनाम	The D.C.I.T., Circle 4(1), Chandigarh.
स्थायी लेखा सं./PAN NO: AABCS3237R		

अपीलार्थी/Appellant	प्रत्यर्थी/Respondent
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आयकर अपील सं./ **ITA No.222/Chd/2017**  
निर्धारण वर्ष / Assessment Year : 2010-11

The A.C.I.T., Circle 4(1), Chandigarh.	बनाम	M/s GlaxoSmithKline Asia Pvt. Ltd.,24- 25 Floor, One Horizon Centre, Golf Course Road, DLF Phase-5, Gurgaon.
स्थायी लेखा सं./PAN NO: AABCS3237R		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

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आयकर अपील सं./ **ITA No.228/Chd/2017**  
निर्धारण वर्ष / Assessment Year : 2011-12

M/s GlaxoSmithKline Asia Pvt. Ltd.,24-25 Floor, One Horizon Centre, Golf Course Road, DLF Phase-5, Gurgaon.	बनाम	The D.C.I.T., Circle 4(1), Chandigarh.
स्थायी लेखा सं./PAN NO: AABCS3237R		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ **ITA No.344/Chd/2017**  
निर्धारण वर्ष / Assessment Year : 2012-13

M/s GlaxoSmithKline Asia Pvt. Ltd.,24-25 Floor, One Horizon Centre, Golf Course Road, DLF Phase-5, Gurgaon.	बनाम	The A.C.I.T., Circle 4(1), Chandigarh.
स्थायी लेखा सं./PAN NO: AABCS3237R		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ **ITA No.47/Chd/2018**  
निर्धारण वर्ष / Assessment Year : 2013-14

M/s GlaxoSmithKline Asia Pvt. Ltd.,24-25 Floor, One Horizon Centre, Golf Course Road, DLF Phase-5, Gurgaon.	बनाम	The A.C.I.T., Circle 4(1), Chandigarh.
स्थायी लेखा सं./PAN NO: AABCS3237R		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ **ITA No.1500/Chd/2018**  
निर्धारण वर्ष / Assessment Year : 2014-15

M/s GlaxoSmithKline Asia Pvt. Ltd.,24-25 Floor, One Horizon Centre, Golf Course Road, DLF Phase-5, Gurgaon.	बनाम	The A.C.I.T., Circle 4(1), Chandigarh.
स्थायी लेखा सं./PAN NO: AABCS3237R		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ **ITA No.1495/Chd/2019**  
निर्धारण वर्ष / Assessment Year : 2015-16

M/s GlaxoSmithKline Asia Pvt. Ltd.,24-25 Floor, One Horizon Centre, Golf Course Road, DLF Phase-5, Gurgaon.	बनाम	The D.C.I.T., Circle 4(1), Chandigarh.
स्थायी लेखा सं./PAN NO: AABCS3237R		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri Ajay Vohra, Sr.Adv.  
Shri Neeraj Jain, Adv. &  
Shri Abhishek Aggarwal, CA

राजस्व की ओर से/ Revenue by : Smt.C.Chandrakanta, CIT

सुनवाई की तारीख/Date of Hearing : 29.07.2021

उद्घोषणा की तारीख/Date of Pronouncement : 26.10.2021

**(Hearing through Webex)**

**आदेश/ORDER**

**Per Annapurna Gupta, Accountant Member:**

All the appeals relate to the same assessee and pertain to 9 assessment years i.e. A.Y. 2007-08 to 2015-16. For assessment years 2007-08 to 2010-11 cross appeals have been filed by the assessee and the department and the remaining, i.e. pertaining to assessment years 2011-12 to 2015-16, are appeals filed by the assessee. While the appeals for A.Y 2007-08 to 2011-12 and A.Y 2013-14, are against the separate orders of the Commissioner of Income Tax(Appeals)(in short referred to as ["CIT(A)"] passed u/s 250(6) of the Income Tax Act,1961, (hereinafter referred to as "Act"), those for A.Y 2012-13, 2014-15 and 2015-16 are against orders passed by the Assessing Officer in compliance with the directions of the Dispute Resolution Panel(DRP), passed u/s 143(3) r.w.s. 144C(5) of the Act.

2. At the outset itself it was stated that the impugned appeals had earlier been listed for hearing alongwith the appeals for assessment year 2005-06 and assessment year 2006-07, in ITA No.2453/Del/2016 and ITA No.532/Chd/2014

respectively, since all the appeals involved certain common issues. That the appeals for assessment years 2005-06 and 2006-07, being the lead years, had been heard and the decision was awaited. Both the parties submitted that certain issues arising in the present appeals, being common to those in assessment years 2005-06 and 2006-07, would be covered by the decision rendered therein. A chart listing the issues involved in all the appeals right from assessment year 2005-06 to assessment year 2015-16 was filed before us. Considering the aforesaid fact the appeals were heard issues-wise as per chart submitted before us.

3. Meanwhile the decision in the appeals for A.Y 2005-06 and 2006-07 was pronounced on 30.07.2021. Taking note of the same and the submission made by both the parties before us, the grounds raised in the present appeals are being proceeded to be adjudicated issue-wise to facilitate adjudication.

**Issue No.1: Disallowance made of provision of stock obsolescence being charged to the profit and loss account, raised in assessee's appeal for following A.Y.:**

<u>Assessment Year</u>	<u>ITA No.</u>	<u>Ground No.</u>
2007-08	242/Chd/2017	3 to 3.3
2009-10	226/Chd/2017	6 to 6.1

It was common ground that the issue was identical to that raised by the assessee in the appeal already heard pertaining to assessment year 2005-06 vide ground No.1.

4. We have gone through the order of the ITAT for assessment year 2005-06 and find the issue to have been adjudicated at para-6 of the order as under:

*“6. We have heard both the parties and have also gone through the documents and decisions relied /referred to before us. The claim of write off of stock amounting to Rs. 59,79,000/- has been denied for want of evidence. The write-offs claimed by the assessee relate to the following:*

<i>Vaccines</i>	<i>37.33lacs</i>
<i>Aquafresh toothbrush</i>	<i>12.46 lacs.</i>
<i>Total</i>	<i>57.79 lacs</i>

*The major write off claim evidently pertains to vaccines which, we find, the assessee consistently claimed had been nearing expiry and thus had no realizable value. Copies of emails exchanged within the assessee company seeking approval for release, write off and destruction of stock of vaccines nearing expiry mentioning specifically the stock of such vaccines, mails granting approval granting for the same, as also sample copies of stock write off sheets of the vaccines were filed to the CIT(A).Therefore it is not that the claim was entirely unsubstantiated. Further despite the repeated assertion of the assessee that the vaccines written off were nearing expiry, evidenced with emails so exchanged and the stock write off sheets so mentioning, the Revenue has not brought anything on record to controvert the said claim. Without pointing out any infirmity in the explanation of the assessee duly evidenced with documents, we hold, the claim could not be denied for want of further evidence. Nothing has been pointed out regarding the*

*insufficiency of evidences filed by the assessee. Then why further evidences were needed to substantiate the claim we are unable to understand. In the light of the same, we hold, the claim of the assessee as fully justified vis a vis write off of vaccines since undoubtedly such vaccines were not capable of being used beyond expiry period and had no realizable value thereafter.*

*As for the write off of Aquafresh tooth brush the assessee we find had explained to the CIT(A) the reasons for discontinuation of the business and the consequent withdrawal of the toothbrushes, from the market, being commercially unviable and had as evidence filed copy of the Board resolution dated 25-11-2003 to this effect. Thus, we find that the assessee has been able to establish documentarily the fact of write off of the said product and the Revenue has not proved anything to the contrary. For the reasons stated above in the context of write off of vaccines we see no reason to disallow the claim of the assessee. Moreover identical claim of the assessee, we have noted, was allowed by the ITAT in identical facts and circumstances in A.Y 2003-04. The claim of the assessee to write off of toothbrush also is therefore allowed*

*In effect the entire claim to write off amounting to Rs. 59,79,000/- is allowed.”*

5. Since the issue already stands adjudicated as above in the preceding assessment year, A.Y. 2005-06, the decision rendered therein will apply to the issue in all the remaining years concerned. Accordingly, the issues of disallowance of provision of stock obsolescence stands decided in favour of the assessee.

**ISSUE No.2**      **Disallowance of 1/3<sup>rd</sup> of the expenditure on advertisement and promotion, holding that it results in promotion of brand name owned by the foreign**

**company, raised in assessee's appeal for following A.Y.**

<u>Assessment Year</u>	<u>ITA No.</u>	<u>Ground No.</u>
2007-08	242/Chd/2017	1 to 1.1
2008-09	225/Chd/2017	2 to 2.1
2009-10	226/Chd/2017	2 to 2.1
2010-11	227/Chd/2017	2 to 2.1
2011-12	228/Chd/2017	2 to 2.1
2012-13	344/Chd/2017	4 to 4.2
2013-14	47/Chd/2018	2 to 2.1
2014-15	1500/Chd/2018	4 to 4.1
2015-16	1495/Chd/2019	5 to 5.1

6. It was common ground that the issue was identical to that raised by the assessee in the appeals already heard pertaining to assessment years 2005-06 and 2006-07 vide ground No.2 and 2 to 2.4 respectively.

7. We have gone through the order of the ITAT for assessment years 2005-06 and 2006-07, and find the issue to have been adjudicated at para 11 of the order as under:

***“11. We have heard both the parties. We are convinced with the arguments of the Ld. Counsel for the assessee that there was no reason/basis at all for holding that the advertisement /promotion expenses benefited the parent AE and hence a portion of it was liable to be disallowed as having not been incurred wholly and exclusively for the purpose of the business***

*of the assessee.*

*There is clear distinction between brand building and advertising & marketing. While the end purpose of both may be the same, i.e increasing sales/turnover, but the approach is definitely different. While advertising only communicates what a business has to offer, reaching out to the end customer and impacting immediate sales, brand building exercise on the other hand creates an identity/perception of the business, generating awareness about the business using strategies and campaigns with the goal of creating a unique and lasting image of the business in the market place. Brand building creates a customer base establishing long term relationship with the customer.*

*With this clear distinction between the two expenses, the onus to establish incurrence of either of the expenses is on the party claiming so. The Revenue claiming that the assessee has incurred brand building expenses, the onus is on the Revenue to establish the said fact. It cannot simply be derived from the fact that assessee has incurred huge expenses on advertisement and sale promotion of products the brand of which belonged to another entity, considering the clear distinction in the end objective of the said expenses and the assessee consistently claiming that it had acquired the exclusive license to manufacture and sell the products in India and thus being the sole user of the brand name in India. These contentions of the assessee have remained uncontroverted. The entire benefit, in such circumstances, inured to the assessee alone as it alone was operating in the Indian market. Benefit if any to the AE was only incidental. And on account of such incidental benefit accruing to a third party it cannot be said that the expense was not wholly and exclusively for the benefit of the assessee. As long as the objective /purpose for incurring an expenditure is to benefit the assessee solely, the expenditure can be said to be incurred wholly and exclusively for the benefit of the assessee. Any incidental benefit accruing to a third party on account of the same, being*

*beyond the control of the assessee, does not dilute the character of the expense.*

*We do not find any reason or basis therefore for holding a part of the expense as pertaining to brand building. We therefore direct deletion of the disallowance made on account of brand building expenses amounting to Rs.8,94,33,333/-*

*Ground of appeal No. 2 is allowed.”*

8. Since the issue already stands adjudicated as above in the preceding assessment years, A.Y. 2005-06 & 2006-07, the decision rendered therein will apply to the issues in all the remaining years concerned. Accordingly, the issues of disallowance of 1/3<sup>rd</sup> of advertisement and promotion expenses stands decided in favour of the assessee.

**Issue No.3: Disallowance of purchase of vaccine of GlaxoSmithkline Biological S.A. u/s 40(a)i) of the Act raised in assessee's appeal for following A.Y.**

<u>Assessment Year</u>	<u>ITA No.</u>	<u>Ground No.</u>
2007-08	242/Chd/2017	2 to 2.4
2008-09	225/Chd/2017	1 to 1.4
2009-10	226/Chd/2017	1 to 1.4
2010-11	227/Chd/2017	1 to 1.4
2011-12	228/Chd/2017	1 to 1.4
2012-13	344/Chd/2017	3 to 3.5
2013-14	47/Chd/2018	1 to 1.4

2014-15	1500/Chd/2018	3 to 3.4
2015-16	1495/Chd/2019	4 to 4.4

9. It was common ground that the issue was identical to that raised by the assessee in the appeals heard pertaining to assessment years 2005-06 and 2006-07 vide ground Nos.2.2 and 3 to 3.9 respectively.

10. We have gone through the order of the ITAT for assessment years 2005-06 and 2006-07 and find the issue to have been adjudicated at para 18 of the order as under:

*“18. We have heard both the parties and have also carefully gone through the orders of the authorities below as also the documents referred to by the Ld. Counsel for the assessee before us. On going through the same and after carefully considering the same we find merit in the contention of the Ld. Counsel for the assessee that the issue needs reconsideration.*

*The AO has held PE of GSK Biologicals SA in India based on his findings that clinical trials and R &D are core activities in vaccine development which is got done by GSK Biologicals in India through the assessee and other affiliates. These findings we find are based on, as mentioned in the assessment order at page 35 “facts extracted from various websites of the assessee’s group companies which throw light on the vaccine business of the group and role of Indian affiliates”. The role of the assessee is based on decision taken in the 63<sup>rd</sup> meeting of the Genetic Engineering Approval Committee on the 8<sup>th</sup> February 2006. The AO has contended that GSK Biologicals is carrying on vaccine development activity through these fixed place of business. That all intellectual*

*property in the vaccine vests with GSK Biologicals, while R&D activity is carried out in India, the assessee is economically dependent on GSK Biologicals SA and has no other business. The Ld. CIT(A) ,we have noted has merely reiterated the findings of the AO.*

*The assessee on the other hand, we find has made specific factual and legal submissions countering the findings of the AO/CIT(A), pointing out that the facts are to the contrary that there was no agreement of GSK Biologicals SA with the assessee but in fact it had entered into two agreements with GSK Pharma, an Indian Company, for carrying out clinical research and data management. Copies of the agreement had been placed on record. It was also pointed out that in terms of the DTAA with Belgium, there was no fixed place PE of GSK Biologicals SA in India as it did not have any such place at its disposal. That conducting clinical trials did not constitute the core activity of GSK Biologicals SA, which was engaged in manufacturing vaccines. That neither GSK Pharma nor the assessee were acting as agents of GSK Biologicals SA, and that in terms of DTAA, PE did not include maintaining premises for research and development. That without prejudice to the aforestated arguments, even if there was a PE of GSK Biologicals, no purchases made by the assessee of vaccines were attributable to the PE and therefore also no profits on account of the said purchases were taxable in India, therefore requiring no taxes to be deducted at source.*

*None of these factual and legal contentions we find have been dealt with by the Ld. CIT(A).*

*On the contrary it was brought to our notice that the AO's findings were based on data/information extracted from websites none of which was related to the assessee. That even the information extracted regarding conducting of clinical trials at pages 39-47 of the AO's order did not mention the assessee as the site where trials were to be carried out. That even the Genetic Engineering Committee report did not relate to the impugned year, being dated 8<sup>th</sup> February*

*2006. That the findings to the effect that no other activity was being carried out by the assessee except clinical trials was incorrect as the assessee was manufacturing Eno and Crocin.*

*The findings of the AO therefore that the assessee was carrying out clinical trials for GSK Biologicals, we find, has been demonstrated before us to be not based on relevant facts. And the Ld. CIT(A) has merely reiterated the findings of the AO despite specific factual and legal contentions made by the assessee to the contrary. We have also noted that the determination of PE of GSK Biologicals SA, is pending before the Hon'ble Delhi High Court in writ petitions filed by GSK Biologicals SA against proceedings initiated u/s 148 of the Act on the basis that there exists PE, for A.Y 2005-06 TO 2009-10.*

*Considering the above, we are of the view that it would be in the fitness of matter to restore the issue back to the AO for adjudication afresh in accordance with law after giving due opportunity of hearing to the assessee and after considering all factual and legal contentions raised by it.*

*Ground No 2.2 – 3.4 are accordingly restored back to the AO with the above directions and therefore stand allowed for statistical purposes.”*

11. Since the issue already stands adjudicated as above in the preceding assessment years, A.Y. 2005-06 & 2006-07, the decision rendered therein will apply to the issues in all the remaining years concerned. Accordingly, the issues of Disallowance of purchase of vaccine of GlaxoSmithkline Biological S.A. u/s 40(a)i) of the Act stands allowed for statistical purposes.

**Issue No.4: Disallowance of Product Development Expenses in relation to pre-launch of product being capital in nature raised in assessee's appeal for following A.Y.**

<u>Assessment Year</u>	<u>ITA No.</u>	<u>Ground No.</u>
2007-08	242/Chd/2017	4 to 4.2
2008-09	225/Chd/2017	4 to 4.2
2009-10	226/Chd/2017	4 to 4.1
2010-11	227/Chd/2017	4 to 4.1
2011-12	228/Chd/2017	5 to 5.1
2012-13	344/Chd/2017	7 to 7.1
2013-14	47/Chd/2018	5 to 5.1
2014-15	1500/Chd/2018	7
2015-16	1495/Chd/2019	8 to 8.2

12. It was common ground that the issue was identical to that raised by the assessee in the appeal already heard pertaining to assessment year 2006-07 vide ground Nos.4 to 4.2.

13. We have gone through the order of the ITAT for assessment year 2006-07 and find the issue to have been adjudicated at para 33 as under:

*“33. We have heard both the parties. Admittedly identical issue arose in the preceding year also in the case of the assessee and the ITAT deemed it fit to restore it back to the AO for adjudication afresh after examining the nature and impact of the expenses vis a vis the existing business of the assessee. In the present case also the Revenue has decided the issue*

*based on general observations without examining the nature and impact of the expenses on the existing business of the assessee. Even the decision of the ITAT in the case of Glaxo Smithkline consumer Health care Ltd.(supra), relied upon by the Ld. Counsel for the assessee ,we find, rendered its judgment after examining the facts relating to the expenses vis a vis its nature and impact on business. The issue therefore, we hold, needs to be reconsidered by the AO for which purpose we restore it to the AO with the direction to adjudicate it in accordance with the direction of the ITAT in the case of the assessee for A.Y 1998-99 and 1999-2000.*

*Ground of appeal No 4 & 4.1 are allowed for statistical purposes.”*

14. Since the issue already stands adjudicated as above in the preceding assessment year, A.Y. 2006-07, the decision rendered therein will apply to the issues in all the remaining years concerned. Accordingly, the issue of Disallowance of Product Development Expenses in relation to pre-launch of product, being capital in nature stands allowed for statistical purposes.

**Issue No.5: Disallowance of market research expenses incurred on market surveys, market research being capital in nature, raised in assessee’s appeal for following A.Y.:**

<u>Assessment Year</u>	<u>ITA No.</u>	<u>Ground No.</u>
2007-08	242/Chd/2017	5 to 5.3
2008-09	225/Chd/2017	3 to 3.2
2009-10	226/Chd/2017	3 to 3.1

2010-11	227/Chd/2017	3 to 3.1
2011-12	228/Chd/2017	3 to 3.1
2012-13	344/Chd/2017	5 to 5.1
2013-14	47/Chd/2018	3 to 3.1
2014-15	1500/Chd/2018	5
2015-16	1495/Chd/2019	6

15. Brief facts relating to the issue are that the assessee had debited expenses incurred towards market research/study which were disallowed by the AO to the extent of 50% on an adhoc basis holding that the assessee had failed to provide name, address and PAN of the parties. The CIT(A) upheld the disallowance but for a different reason, holding that the impugned expenses were capital in nature giving enduring benefit to the assessee having been incurred on products which were yet to be launched.

16. At the outset itself, Ld. counsel for the assessee pointed out that the issue is covered by the order of the Tribunal in the case of GlaxoSmithKline Consumer Healthcare Ltd. for assessment year 1998-99 to 2001-02 and 2002-03, 2003-04 and 2004-05 to 2008-09, 2009-10, 2010-11, 2011-12, 2012-13 and 2013-14. Our attention was drawn to the relevant findings in the said case as under :

*“In this background we may peruse the expenses incurred*

*by the appellant under the head 'Promotional and Trade Marketing expenses'. Such expenditure has been incurred on existing products of the appellant and includes cost of presentation items, gifts, etc. given to the customers on the sale of the product, expenditure on advertisement material etc. The expenditure can be viewed as in actuality discount in kind allowed to the customers and expenditure on advertisement of the existing products of the appellant. Clearly the expenses incurred are of revenue nature. The expenses in question have merely facilitated the carrying on the business of the appellant more fruitfully. The argument of the revenue that such expenditure result in enduring benefit in as much as the expenditure results in enhancing of the brand, in our view, cannot be taken to mean that the expenditure is capital in nature. As we have noted earlier, it is not each and every enduring benefit which is to be conclude as a capital outgoing. At this point it is pertinent to refer to the decision of the Hon'ble Apex Court in the case of Empire Jute Co. Ltd. (supra).*

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*The aforesaid decision of the Hon'ble Apex Court clearly shows that the test of enduring benefit is not conclusive to judge true nature of expenditure. One has to go further and ascertain as to whether particular expenditure results into an advantage of enduring nature in the capital field or revenue field. In the instant case having regard to the nature and details of expenditure it is clear that the expenditure under the head "Promotional and Trade marketing expense " is an expenditure which is incurred wholly and exclusively for the purposes of business and is in the revenue field. The same is allowable as revenue expenditure.*

*Now we may examine the expenditure under the head "Product Development Expenses ". The details of the expenditure show that the same has been incurred for introducing and developing new products. The appellant is engaged in the business of manufacture and sale of food and health care products under a well known brand. The expenses include development expenses for new products namely nutribar chocolate, Ribena soft drink, Horlicks re-launch expenses. Certainly such expenditure has the potential to improve the profitability of the appellant.*

*However, the issue to be considered is whether the expenditure seeks to enlarge the profit yielding capacity or it increases the efficiency of the business. This aspect, in our considered opinion, is to be decided in the light of the business realities under which the appellant is operating. The appellant is engaged in the business of manufacturing of fast moving consumer goods. The business of the appellant is subjected to volatility in consumer preferences, tastes and wants. The appellant is therefore required to perennially study the market and launch new varieties in its products line and meet the competition in the market. It is in this background one has to examine whether the impugned expenditure incurred on development, introduction and launching of newer products is an advantage in the revenue filed or not. In our humble opinion, the expenditure in question has merely enabled the appellant to remain competitive in the market and retain the customer preferences and loyalty towards its brand of products. The said advantage certainly is not limited to the period under consideration but spills over to the future also. So however this is not conclusive to hold that the expenditure in question is a capital expenditure-The parity of reasoning laid down by the apex court in the case of Empire Jute Co. Ltd. (supra) discussed by us in the earlier paragraph is squarely applicable with respect to such expenditure also.*

XXXXXX XXXXX

*In conclusion, we hold that having regard to the aforesaid discussion the claim of the appellant for allowability of impugned expenditure as revenue expenditure is justified. We, therefore set aside the order of the CIT(A) and direct the Assessing officer to delete the addition. "*

17. Referring to the aforesaid decision, ld. counsel for the assessee pointed out that it had been held in the said decision that expenditure incurred which enabled the assessee to remain competitive in the market and retain its customer preferences and loyalty towards its brand of products, could not be said to be capital in nature, even though the benefit may spill over to few

years, since enduring benefit is not conclusive to judge the true nature of an expenditure and for the said purpose, what is to be ascertained is whether a particular expenditure results in an advantage of enduring nature in the capital field or revenue field. He drew our attention to the parity of reasoning drawn in the said decision from the judgement of Apex Court in the case of Empire Jute Company Ltd Vs CIT (1980) 124 ITR 1(SC).

18. Referring to the facts of the case before us, ld. counsel for the assessee pointed out that the assessee company is in the FMCG business (fast moving consumer goods), and it has to continuously expand and enlarge its range of products in order to survive and improve profits and it is towards this endeavour that the assessee develops new types of products from time to time and tests them in the market and if the tests are successful, the products are commercially launched. He contended that it was in the course of these activities that the assessee had to incur expenditure of Rs. 1,26,83,000/-. The ld. counsel for the assessee contended that it is evident that the consumer market research expenses is a necessity for day today running of any fast moving consumer goods business which is marked by cut throat competition and instantaneous and continuous changes in

consumer preferences and for survival expenses of the impugned nature have to be incurred. That these expenses are not incurred once and for all but are recurring in nature which is evident from the fact that such expenditure has been incurred in the future years also. He pointed out that the decision of the CIT(A) holding it as capital in nature was based on account of his observations that the expenditure is not recurring but occurs once and for all, has the potential to enlarge the profit yielding capacity of the assessee by introducing new products and has provided the assessee with an advantage of enduring nature. The ld. counsel for the assessee pointed out that in view of the submissions made in this regard and the decision of the ITAT in the case of GlaxoSmithKline Consumer Healthcare Ltd. (supra) the reasoning of the Revenue authorities for holding the impugned expenditure falls flat.

19. The ld. DR on the other hand heavily relied on the order of the CIT(A) supporting his findings that the impugned expenses were capital in nature and hence had been rightly disallowed.

20. We have heard both the parties and we have also gone through the decision of the ITAT in the case of GlaxoSmithKline Consumer Healthcare Ltd.(supra) cited before us. The issue

relates to disallowance of Market Research Expenses treating them to be capital in nature on account of the fact that they provide enduring benefit, are incurred for launching new products and are not recurring in nature. It is not denied that the assessee is a FMCG company catering to the needs of consumers in the fast moving goods category. As rightly pointed out by the Ld.Counsel for the assessee, the demands in these type of companies are continuously changing and evolving and there is cut throat competition involved in it. Such circumstances, require regular, continuous research and development of the products being marketed so as to remain relevant and competitive in the market. These facts cannot be denied. In the light of these facts, the expenditure incurred by the assessee on market research is merely for maintaining its profit earning ability and does not enhance the same. It is an expenditure which is incurred by the industry segment to which the assessee belongs so as to remain relevant and competitive in the said segment. By no stretch of imagination, the impugned expenditure, therefore, can be said to be capital in nature. The benefit, though made may be derived for a few years but is definitely not on capital account but on the contrary is on a revenue account to maintain its profitability only and not by way

of enhancing it. The decision of the ITAT in the case of GlaxoSmithKline Consumer Healthcare Ltd. (supra) cited before us strengthens the case of the assessee wherein product development expenses which were found to have been incurred not on capital account but on revenue account, though giving enduring benefit in future, were held to be revenue in nature and hence allowable. In view of the above, the disallowance of market research expense is directed to be deleted and we hold that the assessee is entitled to claim the same as revenue in nature. The assessee has alternately pleaded for allowance of depreciation which is of no relevance since the entire claim of expenses has been allowed treating it as revenue in nature

21. The issue of allowability of market research expenses, accordingly, is decided in favour of the assessee.

**Issue No.6: The disallowance of post retirement medical benefit holding this expenditure as being in the nature of contingent liability, raised in assessee's appeal for following A.Y.:**

<u>Assessment Year</u>	<u>ITA No.</u>	<u>Ground No.</u>
2008-09	225/Chd/2017	5
2009-10	226/Chd/2017	5 to 5.2
2010-11	227/Chd/2017	5
2011-12	228/Chd/2017	4

2012-13	344/Chd/2017	6
2013-14	47/Chd/2018	4
2014-15	1500/Chd/2018	6
2015-16	1495/Chd/2019	7-7.1

22. Brief facts relating to the issue are that the AO noted from the balance sheet of the assessee that the assessee had made provision for employees' benefit which included provision for post retirement medical benefits liability. The AO disallowed the same holding that such provisions were not allowable, which was upheld by the ld. CIT(A) holding that the impugned provision is only a contingent liability.

23. Before us, at the outset it was pointed out that identical issue of disallowance of provision for post retirement benefits to employees had been adjudicated by the ITAT in the case of GlaxoSmithKline Consumer Healthcare Ltd. for assessment year 2007-08 to 2013-14 wherein the Tribunal had held as under :

*"In the facts of the present case before us the appellant had recognised and accounted for the post retirement benefit due to its employees, in terms of the scheme of employment and also in terms of the revised/ change in Accounting Standard!5 issued by ICAI which was to be followed during the year, is an allowable deduction in the hands of the appellant. The said claim being based on the valuation of the actuary is both scientific and one of the recognised method of accounting and quantifying the said post retirement medical benefits. In such cases though actual and exact quantification may not be possible, however, the*

*liability so recognised by the appellant could not be said to be unascertained and contingent. The appellant having followed the mercantile system of accounting was compulsorily required to account for the said post retirement medical benefits as the same was quantified and had accrued during the year. The claim of the appellant was thus allowable irrespective of the fact that the appellant had made a provision in the books of account but had claimed the said deduction in the computation of income. It is well settled proposition that the way in which entries are made by the appellant in its books of account is not determinative of the question whether the appellant had earned any profit or suffered any loss as held by the hon'ble apex court in Sulej Cotton Mills Ltd. v. CIT (1979) 116 ITR 1 (SC). It was further held by the hon'ble apex court that what is necessary to be considered is the true nature of transaction and whether in fact it has resulted in profit or loss to the appellant. Further, the said deduction was claimed during the year under consideration and the claim being bona fide is to be allowed in the year in which the same accrues though the said liability is to be discharged at a later date. "*

24. Copy of the order was placed before us. Referring to the same, ld. counsel for the assessee contended that the ITAT held that provision for post retirement benefit made in terms of scheme of employment and also in terms of accounting standard issued by the ICAI which was required to be followed ,is an allowable deduction in the hands of the assessee. It was pointed out that the ITAT had also taken note of the fact that the claim was based on valuation of the same done by an actuary which is both scientific and one of the recognized method of accounting for quantifying post retirement medical benefits. That in such cases, though actual benefit cannot be exactly quantified,

however, liability so recognized cannot be termed to be contingent.

25. The ld. counsel for the assessee pointed out that in the impugned case also, the facts were identical, that the assessee having created the provision in accordance with the terms of employment and the Accounting Standard 15 of the ICAI relating to accounting of employee benefits. He, therefore, contended that the impugned provision had been rightly claimed by the assessee.

26. The ld. DR on the other hand relied on the order of the authorities below.

27. We have heard both the parties. We have also gone through the orders of the ITAT in the case of GlaxoSmithKline Consumer Healthcare Ltd.(supra) and have noted that the issue of allowability of provision created for meeting medical expenses of the employees post retirement had been adjudicated in the said case wherein the ITAT had allowed the said provision on noting that it had been created on scientific basis by actuary in terms of and recognizing the scheme of employment and also the Accounting Standard-15 issued by the ICAI in this regard. Considering the same, the ITAT had held that the said provision

could not be, therefore, said to be contingent in nature and was duly allowable, being recognized method of accounting. In the impugned case also, we find, that the assessee had claimed the provision, valued by an actuary, created in terms of the scheme of employment and the Accounting Standard-15 of the ICAI, which facts have not been controverted by the revenue before us. Therefore, the issue, we find, stands squarely covered by the decision of the ITAT in the case of GlaxoSmithKline Consumer Healthcare Ltd. following which we hold that the provision for post retirement medical benefit is an allowable claim and the disallowance, therefore, made on account of the same is directed to be deleted.

The issue of allowance of post retirement benefits is accordingly decided in favour of the assessee.

**Issue No.7: Issue relating to disallowance of claiming CENVAT recoverable holding that expenditure to be not in the nature of trading expenditure, raised in assessee's appeal for following A.Y.:**

<u>Assessment Year</u>	<u>ITA No.</u>	<u>Ground No.</u>
2008-09	225/Chd/2017	6 to 6.1

28. The facts relating to the issue are that the assessee had written off service tax recoverable which was not allowed by the

Revenue holding that it pertained to earlier years and could not also be treated as bad debt.

29. The assessee contended before us that after the introduction of CENVAT Credit Rules, 2004, it had started taking credit of service tax paid on its input services i.e. Cross Charge Service and Advertisement services. The expenses were debited Ex- Service Tax Component, which was treated as recoverable to be adjusted as input CENVAT Credit against the output service tax to be paid. Therefore, the input Service Tax was not treated as part of cost of services in the Profit & Loss Account but was accumulated under Service Tax recoverable in the balance sheet. That due to judicial pronouncement, the assessee was not allowed utilization of this service tax credit which was, accordingly, charged off to Profit & Loss Account in the year of the judicial order so pronounced. It was pointed out by the counsel that this amount of input credit having been paid against the entire value of services availed, was expense incurred in the course of business of the assessee and since it was not allowed to be set off against service tax payable in the impugned year, the same ought to have been allowed as a deduction on the amount being written off. Alternatively the assessee claimed that

the claim should be allowed in the respective years to which it belonged since it represented cost of services availed.

30. The ld. DR on the other hand relied on the orders of the authorities below.

31. We have heard both the parties. The CENVAT credit write off claimed by the assessee has been denied by the Revenue holding it to be not in trading nature. The facts relating to the claim, not disputed by the Revenue, is that they represented the input service tax paid by the assessee for various services availed, which was accounted for separately, to be adjusted against out-put service tax to be paid. That it was claimed as a write off in the Profit & Loss Account on account of orders passed by the Service Tax Authorities denying benefit of set off to the said claim. In the backdrop of these undisputed facts, it is clear that the CENVAT Credits represented cost of services availed, which was not claimed in the relevant years since they were eligible to be set off against output service tax to be paid by the assessee. On this claim of set off being judicially held to be not allowable, we agree with the Ld.Counsel for the assessee, the impugned CENVAT Credits partook the character of cost of services and did so in the year in which the order holding them

as not eligible for setoff against output tax, was passed. Till then they merely represented asset by way of service tax credit available on account of the same. In view of the same, we find merit in the claim of the assessee that the write off of cenvat credit recoverable was allowable as revenue expenditure in the year written off and the disallowance so made by the revenue authorities, holding them to be non trading in nature, we hold is not in accordance with law and is directed to be deleted.

This issue of claim of CENVAT credit recoverable is accordingly decided in favour of the assessee.

**Issue No.8: Disallowance of provision of Market Claims on account of the assessee having failed to establish the nature of liability raised in assessee's appeal for following A.Y.:**

<u>Assessment Year</u>	<u>ITA No.</u>	<u>Ground No.</u>
2010-11	227/Chd/2017	6 to 6.1

32. The facts relating to the issue are that the assessee had debited and claimed provision for market claims which were disallowed by the revenue holding that it was a liability of future date and was also contingent in nature. It was also observed that the explanation of the assessee, that the same pertained to VAT Schemes of dealers, was not supported by any documentary

proof of actual claim. Accordingly, the provision for market claims was disallowed.

33. Before us the submissions made before the authorities below were reiterated stating that the provision so claimed represented additional liability on account of VAT in respect of sale of finished goods made by the assessee which was provided as per estimate of such market claims by the dealers or distributors. The contention of the ld. counsel for the assessee before us was that the said provision had been made by the assessee for meeting the liability to be incurred in future and the said liability which incurred. In this respect he relied upon decision of the Apex Court in the case of Bharat Earth Movers Vs CIT 245 ITR 428 and in the case of Rotork Controls India Ltd. Vs CIT 314 ITR 62. The ld. counsel for the assessee contended that the present claim had been made by the assessee as per estimation of such market claims by dealers and distributors and therefore, it was the obligation as per the claims to this effect made by dealers/distributors and thus, crystallized and came into effect during the relevant previous years. He, therefore, contended that the impugned claim was allowable. Alternatively, he contended that the amount of market claim which was added

to the income of the assessee in subsequent years on reversal may be directed to be reduced from the same if the claim is held not allowable in the impugned year.

34. The ld. DR on the other hand relied on the orders of the authorities below.

35. We have heard both the parties. There is no dispute vis-à-vis the proposition of law, that an ascertained liability which is a present obligation determined on a reasonable and scientific basis, is to be allowed as deduction even if the outflow for the same, to settle the obligation, arises in a future date. What is important is the incurrance of the liability. In the present case, the assessee has contended that it has incurred liability on account of VAT claims to be made by dealers which is to be discharged in the subsequent years, but, we find, no documentary evidence in this regard has been filed to substantiate its claim. In the absence of the same, we fail to understand how the liability arose in the impugned year or could be said to be present obligation of the assessee even though it was required to be discharged in future years. The facts regarding the claim itself are not clear and therefore, we are not inclined to agree with the contention of the assessee. However,

the alternate claim of the assessee of reducing the said provision reversed in subsequent years from its taxable income is justifiable and the revenue authorities are directed to allow the same in accordance with law.

36. The issue of allowance of provision of market claims is accordingly, adjudicated against the assessee.

**Issue No.9: Regarding claim of surcharge and education cess raised as additional ground by the assessee in all the impugned assessment years, i.e. A.Y 2007-08 to A.Y 2015-16:**

37. This issue has been raised before us as additional ground alongwith an application seeking admission of the same on the grounds that it is a legal issue and therefore, needs to be admitted for adjudication in view of the decision of the Apex Court in the case of NTPC Vs CIT 229 ITR 383(SC). It was pointed out that identical additional ground was raised in assessment years 2005-06, 2006-07 already heard.

38. We have gone through the order of the ITAT pertaining to assessment year 2005-06, 2006-07 and we find that identical additional ground raised therein was admitted for adjudication and thereafter decided against the assessee holding as under :

*“22. We have heard both the parties. Dealing first with*

*the admission of the additional ground raised as above before us, the assessee has raised a legal ground relating to admissibility of education cess paid as a deduction and the adjudication of the same surely does not require any investigation of fresh facts. Even the Ld. DR has not objected to the admission of the same. The additional grounds raised are accordingly admitted for adjudication. The order was pronounced during the course of hearing.*

*Now coming to the contention of the Ld. DR that the additional ground, having not been raised before the CIT(A) and thus not dealt with by him ,needs to be sent back to him for adjudication, we are not convinced with the contention of the Ld. DR. Section 253 of the Act grants right of appeal to the assessee, aggrieved by any of the orders specified therein , to the ITAT. As per Section 254 of the Act, the ITAT may after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it deems fit. Rule 11 of the ITAT Rules,1963,which deals with Grounds which may be taken in appeal, permits raising of additional grounds by appellants, being other than those raised in the memorandum of appeal, subject to the same being heard by the leave of the Tribunal. The Rule further permits the Tribunal to not confine itself to the grounds raised while deciding an appeal.*

*Reading the above together, there is no restriction to the power of the Tribunal in entertaining an additional ground raised before it for adjudication. As long as all facts are available on record all additional grounds, including those raised for the first time can be adjudicated by the ITAT. This issue stands settled by the apex court in the case of NTPC Limited (supra) where on the question whether the Tribunal has jurisdiction to examine a question of law not raised before the lower authorities, it was categorically held that the power of the ITAT in dealing with appeals has been expressed in the statute in the widest possible terms. That there is no restriction of its power to deal only with those issues which arise from the CIT(A)'s order and any question of law ,facts relating*

*to which are on record ,can be raised before the Tribunal for the first time. It was emphasized in the decision that the purpose of assessment proceedings is to correctly assess the tax liability of assesseees in accordance with law and to this end the power of the Tribunal cannot be restricted only to decide issues which arise from the CIT(A)'s order. The decision of the Hon'ble apex court on the issue is as under:*

*"The Tribunal has framed as many as five questions while making a reference to us. Since the Tribunal has not examined the additional grounds raised by the assessee on the merits, we do not propose to answer the questions relating to the merits of those contentions. We reframe the question which arises for our consideration in order to bring out the point which requires determination more clearly. It is as follows:*

*"Where on the facts found by the authorities below a question of law arises (though not raised before the authorities) which bears on the tax liability of the assessee, whether the Tribunal has jurisdiction to examine the same ?"*

*3. Under s. 254 of the IT Act the Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction denied, we do not see any reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under s. 254 only to decide the grounds which arise from the order of the CIT(A). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.*

*4. In the case of Jute Corporation of India Ltd. vs. CIT (1990) 88 CTR (SC) 66 : (1991) 187 ITR 688 (SC) : TC 7R.343, this Court, while dealing with the powers of the AAC observed that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is*

*vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the AAC in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the ITO. This Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The AAC must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. the AAC should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also.*

*5. The view that the Tribunal is confined only to issues arising out of the appeal before the CIT(A) takes too narrow a view of the powers of the Tribunal [vide, e.g., CIT vs. Anand Prasad (1981) 128 ITR 388 (Del) : TC 8R.1021, CIT vs. Karamchand Premchand (P) Ltd. (1969) 74 ITR 254 (Guj) : TC 8R.547 and CIT vs. Cellulose Products of India Ltd. (1985) 44 CTR (Guj) 278 (FB) : (1985) 151 ITR 499 (Guj)(FB) : TC 8R.965]. Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.*

*6. The reframed question, therefore, is answered in the affirmative, i.e., the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee. We remand the proceedings to the Tribunal for consideration of the new grounds raised by the assessee on the merits.”*

*In view of the settled position as above, we do not find any merit in the argument of the Ld. DR and even the case law relied upon by the Ld. DR, we find, is of no assistance as it does not lay a blanket proposition as canvassed by the Ld. DR, but has been rendered in the facts of the case before the Hon'ble High Court. In the said case the Hon'ble High Court found that the ITAT had set aside the order of the CIT(A) and annulled the order of the AO by deciding the appeal on the additional grounds raised after admitting them for adjudication. That instead of concentrating on the issues already decided by the CIT(A) ,the Tribunal only concentrated on the grounds*

*which had not been taken before him and decided the appeal annulling the assessment. In this background the Hon'ble High court held that the Tribunal had exhibited undue haste in deciding the appeal by adjudicating only the issues which were not even there before the CIT(A) and that such approach was neither legal nor proper. In the present case it is not that the outcome of the entire appeal depends on the additional ground raised. On the contrary the additional ground impacts only one claim of the assessee to deduction of education cess paid, which neither requires any facts to be uncovered or even verified or investigated. There is no finding of fact to be recorded vis a vis the impugned issue and hence no impediment to the ITAT in adjudicating the issue. Therefore we find there is no reason to restore it for adjudication to the CIT(A). The contention of the Ld. D.R. therefore that the additional ground raised should be restored to the CIT(A) is accordingly dismissed.*

*Now coming to the issue to be adjudicated, whether the education cess paid by the assessee and calculated as proportion of the income tax, is allowable as expenditure. This issue arises in the context of the provisions of section 40(a)(ii) of the Act which deals with certain amounts which are not allowable while computing the income under the head 'business and profession' and sub-clause(ii) thereof mentions taxes paid on profits and gains of business and profession as not allowable. The relevant provisions of section reproduced as under:*

*“40. Notwithstanding anything to the contrary in [sections 30 to 38](#), the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",—*

*(a) in the case of any assessee—*

*(i) .....*

*.....*

*(ii) any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains.*

*Explanation 1.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes and shall be deemed always to have included any sum eligible for relief of tax under [section 90](#) or, as the case may be, deduction from the Indian income-tax payable under [section 91](#).*

*Explanation 2.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes any sum eligible for relief of tax under [section 90A](#).”*

*23. Undoubtedly, the decision referred to by the Ld. Counsel for the assessee of the Hon'ble High Courts of Bombay and Rajasthan have categorically held education cess to be not covered u/s 40(a)(ii) of the Act. The reasoning being that this provision originally included cess also which was specifically omitted later on and even the CBDT in Circular No.91/58/66-ITJ(19) dated 18-05-1967 clarified that cess was not covered u/s 40(a)(ii). But at the same time we are aware of and even the Ld DR has pointed out the decision of the Hon'ble Apex Court in the case of K. Srinivasan (supra) wherein it has been categorically held that the “tax on income” would include all surcharge and additional surcharge levied on it. The Hon'ble Apex court was seized with the issue whether surcharge is to be paid by assessees on their income considering that it is not mentioned in the charging section of the Act. The Hon'ble apex court , in a detailed order tracing the concept of surcharge in taxation laws, its legislative history ,its dictionary meaning and the language employed in the Finance Bills specifying rates of taxes to be levied and the surcharge and additional surcharge to be paid thereon, found that it only increased the rate of tax. Accordingly the Hon'ble apex court held that surcharge and additional surcharged levied under the Act formed part of tax and therefore was liable to be paid as per the charging provision of the Act. The relevant portion of the order of the Hon'ble apex court in this regard is as under;*

*“Sec. 2 of the Finance Act, 1964, which is headed as "Income- tax and super-tax" provides in sub-s. (1) that income-tax and super-tax shall be charged at the rates specified in Parts I and II of the First Schedule respectively and that*

*in cases to which certain paragraphs of those parts apply these taxes shall be increased by a surcharge for the purpose of the Union. According to sub-s. (2) where the total income of an assessee not being a company includes any income chargeable under the head "Salaries" income-tax and super-tax payable by the assessee on the salary portion of the total income shall be the proportionate amount payable according to the rates provided in the Finance Act, 1963. Under s. 2 of the Finance Act, 1963, income-tax was to be charged at the rates specified in Part I of the First Schedule and super-tax at the rates specified in Part II of that Schedule. The income-tax was to be increased in the cases mentioned by a surcharge and additional surcharge for the purpose of the Union and a special surcharge. The super-tax was, however, to be increased by a surcharge for the purpose of the Union and a special surcharge. It will be noticed that s. 2(2) of the Finance Act, 1964, did not contain mention of any of the surcharges. This led to the controversy which resulted in the reference.*

**4.** *Before the High Court the assessee relied on ss. 4 and 5 of the IT Act, 1961, hereinafter called "the Act". These sections provide for charge of income-tax and super-tax. It was pointed out that surcharges was treated in the Finance Acts as a tax different from the income-tax and super-tax and that surcharge was levied by the Finance Act while the income and super-taxes were levied by the Act. Reference was made in this connection to the First Schedule to the Finance Act, 1963. Part I of that Schedule dealt with "income-tax and surcharge on income-tax". Under that heading were given the rates of income-tax as also the rates of surcharge. Similarly, Part II of the Schedule dealt with super-tax and surcharge on super-tax and under that heading the rates of super-tax and the rates of surcharge on super-tax were given. Among the surcharges in the case of income-tax were mentioned : (a) a surcharge for the purpose of the Union, (b) a special surcharge and (c) an additional surcharge. As regards the surcharge on super-tax there was mention of (a) a surcharge for the purpose of the Union and (b) a special surcharge. The High Court examined the aforesaid provisions of the Finance Acts of 1963 and 1964 and Arts. 270 and 271 of the Constitution apart from the legislative entry 82 in List I of the Seventh Schedule. It came to the conclusion that income-tax and super-tax did not include surcharge and that these were called by different nomenclature in all the statutory provisions.*

**5.** *In order to determine the point before us, which is of considerable complexity, it is necessary to trace the concept to surcharge in taxation laws in our country. The power to increase federal tax by surcharge by the federal legislature was recommended for the first time in the report of the committee on Indian Constitutional Reforms, Volume I, Part I. From paragraph 141 of the proposals it appears that the word "surcharge" was used compendiously for the special addition to taxes on income imposed in September, 1931. The*

*Government of India Act, 1935, Part VII, contained provisions relating to finance, property, contracts and suits. Secs. 137 and 138 in Chapter I headed "Finance" provided for levy and collection of certain succession duties, stamp duties, terminal tax, taxes on fares and freights, and taxes on income, respectively. In the proviso to s. 137 the Federal legislature was empowered to increase at any time any of the duties or taxes leviable under that section by a surcharge for Federal purposes and the whole proceeds of any such surcharge were to form part of the revenues of the federation. Sub-s. (3) of s. 138 which dealt with taxes on income related to imposition of a surcharge. Under the Government of India Act, 1935, the surcharge was levied for the first time by the Indian Finance No. 2 Act, 1940. Sec. 3(1) of that Act read :*

*"Subject to the provisions of this section, the rates of income-tax and rates of super-tax...imposed by sub-s. (1) of s. 7 of the Indian Finance Act, 1940, shall, in respect of the year beginning on the first day of April, 1940, be increased by a surcharge for the purposes of the Central Government."*

*Similar phraseology was employed in respect of surcharge on super-tax. The provisions relating to surcharge were omitted in the Finance Acts of 1946 to 1950. It was reintroduced in the Finance Act of 1951 and the same has been continued in the Finance Acts of subsequent years. Special surcharge came to be levied in the Finance Acts of 1958 to 1964 and 1966 to 1971 and the additional surcharge was levied only by the Finance Act of 1963.*

**6.** *In the Finance Act of 1951, s. 2 relating to income-tax and super-tax provided that these taxes would be levied at the rates specified in Parts I and II of the First Schedule increased in each case by a surcharge for the purpose of the Union. The Finance Act of 1952 was a short document and s. 2 thereof simply provided :*

*"The provisions of s. 2 of, and the First Schedule to, the Finance Act, 1951, shall apply in relation to income-tax and super-tax for the financial year 1952-53 as they apply in relation to income-tax and super-tax for the financial year 1951- 52...."*

*There was no specific mention whatsoever of surcharge in s. 2 nor was there any modification of the First Schedule to the Finance Act of 1951 which contained the rates, etc., relating to the surcharge. Similar state of affairs existed with regard to the Finance Acts of 1953, 1954 and 1957. Sec. 2 of the Finance Act, 1971, is to the effect that the provisions of s. 2 and of the First Schedule to the Finance Act, 1970, shall apply in relation to income-tax for the assessment year or, as the case may be, the financial year commencing on the first day of April, 1971, as they apply in relation to income-tax for the assessment year commencing on the first day of April, 1970, with certain*

*modifications set out in the section. The First Schedule to the Finance Act of 1970 was modified and the Schedule so modified contains provisions for surcharge on income-tax. It is significant that s. 2 of the Finance Act of 1971 speaks only of income-tax and not of any surcharge. It is only in the modifications made in the Schedule to the Finance Act of 1970 that there is provision for a surcharge.*

*7. The above legislative history of the Finance Acts, as also the practice, would appear to indicate that the term "income- tax" as employed in s. 2 includes surcharge as also the special and the additional surcharge whenever provided which are also surcharges within the meaning of Art. 271 of the Constitution. The phraseology employed in the Finance Acts of 1940 and 1941 showed that only the rates of income-tax and super- tax were to be increased by a surcharge for the purpose of the Central Government. In the Finance Act of 1958, the language used showed that income-tax which was to be charged was to be increased by a surcharge for the purposes of the Union. The word "surcharge" has thus been used to either increase the rates of income-tax and super-tax or to increase these taxes. The scheme of the Finance Act of 1971 appears to leave no room for doubt that the term "income-tax" as used in s. 2 includes surcharge.*

*8. According to Art. 271, notwithstanding anything in Arts. 269 and 270, Parliament may at any time increase any of the duties or taxes referred to in those articles by a surcharge for the purposes of the Union and the whole proceeds of any such surcharge shall form part of the consolidated fund of India. Art. 270 provides for taxes levied and collected by the Union and distributed between the Union and the States. Clause (1) says that taxes on income other than agricultural income shall be levied and collected by the Government of India and distributed between the Union and the States in the manner provided in cl. (2). Art. 269 deals with taxes levied and collected by the Union but assigned to the States. The provisions of Art. 268 which is the first one under the heading "Distribution of revenue between the Union and the States" relate to duties levied by the Union but collected and appropriated by the States. Thus, these articles deal with the levy, collection and distribution of the proceeds of the taxes and duties mentioned therein between the Union and the States. The legislative power of Parliament to levy taxes and duties is contained in Arts. 245 and 246(1) read with the relevant entries in List I of the Seventh Schedule.*

*9. As mentioned before, the legislative entry 82 in List I relates to taxes on income other than agricultural income; income-tax, super-tax and surcharge would all fall under this entry. It is exercise of the legislative power conferred by that entry that the Union Parliament enacts the provision in the Finance Act each year relating to them. It is that Act which authorises these taxes to be*

*charged and prescribes the rates at which they can be charged. Sec. 4 of the Act simply provides that where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates income-tax at that rate or those rates shall be charged in accordance thereto and subject to the provisions of the Act. Sec. 95, which was omitted by the Finance Act of 1965, contained similar provision with regard to super-tax. Although under the Act s. 4 is the charging section yet income-tax can be charged only where the Central Act which, in the present case, will be the Finance Act, enacts that income- tax shall be charged for any assessment year at the rate or rates specified therein. The distinction made by the High Court that the surcharges are levied only under the Finance Act and income- tax under the Act may not hold good if the above view which has been pressed on behalf of the revenue were to be accepted. In our judgment it is unnecessary to express any opinion in the matter because the essential point for determination is whether surcharge is an additional mode or rate for charging income-tax.*

**10.** *The meaning of the word "surcharge" as given in the Webster's New International Dictionary includes, among others, "to charge (one) too much or in addition..."; also "additional tax". Thus, the meaning of surcharge is to charge in addition or to subject to an additional or extra charge. If that meaning is applied to s. 2 of the Finance Act, 1963, it would lead to the result that income-tax and super-tax were to be charged in four different ways or at four different rates which may be described as : (i) the basic charge or rate (In Part I of the First Schedule); (ii) surcharge; (iii) special surcharge; and (iv) additional surcharge calculated in the manner provided in the Schedule. Read in this way, the additional charges form a part of the income-tax and super-tax. It is possible to argue, and that argument has been commended on behalf of the Revenue, that the word "surcharge" has been used in Art. 271 for the purpose of separating it from the basic charge of a tax or duty for the purpose of distributing the proceeds of the same between the Union and the States. The proceeds of the surcharge are exclusively assigned to the Union. Even in the Finance Act itself it is expressly stated that the surcharge is meant for the purpose of the Union.*

**11.** *It would appear that, since the Finance Act, 1943, upto the Finance Act, 1967, a provision was made for taxing the income under the head "Salaries" according to the provisions of the Finance Act of the preceding year rather than of the current year if the assessee had any income in addition to his income by way of salary. According to the Tribunal this was done because if the income under the head "Salaries" was to be assessed at the rates fixed by the Finance Act enacted for the current year it would entail considerable administrative work in the form of a refund or collection in the final assessment. Since by the Finance Act of 1967, this method or procedure was*

*dropped we do not consider that much significance can be attached to this aspect.*

**12.** *In the result we are unable to sustain the view of the High Court. The question that was referred must be answered in the affirmative and in favour of the Revenue. In view of the nature of the point involved the parties are left to bear their own costs in this Court. The appeal by certificate is dismissed.”*

*Considering the decision of the Hon'ble Apex Court, when applied to the provisions of section 40(a)(ii) of the Act, it is abundantly clear that the tax levied on profits or gain of any business or profession, which is not allowable as per the said sub-section, would include all surcharge and additional surcharge levied thereon.*

*Now coming to the nature of education cess, the Finance Bill, by virtue of which the rate of taxes are determined in Schedule-1 thereof, deals with the levy of education cess at Chapter-II(12) as under:*

*(12) The amount of income-tax as specified in sub-sections (4) to (10) and as increased by the applicable surcharge, for the purposes of the Union, calculated in the manner provided therein, shall be further increased by an additional surcharge, for the purposes of the Union, to be called the “Health and Education Cess on income-tax”, calculated at the rate of four per cent of such income-tax and surcharge so as to fulfil the commitment of the Government to provide and finance quality health services and universalized quality basic education and secondary and higher education:*

**24.** *A perusal of the above reveals that the education cess is an additional surcharge levied by the Union. Considering that tax on income has been so defined by the Hon'ble Apex Court as above as including surcharge and additional surcharge, it stands settled therefore, that the education cess is in the nature of tax levied on the income from the business and profession and thus specifically not allowable as per the provisions of section 40(a)(ii) of the Act. There is no scope for any other interpretation/ view on the issue considering the decision of the apex court in K. Srinivasan (supra) read with the Finance Bill levying education cess.*

*We therefore hold that education cess falls within the scope of amounts not allowed as deduction u/s 40(a)(ii) of the Act.*

*The additional grounds raised by the assessee are, therefore, dismissed.”*

In view of the same, this issue is admitted for adjudication in all the appeals wherein raised and decided against the assessee.

**Issue No.10: Adjustment made on account of interest on receivable allegedly recharacterizing as on secured loans raised in the following appeals of the assessee.**

<u>ITA No.344/Chd/2017</u>	<u>ITA No.1500/Chd/2018</u>	<u>ITA No.1495/Chd/2019</u>
<u>A.Y.2012-13</u>	<u>A.Y.2014-15</u>	<u>A.Y. 2015-16</u>
Ground No.2 to 2.7	Ground No.2 to 2.7	Ground No.3 to 3.6

39. Briefly stated, the TPO treated the delayed receipts of payments for receivables beyond 30 days as international transactions and bench marked the same applying SBI base rate plus 300 basis points, determining thereby the adjustment to the income of the assessee on account of deemed interest on receivables. The assessee objected to the same before the DRP which objection was dismissed holding the treatment of the delayed receipts of payments for receivables to have been rightly treated as international transactions, as defined for the purpose of transfer pricing adjustment to be made as per

provisions of the Act, but at the same time directed that for treating the same as international transaction delay beyond 60 days is to be considered and the interest rate to be applied is LIBOR plus 400 basis points.

40. There are primarily two aspects to this issue which has been challenged before us;

- i) the treatment of the delayed payment of receivables as international transactions as defined u/s 92B of the Act;
- ii) Determination of arms' length price adjustment be made to the income of the assessee in relation to the said transaction.

41. Taking up first the issue of characterization of delayed payment of receivables beyond 60 days as international transactions u/s 92B of the Act, we find that the AO/TPO and the DRP both have relied upon the insertion of Explanation below section 92B of the Act by the Finance Act, 2012 with retrospective effect from 01.04.2002 clarifying that the international transaction shall include any type of advance payments or deferred payments or receivables. The DRP thereafter has relied upon various ITAT decisions, more particularly in the case of Techbooks International Pvt. Ltd. Vs.

DCIT (2015)-TII-282-ITAT-DEL-TP, affirming this position that outstanding receivables constitute international transaction u/s 92B of the Act.

42. Our attention was drawn by the Ld.Counsel for the assessee to the decision of the Hon'ble Delhi High Court in the case of Pr.CIT Vs. Kusum Healthcare Pvt. Ltd. In ITA No.765/2016 dated 25.04.2017 pointing out therefrom that the Hon'ble High Court had interpreted this very explanation u/s 92B of the Act, holding that the expression "receivables" appearing in the accounts of the entity could not be automatically characterized as an international transaction. That for doing so the TPO needs to discern a pattern in the receivables outstanding indicating that the arrangement reflects an international transaction intended to benefit the AE in some way. It was pointed out that this view was reiterated by the Hon'ble High Court in the case of Avenue Asia Pvt. Ltd. Vs. DCIT reported at 398 ITR 120. The Ld. DR was unable to bring our notice any contrary decision of any High Court on the issue.

43. In view of the same, therefore, the above interpretation by the Hon'ble Delhi High Court, of the explanation inserted to

section 92B of the Act defining the international transactions, will prevail. Following the decision of the Hon'ble Delhi High Court and applying it to the issue before us, we hold that for characterizing the receivables as international transactions, the same could not have been done automatically and the TPO ideally should have studied the pattern in the accounts of the assessee regarding recovery of the amounts receivables and determined from the same thereafter whether the same reflected a pattern indicating an arrangement enduring to the benefit of the AE.

44. In the facts of the cases before us relating to assessment years 2012-13, 2013-14 and 2014-15, we find, no such exercise has been done by the TPO but in fact he has only proceeded to characterize the receivables outstanding for recovery of payment beyond a specific period as international transactions. Therefore, the basis of characterizing the receivables as international transactions in the cases before us is clearly is not in accordance with law as interpreted by the Hon'ble Delhi High Court in the case of Kusum Healthcare Pvt. Ltd. (supra).

45. In the facts of the case relating to assessment year 2012-13 the assessee has pointed out the facts relating to the

recovery of the receivables during the year contending, in turn, that there couldn't have been a pattern reflecting in any way of any benefit being passed to the AE on account of outstanding receivables. He has pointed out that the assessee had recovered 99.72% of its receivables within agreed timeline as under:

- 1) 16 invoices of Rs.28.06 crores have been realized within 30 to 32 days.
- 2) 18 invoices of Rs.7.5 crores have been realized with 60 to 62 days
- 3) 3 invoices of Rs.3.1 crores have been realized after 62 days.

46. This fact we find is corroborated by the calculation sheet annexed to the transfer pricing order passed for the impugned year u/s 92CA(3) of the Act, calculating the adjustment to be made on account of treating the receivables as international transactions, placed before us at page No.262 of the appeal set filed which lists 81 invoices as pointed out by the Ld.Counsel for the assessee also above and indicates two invoices having been realized beyond 62 days totaling in all to 0.1 crores. Therefore, the data filed by the assessee as above stands corroborated by the calculation sheet of TPO also. Considering this fact that only Rs.0.1 crores out of total receivables of

Rs.36.02 crores (28.06+7.5+0.1) have been realized beyond 62 days , which constitute 0.2% of the total receivables and 99.72% of the receivables, therefore, having been collected within time schedule, undoubtedly there is no pattern, in the facts of the case relating to the impugned year, of recovery of payments from receivables indicating any arrangement intended to benefit the AE in any way. In fact the recovery of receivables effected beyond a period of 60 days in the impugned year is too minor and immaterial to reflect any pattern as such, and we, therefore hold, that as per the decision of the Hon'ble Delhi High Court it could not be said that outstanding receivables in the impugned case pending for recovery beyond 60 days could be treated as international transactions. Therefore, the adjustment made on account of interest on the same, for A.Y. 2012-13, amounting to Rs.14,819/- is directed to be deleted.

47. In the remaining years i.e. assessment years 2014-15 and 2015-16 the facts as above relating to the recovery of receivables are not there before us, therefore, the issue needs to be restored back to the TPO to determine the characterization of outstanding receivables as international

transactions in accordance with the observations of the Hon'ble Delhi High Court in the case of Kusum Healthcare Pvt. Ltd. (supra).

48. We have also noted from the order of the Hon'ble Delhi High Court in the case of Kusum Healthcare Pvt. Ltd. (supra) that it has been held that the delay in recovery of receivables would have an impact on the working capital of the assessee which also needs to be studied. In the decision of the ITAT in the case of Kusum Healthcare Pvt. Ltd. vs ACIT in ITA No.6814/Del/2014, relied upon by the Ld.Counsel for the assessee before us, we have noted that the adjustment on account of outstanding receivables was deleted holding that the working capital adjustment would take into account the impact of delayed recovery of debtors as also any account payable mechanism adopted by the assessee to balance the delayed realization. It was, therefore, held that if the operating profit margin of the assessee are higher than the operating profit margin of comparable cases after working capital adjustment, then no adjustment on account of realization of trade receipts is required.

49. Considering the same we restore the issue of treating the

accounts receivables as international transactions and bench marking the same for the purpose of adjustment to be made to the income of the assessee, to the TPO to determine the same afresh in accordance with law.

50. Therefore, for assessment years 2014-15 and 2015-16 the issue is restored back to the TPO and is, therefore, allowed for statistical purposes.

**Issue No.11: Transfer Pricing Adjustment in relation to export of goods raised in assessee's appeal for following A.Y.:**

<u>Assessment Year</u>	<u>ITA No.</u>	<u>Ground No.</u>
2012-13	344/Chd/2017	2 to 2.7
2014-15	1500/Chd/2018	2 to 2.7
2015-16	1495/Chd/2019	3 to 3.6

51. This issue pertains only to assessment year 2015-16, therefore, the facts relevant to the said year are being discussed hereunder:

52. Brief facts relating to the issue are that the assessee had reported sale of products by it to its associate enterprise (AE) GlaxoSmithkline Exports Limited, UK amounting to Rs.37,93,49,355/-. The assessee disclosed an operating margin of 9.59% on the same (OP/OC) and in the TP Study the

transaction was bench marked by the Transactional Net Margin Method (TNMM) considering the assessee as the tested party. Comparables selected disclosed an operating margin of 10.63% and the transaction was claimed to be at arms' length price falling within (+/-) 3% range of the operating profit margin of the assessee. The Transfer Pricing Officer (TPO) carried out a fresh search and selected seven comparables with a median OP/OC margin of 14.04%. Accordingly, an adjustment of Rs.124.04 lacs was computed by the TPO by applying this margin on the operational cost of the assessee which amounted to Rs.3461.53 lacs. The assessee filed objection before the DRP contending that the goods sold to its AE were in turn to be provided to World Health Organization (WHO), as per a Memorandum of Understanding entered into with it, free of cost for elimination of lymphatic filariasis disease from endemic countries. The assessee also objected to the inclusion of certain comparables. The DRP dismissed all the contentions of the assessee holding in paras 3.3 to 3.5 of its order as under:

*“3.3 Having considered the submission of the assessee, we are of the view that the subsequent action of the AE is not material to decide the arm's length price of exports to the AE. The very fact that in the TP study the profit margin of the transaction has been benchmarked shows that the arguments of the transaction being not for commercial*

*purposes does not hold any ground, and must be rejected.*

*3.4 The assessee has objected to rejection of certain companies by the TPO from the set of comparables in the TP study. The following companies were rejected by the TPO on the grounds that they were not appearing in the search portal based on accept/reject matrix of the assessee:*

- (i) Celebrity Biopharma Ltd.*
- (ii) Elysium Pharmaceutical Ltd*
- (iii) Strides Pharma Science Ltd*

*3.4.2 The Financial statements submitted by the assessee has been perused, which has apparently been downloaded from MOCA Website or respective company website. It is also seen that in case of Celebrity Biopharma Ltd 99% shares are held by the promoter director and the nature of the business/products cannot be ascertained from the annual report. The company does not own any patent or intangible and hence is a contract, manufacturer at est. The TPO's action of rejecting these comparables and other compatibles which are not in public domain is therefore upheld. In case of Zim Laboratories Ltd the TPO has rejected n the grounds that it is functionally not comparable. It is admitted that the product names are formulations and compositions which are sold to Pharmaceutical companies for final production of drugs and medicines. TPO's action is upheld.*

*3.5 The assessee has requested for grant of working capital adjustment to the operating margins, which has been denied by the TPO. Having considered the submission of the assessee the TPO is directed to allow working capital adjustment to the assessee and the set comparables. The assessee's claim for risk adjustment is rejected being devoid of merit and to lack of computability.”*

53. The DRP, however, allowed working capital adjustment to the assessee and accordingly after giving effect to the direction of the DRP ,the TPO recomputed the arms' length margin at 12.12% and made an adjustment of Rs.87,58,287/- in the price

of international transaction of export of goods.

54. Before us the Ld.Counsel for the assessee reiterated the contention made before the DRP that the transaction of sale of goods was not for commercial purposes and the AE had further donated the goods to WHO without any charge. There could not have been, therefore, any motive on the part of the assessee to divert any part of its profits to its foreign associate enterprise and, therefore, there ought to have been no adjustment made to the sale price of this transaction. He also objected to the exclusion of certain comparables by the TPO. His submissions in writing in this regard are as under:

*“The DRP allowed working capital adjustment in the margin of comparable companies. After giving effect to the direction of DRP, the TPO re-computed the arm's length margin at 12.12% and made an adjustment of Rs. 87,58,287 in the price of international transaction of export of goods.*

*It is submitted adjustment made by the TPO with respect to the difference in the arm's length price of international transaction related of sale of goods to the associated enterprise is not sustainable and liable to be deleted for the following reasons submitted as under:*

**Re: The transaction of sale of goods was not for commercial purposes and the AEs have further donated the goods to WHO without any charge**

*It is submitted that in terms of Memorandum of Understanding entered by the associated enterprise with World Health Organization ('WHO'), the associated enterprise agreed to provide Albendazole 400 mg tablets required by WHO for*

*implementation of program for elimination of Lymphatic Filariasis disease from each endemic country.*

*The said Albendazole 400 mg tablets were agreed to be provided by the associated enterprise to WHO with any charge. However, the associated enterprise has assured the appellant, an arm's length return of 9% (approx.) on direct and indirect expenses incurred in manufacturing such Albendazole 400 mg tablets and supplying to WHO on its behalf.*

*Accordingly: the appellant, during the year under consideration, has entered into international transaction of sales of 'Albendazole 400 mg' tablets for Rs. 37,93,49,355 to its group company, namely. GlaxoSmithKline Exports Limited. UK and earned an operating profit of 9.59% over cost.*

*It shall be noted here that there could not be nay motive on the part of the appellant to divert any part of its profit to its foreign associated enterprises, by way of selling goods at a lower price as the associated enterprise is not selling the goods, but donating the same to WHO for a philanthropy cause. It would, therefore, be concluded that there was no transfer of profit by the appellant to the associated enterprises so as to result in an adjustment.*

**Re: Fresh search undertaken by the assessc**

*It is submitted that the appellant, in order to verify the suo-moto search undertaken by the TPO, itself undertook a fresh search of comparable companies on the basis of quantitative and qualitative filters applied by the TPO. The search resulted in 22 companies with operating profit margin ranging from 2.30% to 13.49%.*

S. No	Company Name	OP/OC
1	Strides Pharma Science Ltd.	-24.7%
2	Kilitch Drugs (India) Ltd.	-11.2%
3	Celebrity Biopharma Ltd.	-10.0%
4	Colinz Laboratories Ltd.	-0.3%
5	Syschcm (India) Ltd.	-0.2%
6	Ozone Pharmaceuticals Ltd.	0.3%
7	Laboratories Ltd.	2.1%
8	Elysium Pharmaceuticals Ltd.	2.3%
9	Resonance Specialties Ltd.	2.5%

10	<i>Triochem Products Ltd.</i>	5.7%
11	<i>Advik Laboratories Ltd.</i>	6.6%
12	<i>Panchsheel Organics Ltd.</i>	9.00%
13	<i>Wockhardt Ltd.</i>	9.2%
14	<i>Tyche Industries Ltd.</i>	10.19%
15	<i>Granules India Ltd</i>	13.49%
16	<i>NGL Fine Chem Ltd.</i>	14.04%
17	<i>Hikal Limited- Pharma Segment</i>	18.05%
18	<i>Shilpa Medicare Limited</i>	23.27%
19	<i>IOL Chemicals and Pharmaceuticals Limited-Bulk Drugs Segment</i>	25.03
20	<i>Kothari Phytochemicals &amp; Inds.Ltd.- Bulk Drugs segment</i>	31.42%
21	<i>Harman Finochem Ltd.</i>	38.43%
22	<i>Suven Life Sciences Ltd.- Manufacturing Segment</i>	56.02%
	<b>35<sup>th</sup> Percentile</b>	<b>2.30%</b>
	<b>65<sup>th</sup> Percentile</b>	<b>13.49%</b>

Accordingly, it was submitted that since the operating profit margin earned by appellant at 9.59% is within the arm's length range of 2.30%- 13. 4-9%. no adjustment ought to be made in the arm's length price of international transaction of export of goods.

**Re: Incorrect exclusion of comparable by the TPO**

In this regard, it is respectfully submitted that while applying TNMM, the following companies excluded by the TPO in the impugned order ought to be considered as comparable for the reasons tabulated as under:

<b>Company Name</b>	<b>Reasons for Remarks of the applicant exclusion by TPO</b>	<b>Remarks of the applicant</b>
<i>Celebrity Biopharma Ltd. Elysium Pharmaceu</i>	<i>Cherry picked by the appellant as the said companies were not appear</i>	<i>It is submitted that the TPO himself has undertaken a fresh search of comparable companies, applying additional quantitative and qualitative filters, on the basis of contemporaneous</i>

<p><i>ticals Ltd. Strides Pharma Science Ltd.</i></p>	<p><i>in accept/reject matrix submitted by the applicant along with the TP study.</i></p>	<p><i>information available in public domain. Had it been the case that only those companies can be considered as comparable which has featured in the search analysis of comparable companies undertaken at the time of preparation of transfer pricing study, then under such circumstances, the TPO should not have undertaken a fresh search and considered a fresh set of the TPO comparable companies. In fact, has cherry picked only the companies with higher margins in order to predetermined result and rejected the said companies having lower margins.</i></p> <p><i>It may be noted that the companies passes all the filters applied by the TPO and functional dissimilarity is not disputed by the TPO. Therefore, the company be considered by the TPO.</i></p>
<p><i>Triochem Products Ltd.</i></p>	<p><i>Insufficient financial information in the public domain</i></p>	<p><i>Complete financial information with audited accounts is available on the website of the company itself at <a href="http://www.triochemproducts.com/errordocs/notfound.aspx?m=err">http://www.triochemproducts.com/errordocs/notfound.aspx?m=err</a>. Further, the companies passes all the filters applied by the TPO and functional dissimilarity is not disputed by the TPO.</i></p>
<p><i>Zim Laboratori es Ltd.</i></p>	<p><i>Functionally not comparable to the applicant company.</i></p>	<p><i>The products manufactured by the said company include granules. pellets (sustained, modified, extended release), taste masked powders, suspensions, tablets, capsules etc. which caters to various therapeutic segments such as cardiovascular, anti-infective, gastrointestinal, respiratory system nervous system, musculoskeletal, hematology system and vitamins.</i></p> <p><i>The product name listed above are the name of the compositions only and not the</i></p>

		<p><i>commercial name under which it is sold. In fact, as per the website of the company, it is providing services to following medical companies, which are engaged in commercializing and selling such products after further processing:</i></p> <p><i>In view of the aforesaid, the company ought to be ns in the final set of comparable companies.</i></p>
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**Final Set of comparable companies**

*After considering analysis, the range of average operating margin of the final list of comparable companies works out to 2.30% to 11.40% as under:*

<b>S.No.</b>	<b>Company</b>	<b>Adjusted OP/OC</b>
1.	<i>Strides Pharma Science Ltd.</i>	<i>-24.7%</i>
2.	<i>Celebrity Biopharma Ltd.</i>	<i>-10.0%</i>
3.	<i>Zim Laboratories Ltd.</i>	<i>2.10%</i>
4.	<i>Panchsheel Organics Ltd.</i>	<i>2.23%</i>
5.	<i>Elysium Pharmaceuticals Ltd.</i>	<i>2.30%</i>
6.	<i>Triochem Products Ltd.</i>	<i>5.70%</i>
7.	<i>Tyche Industries Ltd.</i>	<i>6.87%</i>
8.	<i>N G L fine-Chem Ltd.</i>	<i>11.40%</i>
9.	<i>Granules India Ltd.</i>	<i>12.10%</i>
10.	<i>IOL Chemicals Pharmaceuticals Ltd.</i>	<i>22.28%</i>
11.	<i>Kothari Phytochemicals &amp; Inds. Ltd.</i>	<i>27.84%</i>
12.	<i>Harman Finochem Ltd.</i>	<i>36.39%</i>
	<b>35<sup>th</sup> Percentile</b>	<b>2.30%</b>
	<b>65<sup>th</sup> Percentile</b>	<b>11.40%</b>

*Since, the operating margin of the applicant at 9.59% lies within the range of final comparable companies from 2.0% to 11.40%, therefore, the international transaction of export of goods undertaken by the applicant ought to be considered to be at arm's length criteria."*

The Ld. DR supported the order of the TPO/ DRP.

55. We have heard both the parties. With regard to the assessee's contention of no adjustment to be made on account of the end purpose of the transaction of sale of goods to its AE being philanthropic, we do not find any merit in the same for the reason that the commercial intention in the transaction between the assessee and its AE is an admitted fact, the assessee having charged a margin of 9% approximately on the cost incurred by it. When there is an admitted commercial intent in the transaction, it should ideally be, therefore, then at arms' length only. The subsequent action of the AE of using the product/goods for philanthropic purpose cannot have any effect considering the admitted commercial transaction between the assessee and its AE.

56. As for other contention of the assessee regarding exclusion of certain comparables, we have noted that the assessee has given detailed reasons for inclusion of certain comparables in the list of comparables selected by the TPO which includes the following names:

- 1) Celebrity Biopharma Ltd.
- 2) Elysium Pharmaceuticals Ltd.
- 3) Strides Pharma Science Ltd.
- 4) Triochem Products Ltd.

5) Zim Laboratories Ltd.

57. The DRP, we find, has only discussed and dealt with two comparables i.e. Celebrity Biopharma Ltd. and Zim Laboratories Ltd. while rejecting the entire comparables pointed out by the assessee as above, as having been wrongly excluded by the TPO. Even vis-à-vis the reasons given for rejecting Zim Laboratories Ltd. as being not functionally comparables, the findings of the DRP that the product names are formulation and composition which are sold to pharmaceutical companies for final production of drugs and medicines, we find, has not considered the facts relating to the company as pointed out to us wherein the assessee has mentioned the products manufactured by said company as including tablets, capsules, etc. which cater to various therapeutic segments. How this has been read to mean only formulations and composition sold for final production of drugs, we fail to understand.

58. Since we find the DRP has not applied its mind completely to the contention of the assessee before it, we consider it fit to restore the issue back to the TPO for reconsideration of the contention of the assessee regarding exclusion of certain

comparables from the list of comparables selected by the TPO. The TPO is directed to pass a speaking order detailing the reasons for rejecting the above comparables as pointed out by the assessee and thereafter adjudicate the issue in accordance with law. Needless to add the assessee be granted due opportunity of hearing in this regard. This issue therefore, is partly allowed for statistical purposes.

59. We shall now deal with the appeals for each of the assessment years before us.

**A.Y. 2007-08**

आयकर अपील सं./ **ITA No.242/Chd/2017**  
निर्धारण वर्ष / Assessment Year : 2007-08  
(Assessee's Appeal)

- “1. *That the Commissioner of Income-tax (Appeals) [(‘CIT(A)'] erred on facts and in law in sustaining the disallowance of Rs.5,10,74,000, being 1/3<sup>rd</sup> of the expenditure on advertisement and promotion of Rs. 15,32,22,000 allegedly on the ground that the said expenditure resulted in promotion of brand name owned by the foreign company.*
- 1.1 *That the CIT(A) erred on facts and in law in not appreciating that the assessee is the exclusive licensee authorized to manufacture and sell products under the brand name in India and since the expenditure was incurred in the course of carrying on of its business, it was allowable deduction as business expenditure.*

60. The issue involved in the above grounds stands adjudicated by us above at Issue No.2 in para 7-to 8 of our order above. Accordingly, this ground is allowed

2. *That the CIT(A) erred on facts and in law in sustaining disallowance of Rs. 96.44,127 under section 40(a)(i) of the Act, with respect to purchase of vaccine amounting to Rs. 19,12,91,000 made from GlaxoSmithKline Biological S.A. ('GSK, Bio'), Belgium, allegedly holding that the appellant -as failed to deduct tax at source from such payment.*

2.1 *That the CIT(A) erred on facts and in law in allegedly holding that GSK Bio has outsourced its core activity to the appellant and all the activities are undertaken under direct supervision and control of GSK Bio and thereby establishing that there is a constant touch between the appellant and GSK Bio for R&D activities*

2.2 *That the CIT(A) erred on facts and in law in holding that clinical trial activities constitute permanent establishment of GSK Bio in India within the meaning of Double Taxation Avoidance Agreement (DTAA) between India and Belgium on account of the following:*

a. *Fixed place of business in the form of place where clinical trials and research and development takes place including but not limited to CDMCI and BDS1, Bangalore under Article 5(1) of the DTAA;*

b. *Premises used as a sales outlet or for receiving or soliciting orders with respect to vaccines under Article 5(2)(i) of the DTAA;*

c. *CDMCI, Bangalore under Article 5(2)(c) of the TAA;*

d. *BDS1, Bangalore under Article 5(2)(c) of the DTAA; and*

e. *Dependent agent PE in the form of the appellant under Article 5(4) of the DTAA.*

2.3 *That the CIT(A) erred on facts and in law in alternatively holding that the assessee constituted business connection with*

*GSK Bio within the meaning of section 9(1)(i) of the Act.*

*2.4 Without prejudice, the CIT(A) erred on facts and in law in determining the profit attributable to the alleged PE in India at 23% of the net profits of GSK, Bio, as against 15.38% determined by the appellant on the basis of functions, asset and risk analysis of the appellant vis-a-vis GSK, Bio,*

61. The issue involved in the above grounds stands adjudicated by us above at Issue No.3 in para 10 to 11 of our order above. Accordingly, this ground is allowed for statistical purposes.

*3. That the CIT(A) erred on facts and in law in sustaining the disallowance of stock obsolescence of Rs. 11,12,000 allegedly holding that the appellant failed to produce details of (i) stock with batch number (ii) manufacturing and expiry date of such goods, and (iii) method of destruction of such goods, to substantiate the claim.*

*3.1 That the CIT(A) erred on facts and in law in rejecting the additional evidence filed under Rule 46A of the Income Tax Rules, 1962, with respect to disallowance of obsolete stock, allegedly holding that the appellant has failed to furnish the details sought by the assessing officer and no submission were made before the assessing officer regarding the inability in filing such details.*

*3.2 That the CIT(A) erred on facts and in law in not appreciating the fact that in the case of the appellant itself, similar expenses incurred towards "Provision for Stock Obsolescence" was allowed deduction by the Dispute Resolution Panel ('DRP') in the direction issued for the assessment year 2006-07 and the revenue is not in appeal against the direction of DRP.*

*3.3 That the CIT(A) erred on facts and in law in not adjudicating appellant's contention raised in grounds of appeal no. 4.1 and 4.2 filed before him, for directing the assessing officer to expunge the extraneous and unfounded remarks made in the assessment order alleging that the appellant was once*

*charged for improper disposal of expired drugs by FDA Maharashtra.*

62. The issue involved in the above grounds stands adjudicated by us above at Issue No.1 in para 4 to 5 of our order above. Accordingly, this ground is allowed

*4. That the CIT(A) erred on facts and in law in sustaining the disallowance of product development expenses amounting to Rs. 8,21,000 allegedly holding that the said expenditure is in relation to pre-launch of a product and therefore, capital in nature.*

*4.1 Without prejudice, that the CIT(A) erred on facts and in law in not allowing depreciation @ 25% on the said product development expenditure by treating the same as capital in nature.*

*4.2. Without prejudice, that the CIT(A) erred on facts and in law in not allowing depreciation @ 25% on the said product development expenditure incurred for the earlier assessment year, i.e. AY 2006-07, by treating the same as capital in nature.*

63. The issue involved in the above grounds stands adjudicated by us above at Issue No.4 in para 13 to 14 of our order above. Accordingly, this ground is allowed for statistical purposes

*5. That the CIT(A) erred on facts and in law in suo-moto disallowing market research expenses amounting to Rs. 1,26,83,000 allegedly holding that the said expenditure incurred on market surveys, market research for the products which are to be launched and party for existing products, are capital in nature and gave enduring benefit to the appellant.*

*5.1 That while the CIT(A) has categorically held that the*

*disallowance of the said expense on adhoc basis by the AO is not tenable, he has erred on facts and in law in suo-moto treating the same to be capital in nature without appreciating the fact that the AO has never treated the said expense to be capital in nature.*

5.2 *That the CIT(A) erred on facts and in law in sustaining the said disallowance on a ground different than raised by the assessing officer without issuing an enhancement notice to the appellant.*

5.3 *Without prejudice, that the CIT(A) erred on facts and in law in not allowing depreciation @ 25% on the said market research expenses by treating the same as capital in nature.*

64. The issue involved in the above grounds stands adjudicated by us above at Issue No.5 in para 20 to 21 of our order above. Accordingly, this ground is allowed in the said terms.

65. The assessee has also raised additional ground the admission & adjudication of which has been dealt in issue No.9 at para 38 of our order above

The additional ground accordingly is admitted for adjudication and dismissed.

66. In effect Appeal of the assessee is partly allowed for statistical purposes

निर्धारण वर्ष / Assessment Year : 2007-08  
(Revenue's Appeal)

*“i). On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the disallowance from Rs. 19,12,91,000/- to Rs. 96,44,127/- made u/s 40(a)(ia) of the Act on account of payment made to Glaxo Smith Kline Biological SA at Belgium for purchase of Vaccine without deducting tax u/s 195 of the by relying on circular No. 2/2014 dated 26.02.2014 and circular No. 3/2015 dated 12.02.2015 holding that these circulars were clarificatory in nature ignoring the fact that these circulars came into force during F.Y. 2013-14 and F.Y. 2014-15 respectively and do not apply to A.Y. 2007-08.*

67. It was common ground that the issue raised above was connected to Ground No.2 to 2.4 of the assesses appeal in ITA No.242/Chd/2017 for the impugned year. Since the said issue has been restored back to the AO at para 61 of our order above, this issue also stands restored to the AO with the direction to the AO to decide the same alongwith the said grounds No.2 to 2.4 of the assesses appeal.

Ground of appeal No.i is allowed for statistical purposes.

*ii) On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 4703/- made on account of written off advances by treating the same to be in the nature of business loss incidental to the business of the assessee when these advances had never been shown by the assessee as a part of its income and therefore could not be claimed as expense when these were written off.*

68. The issue involved relates to the claim of write off of advances, relating to old outstanding claims recoverable from vendors, written off in the Profit & Loss Account since they were no longer recoverable. The AO disallowed the said claim holding them to be not in relation to the business of the assessee, which was allowed by the Ld.CIT(A) holding that they were in the nature of business loss incidental to the business of the assessee and as such covered u/s 37(1) of the Act.

69. The Department has challenged this allowance of claim by the Ld.CIT(A) before us. In this regard the Ld.Counsel for the assessee has pointed out that the issue is covered in favour of the assessee by the direction of the DRP in assessee's own case for assessment year 2006-07.

70. We have gone through the orders of the authorities below and see no reason to interfere in the order of the Ld.CIT(A). The fact that the advances written off relate to outstanding claim of vendors has not been disputed by the Revenue. In the light of this fact, the finding of the Ld.CIT(A) that the irrecoverability of the same tantamounted to trading/business losses to the assessee, we find, is correct. Moreover even the DRP has decided this issue in favour of the assessee in assessment year

2006-07. Therefore, we do not find any merit in the ground raised by the Revenue and dismiss the same.

*iii) On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the disallowance of Rs. 29,42,500/- on account of discount on sales, Rs. 2,91,33,000/- on account of selling and distribution expenses and Rs. 1,20,72,000/- on account of sales promotion expenses by admitting the additional evidence by ignoring Rule 46 A of the Income tax Rules especially when the assessee was given sufficient time and opportunity during the assessment proceedings to furnish the details/proof of the same but it failed to do so and also the fact that the AO had raised objection to the admission of addl. evidence during the appellate proceedings.*

71. In the impugned ground the challenge to the order of the Ld.CIT(A) by the Revenue is to the admission of additional evidences, ignoring the provisions of Rule 46A of the Income Tax Rules,1962, governing the manner of admission of additional evidences in this regard.

72. The facts relating to the issue are that during assessment proceedings the AO had disallowed 50% of expenditure relating to discount on sales, market research expenses, selling and distribution expenses, sales promotion expenses for the reason that the assessee had not furnished details of expenses incurred in respect of discount on sales and whether TDS had been deducted on the same or not and had further not

submitted names, addresses and PANs of the parties. With respect to the disallowance of other expenses the reasoning of the AO was the same on account of non furnishing of proper information regarding the same. During appellate proceedings the assessee filed additional evidences which was admitted by the Ld.CIT(A) after confronting the AO with the same and the issue, thereafter, decided partly in favour of the assessee. It is against this admission of additional evidences that the Revenue has come up before us contending that the AO had objected to the admission of the additional evidences on the ground that sufficient opportunity had been given to the assessee during assessment proceedings to furnish the same and, therefore, as per Rule 46A the said evidences ought to have not been admitted in the appellate proceedings.

73. We have gone through the order of the Ld.CIT(A) who, we find, had admitted the additional evidences noting the fact that the details asked for by the AO were cumbersome and the assessee was given only two days' time to furnish the same and the assessee when requested for further time, the same was not given and the assessment order passed. The Ld.CIT(A), we find, has also noted that the assessee couriered these details to the

AO but they were still not considered by him. These facts have remained uncontroverted before us. In the light of the above facts, since adequate opportunity had not been given to the assessee to furnish the details and the facts demonstrating that the assessee made every possible effort to file the same during assessment proceedings, the admission of the additional evidences by the Ld.CIT(A), we hold, are in accordance with Rule 46A of the Income Tax Rules ,1962, which require admission of the additional evidences by the CIT(A) in the absence of adequate opportunity given during assessment proceedings.

In view of the above, we do not find any merit in the ground raised by the Revenue and dismiss the same.

74. In effect appeal of the Revenue is partly allowed for statistical purposes.

**A.Y 2008-09**

आयकर अपील सं./ **ITA No.225/Chd/2017**  
निर्धारण वर्ष / Assessment Year : 2008-09  
(Assessee's Appeal)

- “1. *That the Commissioner of Income-tax (Appeals) [‘CIT(A)'] erred on facts and in law in sustaining disallowance of Rs. 1,53,69,881 under section 40(a)(i) of the Act, with respect to purchase of vaccine amounting to*

*Rs. 23,43,93,453 made from GlaxoSmithKline Biological S.A. ('GSK, Bio'), Belgium, allegedly holding that the appellant has failed to deduct tax at source from such payment.*

*1.1 That the CIT(A) erred on facts and in law in allegedly holding that GSK Bio has outsourced its core activity to the appellant and all the activities are undertaken under direct supervision and control of GSK Bio and thereby establishing that there is a constant touch between the appellant and GSK Bio for R&D activities.*

*1.2 That the CIT(A) erred on facts and in law in holding that clinical trial activities constitute permanent establishment of GSK Bio in India within the meaning of Double Taxation Avoidance Agreement (DTAA) between India and Belgium on account of the following:*

- a. Fixed place of business in the form of place where clinical trials and research and development takes place including but not limited to CDMCI and BDSI, Bangalore under Article 5(1) of the DTAA;*
- b. Premises used as a sales outlet or for receiving or soliciting orders with respect to vaccines under Article 5(2)(i) of the DTAA;*
- c. CDMCI, Bangalore under Article 5(2)(c) of the DTAA;*
- d. BDSI, Bangalore under Article 5(2)(c) of the DTAA; and*
- e. Dependent agent PE in the form of the appellant under Article 5(4) of the DTAA.*

*1.3 That the CIT(A) erred on facts and in law in alternatively holding that the assessee constituted business connection with GSK Bio within the meaning of section 9(1)(i) of the Act.*

*1.4 Without prejudice, the CIT(A) erred on facts and in law in determining the profit attributable to the alleged PE in India at 23% of the net profits of GSK, Bio, as against 15.38% determined by the appellant on the basis of functions, asset and risk analysis of the appellant vis-a-vis GSK, Bio.*

75. The issue involved in the above grounds stands adjudicated by us above at Issue No.3 in para 10 to 11 of our order above. Accordingly, this ground is allowed for statistical purposes.

*2 That the CIT(A) erred on facts and in law in sustaining the disallowance of Rs. 9,12,99,000, being 1/3<sup>rd</sup> of the expenditure on advertisement and promotion of Rs. 27,38,96,000 allegedly on the ground that the said expenditure resulted in promotion of brand name owned by the foreign company.*

*2.1 That the CIT(A) erred on facts and in law in not appreciating that the assessee is the exclusive licensee authorized to manufacture and sell products under the brand name in India and since the expenditure was incurred in the course of carrying on of its business, it was allowable deduction as business expenditure.*

76. The issue involved in the above grounds stands adjudicated by us above at Issue No.2 in para 7 to 8 of our order above. Accordingly, this ground is allowed.

*3 That the CIT(A) erred on facts and in law in sustaining the disallowance of market research expenses amounting to Rs. 1,86,45,000 allegedly holding that the said expenditure incurred on market surveys, market research for the products which are to be launched and party for existing products, are capital in nature and gave enduring benefit to the appellant.*

*3.1 Without prejudice, that the CIT(A) erred on facts and in law in not allowing depreciation @25% on the said market research expenses by treating the same as capital in nature.*

- 3.2 *Without prejudice, that the CIT(A) erred on facts and in law in not allowing depreciation @ 25% on the said market research expenses incurred for the earlier assessment year, i.e. AY 2007-08, by treating the same as capital in nature.*

77. The issue involved in the above grounds stands adjudicated by us above at Issue No.5 in para 20-21 of our order above. Accordingly, this ground is allowed in the said terms.

- 4 *That the CIT(A) erred on facts and in law in sustaining the disallowance of product development expenses amounting to Rs. 54,08,000 allegedly holding that the said expenditure is in relation to pre-launch of a product and therefore, capital in nature.*
- 4.1 *Without prejudice, that the CIT(A) erred on facts and in law in not allowing depreciation @ 25% on the said product development expenditure by treating the same as capital in nature.*
- 4.2 *Without prejudice, that the CIT(A) erred on facts and in law in not allowing depreciation @ 25% on the said product development expenditure incurred for the earlier assessment year, i.e. AY 2006-07 and 2007-08, by treating the same as capital in nature.*

78. The issue involved in the above grounds stands adjudicated by us above at Issue No.4 in para 13 to 14 of our order above. Accordingly, this ground is allowed for statistical purposes.

5. *That the CIT(A) erred on facts and in law in sustaining the disallowance on account of provision for post-retirement medical benefit given to employees of amounting to Rs.*

*6,62,343 allegedly holding that the these provision are in the nature of contingent liability and thus not subject to deduction under income tax.*

79. The issue involved in the above grounds stands adjudicated by us above at Issue No.6 in para 27 of our order above. Accordingly, this ground is allowed.

*6. That the CIT(A) erred on facts and in law in sustaining the disallowance of Cenvat credit recoverable amounting to Rs. 3,45,67,000 allegedly holding that the said expenditure is not in the nature of trading loss and therefore cannot be allowed as a business expense.*

*6.1 That the CIT(A) erred on facts and in law in sustaining the disallowance, allegedly holding that that the amount of cenvat credit incurred towards output services accumulated and not utilized pertains to earlier years and even if it has been written off during the relevant financial year, it is not in nature of trading loss pertaining to the year under consideration.*

80. The issue involved in the above grounds stands adjudicated by us above at Issue No.7 in para 31 of our order above. Accordingly, this ground is allowed

81. The assessee has also raised additional ground as under:

*"1. That on the facts and circumstances of the case and in law. the assessing officer ought to have allowed, in pursuance to law clarified by the Hon'ble Rajasthan High Court in the case of Chambal Fertilisers and Chemicals Ltd vs JCIT: D.B. 1TA No.52/2018 and Hon'ble Bombay High Court in the case of Sesa Goa Ltd vs JCIT: 117 taxmann.com 96 (Bom HC), deduction of Rs. 2,55,04,589, being education cess computed on returned income, paid by the Appellant before the due*

*date of filing return of income for the subject assessment year.*

2. *That on the facts and circumstances of the case and in law, pursuant to law clarified in the case of Chambal Fertilisers and Chemicals Ltd (supra) and Sesa Goa Ltd (supra), the assessing officer also ought to have allowed further deduction in respect of any additional amount paid by the Appellant towards education cess during the financial year relevant to the subject assessment year."*

82. The admission & adjudication of the above grounds has been dealt in issue No.9 at para 38 of our order above

The additional ground accordingly is admitted for adjudication and dismissed.

83. In effect appeal of the assessee is partly allowed for statistical purposes.

आयकर अपील सं./ **ITA No.220/Chd/2017**  
निर्धारण वर्ष / Assessment Year : 2008-09  
(Revenue's Appeal)

- "i) *On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the disallowance from Rs. 23,43,93,453/- to Rs. 1,53,69,881/- made u/s 40(a)(ia) of the Act on account of payment made to Glaxo Smith Kline Biological SA at Belgium for purchase of Vaccine without deducting tax u/s 195 of the by relying on circular No. 2/2014 dated 26.02.2014 and circular No. 3/2015 dated 12.02.2015 holding that these circulars were clarificatory in nature ignoring the fact that these circulars came into force during F.Y. 2013-14 and F.Y. 2014-15 respectively and do not apply to A.Y. 2008-09.*

84. It was common ground that the issue raised above was

connected to Ground No.1 to 1.4 of the assesses appeal in ITA No.225/Chd/2017 for the impugned year. Since the said issue has been restored back to the AO at para 75 of our order above, this issue also stands restored to the AO with the direction to the AO to decide the same alongwith the said grounds 2 to 2.4 of the assesses appeal.

Ground of appeal No.i is allowed for statistical purposes.

- ii) *On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 42,000/- made on account of written off advances by treating the same to be in the nature of business loss incidental to the business of the assessee when these advances had never been shown by the assessee as a part of its income and therefore could not be claimed as expense when these were written off.*

85. It was common ground that the issue raised in the above ground was identical to that raised by the Revenue in its appeal for A.Y 2007-08, in ITA No.219/Chd/2017 in ground No.ii. In view of the same our decision rendered therein at para 70 of our order above will apply following which this ground raised is dismissed.

86. In effect appeal of the Revenue is partly allowed for statistical purposes.

**A.Y 2009-10**

आयकर अपील सं./ **ITA No.226/Chd/2017**

निर्धारण वर्ष / Assessment Year : 2009-10

(Assessee's Appeal)

- “1. *That the Commissioner of Income-tax (Appeals) ['CIT(A)] erred on facts and in law in sustaining disallowance of Rs. 1,77,16,251 under section 40(a)(i) of the Act, with respect to purchase of vaccine amounting to Rs. 24,16,16,000 made from GlaxoSmithKline Biological S.A. ('GSK, Bio'), Belgium, allegedly holding that the appellant has failed to deduct tax at source from such payment.*
- 1.1 *That the CIT(A) erred on facts and in law in allegedly holding that GSK Bio has outsourced its core activity to the appellant and all the activities are undertaken under direct supervision and control of GSK Bio and thereby establishing that there is a constant touch between the appellant and GSK Bio for R&D activities*
- 1.2 *That the CIT(A) erred on facts and in law in holding that clinical trial activities constitute permanent establishment of GSK Bio in India within the meaning of Double Taxation Avoidance Agreement (DTAA) between India and Belgium on account of the following:*
- a. *Fixed place of business in the form of place where clinical trials and research and development takes place including but not limited to CDMCI and BDSI, Bangalore under Article 5(1) of the DTAA;*
- b. *Premises used as a sales outlet or for receiving or soliciting orders with respect to vaccines under Article 5(2)(i) of the DTAA;*
- c. *CDMCI, Bangalore under Article 5(2)(c) of the DTAA;*
- d. *BDSI. Bangalore under Article 5(2)(c) of the DTAA; and*

e. *Dependent agent PE in the form of the appellant under Article 5(4) of the DTAA.*

1.3 *That the CIT(A) erred on facts and in law in alternatively holding that the assessee constituted business connection with GSK Bio within the meaning of section 9(1 )(i) of the Act.*

1.4 *Without prejudice, the CIT(A) erred on facts and in law in determining the profit attributable to the alleged PE in India at 23% of the net profits of GSK, Bio, as against 15.38% determined by the appellant on the basis of functions, asset and risk analysis of the appellant vis-a-vis GSK, Bio.*

87. The issue involved in the above grounds stands adjudicated by us above at Issue No.3 in para 10 to 11 of our order above. Accordingly, this ground is allowed for statistical purposes.

2. *That the CIT(A) erred on facts and in law in sustaining the disallowance of Rs. 11,48,37,000, being 1/3<sup>rd</sup> of the expenditure on advertisement and promotion of Rs. 34,45,11,000 allegedly on the ground that the said expenditure resulted in promotion of brand name owned by the foreign company.*

2.1 *That the CIT(A) erred on facts and in law in not appreciating that the assessee is the exclusive licensee authorized to manufacture and sell products under the brand name in India and since the expenditure was incurred in the course of carrying on of its business, it was allowable deduction as business expenditure.*

88. The issue involved in the above grounds stands adjudicated by us above at Issue No.2 in para 7 to 8 of our order above. Accordingly, this ground is allowed

3. *That the CIT(A) erred on facts and in law in sustaining the disallowance of market research expenses amounting to Rs.1,94,71,000 (after allowing depreciation @25% p.a. on expense of Rs. 2,59,62,000) allegedly holding that the said expenditure incurred on market surveys, market research for the products which are to be launched and party for existing products, are capital in nature and gave enduring benefit to the appellant.*

3.1 *Without prejudice, that the CIT(A) erred on facts and in law in not allowing depreciation @ 25% on the said market research expenses incurred for the earlier assessment years, i.e. AY 2007-08 and 2008-09, by treating the same as capital in nature.*

89. The issue involved in the above grounds stands adjudicated by us above at Issue No.5 in para 20 to 21 of our order above. Accordingly, this ground is allowed in said terms.

4 *That the CIT(A) erred on facts and in law in sustaining the disallowance of product development expenses amounting to Rs. 18,07,000 (after allowing depreciation @25% p.a. on expense of Rs, 24,09,000) allegedly holding that the said expenditure is in relation to pre-launch of a product and therefore, capital in nature.*

4.1 *Without prejudice, that the CIT(A) erred on facts and in law in not allowing depreciation @ 25% on the said product development expenditure incurred for the earlier assessment years, i.e. AY 2006-07, 2007-08 and 2008-09, by treating the same as capital in nature.*

90. The issue involved in the above grounds stands adjudicated by us above at Issue No.4 in para 13 to 14 of our order above. Accordingly, this ground is allowed for statistical purposes.

5 *That the CIT(A) erred on facts and in law in sustaining the disallowance on account of provision for post-retirement medical benefit given to employees of amounting to Rs. 8,88,780 allegedly holding that the these provision are in the nature of contingent liability and thus not subject to deduction under income tax.*

5.1 *That the CIT(A) erred on facts and in law in sustaining disallowance of provision of market claims amounting to Rs. 1,43,39,000 allegedly holding that the appellant has failed to establish with supporting evidence the nature of liability for which provision has been created and claimed.*

5.2 *Without prejudice, that the CIT(A) erred on facts and in law in not considering that under the mercantile system of accounting deduction of expenditure is allowable in the year in which the liability is quantified and accrued, notwithstanding that the same has to be discharged at a later date.*

91. The issue involved in ground No.5 stands adjudicated by us above at Issue No.6 in para 27 of our order above. Accordingly, this ground is allowed.

92. The issue involved in ground no.5.1 stands adjudicated by us above at Issue No.8 in para 35 to 36 of our order above. Accordingly, this ground is dismissed.

93. Ground No.5.2 is argumentative and relates to both the issues raised in Ground No5 & 5.2 and has been dealt with in them.

6. *That the CIT(A) erred on facts and in law in upholding the disallowance of a sum of Rs. 87,32,000 being the amount of provision of stock obsolescence charged to the profit and*

*loss account allegedly on the ground that:*

- (i) the appellant failed to furnish evidence for destruction of obsolete stock.*
- (ii) No details of drugs which have become obsolete and withdrawn and actually destroyed were furnished by the assessee.*

*6.1 That the CIT(A) erred on facts and in law in not appreciating that the said provision for stock obsolescence was a trading loss incurred in the course of the carrying on of the business and is allowable as deduction under section 28 of the Act.*

94. The issue involved in the above grounds stands adjudicated by us above at Issue No.1 in para 4 to 5 of our order above. Accordingly, this ground is allowed

95. The assessee has also raised additional ground as under:

- "1. That on the facts and circumstances of the case and in law. the assessing officer ought to have allowed, in pursuance to law clarified by the Hon'ble Rajasthan High Court in the case of Chambal Fertilisers and Chemicals Ltd vs JCIT: D.B. 1TA No.52/2018 and Hon'ble Bombay High Court in the case of Sesa Goa Ltd vs JCIT: 117 taxmann.com 96 (Bom HC), deduction of Rs. 2,55,04,589, being education cess computed on returned income, paid by the Appellant before the due date of filing return of income for the subject assessment year.*
- 2. That on the facts and circumstances of the case and in law, pursuant to law clarified in the case of Chambal Fertilisers and Chemicals Ltd (supra) and Sesa Goa Ltd (supra), the assessing officer also ought to have allowed further deduction in respect of any additional amount paid by the Appellant towards education cess during the financial year relevant to the subject assessment year."*

96. The admission & adjudication of the above grounds has been dealt in Issue No.9 at para 38 of our order above

The additional ground accordingly is admitted for adjudication and dismissed.

97. In effect appeal of the assessee is partly allowed for statistical purposes.

आयकर अपील सं./ **ITA No.221/Chd/2017**  
निर्धारण वर्ष / Assessment Year : 2009-10  
(Revenue's Appeal)

*“i) On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the disallowance from Rs. 24,16,16,000/- to Rs. 1,77,16,251/- made u/s 40(a)(ia) of the Act on account of payment made to Glaxo Smith Kline Biological SA at Belgium for purchase of Vaccine without deducting tax u/s 195 of the by relying on circular No. 2/2014 dated 26.02.2014 and circular No. 3/2015 dated 12.02.2015 holding that these circulars were clarificatory in nature ignoring the fact that these circulars came into force during F.Y. 2013-14 and F.Y. 2014-15 respectively and do not apply to A.Y. 2009-10.*

98. It was common ground that the issue raised above was connected to Ground No.1 to 1.4 of the assesses appeal in ITA No.226/Chd/2017 for the impugned year. Since the said issue has been restored back to the AO at para 87 of our order above ,this issue also stands restored to the AO with the direction to the AO to decide the same alongwith the said grounds 2 to 2.4

of the assesses appeal.

Ground of appeal No.i is allowed for statistical purposes.

- ii) *On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 95,000/- made on account of written off advances by treating the same to be in the nature of business loss incidental to the business of the assessee when these advances had never been shown by the assessee as a part of its income and therefore could not be claimed as expense when these were written off.*

99. It was common ground that the issue raised in the above ground was identical to that raised by the Revenue in its appeal for A.Y 2007-08,in ITA No.219/Chd/2017 in ground No.ii. In view of the same our decision rendered therein at para70 of our order above will apply following which this ground raised is dismissed.

100. In effect appeal of the Revenue is partly allowed for statistical purposes.

**A.Y 2010-11**

आयकर अपील सं./ ITA No.227/Chd/2017

निर्धारण वर्ष / Assessment Year : 2010-11  
(Assessee's Appeal)

1. *That the Commissioner of Income-tax (Appeals) ['CIT(A)'] erred on facts and in law in sustaining disallowance of Rs. 3,15,42,101 under section 40(a)(i) of the Act, with respect to purchase of vaccine amounting to Rs. 24,98,62,000 made from GlaxoSmithKline Biological S.A. ('GSK, Bio'), Belgium, allegedly holding that the appellant has failed to deduct tax at source from such payment.*
  - 1.1 *That the CIT(A) erred on facts and in law in allegedly holding that GSK Bio has outsourced its core activity to the appellant and all the activities are undertaken under direct supervision and control of GSK Bio and thereby establishing that there is a constant touch between the appellant and GSK Bio for R&D activities*
  - 1.2 *That the CIT(A) erred on facts and in law in holding that clinical trial activities constitute permanent establishment of GSK Bio in India within the meaning of Double Taxation Avoidance Agreement (DTAA) between India and Belgium on account of the following:*
    - a. *Fixed place of business in the form of place where clinical trials and research and development takes place including but not limited to CDMCI and BDSI, Bangalore under Article 5(1) of the DTAA;*
    - b. *Premises used as a sales outlet or for receiving or soliciting orders with respect to vaccines under Article 5(2)(i) of the DTAA;*
    - c. *CDMCI, Bangalore under Article 5(2)(c) of the DTAA;*
    - d. *BDSI, Bangalore under Article 5(2)(c) of the DTAA; and*

*e. Dependent agent PE in the form of the appellant under Article 5(4) of the DTAA.*

*1.3 That the CIT(A) erred on facts and in law in alternatively holding that the assessee constituted business connection with GSK Bio within the meaning of section 9(1 )(i) of the Act.*

*1.4 Without prejudice, the CIT(A) erred on facts and in law in determining the profit attributable to the alleged PE in India at 23% of the net profits of GSK, Bio, as against 15.38% determined by the appellant on the basis of functions, asset and risk analysis of the appellant vis-a-vis GSK, Bio.*

101. The issue involved in the above grounds stands adjudicated by us above at Issue No.3 in para 10 to 11 of our order above. Accordingly, this ground is allowed for statistical purposes.

*1. That the CIT(A) erred on facts and in law in sustaining the disallowance of Rs. 14,54,53,000, being 1/3<sup>rd</sup> of the expenditure on advertisement and promotion of Rs. 4,363.60 lacs allegedly on the ground that the said expenditure resulted in promotion of brand name owned by the foreign company.*

*2.1 That the CIT(A) erred on facts and in law in not appreciating that the assessee is the exclusive licensee authorized to manufacture and sell products under the brand name in India and since the expenditure was incurred in the course of carrying on of its business, it was allowable deduction as business expenditure.*

102. The issue involved in the above grounds stands adjudicated by us above at Issue No.2 in para 7 to 8 of our

order above. Accordingly, this ground is allowed.

3. *That the CIT(A) erred on facts and in law in sustaining disallowance of market research expenses amounting to Rs. 3,07,09,000 (after allowing depreciation @25% on the expense of Rs. 4,09,46,000) allegedly holding that the said expenditure incurred on market surveys, market research for the products which are to be launched and party for existing products, are capital in nature and gave enduring benefit to the appellant.*

3.1 *Without prejudice, that the CIT(A) erred on facts and in law in not allowing depreciation @ 25% on the said market research expenses incurred for the earlier assessment years, i.e. AY 2007-08, 2008-09 and 2009-10, by treating the same as capital in nature.*

103. The issue involved in the above grounds stands adjudicated by us above at Issue No.5 in para 20 to 21 of our order above. Accordingly, this ground is allowed in said terms.

4. *That the CIT(A) erred on facts and in law in sustaining the disallowance of product development expenses amounting to Rs. 59,44,000 (after allowing depreciation @25% p.a. on expense of Rs. 79,25,000) allegedly holding that the said expenditure is in relation to pre-launch of a product and therefore, capital in nature.*

4.1 *Without prejudice, that the CIT(A) erred on facts and in law in not allowing depreciation @ 25% on the said product development expenditure incurred for the earlier assessment years, i.e. AY 2006-07, 2007-08, 2008-09 and 2009-10, by treating the same as capital in nature.*

104. The issue involved in the above grounds stands

adjudicated by us above at Issue No.4 in para 13 to 14 of our order above. Accordingly, this ground is allowed for statistical purposes.

5. *That the CIT(A) erred on facts and in law in sustaining the disallowance on account of provision for post-retirement medical benefit given to employees amounting to Rs. 3,34,000 allegedly by holding that the these provision are in the nature of contingent liability and thus not subject to deduction under income tax.*

105. The issue involved in the above grounds stands adjudicated by us above at Issue No.6 in para 27 of our order above. Accordingly, this ground is allowed

6. *That the CIT(A) erred on facts and in law in sustaining disallowance of provision of market claims amounting to Rs. 1,96,24,000 allegedly holding that the appellant has failed to establish with supporting evidence the nature of liability for which provision has been created and claimed.*

- 6.1 *Without prejudice, that the CIT(A) erred on facts and in law in not considering that under the mercantile system of accounting deduction of expenditure is allowable in the year in which the liability is quantified and accrued, notwithstanding that the same has to be discharged at a later date.*

106. The issue involved in the above grounds stands adjudicated by us above at Issue No.8 in para 35 to 36 of our order above. Accordingly, this ground is dismissed.

The assessee has also raised additional ground as under:

- "1. That on the facts and circumstances of the case and in law. the assessing officer ought to have allowed, in pursuance to law clarified by the Hon'ble Rajasthan High Court in the case of Chambal Fertilisers and Chemicals Ltd vs JCIT: D.B. 1TA No.52/2018 and Hon'ble Bombay High Court in the case of Sesa Goa Ltd vs JCIT: 117 taxmann.com 96 (Bom HC), deduction of Rs. 2,55,04,589, being education cess computed on returned income, paid by the Appellant before the due date of filing return of income for the subject assessment year.
2. That on the facts and circumstances of the case and in law, pursuant to law clarified in the case of Chambal Fertilisers and Chemicals Ltd (supra) and Sesa Goa Ltd (supra), the assessing officer also ought to have allowed further deduction in respect of any additional amount paid by the Appellant towards education cess during the financial year relevant to the subject assessment year."

107. The admission & adjudication of the above grounds has been dealt in Issue No.9 at para of our order above

The additional ground accordingly is admitted for adjudication and dismissed.

108. In effect appeal of the assessee is partly allowed for statistical purposes.

आयकर अपील सं./ **ITA No.222/Chd/2017**  
निर्धारण वर्ष / Assessment Year : 2010-11  
(Revenue's Appeal)

- i) On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in restricting the disallowance from Rs. 24,98,62,000/- to Rs. 3,15,42,101/- made u/s 40(a)(ia) of the Act on

*account of payment made to Glaxo Smith Kline Biological SA at Belgium for purchase of Vaccine without deducting tax u/s 195 of the by relying on circular No.2/2014 dated 26.02.2014 and circular No. 3/2015 dated 12.02.2015 holding that these circulars were clarificatory in nature ignoring the fact that these circulars came into force during F.Y. 2013-14 and F.Y. 2014-15 respectively and do not apply to A.Y. 2010-11.*

109. It was common ground that the issue raised above was connected to Ground No.1 to 1.4 of the assesses appeal in ITA No.227/Chd/2017 for the impugned year. Since the said issue has been restored back to the AO at para 101 of our order above, this issue also stands restored to the AO with the direction to the AO to decide the same alongwith the said grounds 2 to 2.4 of the assesses appeal.

Ground of appeal No.i is allowed for statistical purposes.

110. In effect appeal of the Revenue is allowed for statistical purposes

**A.Y 2011-12**

आयकर अपील सं./ **ITA No.228/Chd/2017**

निर्धारण वर्ष / Assessment Year : 2011-12  
(Assessee's Appeal)

- “1. *That the Commissioner of Income-tax (Appeals) [‘CIT(A)’] erred on facts and in law in sustaining disallowance of Rs. 1,37,82,000 under section 40(a)(i) of the Act, with respect to purchase of vaccine amounting to Rs. 47,32,96,000 made from GlaxoSmithKline Biological S.A. (‘GSK, Bio’), Belgium, allegedly holding that the appellant has failed to deduct tax at source from such payment.*
- 1.1 *That the CIT(A) erred on facts and in law in allegedly holding that GSK Bio has outsourced its core activity to the appellant and all the activities are undertaken under direct supervision and control of GSK Bio and thereby establishing that there is a constant touch between the appellant and GSK Bio for R&D activities*
- 1.2 *That the CIT(A) erred on facts and in law in holding that clinical trial activities constitute permanent establishment of GSK Bio in India within the meaning of Double Taxation Avoidance Agreement (DTAA) between India and Belgium on account of the following:*
- a. *Fixed place of business in the form of place where clinical trials and research and development takes place including but not limited to CDMCI and BDSI, Bangalore under Article 5(1) of the DTAA;*
- b. *Premises used as a sales outlet or for receiving or soliciting orders with respect to vaccines under Article 5(2)(i) of the DTAA;*
- c. *CDMCI, Bangalore under Article 5(2)(c) of the DTAA;*
- d. *BDSI, Bangalore under Article 5(2)(c) of the DTAA; and*

e. *Dependent agent PE in the form of the appellant under Article 5(4) of the DTAA.*

1.3 *That the CIT(A) erred on facts and in law in alternatively holding that the assessee constituted business connection with GSK Bio within the meaning of section 9(1 )(i) of the Act.*

1.4 *Without prejudice, the CIT(A) erred on facts and in law in determining the profit attributable to the alleged PE in India at 23% of the net profits of GSK, Bio, as against 15.38% determined by the appellant on the basis of functions, asset and risk analysis of the appellant vis-a-vis GSK, Bio.*

111. The issue involved in the above grounds stands adjudicated by us above at Issue No.3 in para 10 to 11 of our order above. Accordingly, this ground is allowed for statistical purposes.

2 *That the CIT(A) erred on facts and in law in sustaining the disallowance of Rs. 19,68,95,000, being 1/3<sup>rd</sup> of the expenditure on advertisement and promotion of Rs. 59,06,86,000 allegedly on the ground that the said expenditure resulted in promotion of brand name owned by the foreign company.*

2.1 *That the CIT(A) erred on facts and in law in not appreciating that the assessee is the exclusive licensee authorized to manufacture and sell products under the brand name in India and since the expenditure was incurred in the course of carrying on of its business, it was allowable deduction as business expenditure.*

112. The issue involved in the above grounds stands adjudicated by us above at Issue No.2 in para 7 to 8 of our

order above. Accordingly, this ground is allowed.

3 *That the CIT(A) erred on facts and in law in sustaining disallowance of market research expenses amounting to Rs. 4,57,28,250 (after allowing depreciation @ 25% p.a. on expense of Rs. 6,09,71,000) allegedly holding that the said expenditure incurred on market surveys, market research for the products which are to be launched and party for existing products, are capital in nature and gave enduring benefit to the appellant.*

3.1 *Without prejudice, that the CIT(A) erred on facts and in law in not allowing depreciation @ 25% on the said market research expenses incurred for the earlier assessment year, i.e. AY 2007-08, 2008-09, 2009-10 and 2010-11, by treating the same as capital in nature.*

113. The issue involved in the above grounds stands adjudicated by us above at Issue No.5 in para 20 to 21 of our order above. Accordingly, this ground is allowed in said terms.

4. *That the CIT(A) erred on facts and in law in sustaining the disallowance on account of provision for post-retirement medical benefit given to employees of amounting to Rs. 7,40,627 allegedly holding that the these provision are in the nature of contingent liability and thus not subject to deduction under income tax.*

114. The issue involved in the above grounds stands adjudicated by us above at Issue No.6 in para 27 of our order above. Accordingly, this ground is allowed.

5. *That the CIT(A) erred on facts and in law in sustaining the disallowance of product development expenses amounting to Rs. 95,76,000 (after allowing depreciation @ 25% p.a. of*

*expense of Rs. 1,27,68,000/- allegedly holding that the said expenditure is in relation to pre-launch of a product and therefore, capital in nature.*

- 5.1 *Without prejudice, that the CIT(A) erred on facts and in law in not allowing depreciation @ 25% on the said product development expenditure incurred for the earlier assessment years, i.e. AY 2006-07 to 2010-11, by treating the same as capital in nature.*

115. The issue involved in the above grounds stands adjudicated by us above at Issue No.4 in para 13 to 14 of our order above. Accordingly, this ground is allowed for statistical purposes.

116. The assessee has also raised additional ground as under:

1. *That on the facts and circumstances of the case and in law. the assessing officer ought to have allowed, in pursuance to law clarified by the Hon'ble Rajasthan High Court in the case of Chambal Fertilisers and Chemicals Ltd vs JCIT: D.B. 1TA No.52/2018 and Hon'ble Bombay High Court in the case of Sesa Goa Ltd vs JCIT: 117 taxmann.com 96 (Bom HC), deduction of Rs. 2,55,04,589, being education cess computed on returned income, paid by the Appellant before the due date of filing return of income for the subject assessment year.*
2. *That on the facts and circumstances of the case and in law, pursuant to law clarified in the case of Chambal Fertilisers and Chemicals Ltd (supra) and Sesa Goa Ltd (supra), the assessing officer also ought to have allowed further deduction in respect of any additional amount paid by the Appellant towards education cess during the financial year relevant to the subject assessment year."*

117. The admission & adjudication of the above grounds has

been dealt in Issue No.9 at para 38 of our order above

The additional ground accordingly is admitted for adjudication and dismissed.

118. In effect appeal of the assessee is partly allowed for statistical purposes.

**A.Y 2012-13**

आयकर अपील सं./ **ITA No.344/Chd/2017**  
निर्धारण वर्ष / Assessment Year : 2012-13  
(Assessee's Appeal)

1. *That the assessing officer erred on facts and in law in completing the assessment under section 143(3) of the Income Tax Act ('the Act') at an income of Rs. 2,18,45,08,400 as against the returned income of Rs.1,75,46,21,920.*

The above ground is general in nature and needs no adjudication

2. *That the assessing officer erred on facts and in law in making an adjustment of Rs. 14.819 to the arm's length price of alleged 'international transactions' of accounts receivable undertaken with the associated enterprise, on the basis of the order passed under section 92CA(3) of the Act by the Transfer Pricing Officer (TPO).*

- 2.1 *That the Dispute Resolution Panel ('DRP') erred on facts and in law in upholding the order of the TPO, wherein, it was held that the alleged delay in receipt of receivables as unsecured loans advance to the associated enterprise which is as an international transaction in terms of section 92B of the Act.*
- 2.2 *That the DRP/TPO erred on facts and in law in not appreciating that delay in receipt of receivable is not an 'international transaction', per se, under section 92B of the Act but is a consequence of an 'internal transaction' undertaken in the form of sale of goods/services rendered to the associated enterprise.*
- 2.3 *That the DRP/TPO erred on facts and in law in re-characterizing the alleged delay in receipts of receivables as unsecured loans advanced to the associated enterprises and making a transfer pricing adjustment on that basis.*
- 2.4 *Without prejudice, that the DRP/TPO erred on facts and in law in not accepting that in any case the transaction of delay in respect of receivables was closely linked to the 'international transaction' of exports and since the profit earned by the appellant as a percentage of cost is higher than the profit earned by comparable companies, no transfer pricing adjustment was even otherwise required to be made in this regard.*
- 2.5 *Without prejudice, that the DRP/TPO erred on facts and in law in rejecting the delay in receipt of receivables on transaction undertaken with unrelated third parties as comparable uncontrolled price for the purpose of benchmarking the delay in receipt of receivables on transaction undertaken with associated enterprises, applying CUP method.*
- 2.6 *Without prejudice, that the DRP/TPO erred on facts and in law in adding an adhoc mark-up of 400 points on the Libor rate of interest, arbitrarily on account of credit rating risk, security risk, transaction cost etc.*
- 2.7 *Without prejudice, that the DRP/ TPO erred on facts and in law in not appreciating that the in terms of Master Circular No. 10/2011-12, Reserve Bank of India allows a period of*

*12 months to all companies for receiving repatriation of export sales proceeds, and therefore, interest if any, ought to be imputed on the period of delay beyond 12 months.*

119. The issue involved in the above grounds stands adjudicated by us above at Issue No.10 in para 40 to 50 of our order above. Accordingly, this ground is allowed for the impugned year.

Corporate tax issue

3. *That the assessing officer erred on facts and in law in making disallowance of Rs. 1,61,64,003 under section 40(a)(i) of the Act, with respect to purchase of vaccine amounting to Rs. 66,17,54,000 made from GlaxoSmithKline Biological S.A. ('GSK, SA'), Belgium, allegedly holding that the appellant had failed to deduct tax at source from such payments.*
- 3.1 *That the assessing officer erred on facts and in law in holding that GSK, SA had a permanent establishment in India and was, therefore, taxable in India in as much as all activities of vaccine development, including clinical trials and R & D of GSK, SA are being carried out through the fixed place of business in India and under direct supervision and control of GSK, SA.*
- 3.2 *That the assessing officer erred on facts and in law in holding that the appellant was responsible for undertaking any clinical trial as well as research and development activities on behalf of GSK, SA, the resultant new/ improved product of which belongs to GSK Biological SA.*
- 3.3 *That the assessing officer erred on facts and in law in holding that clinical trial activities constitute permanent establishment of GSK Biological SA in India within the meaning of Article 5 of Double Taxation Avoidance Agreement (DTAA)*

*between India and Belgium on account of the following:*

- a. Fixed place of business in the form of place where clinical trials and research and development takes place including but not limited to CDMCI and BDSI, Bangalore under Article 5(1) of the DTAA;*
  - b. Premises used as a sales outlet or for receiving or soliciting orders with respect to vaccines under Article 5(2)(i) of the DTAA;*
  - c. CDMCI, Bangalore under Article 5(2)(c) of the DTAA;*
  - d. BDSI, Bangalore under Article 5(2)(c) of the DTAA; and*
  - e. Dependent agent PE in the form of the appellant under Article 5(4) of the DTAA.*
- 3.4 That the assessing officer erred on facts and in law in alternatively holding that the assessee constituted business connection with GSK Belgium SA within the meaning of section 9(1 )(i) of the Act.*

- 3.5 Without prejudice, the assessing officer erred on facts and in law in determining the profit attributable to the alleged PE in India at 22.5% of the net profits of GSK, SA as against 15.38% determined by the appellant on the basis of functions, asset and risk analysis of the appellant vis-a-vis GSK, SA.*

120. The issue involved in the above grounds stands adjudicated by us above at Issue No.3 in para 10-11 of our order above. Accordingly, this ground is allowed for statistical purposes.

*4. That the assessing officer erred on facts and in law in disallowing a sum of Rs. 33,28,14,000, being 1/3<sup>rd</sup> of the expenditure incurred by the appellant on advertisement and publicity amounting to Rs. 99,84,41,000 lacs, holding that the expenditure was incurred for brand building for the entities owning the brand.*

*4.1. That the assessing officer erred on facts and in law in not appreciating that expenditure on advertisement and publicity incurred by the appellant is wholly & exclusively for his manufacturing and distribution activity and any benefit arising in the form of brand building to the associated enterprises is incidental benefit.*

*4.2 That the assessing officer erred on facts and in law in holding that there was a strong nexus between the advertisement expenditure and revenues of the associated enterprises and, therefore, the associated enterprises should contribute towards advertisement expenditure incurred by the assessee in India.*

121. The issue involved in the above grounds stands adjudicated by us above at Issue No.2 in para 7 to 8 of our order above. Accordingly, this ground is allowed.

*5. That the assessing officer erred on facts and in law in disallowing market research expenses amounting to Rs. 5,28,08,250 (after allowing depreciation @ 25% on Rs. 7,04,11,000 i.e. Rs. 1,76,02,750) on the alleged ground that the said expenditure was capital in nature and gave enduring benefit to the appellant.*

*5.1 Without prejudice, that the assessing officer erred on facts and in law in not allowing depreciation @ 25% on the said market research expenses*

*incurred for the earlier assessment year, i.e. AY 2007-08 to 2011-12, by treating the same as capital in nature.*

122. The issue involved in the above grounds stands adjudicated by us above at Issue No.5 in para 20 to 21 of our order above. Accordingly, this ground is allowed in said terms.

6. *That the assessing officer erred on facts and in law in making addition of Rs. 5,86,661 with respect to provision of medial reimbursement to retired employees allegedly holding that the expenditure was contingent in nature and the amount has not been actually paid thus not allowed as deduction.*

123. The issue involved in the above grounds stands adjudicated by us above at Issue No.6 in para 27 of our order above. Accordingly, this ground is allowed.

7. *That the assessing officer erred on facts and in law in disallowing product development expenses amounting to Rs. 2,74,98,750(after allowing depreciation @25%onRs.3,66,65,000i.e.Rs.91,66,250)allegedly holding that the said expenditure is capital in nature and gave enduring benefit to the appellant.*

- 7.1 *Without prejudice, that the assessing officer erred on facts and in law in not allowing depreciation @ 25% on the said product development expenditure incurred for the earlier assessment year, i.e. AY 2006-07 to 2011-12, by treating the same as capital in nature.*

124. The issue involved in the above grounds stands adjudicated by us above at Issue No.4 in para 13 to 14 of our order above. Accordingly, this ground is allowed for statistical

purposes.

8. *That the assessing officer erred on facts and in law in levying interest under sections 234B, 234D and 244k of the Act.*

125. This ground is consequential in nature and is therefore not being dealt with by us.

126. The assessee has also raised additional ground as under:

- "1. *That on the facts and circumstances of the case and in law. the assessing officer ought to have allowed, in pursuance to law clarified by the Hon'ble Rajasthan High Court in the case of Chambal Fertilisers and Chemicals Ltd vs JCIT: D.B. 1TA No.52/2018 and Hon'ble Bombay High Court in the case of Sesa Goa Ltd vs JCIT: 117 taxmann.com 96 (Bom HC), deduction of Rs. 2,55,04,589, being education cess computed on returned income, paid by the Appellant before the due date of filing return of income for the subject assessment year.*
2. *That on the facts and circumstances of the case and in law, pursuant to law clarified in the case of Chambal Fertilisers and Chemicals Ltd (supra) and Sesa Goa Ltd (supra), the assessing officer also ought to have allowed further deduction in respect of any additional amount paid by the Appellant towards education cess during the financial year relevant to the subject assessment year."*

127. The admission & adjudication of the above grounds has been dealt in ISSUE No.9 at para 38 of our order above

The additional ground accordingly is admitted for adjudication and dismissed.

128. In effect appeal of the assessee is partly allowed for statistical purposes.

**A.Y 2013-14**

आयकर अपील सं./ **ITA No.47/Chd/2018**  
निर्धारण वर्ष / Assessment Year : 2013-14  
(Assessee's Appeal)

1. *That the Commissioner of Income-tax (Appeals) ['CIT(A)] erred on facts and in law in sustaining disallowance of Rs. 68,39,550 under section 40(a)(i) of the Act, with respect to purchase of vaccine amounting to Rs. 73,41,73,000 made from GlaxoSmithKline Biological S.A. ('GSK, Bio'), Belgium, allegedly holding that the appellant has failed to deduct tax at source from such payment.*
- 1.1 *That the CIT(A) erred on facts and in law in allegedly holding that GSK Bio has outsourced its core activity to the appellant and all the activities are undertaken under direct supervision and control of GSK Bio and thereby establishing that there is a constant touch between the appellant and GSK Bio for R&D activities.*
- 1.2 *That the CIT(A) erred on facts and in law in holding that clinical trial activities constitute permanent establishment of GSK Bio in India within the meaning of Double Taxation Avoidance Agreement (DTAA) between India and Belgium on account of the following:*
  - a. *Fixed place of business in the form of place where clinical trials and research and*

*development takes place including but not limited to CDMCI and BDSI, Bangalore under Article 5(1) of the DTAA;*

- b. Premises used as a sales outlet or for receiving or soliciting orders with respect to vaccines under Article 5(2)(i) of the DTAA;*
- c. CDMCI, Bangalore under Article 5(2)(c) of the DTAA;*
- d. BDSI, Bangalore under Article 5(2)(c) of the DTAA; and*
- e. Dependent agent PE in the form of the appellant under Article 5(4) of the DTAA.*

*1.3 That the CIT(A) erred on facts and in law in alternatively holding that the appellant constituted business connection with GSK Bio within the meaning of section 9(1)(i) of the Act.*

*1.4 Without prejudice, the CIT(A) erred on facts and in law in determining the profit attributable to the alleged PE in India at 22.5% of the net profits of GSK, Bio, as against 15.38% determined by the appellant on the basis of functions, asset and risk analysis of the appellant vis-a-vis GSK, Bio.*

129. The issue involved in the above grounds stands adjudicated by us above at Issue No.3 in para 10 to 11 of our order above. Accordingly, this ground is allowed for statistical purposes.

*1 That the CIT(A) erred on facts and in law in sustaining the disallowance of Rs. 39,76,18,333, being 1/3<sup>rd</sup> of the expenditure on advertisement and promotion of Rs. 11928.55 lacs allegedly on the ground that the said expenditure resulted in*

*promotion of brand name owned by the foreign company.*

- 1.1 *That the CIT(A) erred on facts and in law in not appreciating that the appellant is the exclusive licensee authorized to manufacture and sell products under the brand name in India and since the expenditure was incurred in the course of carrying on of its business, it was allowable deduction as business expenditure.*

130. The issue involved in the above grounds stands adjudicated by us above at Issue No.2 in para 7 to 8 of our order above. Accordingly, this ground is allowed.

3. *That the CIT(A) erred on facts and in law in sustaining disallowance of market research expenses amounting to Rs. 6,62,29,500 (after allowing depreciation @ 25% p.a. on expense of Rs, 8,83,06,000) allegedly holding that the said expenditure incurred on market surveys, market research for the products which are to be launched and party for existing products, are capital in nature and gave enduring benefit to the appellant.*

- 3.1 *Without prejudice, that the CIT(A) erred on facts and in law in not allowing depreciation @ 25% on the said market research expenses incurred for the earlier assessment year, i.e. AY 2007-08, to 2012-13, by treating the same as capital in nature.*

131. The issue involved in the above grounds stands adjudicated by us above at Issue No.5 in para 20 to 21 of our order above. Accordingly, this ground is allowed in said terms.

- 4.*That the CIT(A) erred on facts and in law in sustaining the disallowance on account of provision for post-retirement medical benefit given to employees of amounting to Rs. 20,00,628*

*allegedly holding that the these provision are in the nature of contingent liability and thus not subject to deduction under "come tax.*

132. The issue involved in the above grounds stands adjudicated by us above at Issue No.6 in para 27 of our order above. Accordingly, this ground is allowed.

*5. That the CIT(A) erred on facts and in law in sustaining the disallowance of product development expenses amounting to Rs. 5,35,81,500 (after allowing depreciation @ 25% p.a. of expense of Rs. 7,14,42,000) allegedly holding that the said expenditure is in relation to pre-launch of a product and therefore, capital in nature.*

*5.1 Without prejudice, that the CIT(A) erred on facts and in law in not allowing depreciation @ 25% on the said product development expenditure incurred for the earlier assessment year, i.e. AY 2006-07 to 2012-13, by treating the same as capital in nature.*

133. The issue involved in the above grounds stands adjudicated by us above at Issue No.4 in para 13 to 14 of our order above. Accordingly, this ground is allowed for statistical purposes.

The assessee has also raised additional ground as under:

*"1. That on the facts and circumstances of the case and in law. the assessing officer ought to have allowed, in pursuance to law clarified by the Hon'ble Rajasthan High Court in the case of Chambal Fertilisers and Chemicals Ltd vs JCIT: D.B. 1TA No.52/2018 and Hon'ble Bombay High Court in the case of Sesa Goa Ltd vs JCIT: 117*

*taxmann.com 96 (Bom HC), deduction of Rs. 2,55,04,589, being education cess computed on returned income, paid by the Appellant before the due date of filing return of income for the subject assessment year.*

2. *That on the facts and circumstances of the case and in law, pursuant to law clarified in the case of Chambal Fertilisers and Chemicals Ltd (supra) and Sesa Goa Ltd (supra), the assessing officer also ought to have allowed further deduction in respect of any additional amount paid by the Appellant towards education cess during the financial year relevant to the subject assessment year."*

134. The admission & adjudication of the above grounds has been dealt in Issue No.9 at para 38 of our order above

The additional ground accordingly is admitted for adjudication and dismissed.

135. In effect appeal of the assessee is partly allowed for statistical purposes.

**A.Y 2014-15**

**ITA No.1500/Chd/2018**  
Assessment Year : 2014-15  
(Assessee's Appeal)

- “1. *That the assessing officer erred on facts and in law in completing the assessment under section 143(3)*

*read with section 144C of the Income- tax Act ("the Act")  
at an income of Rs. 2,98,91,55,911 as against income of  
Rs. 2,57,62,21,110 returned by the assessee.*

136. The above ground is general in nature and needs no adjudication.

*1.1 That on the facts and circumstances of the case and in law, the impugned order passed by the assessing officer is barred by limitation and therefore, is liable to be quashed.*

137. No arguments were made vis a vis the above ground. This ground of appeal is therefore dismissed.

*2. That the assessing officer erred on facts and in law in making an adjustment of Rs.11,41,294 to the arm's length price of alleged 'international transactions' of accounts receivable undertaken with the associated enterprise, on the basis of the order passed under section 92CA(3) of the Act by the Transfer Pricing officer (TPO) and sustained by Dispute Resolution Panel ('DRP').*

*2.1 That the DRP/ TPO erred on facts and in law in re-characterizing the alleged transaction of delay in receipts of receivables as unsecured loans advanced to the associated enterprises.*

*2.2 That the DRP/ TPO erred on facts and in law in not appreciating that delay in receipt of receivable is not an 'international transaction', per se, under section 92B of the Act but is a consequence of an 'international transaction' undertaken in the form of services rendered to the associated enterprise.*

*2.3 That the DRP/TPO erred on facts and in law in holding that the non- realization of invoice value beyond the*

*period of 60 days is a separate international transaction, whose arm's length price is required to be determined separately.*

- 2.4 *Without prejudice, that the DRP/ TPO erred on facts and in law in not accepting that in any case the transaction of delay in respect of receivables was closely linked to the 'international transaction' of export and since the profit earned by the assessee as a percentage of cost is higher than the working capital adjusted profit earned by comparable companies, no transfer pricing adjustment was even otherwise required to be made in this regard.*
- 2.5 *Without prejudice, that the DRP/ TPO erred on facts and in law in not appreciating that the appellant has received receivables from unrelated parties with similar delay of period and accordingly the delay in receipt of receivables from unrelated parties should be considered as a valid internal CUP for the purpose of benchmarking.*
- 2.6 *Without prejudice, that the DRP/ TPO erred on facts and in law in adding an adhoc mark-up of 400 points on the Libor rate of interest, arbitrarily on account of credit rating risk, security risk, transaction cost etc., following the direction of DRP passed in the preceding year.*
- 2.7 *Without prejudice, that on the facts and in the circumstances of the case and in law, the DRP/TPO erred on facts and in law in not appreciating that the in terms of Master Circular of 2013-14, Reserve Bank of India allows a period of 12 months to all companies for receiving repatriation of export sales proceeds, and therefore, interest if any, ought to be imputed on the period of delay beyond 12 months.*

138. The issue involved in the above grounds stands adjudicated by us above at Issue No.10 in para 40 to 50 of our order above. Accordingly, this ground is allowed for statistical purposes.

3. *That the DRP/ AO erred on facts and in law in sustaining disallowance of Rs. 43,83,000 under section 40fa)(i) of the Act, with respect to purchase of vaccine amounting to Rs. 59,44,14,000 made from GlaxoSmithKline Biological S.A. ('GSK, Bio'), Belgium, allegedly holding that the appellant has failed to deduct tax at source from such payment.*
- 3.1 *That the DPR/ AO erred on facts and in law in allegedly holding that GSK Bio has outsourced its core activity to the appellant and all the activities are undertaken under direct supervision and control of GSK Bio and thereby establishing that there is a constant touch between the appellant and GSK Bio for R&D activities.*
- 3.2 *That the DRP/ AO erred on facts and in law in holding that clinical trial activities constitute permanent establishment of GSK Bio in India within the meaning of Double Taxation Avoidance Agreement (DTAA) between India and Belgium on account of the following:*
- a. *Fixed place of business in the form of place where clinical trials and research and development takes place including but not limited to CDMCI and BDSI, Bangalore under Article 5(1) of the DTAA;*
  - b. *Premises used as a sales outlet or for receiving or soliciting orders with respect to vaccines under Article 5(2)(i) of the DTAA;*
  - c. *CDMCI, Bangalore under Article 5(2)(c) of the DTAA;*
  - d. *BDSI, Bangalore under Article 5(2)(c) of the DTAA; and*
  - e. *Dependent agent PE in the form of the appellant under Article 5(4) of the DTAA.*
- 3.3 *That the DRP/ AO erred on facts and in law in alternatively holding that the appellant constituted business connection with GSK Bio within the meaning of section 9(1)(i) of the Act.*

3.4 *Without prejudice, the DRP/ AO erred on facts and in law in determining the profit attributable to the alleged PE in India at 22.5% of the net profits of GSK, Bio, as against 15.38% determined by the appellant on the basis of functions, asset and risk analysis of the appellant vis-a-vis GSK, Bio.*

139. The issue involved in the above grounds stands adjudicated by us above at Issue No.3 in para 10 to 11 of our order above. Accordingly, this ground is allowed for statistical purposes.

4. *That the DRP/ AO erred on facts and in law in sustaining the disallowance of Rs.37,74,87,000, being 1/3<sup>rd</sup> of the expenditure on advertisement and promotion of Rs. 11324.59 lacs allegedly on the ground that the said expenditure resulted in promotion of brand name owned by the foreign company.*

4.1 *That the DRP/ AO erred on facts and in law in not appreciating that the appellant is the exclusive licensee authorized to manufacture and sell products under the brand name in India and since the expenditure was incurred in the course of carrying on of its business, it was allowable deduction as business expenditure.*

140. The issue involved in the above grounds stands adjudicated by us above at Issue No.2 in para 7 to 8 of our order above. Accordingly, this ground is allowed.

5. *That the DRP/ AO erred on facts and in law in sustaining disallowance of market research expenses amounting to Rs.5,42,63,000 (after allowing depreciation @ 25% p.a. on expense of Rs.1,35,65,750) allegedly holding that the said expenditure incurred on market surveys, market research for the products which are to be launched and party for existing products, are*

*capital in nature and gave enduring benefit to the appellant.*

141. The issue involved in the above grounds stands adjudicated by us above at Issue No.5 in para 20 to 21 of our order above. Accordingly, this ground is allowed.

6. *That the DRP/ AO erred on facts and in law in sustaining the disallowance on account of provision for post-retirement medical benefit given to employees of amounting to Rs. 17,72,337 allegedly holding that the these provision are in the nature of contingent liability and thus not subject to deduction under income tax.*

142. The issue involved in the above grounds stands adjudicated by us above at Issue No.6 in para 27 of our order above. Accordingly, this ground is allowed.

7. *That the DRP/ AO erred on facts and in law in sustaining the disallowance of product development expenses amounting to Rs. 2,63,75,250 (after allowing depreciation @ 25% p.a. of expense of Rs. 87,91,750) allegedly holding that the said expenditure is in relation to pre-launch of a product and therefore, capital in nature.*

7.1 *Without prejudice, that the DRP/ AO erred on facts and in law in not allowing depreciation @ 25% on the said product development expenditure incurred for the earlier assessment year, i.e. AY 2006-07 to 2013-14, by treating the same as capital in nature.*

143. The issue involved in the above grounds stands adjudicated by us above at Issue No.4 in para 13 to 14 of our order above. Accordingly, this ground is allowed for statistical

purposes.

144. The assessee has also raised additional ground as under:

- "1. That on the facts and circumstances of the case and in law. the assessing officer ought to have allowed, in pursuance to law clarified by the Hon'ble Rajasthan High Court in the case of Chambal Fertilisers and Chemicals Ltd vs JCIT: D.B. 1TA No.52/2018 and Hon'ble Bombay High Court in the case of Sesa Goa Ltd vs JCIT: 117 taxmann.com 96 (Bom HC), deduction of Rs. 2,55,04,589, being education cess computed on returned income, paid by the Appellant before the due date of filing return of income for the subject assessment year.
2. That on the facts and circumstances of the case and in law, pursuant to law clarified in the case of Chambal Fertilisers and Chemicals Ltd (supra) and Sesa Goa Ltd (supra), the assessing officer also ought to have allowed further deduction in respect of any additional amount paid by the Appellant towards education cess during the financial year relevant to the subject assessment year."

145. The admission & adjudication of the above grounds has been dealt in Issue No.9 at para 38 of our order above

The additional ground accordingly is admitted for adjudication and dismissed.

146. In effect appeal of the assessee is partly allowed for statistical purposes.

**A.Y 2015-16**

आयकर अपील सं./ **ITA No.1495/Chd/2019**

निर्धारण वर्ष / Assessment Year : 2015-16

(Assessee's Appeal)

*"1. That the Assessing Officer erred on facts and in law in completing the assessment under section 143(3) read with section 144C of the Income-tax Act ("the Act") at an income of Rs. 404,73,27,530 as against income of Rs.361,50,30,310 returned by the appellant.*

147. The above ground being general in nature needs no adjudication.

*1.1 That on the facts and circumstances of the case and in law, the impugned order passed by the assessing officer is barred by limitation and therefore, is liable to be quashed.*

148. No arguments were made vis a vis the above ground. This ground therefore stands dismissed.

*2.That the assessing officer erred on facts and in law in making an adjustment of Rs. 87,58,287 to the arm's length price of 'international transactions' of export of goods by the appellant with the associated enterprise, on the basis of the order passed by the Transfer Pricing Officer ('TPO')/ Dispute Resolution Panel ('DRP').*

*2.1 That the AO/ TPO erred in the facts and in law in not considering that the transaction of sale of goods was not for commercial*

*purposes and AEs have further donated the goods to WHO without any charge.*

2.2 *That the TPO/ DRP erred on facts and in law in rejecting the following companies from the final set of comparable companies allegedly holding them to have been cherry picked by the appellant:*

- *Celebrity Biopharma Ltd.*
- *Elysium Pharmaceuticals Ltd.*
- *Strides Pharma Science Ltd.*

2.3 *The DRP erred on facts and in law in rejecting companies considered by the appellant holding that such companies are contract manufacturer, without appreciating that the appellant also acts as contract manufacturer for the associated enterprises for sale of Albendazole tablets.*

2.4 *That the TPO/ DRP erred on facts and in law in rejecting Triochem Products Ltd as comparable from the final set of comparable companies allegedly holding that complete financial information is not available in public domain.*

2.5 *That the TPO/ DRP erred on facts and in law in rejecting Zim Laboratories Ltd. as comparable from the final set of comparable companies allegedly holding that the company is functionally dissimilar to the appellant.*

149. The issue involved in the above grounds stands adjudicated by us above at Issue No.11 in para 55 to 58 of our order above. Accordingly, this ground is allowed for statistical purposes.

3. *That the assessing officer erred on facts and in law in making an adjustment of Rs. 18,98,270 to*

*the arm's length price of alleged 'international transactions' of accounts receivable undertaken with the associated enterprise, on the basis of the order passed under section 92CA(3) of the Act by the Transfer Pricing officer ('TPO') and sustained by Dispute Resolution Panel ('DRP').*

- 3.1 *That the DRP/ TPO erred on facts and in law in re-characterizing the alleged transaction of delay in receipts of receivables as unsecured loans advanced to the associated enterprises.*
- 3.2 *That the DRP/ TPO erred on facts and in law in not appreciating that delay in receipt of receivable is not an 'international transaction', per se, under section 92B of the Act but is a consequence of an 'international transaction' undertaken in the form of services rendered to the associated enterprise.*
- 3.3 *That the DRP/ TPO erred on facts and in law in holding that the non-realization of invoice value beyond the period of 60 days is a separate international transaction, whose arm's length price is required to be determined separately.*
- 3.4 *Without prejudice, that the DRP/ TPO erred on facts and in law in not accepting that in any case the transaction of delay in respect of receivables was closely linked to the "international transaction" of export and since the profit earned by the appellant as a percentage of cost is higher than the working capital adjusted profit earned by comparable companies, no transfer pricing adjustment was even otherwise required to be made in this regard.*
- 3.5 *Without prejudice, that the DRP/ TPO erred on facts and in law in adding an adhoc mark-up of 400 points on the Libor rate of interest, arbitrarily on account of credit rating risk, security risk, transaction cost etc., following the direction of DRP passed in the preceding year.*
- 3.6 *Without prejudice, that on the facts and in the circumstances of the case and in law, the DRP/TPO erred*

*on facts and in law in not appreciating that the in terms of Master Circular of 2014-15, Reserve Bank of India allows a period of 9 months to all companies for receiving repatriation of export sales proceeds, and therefore, interest if any, ought to be imputed on the period of delay beyond 9 months.*

150. The issue involved in the above grounds stands adjudicated by us above at Issue No.10 in para 40 to 50 of our order above. Accordingly, this ground is allowed for statistical purposes.

4. *That the DRP/ AO erred on facts and in law in sustaining disallowance of Rs. 4,56,300 under section 40(a)(i) of the Act, with respect to purchase of vaccine amounting to Rs. 987.27 lakhs made from GlaxoSmithKline Biological S.A. ('GSK, Bio'), Belgium, allegedly holding that the appellant has failed to deduct tax at source from such payment.*

4.1 *That the DPR/ AO erred on facts and in law in allegedly holding that GSK Bio has outsourced its core activity to the appellant and all the activities are undertaken under direct supervision and control of GSK Bio and thereby establishing that there is a constant touch between the appellant and GSK Bio for R&D activities.*

4.2 *That the DRP/ AO erred on facts and in law in holding that clinical trial activities constitute permanent establishment of GSK Bio in India within the meaning of Double Taxation Avoidance Agreement (DTAA) between India and Belgium on account of the following:*

- a. *Fixed place of business in the form of place where clinical trials and research and development takes place including but not limited to GDMCI and BDSI, Bangalore under Article 5(1) of the DTAA;*
- b. *Premises used as a sales outlet or for receiving or soliciting orders with respect to vaccines under Article 5(2)(i) of the DTAA;*

- c. *CDMCI, Bangalore under Article 5(2)(c) of the DTAA;*
- d. *BDSI, Bangalore under Article 5(2)(c) of the DTAA; and*
- e. *Dependent agent PE in the form of the appellant under Article 5(4) of the DTAA*

*4.3 That the DRP/ AO erred on facts and in law in alternatively holding that the appellant constituted business connection with GSK Bio within the meaning of section 9(1 )(i) of the Act.*

*4.4 Without prejudice, the DRP/ AO erred on facts and in law in determining the profit attributable to the alleged PE in India at 22.5% of the net profits of GSK, Bio, as against 15.38% determined by the appellant on the basis of functions, asset and risk analysis of the appellant vis-a-vis GSK, Bio.*

151. The issue involved in the above grounds stands adjudicated by us above at Issue No.3 in para 10 to 11 of our order above. Accordingly, this ground is allowed for statistical purposes.

*5. That the DRP/ AO erred on facts and in law in sustaining the disallowance of Rs. 38,09,78,666, being 1/3<sup>rd</sup> of the expenditure on advertisement and promotion of Rs. 11429.36 lacs allegedly on the ground that the said expenditure resulted in promotion of brand name owned by the foreign company.*

152. The issue involved in the above grounds stands adjudicated by us above at Issue No.2 in para 7 to 8 of our order above. Accordingly, this ground is allowed.

6. *That the DRP/ AO erred on facts and in law in sustaining disallowance of market research expenses amounting to Rs. 5,56,20,000 (after allowing depreciation @ 25% p.a. on expense of Rs. 7,41,60,000) allegedly holding that the said expenditure incurred on market surveys, market research 7.1 for the products which are to be launched and part party for existing products, are capital in nature and gave enduring benefit to the appellant.*

153. The issue involved in the above grounds stands adjudicated by us above at Issue No.5 in para 20 to 21 of our order above. Accordingly, this ground is allowed.

7. *That the DRP/ AO erred on facts and in law in sustaining the disallowance on account of provision for post-retirement medical benefit given to employees of amounting to Rs. 23,75,010 allegedly holding that these provision are in the nature of contingent liability and thus not subject to deduction under income tax.*

7.1 *That the DRP erred on facts and in law in observing that "why additional provision needs to be created when the annual premium paid and charged to the P&L account covers all the liabilities that the assessee is obliged to discharges in respect of the retirees".*

154. The issue involved in the above grounds stands adjudicated by us above at Issue No.6 in para 27 of our order above. Accordingly, this ground is allowed.

8. *That the DRP/ AO erred on facts and in law in sustaining the disallowance of product development expenses amounting to Rs. 2,15,76,000 (after allowing depreciation @ 25% p.a. of*

*expense of Rs. 2,87,68,000) allegedly holding that the said expenditure is in relation to pre-launch of a product and therefore, capital in nature.*

- 8.1 *Without prejudice, that the DRP/ AO erred on facts and in law in not appreciating that even if the expenditure incurred on product development is considered to be in the nature of capital expenditure, the said expenditure ought to be allowed deduction under section 35(1 )(iv) of the Act.*
- 8.2 *Without prejudice, that the DRP/ AO erred on facts and in law in not allowing depreciation @ 25% on the said product development expenditure incurred for the earlier assessment year, i.e. AY 2006-07 to 2013-14, by treating the same as capital in nature.*

155. The issue involved in the above grounds stands adjudicated by us above at Issue No.4 in para 13 to 14 of our order above. Accordingly, this ground is allowed for statistical purposes.

156. The assessee has also raised additional ground as under:

- "1. *That on the facts and circumstances of the case and in law. the assessing officer ought to have allowed, in pursuance to law clarified by the Hon'ble Rajasthan High Court in the case of Chambal Fertilisers and Chemicals Ltd vs JCIT: D.B. 1TA No.52/2018 and Hon'ble Bombay High Court in the case of Sesa Goa Ltd vs JCIT: 117 taxmann.com 96 (Bom HC), deduction of Rs. 2,55,04,589, being education cess computed on returned income, paid by the Appellant before the due date of filing return of income for the subject assessment year.*
2. *That on the facts and circumstances of the case and in*

*law, pursuant to law clarified in the case of Chambal Fertilisers and Chemicals Ltd (supra) and Sesa Goa Ltd (supra), the assessing officer also ought to have allowed further deduction in respect of any additional amount paid by the Appellant towards education cess during the financial year relevant to the subject assessment year."*

157. The admission & adjudication of the above grounds has been dealt in Issue No.9 at para 38 of our order above

The additional ground accordingly is admitted for adjudication and dismissed.

158. In effect appeal of the assessee is partly allowed for statistical purposes.

159. In the result, all the appeals of the assessee and the Revenue, stand partly allowed for statistical purposes.

Order pronounced on 26<sup>th</sup> October, 2021.

Sd/-  
**(SATBEER SINGH)**  
न्यायकि सदस्य/Judicial Member  
दिनांक /Dated: 26<sup>th</sup> October, 2021  
\*रती\*

Sd/-  
**(ANNAPURNA GUPTA)**  
लेखा सदस्य/Accountant Member

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

1. अपीलार्थी/ The Appellant

2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT,  
CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,  
सहायक पंजीकार/ Assistant Registrar