

आयकर अपीलीय अधिकरण “के” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“K” BENCH, MUMBAI

माननीय श्री महावीर सिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI MAHAVIR SINGH, VP AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM
(Hearing Through Video Conferencing Mode)

1. आयकरअपील सं./ I.T.A. No.6901/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2010-11)

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2. आयकरअपील सं./ I.T.A. No.6840/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2011-12)

M/s FDC Limited 142-48, S. V. Road Jogeshwari (West) Mumbai – 400 102	बनाम/ Vs.	ACIT Circle– 8(1) {now ACIT Circle 9(3)(1)} R. No. 215, Aayakar Bhavan Mumbai-400 020
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AAACF-0253-H		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

&

3. आयकरअपील सं./ I.T.A. No.7016/Mum/2018
(निर्धारण वर्ष / Assessment Year: 2010-11)

ACIT Circle– 8(1) {now ACIT Circle 9(3)(1)} R. No. 215, Aayakar Bhavan Mumbai-400 020	बनाम/ Vs.	M/s FDC Limited 142-48, S. V. Road Jogeshwari (West) Mumbai – 400 102
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No. AAACF-0253-H		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Assessee by	:	Shri S. S. Nagar, Ld. AR
Revenue by	:	Shri Sunil Deshpande, Ld. CIT-DR

सुनवाई की तारीख/ Date of Hearing	:	20/07/2021
घोषणा की तारीख / Date of Pronouncement	:	08/10/2021

आदेश / O R D E R**Manoj Kumar Aggarwal (Accountant Member)**

1.1 The assessee is in further appeal before us for Assessment Years (AY) 2010-11 & 2011-12 whereas the revenue is in further appeal for AY 2010-11. The facts as well as issues are substantially the same in both the years and therefore, the appeals were heard together and are now being disposed-off by way of this consolidated order for the sake of convenience & brevity. It is admitted position that adjudication in one year shall apply to the other year also so far as common grounds are concerned.

1.2 In the above background, we take up cross-appeals for AY 2010-11 which arises out of the order of Ld. Commissioner of Income Tax (Appeals)-56, Mumbai {CIT(A)} dated 04/09/2018 in the matter of assessment framed by Ld. Assessing Officer (AO) u/s 143(3) r.w.s. 144C(3) on 20/03/2014. The Ld. AO has passed the order after incorporating certain Transfer-Pricing (TP) Adjustments as proposed by Ld. Transfer Pricing Officer-I(8), Mumbai (TPO) in its order u/s 92CA(3) dated 24/01/2014. The assessment order has subsequently been rectified by Ld. AO u/s 154 on 24/12/2014 to rectify certain errors. Though the assessee preferred further appeal before Ld.CIT(A), however, the appeal was partly allowed in impugned order dated 04/09/2018. Aggrieved, the assessee as well as revenue is in further appeal before us.

1.3 The grounds raised by the assessee read as under: -

DETERMINATION OF ALP W.R.T PRODUCTS SOLD TO AE-FDC INTERNATIONAL LTD. UK

1) The Ld CIT(A) erred in holding that the Ld AO did not reject the Cost Plus Method as the Most Appropriate Method adopted by the Assessee in arriving at the

Arms Length Price (ALP) for products sold to FDC International Limited, UK, (the Assessee's Associated Enterprise (AE)) and further failed to appreciate that the Cost Plus Method is the most appropriate method to arrive at the ALP in the facts of the present case.

2) The Ld. CIT(A) erred in not granting adjustment of non-variable costs, sales return and competition in arriving at the Arm's Length Price (ALP) for products sold to FDC International Limited, UK, (the Assessee's Associated Enterprise (AE)) without giving any cogent reasons and has passed an unreasoned order and thus said adjustments may be allowed while calculating ALP.

3) The Ld. CIT(A) erred in directing AO to determine extent of adjustment while granting adjustment for functional difference and marketing cost without appreciating that the quantum of adjustment was neither disputed by AO nor quantum of adjustment was an issue before Ld. CIT(A) and hence said direction may be set-aside.

4) The Ld. CIT(A) while determining the ALP erred in not reducing the adjustment of Rs.2,95,43,542/- being erroneous addition of effect of competition in UK market in case of Hypermellose Eye Drops without appreciating that Assessee has not claimed said adjustment while arriving at ALP and hence said adjustment may be granted.

5) The Ld. CIT(A) while determining the ALP erred in not reducing the adjustment of Rs.2,42,885/- in case of Timolol 0.25% Eye Drops and Rs.1,01,64,981/- in case of Hypermellose Eye Drops being erroneous addition to actual selling price instead of ALP wherein ALP is lower than actual selling price and hence said adjustment may be granted.

DETERMINATION OF ALP ON LOAN GIVEN TO AE - FDC PHARMACEUTICALS SA PTY LTD

6) The Ld. CIT(A) erred in making adjustments in ALP of LIBOR plus mark up of 3% relating to interest on loan given to the AE namely FDC Pharmaceuticals SA Pty Ltd, South Africa, without appreciating the fact that the interest charged on loan by the Assessee to its AE was at Arm's Length Price and hence the adjustment sustained by the Ld. CIT(A) may be deleted.

6.1) Without prejudice to the above, the adjustment of LIBOR plus mark up of 3% is very high and unreasonable in the facts of the present case and same may be reduced.

DEDUCTION U/S 35(2AB) OF RS.3,29,67,717/- TOWARDS DEVELOPMENT OF E-COLI CLONE

7) The Ld. CIT(A) erred in disallowing a sum of Rs.3,29,67,717/- claimed u/s 35(2AB) pertaining to corresponding expense of Rs. 2,19,78,478/- on the ground that it is ineligible for deduction as Assessee did not have Form 3CM without appreciating that no proper opportunity of hearing was given and Form 3CM is not a mandatory requirement in the facts of the present case and hence, deduction u/s 35(2AB) may be granted.

8) The Ld.CIT(A) erred in not adjudicating that deduction u/s 35(2AB) of Rs.3,29,67,717 pertained to current year and not earlier years.

DEDUCTION U/S 35(2AB) W.R.T. ROHA AND GOA UNIT-III R & D UNITS

9) The Ld CIT(A) erred in not admitting additional evidence u/r 46A w.r.t. claim of weighted deduction u/s 35(2AB) of Rs.1,13,99,619/- on total expense of Rs.75,99,745/- pertaining to R & D at Roha unit.

10) The Ld. CIT(A) erred in not admitting claim of weighted deduction u/s 35(2AB) of Rs.39,93,818/- on total expense of Rs.26,62,545/- pertaining to R & D at Goa Unit-III.

11) The Ld CIT(A) erred in not granting weighted deduction u/s 35(2AB) on Roha and Goa Unit-III R & D units on the ground that there is no Form 3CM without appreciating that as R & D activity was being carried out and DSIR Approval was in existence and thus in the facts of the present case Form 3 CM was not a mandatory requirement and hence deduction u/s 35(2AB) may be granted.

12) The Ld. CIT(A) erred in not considering Form 3CK filed by the Company with DSIR on 23.03.2010.

13) The Ld. CIT(A) erred in not granting weighted deduction u/s 35(2AB) on Roha and Goa Unit-III R & D units without adjudicating the merits of the case.

DISALLOWANCE OF PROMOTIONAL ITEMS TO STOCKISTS AND DOCTORS WITH NAME OF ASSESSEE'S PRODUCTS EMBOSSED ON ITEMS

14) The Ld CIT(A) erred in disallowing promotional items given to stockists of Rs.1,37,61,757/- u/s 37(1) without appreciating that said expenses are incurred wholly and exclusively for business and Assessee has proved that same are incurred for business purpose and hence, disallowance of Rs. 1,37,61,757/- may be deleted.

14.1) Without prejudice to the above, the Ld CIT(A) erred in disallowance of entire expense on promotional items given to stockists of Rs.1,37,61,757/- u/s 37(1) though he accepted that same were legally allowable.

15) The Ld CIT(A) erred in disallowing promotional items given to doctors of Rs.6,33,13,692/- u/s 37(1) without appreciating that said expenses are incurred wholly and exclusively for business and Assessee has proved that same are incurred for business purpose and hence, disallowance of Rs.6,33,13,692/- may be deleted.

15.1) Without prejudice to the above, the Ld. CIT(A) erred in disallowing entire expense on promotional items given to doctors of Rs.6,33,13,692/- with name of Assessee's products embossed on the items u/s 37(1) though he accepted that same were legally allowable.

DISALLOWANCE OF BALANCE PUBLICITY EXPENSES

16) The Ld. CIT(A) erred in remanding the issue of balance publicity expenses of Rs.80,98,309/- to Ld. AO though Ld. CIT(A) has no power to do so and thus said direction may be set-aside and balance publicity expenses may be allowed.

DISALLOWANCE OF ALLEGED BOGUS PURCHASE

17) The Ld CIT(A) erred in disallowing alleged bogus purchases of Rs.65,56,421/- without appreciating that purchases were genuine and purchases of articles were made in the regular course of business duly supported by the goods received note from its godown, bills received from the supplying parties (who at that material point of time were not declared as defaulters by the Sales Tax department), payment by A/c Payee cheques, bank certificate reflecting amount credited to party's A/c, stock register, dispatch advice along with lorry receipts and distribution of articles so purchased in its normal course of business, and hence the disallowance may be deleted.

17.1) The Ld CIT(A) erred in disallowing genuine purchases of Rs.7,31,027/- from Shakti Trading Company having valid TIN as on 31st March 2010 since its TIN cancellation date was w.e.f. 30.11.2010.

ALLOCATION OF CERTAIN CORPORATE EXPENSES TO S.80IB/ 80IC UNITS

18) The Ld. CIT(A) erred in holding that interest to others of Rs.95,83,830/- needs to be partly allocated to S. 80IB / 80IC units without appreciating that entire interest expenses pertains to Head Office and no allocation is called for.

19) The Ld. CIT(A) erred in holding that depreciation on factory building, plant and machinery [excluding ETP] and pallet trucks of Rs.11,08,126/- needs to be allocated to S. 80IB / 80IC units without appreciating that said depreciation pertains to Head Office exclusively and no allocation is called for.

DEDUCTION U/S 80IB / 80IC ON SCRAP SALES AND EXPORT INCENTIVES

20) The Ld. CIT(A) erred in not granting deduction u/s 80IB/ 80IC on scrap sales of Rs.8,25,985/- without appreciating said income is derived from business undertaking and is thus eligible for deduction u/s 80IB / 80IC.

21) The Ld. CIT(A) erred in not granting deduction u/s 80IB / 80IC on export incentives of Rs.4,34,365/- without appreciating said income is derived from business undertaking and is thus eligible for deduction u/s 80IB/ 80IC.

ALLOCATION OF R & D EXPENSES TO S. 80IB/ 80IC UNITS

22) The Ld. CIT(A) has erred in holding that contribution to Vision Research foundation of Rs. 12,50,000/- requires to be allocated to S. 80IB/ 80IC units without appreciating that it is in form of donation and not related to any of the manufacturing plants and hence, the direction for allocation may be set-aside.

23) The appellant craves leave to add, to alter, to vary, to delete or to amend all or any of the grounds above mentioned.

During hearing, the Ld. Authorized Representative for assessee (AR), submitted that the assessee is not pressing ground numbers 3,4,5,6 & 6.1 since relief has already been granted by Ld. TPO in order giving effect to impugned order. The Ld. AR also submitted that the assessee is not pressing ground no. 21 of the appeal. Accordingly, these grounds stand dismissed as being *not pressed*.

1.4 The grounds raised by the revenue read as under: -

1. Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in granting the adjustment pertaining to marketing cost and functional differences claimed by the assessee and rejected by the Transfer Pricing Officer (TPO).

2. Whether on the facts and circumstances of the case and in the law, the Ld.CIT(A) erred in granting the adjustment pertaining to marketing cost without considering the fact that the marketing cost does not vary by pack size and also the expenses incurred on marketing are already included in the actual expenses of the assessee.

3. Whether on the facts and circumstances of the case and in the law, the Ld.CIT(A) erred in granting the adjustment pertaining to functional differences without giving any reasons for the same.

4. Whether on the facts and circumstances of the case and in the law, the Ld.CIT(A) erred in granting the adjustment pertaining to functional differences,

without prejudice, in not commenting upon the correctness of the computation done for granting the adjustment.

5. Whether on the facts and circumstances of the case and in the law, the Ld.CIT(A) erred in granting the adjustment pertaining to functional differences without taking notice of the act that as per the agreement produced by the assessee, no instances were found wherein it was mentioned that the assessee is going to give discount / adjustment on account of product license and lab analysis cost and these expenses are part of business of the AE and any adjustments on account of these expenses will impact the profitability of the AE.

6. Whether on the facts and in the circumstances of the case and in law, was Ld.CIT(A) right in allowing depreciation on intangible asset of Rs.2,19,78,478/- commencing from A.Y.2010-11 when such depreciation is not claimed by the assessee in the grounds of appeal?

7. Whether on the facts and in the circumstances of the case and in law, Ld. CIT(A) is right in allowing depreciation on intangible asset for A.Y.2010-11 when the asset was acquired and put to use in A. Y. 2004-05.

1.5 The assessee, vide letter dated 26/12/2020, has raised certain additional grounds of appeal which read as under: -

1.0 That on the facts and in the circumstances of the case, the disallowance, imposition of tax and interest with reference thereto, the quantification of taxable income and the tax liability, has been grossly unjustified, erroneous and unsustainable and necessary direction be given to the Ld. AO to give appropriate relief in accordance with law.

2.0 That on the facts and in the circumstances of the case, Education Cess & Secondary and Higher Education Cess on Income Tax and Dividend Distribution Tax may kindly be allowed as a deduction in computing total income under the normal provisions of the Act.

3.0 That on the facts and in the circumstances of the case, the Ld. A.O. ought not to have made proportionate disallowance pertaining to interest u/s 14A under the normal provisions of the Act since the appellant had sufficient interest free funds available to make such tax-free investment.

4.0 That on the facts and in the circumstances of the case, disallowance u/s 14A cannot be made under the provisions of section 115JB of the Act.

Upon perusal of the same, it is evident that the assessee has made new claims which are admitted in terms of the decision of Hon'ble Apex Court in **National Thermal Power Corporation Ltd. V/s CIT (1998; 229 ITR 383)**.

1.6 For ease of reference, the grounds of assessee's appeal which fall for our adjudication could be tabulated in the following manner: -

Ground Nos.	Grounds / Issue
1. to 2.	TP adjustment on account of products sold by the assessee to AE
7. & 8.	Weighted Deduction u/s 35(2AB) towards development of E-Coli Clone
9. to 13.	Deduction u/s 35(2AB) for Roha & Goa Unit-III R & D Units
14. to 16.	Disallowance of Publicity Expenses
17. & 17.1	Addition on account of alleged bogus purchases
18. & 19.	Allocation of Corporate Expenses to 80IB / 80IC units
20. & 22.	Deduction u/s 80IB /80IC on scrap sales & allocation of certain R & D Expenses
23.	General in Nature
Additional Grounds	
2.0	Deduction of Education and Secondary & Higher Education cess
3.0 & 4.0	Disallowance u/s 14A
1.0	Erroneous levy of interest u/s 234C

1.7 Similarly, the grounds of the revenue could be tabulated in the following manner: -

G.Nos.	Grounds / Issue
1. to 5.	Grant of Various adjustment while computing ALP
6. & 7.	Depreciation on intangible assets

1.8 The Ld. AR placed on record ground-wise chart to assail the additions as sustained in the appellate order. The Ld. CIT-DR, on the other hand, pleaded for dismissal of assessee's appeal. The Ld. DR also assailed the relief granted by Ld. CIT(A) in the impugned order. For the same, reliance has been placed on various judicial pronouncements, the copies of which have been placed on record.

1.9 We have carefully heard the rival submissions and perused relevant material on record. We have also deliberated on various judicial pronouncements as cited before us during the course of hearing. Our adjudication to the subject matter of appeal would be as given in succeeding paragraphs.

1.10 The assessee being resident corporate assessee is stated to be engaged in manufacturing of drugs. As per return of income, the assessee has paid taxes on Book-Profits u/s 115JB. While framing the

assessment, the assessee has been saddled with Transfer-Pricing Adjustments of Rs.817.56 Lacs as proposed by Ld. Transfer Pricing Officer (TPO) as well as various other additions / disallowances which is the subject matter of cross-appeal before us. The same are enumerated as well as adjudicated as under: -

2. Transfer Pricing Adjustments

2.1 Since the assessee carried out certain international transactions with its Associated Enterprises (AE), the same were referred to Ld. Transfer Pricing Officer-I(8), Mumbai (TPO) u/s 92CA(1) for determination of Arm's Length Price (ALP). It was noted by Ld. TPO that assessee was engaged in the manufacturing of formulation (final medicinal products) and Active Pharmaceutical Ingredients (API). Nearly 90% of the sales were from formulations whereas balance 10% sales were from APIs. The assessee reflected turnover of approx. Rs.660 Crores with Net profit of approx. Rs.149 Crores. The sales were 90% domestic sales whereas the balance 10% sales were export sales.

2.2 It further transpired that the assessee has two Associated Enterprises (AE) i.e. FDC International Ltd., UK (FDC-UK) and FDC Pharmaceutical SA (Pty) Ltd. (FDC-SA). FDC-UK is stated to be a trading entity having operations in European Markets. It is a wholly owned subsidiary of the assessee and carries on trading of pharmaceutical products. FDC-SA engages in trading of generic drugs. It is a joint venture entity in which assessee hold 49% stake.

2.3 During this year, the assessee entered into following international transactions with its Associated Enterprise (AE): -

Particulars of transaction	Name of the AE	Amount	Method Applied
Sale of Finished Goods	FDC-UK	8,06,13,116	CPM
	FDC-SA	24,51,266	CPM
Interest accrued on Loan advanced to AEs	FDC-UK	16,78,890	CUP
	FDC-SA	11,31,620	CUP

The subject matter of dispute before us is TP adjustment on sale of finished goods to AEs.

Sale of finished goods to FDC-UK

2.4 The assessee, in its TP study report, adopted Cost-Plus-Method (CPM) to benchmark the transactions and compared product-wise margin earned on sales to AE vis-à-vis margin earned on sales made to unrelated parties in the export market as well as in the local market. One product viz. Chloramphenicol Eye-drops 0.5%10ml. was not sold to any unrelated parties. Therefore, the margin on this product were compared with margin earned on sales of all types of eye-drops made to unrelated parties both local and export. The assessee computed product-wise %age margin on cost of sales to AE and compared the same with %age margin on cost of sales to non-AE. The same has been tabulated on para-7 of Ld. TPO's order. The product-wise margins on sales were computed by deducting total cost per unit from selling price. Certain adjustments were then made to per unit margin and %age margin on cost was computed which has been tabulated in para-8 of Ld. TPO's order.

However, the assessee was asked to submit detailed working of the Arm's Length price (ALP) by comparing selling price of products exported to AE in comparison to products sold in local market by considering selling price of product sold in local market as the starting point and giving reasons for difference in adjustments. In other words, benchmarking was sought to be done as per Comparable Uncontrolled

Price method (CUP). Taking product wise selling price of non-AE sales as the base, the assessee adjusted the same for various factors and arrived at Arm's Length Selling Price per unit and compared the same with actual selling price to AE.

In para-9, the adjustment made in domestic selling price of a product namely Sodium Cromoglicate Eye-drops 13.5 ml was tabulated which were then compared with selling price per unit of AE sales. The selling price was adjusted for various factors viz. effect of raw material cost, packing material cost, non-variable costs, effect of excise duty, effect of functional differences, effect of marketing costs, effect of sales return, effect of competition in foreign market etc. Similar working was done for other products sold to AE. On the basis of the same, it was submitted by the assessee that the transactions were at Arm's Length Price (ALP). The margin on one product namely Timolol 0.5% eye-drops were slightly lower than margins earned on sales made to local parties, however, the difference was stated to be within the safe harbor range of $\pm 5\%$ and therefore, no TP adjustments were thus offered by the assessee on this account also.

2.5 The dispute arose in view of the fact that Ld. TPO objected to the 5 adjustments out of 8 adjustments as made by the assessee while computing the Arm's Length Price. Though the assessee furnished detailed explanation justifying the adjustments so made, however, Ld. TPO opined that few of the adjustments could not be allowed to the assessee and therefore, certain TP adjustments were proposed as per following details: -

Product (eye drops)	Adjustment disallowed by Ld. TPO	TP Adjustment (Rs.)
Sodium Cromoglicate 13.5 ml	(i) Competition in UK market (ii) Sales Return (iii) Marketing Cost (iv) Functional difference (v) Non-variable cost	Rs.231.86 Lacs
Timolol 0.5% 5 ml	-----Do-----	Rs.10.85 Lacs
Hypermellose Eye drops 10ml	-----Do-----	Rs.554.91 Lacs
Timolol 0.25% 5 ml	(i) Sales Return (ii) Marketing Cost (iii) Functional difference	Rs.4.64 Lacs
	Total	Rs.802.26 Lacs

In other words, Ld. TPO added back these adjustments as made by the assessee to actual selling price per unit to AE sales and proposed the adjustments. To put it differently, the adjustment made by the assessee on account of tabulated factors was denied. No adjustment was proposed against sales made to other AE i.e. FDC-SA. Aggrieved, the assessee preferred further appeal before Ld. CIT(A).

2.6 Regarding selection of most appropriate method (MAM), the Ld. CIT(A) noted that Cost-Plus-Method as adopted by the assessee was never rejected by Ld. TPO. The manner of computation resorted to by Ld. TPO was merely recasting of method adopted by the assessee. The assessee contested the rejection of 5 adjustments before Ld. CIT(A). Few of the adjustments were allowed whereas few of the adjustments were denied which has led to cross-appeal before us. The adjudication to the adjustments by Ld. CIT(A) was as under:-

(i) Non-variable cost

The assessee submitted that change in packing size would affect cost of packing and packing material and would require change in machinery, tools, dies etc. The Ld. TPO held that in case of change in packing size,

these costs would not change substantially unless evidenced by the assessee. The Ld. CIT(A) confirmed the action of Ld. TPO on account of lack of data based evidence.

(ii) Functional difference

The Ld. TPO refused to grant this adjustment. However, Ld. CIT(A), allowed the same by observing that these were part of contract between the assessee and the AE and therefore, the adjustment was to be granted.

(iii) Marketing Costs

The Ld. TPO did not grant this adjustment. However, Ld. CIT(A) concurred that the reasons supplied by assessee were valid. The nature of marketing would be different in different geographical locations. Marketing costs also vary.

(iv) Sales Return

The assessee factored sales return in cost of sale which was denied by Ld. TPO. The Ld. CIT(A) rejected assessee's plea by observing that this adjustment could be considered only in the year when the sales return have actually taken place.

(v) Competition

The Ld. TPO denied this adjustment which was confirmed by Ld. CIT(A).

The aforesaid adjudication by Ld. CIT(A) has reduced the TP adjustment from Rs.802.26 Lacs to Rs.151.16 Lacs. Aggrieved, the assessee as well as revenue is in further appeal before us.

Our findings & adjudication

2.7 Upon careful consideration of factual matrix, we find that the assessee has benchmarked these transactions using CPM method as

Most Appropriate Method. However, Ld. TPO has recomputed the adjustment by adopting CUP method and proposed TP adjustments by denying certain adjustments as claimed by the assessee while arriving at Arm's Length Price. Therefore, we find that the dispute before us is in narrow compass and the issue of selection of most appropriate method is not of that vital importance. Hence, without going into the question of Most Appropriate Method, the short dispute before us would be whether the aforesaid adjustments as denied by Ld. TPO would be allowable to the assessee or not? The same are being dealt as well as adjudicated as under: -

(i) Functional difference

The adjustment of functional difference has been denied by Ld. TPO on the ground that there was no mention in the agreement that product license and lab test expenses were to be borne by the AE and reduction in profitability of AE would not be relevant for determining ALP. However, Ld. CIT(A) noted that these adjustments were found to be part of contract between the assessee and AE. We find that product license maintenance cost and lab analysis were borne by AE which in case of sales to non-AE was borne by the assessee. The assessee's function in case of sales to AE is restricted to manufacturing only. The assessee performs the function of contract manufacturer. The product licenses were held by the AE who was also responsible for maintenance of the product licenses. The manufacturing was done in strict adherence to Product License and the labeling on products was of assessee's AE. The same is evident from Technical agreement (page no. 342-356 of the Paper Book) between the assessee and FDC-UK (AE). In case of non-AE sales, these expenses are to be borne by the assessee, which fact

remains undisputed before us. Therefore, the adjustment of this component has rightly been allowed by Ld. CIT(A).

(ii) Marketing Costs

This adjustment was granted by Ld. CIT(A) by observing that the nature of marketing would be different in different geographical locations. Marketing costs also vary. The Ld. AR has submitted that marketing cost is actually incurred by the assessee for local as well as export sales to non-AEs. However, in case of sales to AE, the selling expenses were to be borne by AE and not the assessee. The marketing costs differ with geographical conditions. Sales in local markets are prescription drugs and therefore, sale promotion forms major expenses. In exports, the marketing expenses are not as high as compared to local markets as the sale would be made to fixed distributors. Marketing costs may not vary with pack size but it would vary with selling price as marketing costs are calculated as percentage of selling price. Since Ld. TPO is comparing local sale price with that of export sale price, the adjustment of marketing expenses need to be allowed as the same are already incorporated in the selling price since expenses incurred in local markets would be high and therefore, selling price of products sold in local market would also be high.

We concur with the aforesaid submissions made by Ld. AR since the marketing costs would vary with geographical locations and would impact the ultimate selling price. Therefore, this adjustment has rightly been allowed by Ld. CIT(A).

(iii) Non-variable cost

The Ld. TPO has denied the same on the ground that overheads would not vary with pack size. The Ld. CIT(A) upheld the same in the absence

of data based evidence. However, we find that this adjustment would be available to the assessee since pack-size is not similar in case of Allercorn eye-drops and Moisol eye-drops. While computing ALP, hypothetical selling price and costs have been considered in proportion to the pack size. In such a case, the adjustment arising out of hypothetical non-variable cost based on the same proportion should be allowed. In case of Timolol 0.5% eye-drops, overheads were more in case of domestic sale due to manufacturing from old machineries which consumed more labour hours for packaging and maintenance costs. This fact is undisputed before us. Therefore, the same is required to be factored-in while benchmarking the prices. Hence, we direct lower authorities to allow this adjustment.

(iv) Sales Return

The only reason of rejection of this adjustment is the observation of Ld. CIT(A) that the same was to be considered only in the year when the sales returns have actually taken place. However, the said observation overlook the fact that sales return and recall cost in case of AE sale was to be borne by the AEs as per supply agreement (page 339 of paper-book). As per the terms, once the products are released for sale by designated quality testing facility, the supplier's liability towards cost, expenses and losses to the extent of any claims, returns, rejection, recall would cease and the same would be on AE only without any recourse to the supplier. In case of non-AE sales, the said liability would be on assessee. Therefore, this crucial factor would require adjustment in the selling price while benchmarking the transactions. We order so.

(v) Competition

We are of the opinion that the competition in two geographical locations would vary due to market conditions and government regulations prevailing in the market. The assessee, vide letter dated 06/01/2014, has submitted detailed chart scientifically quantifying the competition effect. The assessee has also produced invoices raised by the AE to its customers to prove competition effect. In UK, National Health Service determines reimbursement price of each drug and reimburses the same to retailers. The assessee has also submitted its value chain of UK drug market and functions performed by each party in value chain to justify its margins and arm's length price. In the absence of any adverse findings by lower authorities, we concur with these submissions and accordingly, the assessee's plea is to be accepted. Accordingly, we direct Ld. AO / TPO to grant this adjustment.

2.8 In the result, Ground No.2 of assessee's appeal stand allowed which render ground no.1 as infructuous. Ground Nos.1 to 5 of revenue's appeal stands dismissed.

Corporate Issues

3. Wrong claim of R & D Deduction u/s 35(2AB) for Jogeshwari Unit

3.1 The assessee claimed weighted deduction u/s 35(2AB) for Research & Development (R&D) expenditure at 3 units viz. (i) Jogeshwari Unit; (ii) Roha Unit; & (iii) Goa Unit.

Upon perusal of details, it transpired that the expenses claimed for Jogeshwari Unit include expenditure of Rs.219.78 Lacs towards purchase of technology for genetically modified E-coli clone for R & D Biotech. This technology was purchased in the year 2004 from M/s Prospec Tany Technogene Ltd., Israel. This technology was stated to be

scaled up from 5 liters to 15 liters fermentation scale. Thereafter, various R&D activities and clinical trials were conducted to make the technology commercially viable. After making the technology commercially viable, the expenditure was charged and claimed @150% during the year u/s 35(2AB) in terms of decision of Hon'ble Madras High Court in **CIT V/s Sundaram Fasteners Ltd. (223 ITR 455)**.

3.2 However, Ld. AO opined that since the entire expenditure was incurred in financial year (FY) 2003-04, the expenditure was allowable only in AY 2004-05 and not in this year. The assessee did not give any proof that the technology had actually become operative in this year. Therefore, the weighted deduction of Rs.329.67 Lacs as claimed by the assessee was denied.

3.3 During appellate proceedings, the assessee submitted additional evidences which were in the shape of permission from Directorate General of Health Services for containerization of experimental batches of recombinant protein filgrastim in pre-filled syringes at M/s Sovereign Pharma Pvt. Ltd. (Daman) for R&D purposes. The permission would prove that the R&D became operative in this year. In the alternative, the assessee pleaded for depreciation of 25% against the same as applicable to intangible assets. The additional evidences filed by the assessee were subject to remand report wherein Ld. AO objected to additional evidences and pleaded for rejection of the assessee's plea. After considering the same, Ld. CIT(A) held that the relevant document to claim the deduction would be availability of certificate in Form 3CM issued by Secretary DSIR, Govt. of India. Since the assessee has not complied with the mandatory condition of claiming the benefit, the weighted deduction would not be available to the assessee. The

expenditure would also be not allowable as revenue expenditure. However, the assessee would be eligible to claim depreciation on the same from this year onwards. Aggrieved, the assessee as well as the revenue is in further appeal before us.

Our findings & adjudication

3.4 From the factual matrix, it could be gathered that though the technology was acquired by the assessee in earlier years, however, for commercial feasibility the technology had to be scaled up from 5 liters to 15 liters fermentation scale. Thus, further R&D work was involved. Till such time, the assessee debited all the related expenditure as 'Work-in-progress' and reflected the same in the Balance Sheet. It is undisputed fact that no deduction whatsoever has been claimed by the assessee against this expenditure in earlier years. During this year, the assessee's formulated protein received permission from Director General of Health Services (Page 389 of paperbook-2; letter dated 10/07/2009) for containerization of experimental batches of recombinant protein Filgrastim in pre-filled syringes from third party and the technology acquired by the assessee would be made available in market on containerization. Since, in this year, the asset was ready for use, the assessee capitalized the same and claimed weighted deduction of 150% u/s 35(2AB). The Ld. AO denied the same on the ground that the deduction was to be claimed in the year in which the expenditure was incurred and the assessee did not give any proof that the technology became operative in this year. During appellate proceedings, the assessee furnished aforesaid permission which would substantiate the assessee's claim that the technology became operative only in this year. However, Ld. CIT(A) denied the same on altogether new ground by

observing that in the absence of Form 3CM, the deduction would not be available which is the grievance of the assessee. The Ld. CIT(A) has allowed depreciation on the intangible asset which is the grievance of the revenue.

3.5 Upon careful consideration of factual matrix, we find that incurring of the expenditure on R&D activity is not under dispute at all. It is also not under dispute that the expenditure has been accumulated as work-in-progress in earlier years and no deduction thereof has even been claimed by the assessee, in any manner. The assessee has already furnished permission from Directorate General of Health Service in support of the fact that the technology became operative in this year only. We find that the Accounting Standard-26 (AS-26) on intangibles as issued by The Institute of Chartered Accountants of India mandate the assessee to recognize / capitalize intangibles only if it is probable that future economic benefits will flow to the enterprise, the asset is commercially viable and the cost of the asset can be measured reliably. Following the same, the assessee has capitalized the expenditure in this year and made the claim which is in line with the mandate Accounting Standard issued by ICAI. Therefore, in our opinion, the current year would be the correct year of claiming deduction u/s 35(2AB).

3.6 Regarding non-availability of Form 3CM, we find that the assessee has its R&D Facility approved by DSIR since Financial Year 1976-77 which has been renewed from time to time. The assessee has such approval for this year also (Page 453-454 of Paper Book- 2). Not only this, the approval has further been renewed up-to 31/03/2015 (Page 455 of Paper Book-2). After having complied with all the conditions for issuance of Form 3CM, the assessee has already applied in Form 3CK

for this year vide letter dated 12/03/2010 (Page Nos. 430 to 438 of Paper Book-2; submitted with the DSIR on 23/03/2010). Further, the assessee has already obtained Form 3CM for the period from 01/4/2004 to 31/03/2007 as well as for the period from 01/04/2012 to 31/03/2015 for all its R&D Units (Pg. 426 to 429 of Paper Book- 2). In such a case, the ratio of decision of Hon'ble Gujarat High Court in **CIT V/s Claris Lifesciences Ltd. (326 ITR 251)** would squarely apply in favor of the assessee. In this decision, it has been held by Hon'ble Court that the approval of R&D facility by DSIR is sufficient to claim deduction u/s 35(2AB). This decision has been followed by coordinate bench of Mumbai Tribunal in **Advance Enzyme Technologies P Ltd V/s ACIT (2020; 116 Taxmann.com 498)** wherein it has been held that once existence of R&D facility was not disputed and expenditure for that purpose was genuine in nature and recognition to facility was valid during relevant period, then merely for reason of non-issuance of approval for certain period in prescribed Form 3CM by competent authority, weighted deduction as claimed u/s 35(2AB) could not be denied. Similar is the view of Pune Tribunal in **Minilec India (P.) Ltd. V/s ACIT (2018; 93 Taxmann.com 213)** wherein it was observed by the bench that non-receipt of Form No. 3CM is at best a procedural lapse and is not fatal for denial of claim of deduction u/s 35(2AB). Therefore, considering the entirety of facts and circumstances, we reverse the adjudication of Ld. CIT(A) and direct Ld. AO to grant weighted deduction u/s 35(2AB) as claimed by the assessee.

3.7 Ground Nos. 7 & 8 of assessee's appeal stand allowed which renders revenue's ground nos. 6 & 7 as infructuous. The revenue's appeal stand dismissed.

4. Disallowance of R & D Exp. pertaining to Roha and Goa unit-III

4.1 It transpired that the assessee had three R&D units viz. (i) Jogeshwari Unit which is stated to be lab-scale R&D unit; (ii) Roha unit which is stated to be Plant-scale R&D Unit for producing kilo scale level of APIs for testing purposes; (iii) Goa unit-III which is stated to be pilot scale unit for formulations.

4.2 The assessee claimed weighted deduction @150% for Rs.119.08 Lacs against expenses of Rs.79.39 Lacs pertaining to Roha R & D Unit. These expenses include capital expenditure of Rs.16.05 Lacs. The details of employees working in this unit has been tabulated in para 4.2 of the assessment order. However, considering the designation and qualification of the employees, Ld. AO opined that most of the employees were working for production. The capital items purchased were not special item which could be used for R&D activity. In other words, the claim made by the assessee was under doubt.

4.3 Consequently, a survey was conducted at Jogeshwari & Roha unit on 17/10/2013. During survey, statements of key persons associated with R&D activity were taken. In these statements, these persons confirmed that no R&D activity was being carried out at Roha unit. The relevant extract from the statements have already been extracted in the assessment order. Relying on the same, Ld. AO opined that Roha unit was mainly manufacturing unit. The technology being developed at Jogeshwari R&D unit was transferred to Roha & Goa units for commercial production. The assessee could not produce any evidence to prove carrying out of R&D activities at Roha unit. Therefore, the weighted deduction could not be allowed to the assessee. Consequently,

revenue expenditure would be allowable as per actuals whereas depreciation would be allowable on capital expenditure incurred at Roha unit. Similar working was done for Goa unit-III. In other words, weighted deduction as claimed against both the units was denied to the assessee and revenue expenditure was allowed as per actuals whereas depreciation was allowed on the capital expenditure.

4.4 During appellate proceedings, to prove the fact of carrying out of R&D activities at these units, the assessee submitted additional evidences which were in the shape of DSIR approval for in-house R & D activities at these units for the period 01/04/2010 to 31/03/2015, patents filed for products developed at Roha unit, affidavit of persons clarifying their earlier statements and confirming that R&D activity took place outside Jogeshwari unit also. However, Ld.AO, in the remand report, taking a new ground, stated that the disallowance was justified in the absence of Form No. 3CM for these R&D units. For the same reason, Ld. CIT(A) rejected the affidavits and confirmed the stand of Ld. AO. Aggrieved, the assessee is in further appeal before us.

Our findings and Adjudication

4.5 During the course of hearing, Ld. AR submitted that there were ample evidences in support of the fact that R & D activities were being carried out at both the units. It was also pleaded that deduction was denied merely on the basis of statement recorded during survey. These statements recorded u/s 133A, in terms of various judicial pronouncements, would not have any evidentiary value. As against this, the assessee had filed additional evidences in the shape of DSIR approval for in-house R & D activities at these units for the relevant period (Pg. 453 to 456 of the Paper Book-2), patents filed for products

(Amlodipine and Lornoxicam) developed at Roha R & D unit (Pg. 439 to 452 of the Paper Book-2) along with affidavit of all the five officials clarifying their earlier statements and confirming that R & D activity took place outside Jogeshwari unit also (Pg. 459 to 479 of Paper Book-2). In the remand report, Ld. AO could not give any adverse comment on these additional evidences but again denied the deduction altogether on the new ground that Form 3CM was not submitted. The Ld. CIT(A) confirmed the same and refused to admit the affidavits. The Ld. AR also submitted that the survey team never visited Goa Unit and therefore, the denial of deduction was without any basis. Our attention has been drawn to the various documentary evidences furnished by the assessee before lower authorities vide reply dated 10/02/2014 in support of the claim. The Ld. CIT-DR, on the other hand, supported the impugned order and submitted that in the absence of Form 3CM, the deduction would not be available to the assessee.

4.6 Upon perusal of orders of lower authorities, we find that except for statement of 5 officials, there is no other reason to deny the deduction to the assessee. However, we find that these statements have been recorded u/s 133A during survey proceedings without there being any back up evidences. In the absence of any corroborative material on record, these statements would not hold much evidentiary value and it was incumbent upon the AO to prove his case by corroborative evidences. This proposition has been laid down by Hon'ble Supreme Court in **CIT V/s S. Khader Khan & Sons (2013; 352 ITR 480)** as well as in various other decisions of Hon'ble High Courts {**CIT V/s Ashok Kumar Jain (2014) 369 ITR 145 (Raj); CIT V/s MP Scrap Traders (2015) 372 ITR 507 (Guj)**}.

Another fact borne out of the record is that all these officials have submitted sworn affidavits clarifying their earlier statements and confirming that R & D activity took place outside Jogeshwari unit also. These evidences have nowhere been controverted and no further investigation has been carried out. The Ld. CIT(A) has rejected the same on the ground that these were not pre-existing document and no efforts were made by lower authorities to examine / verify the same.

4.7 As against this, it is quite evident that the assessee, during the course of proceedings before lower authorities, furnished ample evidences to substantiate its claim. These evidences were as follows: -

- (i) DSIR Approval for in-house R&D activity at Roha and Goa Unit III for the entire period from 01/04/2007 to 31/03/2010 and from 01/04/2010 to 31/03/2015
- (ii) Patent filed for products developed at Roha R&D namely Amlodipine and Lornoxicam.
- (iii) R&D Activity chart along with explanatory notes.
- (iv) Scheme of DSIR for granting recognition and registration to in-house R&D units.
- (iv) Diagrammatic representation of the flow of R&D activities.
- (v) Photos of R&D facility at Roha and Goa Unit III.
- (vi) List of equipments available at Roha Unit to carry out R&D activities.
- (vii) List of equipments available at Goa Unit III to carry out R&D activities.

The copies of all these documents have also been placed before us on page nos. 439 to 452 and 480 to 494 of the paperbook. Upon perusal of the same, it could be concluded that the assessee has sufficiently demonstrated the carrying out of R & D Activities at Roha as well as Goa-III Unit. The Ld.AO, in the remand report, has accepted the affidavit of officials clarifying their statements and has not re-examined them. Therefore barring statements taken during survey proceedings, the revenue is unable to controvert the assessee's documentary evidences and bring on record any cogent material to dislodge the same. Another undisputed fact is that Survey Team never visited Goa Unit and

therefore, the conclusion that no R & D activity was being carried at this unit has no legs to stand.

4.8 So far as the observation of lower authorities that Form 3CM was not available, is concerned, we find that the aforesaid units had valid approvals from DSIR during the year and non-availability of Form 3CM would not be fatal to claim of deduction. Our adjudication as given in preceding para 3.6 shall mutatis-mutandis apply to the findings of lower authorities.

4.9 Finally, on the given facts and circumstances of the case, we reverse the stand of lower authorities and direct Ld. AO to grant weighted deduction u/s 35(2AB) against both the units. Ground Nos. 9 to 13 of the assessee's appeal stand allowed.

5. Disallowance of Publicity Expenses u/s 37(1)

5.1 The assessee claimed publicity expenses of Rs.2922.18 Lacs during the year. The expenses were stated to be in the nature of publication of literature / booklets of products and promotional items given to doctors and stockiest. These expenses were stated to be incurred as general sales promotion practice being followed by the pharmaceutical industry. The promotional items given to doctors were stated to be embossed with company's product name and the same was given along with product literature. The value of item was stated to be very small which in no way, would affect integrity and freedom of the doctors and was stated to be neither given as incentive or inducement. The promotional items were given to stockiest under an incentive scheme to promote the sale of products. It was submitted that since the expenditure fulfilled the conditions laid down u/s 37(1), the same were allowable business expenditure.

5.2 Regarding applicability of CBDT Circular No.5/2012 dated 01/08/2012 which provided that freebies given in violation to the Indian Medical Council (Professional conduct, etiquette and ethics) Regulations, 2002 would be inadmissible deduction, it was submitted that these rules were meant for medical professionals only and these rules would otherwise be applicable only from 01/08/2012 i.e. from the date on which the circular was issued.

5.3 However, rejecting assessee's submissions, Ld.AO opined that the Circular would apply to the assessee w.e.f. 10/12/2009 i.e. the date on which the Medical Council of India imposed the prohibition. Finally, the following publicity expenses incurred by the assessee from 10/12/2009 to 31/03/2010 were held to be illegal and inadmissible u/s 37(1): -

No.	Particulars	Amt. (Rs.)
1.	Books, Journals, reference articles	Rs.13.74 Lacs
2.	Prescription pad /chit block	Rs.35.27 Lacs
3.	Calendars, New year Diaries	Rs.10.42 Lacs
4.	Items given for use in dispensary (stethoscope, BP apparatus, Thermometers)	Rs.21.54 Lacs
5.	Promotional / Recall items with product names embossed on them	Rs.633.13 Lacs
	Total	Rs.714.12 Lacs

In addition, another expenditure of Rs.137.61 Lacs stated to be incurred on promotional items given to stockiest as incentive was also disallowed on the allegation that these items were distributed to doctors and no supporting documents were filed by the assessee. In other words, Ld.AO computed aggregate disallowance of Rs.851.73 Lacs which was reduced by an amount of Rs.37.13 Lacs since the same was already disallowed as alleged bogus purchases.

5.4 During appellate proceedings, the assessee furnished additional evidences which were in the shape of Extract of minutes of General

Body Meeting of Medical Council of India held on 11/03/2010, details of promotional items given to stockiest as incentives, details of promotional items given to doctors which were not in the nature of gifts, value-wise bifurcation of promotional items given to doctors as brand reminders, details of stockiest to whom items were given under incentive scheme for the appellant's product 'Electral' during the period 01/01/2010 to 24/03/2010 along with names and addresses, confirmations from stockiest regarding receipt of gifts. These additional evidences were subjected to remand proceedings wherein Ld. AO alleged that the confirmations were given by stockiest on identical proforma. With respect to promotional items given to doctors, it was confirmed by Ld. AO that the assessee had provided the details of gifts along with rate per unit of these items and opined that the issue may be decided on merits.

5.5 The Ld. CIT(A), after considering the factual matrix, opined that overall claim could not be allowed as deduction. In para 64, Ld. AO was directed to satisfy himself that the transactions of procurement of material were genuine and further the printed literature, booklets, books, journals etc. pertained to medical / pharmaceutical field. Further, none of the payments are to a person whose name figure in the list of accommodation entry provider. However, promotional / recall items with products names embossed on them as given to doctors for Rs.633.13 Lacs and promotional items given to stockiest for Rs.137.61 Lacs was to be disallowed in the absence of confirmation from recipients and correct and complete description and demonstration of nature of gifts proving it as an item for medical / pharmaceutical business. Aggrieved the assessee is in further appeal before us.

Our findings and Adjudication

5.6 Upon careful consideration, we find that the assessee is a pharmaceutical company engaged in the manufacturing of formulation (final medicinal products) and API (Active Pharmaceutical Ingredients). The pharmaceutical industry is prohibited from advertising its products and the biggest customer for this industry is practicing doctors who in the course of professional practice prescribe medicines for consumption by patients. Due to existence of competition in the market because of availability of pharmaceuticals from different suppliers, it would be necessary for the assessee to ensure awareness and visibility of its products amongst doctors as against advertising its products. In other words, the assessee has to ensure that maximum number of doctors is made aware of the existence of the assessee's products as well as its availability. Therefore, it would be necessary for the assessee to incur such publicity expenditure so as to bring awareness and knowledge of the existence of its product range to doctors. The same is supported by the fact that the company's logo and product names are embossed on all the items distributed as gifts and therefore, these items were also intended to serve as retentive reminder of brand name of assessee's products and not to influence the decision of the doctors. The nature and the type of items distributed amongst doctors are not the type which can be considered as intended to influence the decisions of the Doctors. It could be gathered that the value of items given to doctors is generally below Rs.1000/- per article.

5.7 In the above background, we find that the expenditure incurred by the assessee post 10/12/2009 (date on which the stated rules have

come into force) and finally allowed / disallowed by lower authorities could be tabulated as under: -

Sr.	Details of Publicity Expense	Amount (Rs.)	Remarks
I.	Promotional items given to other than Doctors		
1.	Promotional items given to Stockiest	1,37,61,757	Disallowed
2.	Market research and related reports	22,69,793	Allowed by AO
3.	Bags given to our marketing representative	6,06,479	Allowed by AO
	Total(I)	1,66,38,029	
II.	Promotional items given to Doctors		
1.	Printed literature and booklets containing product information	1,20,13,275	Allowed by AO
2.	Books/ Journals/ Reference article	13,74,208	Allowed by CIT(A) subject to further verification
3.	Prescription pad/ Chit block	35,27,204	-do-
4.	Calendars/ New Year Diaries	10,42,321	-do-
5.	Items given for use in Dispensary (Stethoscope, BP apparatus, Thermometer etc.)	21,54,576	-do-
6.	Promotional/ recall items with appellant's product name embossed on the same.	6,33,13,692	Disallowed
	Total (II)	8,34,25,276	
	Grand Total (I + II)	10,00,63,305	

It could be seen that the assessee has incurred aggregate expenditure of Rs.2922.18 Lacs during the year out of which expenditure of Rs.1921.55 Lacs has been incurred between the period 01/04/2009 to 09/12/2009 whereas balance expenditure of Rs.1000.63 Lacs has been incurred from 10/12/2009 to 31/03/2010. The expenditure incurred before 10/12/2009 has fully been allowed but expenditure incurred thereafter has been disallowed primarily in terms of CBDT Circular No. 5/2012 dated 01/08/2012 which provide that the medical freebies offered

by the assessee in terms of violation of MCI guidelines would be inadmissible deduction.

5.8 We find that the issue of applicability of CBDT circular to pharmaceutical companies has been examined in various decision of this Tribunal and it has finally been settled that the Circular do not apply to AY 2010-11 as it was issued on 01/08/2012 and the same is not applicable retrospectively. The Mumbai Tribunal in **Syncom Formulations (I) Ltd. V/s DCIT (ITA Nos. 6429/Mum/2012 & ors.; 23/12/2015 for AYs 2010-11 and 2011-12)** has concluded that the aforesaid CBDT Circular No. 5/2012, dated 01/08/2012 would not be applicable to AYs 2010-11 & 2011-12 since the same was introduced only w.e.f. 01/08/2012. Similar is the view in **Aristo Pharmaceuticals Pvt. Ltd. Vs. ACIT (ITA No.6680/Mum/2012 & ors.; AYs 2009-10, 2011-12 & 2012-13; 26/07/2018)** wherein it has been held that MCI regulations would not be applicable to pharmaceutical companies. Further CBDT circular enlarging the scope of Indian Medical Council Regulation, 2002 could not be reckoned to have a retrospective effect. In this decision, the bench has referred to another decision of Tribunal in **DCIT V/s PHL Pharma Ltd. [2017; 78 Taxmann.com 36)**.

In the decision of **ICPA Health Product Ltd. (ITA Nos.6244-45/M/2017;20/04/2018)** it has been held by the bench as under:

"The expenditure on distributing glass, face mask, pen, writing pad, towel set, wall clock, paper cups except Voltas Cooler and stabilizer cannot be regarded as freebies given to doctors. Hence except the cost of Voltas Cooler and Stabilizer of Rs.29,990/-, all the remaining expenditure incurred by assessee on account of sale promotion expenses, is allowable."

In the decision of Mumbai Tribunal in **DCIT V/s PHL Pharma Ltd. [2017; 78 taxmann.com 36)**, it has further been held that MCI Regulation

prohibits medical practitioners and do not have prohibitory effect on pharmaceutical companies. Further, expenses incurred by assessee could not be reckoned as freebies given to doctors as they were purely promotional materials which were distributed to doctors for brand recognition and not for purpose of granting gift or any other form of inducement to doctors. Also, expenditure incurred by pharma companies for customer relationship management, key account management, gift articles, free medicine sample, advertisement and sales promotion could not be considered as freebies given to doctors since they were purely for brand recognition and therefore, all these expenditure would be allowable as business expenditure and were not impaired by Explanation-1 to section 37(1). There is no prohibition on the Pharma companies under any law to distribute such promotional materials and therefore, Explanation to Section 37(1) cannot be said to be applicable to such assessee.

5.9 We find that analogous views have been expressed in plethora of decisions which could be tabulated as under: -

- DCIT V/s Ochoa Laboratories Ltd. (ITA No. 4114/Del/2009, dated 25.08.2017)
- ACIT V/s Liva Healthcare Ltd., Mumbai (ITA No. 904/Mum/2013, dated 12.09.2016)
- Confederation of Indian Pharmaceutical Industry (SSI) V/s CBDT (CWP No. 10793 of 2012, dated 26.12.2012)(HP)
- CIT V/s KapScan and Diagnostic Centre (P.) Ltd. [2012] 344 ITR 476 (P&H)
- Solvay Pharma India Ltd V/s PCIT (89 taxmann.com 249)
- ACIT V/s Geno Pharmaceuticals Ltd. (ITA No. 12/PNJ/2014)
- UCB India (P.) Ltd. V/s ITO (ITA No. 6681/Mum/2013)
- Dr. Reddy's Laboratories Ltd. V/s Addl. CIT (TS-5033-ITAT-2017)
- Cadila Pharmaceuticals Ltd V/s DCIT (51 CCH 032, Ahmedabad Tribunal)
- ITO Vs. Sunflower Pharmacy (51 CCH 0575, Ahmedabad Tribunal)
- DCIT V/s Esaote India (NS) Ltd. (53 CCH 0648 Ahmedabad Tribunal)
- M/s. Unicure Remedies Pvt. Ltd V/s ACIT (ITA No. 3058/AHD/2014)
- J.B. Chemicals & Pharmaceuticals Ltd (ITA No. 6075/Mum/2014)
- Eisai Pharmaceuticals India Pvt. Ltd V/s DCIT (ITA No. 1381/Mum/2016)
- Macleods Pharmaceuticals Ltd. Vs. ACIT (2016) 48 CCH 0298 (Mumbai ITAT)
- DCIT V/s Bayer Pharmaceuticals Pvt. Ltd. (ITA No. 6222/Mum/2018)
- India Medtronic Pvt. Ltd. V/s DCIT (ITA No. 1246/Mum/2016)

- Troikaa Pharmaceuticals Ltd. V/s DCIT (ITA No. 2458/Ahd/2017)
- Emcure Pharmaceuticals V/s DCIT (ITA No. 1532/Pun/2015)
- Aishika Pharma (P.) Ltd. V/s ITO (106 taxmann.com 192; Delhi - Trib.)
- Serum Institute of India Ltd. V/s DCIT (ITA No. 549/Pun/2016)

5.10 Therefore, considering the ratio of all the above decisions, we would hold that CBDT circular was not applicable to the assessee during this year. Accordingly, the promotional / recall items being distributed to doctors for Rs.633.13 Lacs would not be hit by cited CBDT circular and therefore, these expenses would be an allowable deduction. We order so.

5.11 So far as the remaining items viz. books, journals, reference articles, prescription pad / chit block, calendars / new-year dairies & items given for use in dispensaries (item nos. II-2 to 5) are concerned, we find that the expenditure have been incurred throughout the year. The nature of these items is similar as incurred by the assessee before 10/12/2009 which has been fully allowed by Ld. AO himself. Therefore, there is no reason as to why these are not allowable thereafter. We find that the assessee, during assessment proceedings as well as during remand proceedings, has filed sufficient documentary evidences including sample confirmations from stockiest, copies of invoices etc. in support of the expenditure and no infirmity could be found in the same by Ld. AO except for the allegation that these documents were not sufficient. Therefore, we would hold that all such expenses were incurred for business purposes and allowable u/s 37(1).

5.12 The expenditure incurred on stockiest for Rs.137.61 Lacs was for the purpose of promoting the sale of one of the products i.e. 'Electral' (ORS). The assessee has distributed 'Thali-vati' under an incentive scheme to the Stockiest on the basis of quantity of Electral purchased by

the stockiest. The only reason to disallow the same is the absence of supporting evidences. However, we find that the assessee has already furnished Name and Addresses of each stockiest along with sales achieved by them, total no. of gifts as well as value thereof (Page 574 to 612 of Paper Book-2). The stockiest are more than 1300 in number and the assessee has filed confirmation of more than 200 stockiest. Keeping in view the vast network of stockiest, confirmation from each of the suppliers could not be possible. The Ld. AO, in the remand proceedings, simply reconfirmed the disallowance by holding that confirmations are in identical Performa and seem to have been given at the insistence of the appellant. However, no investigation or third party confirmations have been obtained whereas the assessee has well documented its claim. Therefore, the observations of Ld. AO are merely on the basis of presumption, surmises and conjectures. It could also be seen that similar claim has been allowed in subsequent AYs 2012-13 & 2013-14 in scrutiny assessment proceedings and therefore, there could be no occasion to doubt the same in this year. Hence, we delete the addition of Rs.137.61 Lacs.

5.12 Finally, considering the entirety of facts and circumstances, the impugned additions are not sustainable in law. By deleting the same, we allow ground nos. 14 to 16 of assessee's appeal.

6. Addition on account of alleged bogus purchases

6.1 Pursuant to receipt of certain information from Sales Tax Department, Maharashtra, it transpired that the assessee made suspicious purchases aggregating to Rs.65.56 Lacs from 5 entities as detailed in para 5.1 of the assessment order. Notices issued u/s 133(6) to all the suppliers did not elicit any satisfactory response. Though the

assessee supplied copies of invoices & other documents, however, many deficiencies were noted by Ld.AO in the same. The perusal of suppliers' bank statements established that there were huge cash withdrawals from their bank accounts at regular intervals. In the light of all these observations, these purchases were disallowed and added back to the income of the assessee.

6.2 During appellate proceedings, to substantiate these purchases, the assessee furnished Good Inward Transaction Report, Stock statement reflecting receipt and dispatch of goods, Lorry receipts, bank statements etc. These were subjected to remand proceedings. However, Ld. AO brushed aside these evidences and justified the additions. The Ld. CIT(A) concurred with the stand of Ld. AO. Aggrieved, the assessee is in further appeal before us.

6.3 We find that this issue has been subject matter of adjudication by Tribunal in assessee's own case for AY 2009-10, ITA No.2060/Mum/2017 order dated 12/09/2018 wherein, on identical factual matrix, the additions have been estimated at 12.5%. Respectfully following the same, we direct Ld. AO to restrict the additions to the extent of 12.5% of suspicious purchases. The same comes to Rs.8,19,552/-. The balance addition stand deleted. Ground No.17 & 17.1 stand partly allowed.

7. Allocation of Corporate Expenses to 80-IB / 80-IC Units

7.1 The assessee claimed deduction u/s 80-IB @ 30% on two units viz. Goa (ORS) and Goa (Unit-III) whereas it claimed deduction u/s 80-IC @100% on Baddi Unit as per following details: -

Unit	Deduction Claimed
Goa ORS-80-IB-30%	5,84,63,784/-
Goa Unit - III 80-IB - 30%	17,00,05,765/-

Baddi – 80-IC- 100%	54,20,05,593/-
Total	77,04,75,142/-

The net profit shown by these units was found to be abnormally high in comparison to other units. Upon perusal of unit wise Profit & Loss Account, it was noted by Ld. AO that the assessee allocated part of expenses in the ratio of net sales basis (sales of manufacturing units, loan licensee and purchase for resale) whereas part of the expenses were allocated on the basis of Net Sales-SVOP basis (i.e. considering the sales done by manufacturing plant only and excluding the sales done by loan-licensee and purchases for resale). However, the said method was not accepted by Ld. AO.

7.2 The Ld. AO also opined that income from investments and other income earned by the assessee would not require much of the staff and therefore staff salary, communication expenses etc. could not be linked with the above head of income. Similarly, finance expenses, R&D expenses, salary and depreciation pertaining to manufacturing activities would be incurred at plants only. Therefore, operating expenses, finance expenses and depreciation aggregating to Rs.360.78 Lacs was to be allocated amongst various units in the net sales ratio. The R & D salary expenses amounting to Rs.1173.40 Lacs were required to be allocated in the SVOP ratio of the manufacturing unit.

7.3 Finally, the expenses of Rs.360.78 Lacs were allocated to above three units in net sales ratio, the details of which are as under: -

Sr. No.	Particulars	Amount (Rs.)
1	Operating Expenses	1,51,74,178/-
2	Finance Expenses	1,10,51,559/-
3	Depreciation	98,52,309/-
	Total	3,60,78,046/-

7.4 It was noted by Ld.AO that R&D salary was booked by assessee in corporate office account only. However, R&D activity was done to enhance the profitability of manufactured goods. Therefore, the weighted deduction claimed on R&D revenue expenses as well as capital expenses were to be allocated amongst the manufacturing units on the basis of SVOP ratio. The activities like purchase for resale and loan licensee could not be linked with any R&D activity. Therefore, weighted deduction on R&D formulation, R&D biotech and other R&D was allocated on the basis of SVOP ratio which has been given in para 7.5 of the order.

7.5 The segmental results of the three units also contained receipts in the nature of sale of scrap of packing material and raw material which could not be said to be derived from industrial activity and therefore, the same was to be excluded while computing the deduction u/s 80-IB / 80-IC. Similarly, export incentives as well as excess provision of expenses written-back was to be excluded while computing the deduction.

7.6 Incorporating the above adjustments, Ld. AO revised quantum of deduction in the following manner: -

Unit	Deduction Claimed	Deduction Allowed
Goa ORS-80IB-30%	5,84,63,784/-	5,42,54,162/-
Goa Unit - III 80IB - 30%	17,00,05,765/-	15,47,17,200/-
Baddi - 80IC- 100%	54,20,05,593/-	48,75,88,838/-
Total	77,04,75,142/-	69,65,60,200/-

7.7 During appellate proceedings, the assessee assailed the re-allocation of operating expenses, finance expenses and depreciation. The Ld. CIT(A) after considering the submissions, dealt with each of the head of expenditure and held that few of the expenditure need not be allocated to the three units. Further excess provision of expenses

written-back would not be excluded whereas export incentives as well as scrap sale would be excludible while computing the deduction. The ground relating to allocation of R&D expenses was partly allowed. Aggrieved, the assessee is in further appeal before us.

Our findings and Adjudication

8.1 The Ld. AR, in the chart, has tabulated the issues to be adjudicated by us, in the following manner: -

A. Allocation of operating Expenses

No.	Particulars	Amount (Rs.)	Remarks
1.	Rent of Jogeshwari	36,000/-	Allowed by CIT(A)
2.	R&M (Plant & Machinery)	24,452/-	-do-
3.	ETP Expenses	86,013/-	-do-
4.	Insurance	48,73,163/-	-do-
5.	Buyback expenses	1,54,551/-	do-
6.	Service Tax Paid	20,58,208/-	Accepted by the appellant
7.	R&M Building	79,41,791/-	-do-
	Total	1,51,74,178/-	

B. Allocation of Finance Expenses

No.	Particulars	Amount (Rs.)	Remarks
1.	Bank Charges	14,67,729/-	Accepted by the appellant
2.	Interest to-others mainly interest paid to C&F Agents	95,83,830/-	Interest expenses incurred for earning exempt income allowed by CIT(A)
	Total	1,10,51,559/-	

C. Depreciation

No.	Particulars	Amount (Rs.)	Remarks
1.	Factory Building	2,72,084/-	Disallowed
2.	Plant & Machinery (Including ETP)	8,34,304/-	Disallowed other than ETP
3.	Pallet Trucks/ Trolley	1,738/-	Disallowed
4.	R&D Technical Knowhow	6,44,329/-	Allowed by CIT(A)
5.	R & D Assets	80,99,854/-	Allowed by CIT(A)
	Total	98,52,309/-	

In this regard, it is the limited submission of Ld. AR that depreciation (other than ETP) as directed to be allocated by Ld. CIT(A) as mentioned at Serial Nos. C-1 to 3 above pertains to Head Office Plant & Machinery and the same has no connection with Sec. 80-IB/80-IC units. Similarly, it is the submission of Ld. AR that the Interest expense should not be allocated as the assessee has not made any specific borrowings for setting up of 80-IB / 1C unit and its working capital requirement is met by the funds generated from the profits made by the unit.

8.2 Finding strength in the aforesaid arguments, we direct Ld. AO to re-consider the factual matrix as submitted before us and re-adjudicate the issue of allocation of deprecation as mentioned at Serial Nos. C-1 to 3 and interest expenditure as mentioned at serial no.B-2.

8.3 Regarding allocation of R&D expenses of Rs.1022.62 Lacs to Sec.80-IB / 1C units, we find that the assessee has R&D centers at Jogeshwari, Roha and Goa Unit-III. The R&D expenses pertain to formulations, synthesis and foods. The drugs being developed by R&D formulations is manufactured in all Sec.80-IB/ 1C units. The re-allocation made by Ld. AO and the adjudication of Ld. CIT(A) could be summarized as under: -

No.	Particulars of R&D Deduction	Amount (Rs.)	Remarks
1	Formulation Centre	8,43,15,810/-	Accepted by the appellant
2	Biotech Centre	6,98,55,625/-	Allowed by CIT(A)
3	Expenditure on Scientific Research u/s 35(l)(i)	1,57,56,469/-	-do-
4	Contribution to Vision Research Foundation	12,50,000/-	Disallowed by CIT(A)
5	Amount Paid to National Chemical Laboratory	9,40,250/-	Allowed by CIT(A)

It could be seen that the only grievance of the assessee is reallocation of expenditure of Rs.12.50 Lacs as paid to Vision Research foundation. It is the submissions of Ld. AR that the same may not be reallocated since such contribution is in the form of contribution / donation and is not in any way related to any of the plants. Since it is in the nature of a corporate expense, no such allocation should be made. Concurring with the same, we direct Ld. AO consider the nature of receipt and if the same is in the form of donation, no allocation thereof should be made while computing the deduction.

8.4 Regarding exclusion of other income while computing the deduction, the only grievance of the assessee is exclusion of scrap sale. The Ld. AR has submitted that scrap has directly arisen out of manufacturing process and is an integral part of the manufacturing process and therefore deduction u/s 80-IB/80-IC should be allowed on the same as per the decision of Hon'ble Gujarat High Court in **CIT V/s Jikar A. Saiyed (221 Taxman 451)**.

8.5 We find that the issue is squarely covered in assessee's favor by the aforesaid decision wherein Hon'ble Gujarat High Court referring to its earlier decision in **DCIT V/s Harjivandas Juthabhai Zaveri (2002; 258 ITR 785)**, dismissed revenue's appeal by observing as under: -

5. The decision of this Court in the case of *Harjivandas Juthabhai Zaveri (supra)* has been subsequently considered by the Delhi High Court in the case of *CIT v. Sadhu Forging Ltd.* [2011] 336 ITR 444/200 Taxman 1/11 taxmann.com 322 (Delhi) and it is held that receipt of sale of scrap part and parcel of industrial activity and therefore, deduction under Section 80IB is allowable. In the said decision, the Delhi High Court has held that the industrial undertaking set up by the assessee was for the purpose of manufacture of steel forging, transmission gears and part and accessories of motor vehicles and the scrap of these items was stated to be a by product of manufacturing process. The activity of forging was "manufacturing" within the ambit of section 80IB. It was immaterial that the assessee was doing the job of forging also for customers and was charging them on job work basis or on the basis of labour charges. It would still be qualified as carrying on eligible business under Section 80-IB. The activities of the assessee were in giving heat treatment for which

it had earned labour charges and job work charges. It could thus be said that the assessee had done a process on the raw material which was nothing but a part and parcel of the manufacturing process of the industrial undertaking. These receipts could not be said to be independent income of the manufacturing activities of the undertaking of the assessee and thus could not be excluded from the profits and gains derived from the industrial undertaking for the purpose of computing deduction under Section 80-IB. These were gains derived from the industrial undertaking and so entitled for the purpose of computing deduction under Section 80-IB. There could not be any two opinions that manufacturing activity of the type of material being undertaken by the assessee would also generate scrap in the process of manufacturing. The receipts from sale of scrap being part and parcel of the activity and being proximate thereto would also be within the ambit of gains derived from the industrial undertaking for the purpose of computing deduction under Section 80-IB.

6. Applying the ratio / law laid down by this Court in the case of *Harjivandas Juthabhai Zaveri (supra)* as well as Delhi High Court in the case of *Sadhu Forging Ltd (supra)*, to the facts of the case on hand, it cannot be said that the learned Tribunal has committed any error in holding that the deduction under Section 80-IB of the Act is allowable for the income from sale of scrap. Under the circumstances, substantial question of law raised is answered against the revenue. Hence, present appeal deserves to be dismissed and is accordingly dismissed.

Since facts are similar before us and no contrary decision is on record, we direct Ld. AO to include the scrap sale while computing the deduction u/s 80-IB / 80-IC.

8.6 Consequently, Ground Nos. 18, 19 & 22 stand allowed for statistical purposes. Ground No. 20 stand allowed. Ground No.23 is general in nature.

Additional Grounds of Assessee's Appeal

9. Disallowance u/s 14A

9.1 The assessee earned exempt dividend income of Rs.483.13 Lacs and offered suo-moto disallowance of Rs.28.91 Lacs in the return of income. Since the assessee had sufficient own funds, no interest was disallowed u/s 14A. However, rejecting the same, Ld. AO, applying Rule 8D(2)(ii), computed interest disallowance of Rs.8.70 Lacs and added the same to assessee's income under normal provisions as well as while computing Book Profits u/s 115JB. Though, this ground was not pressed

during appellate proceeding, however, the assessee has challenged this addition / adjustment before us.

9.2 The Ld.AR, drawing attention to the financial statements, submitted that the assessee has sufficient own funds in the form of share capital and free reserves / surplus and therefore, the interest disallowance u/s 14A was not justified in terms of the decision of Hon'ble Bombay High Court in **CIT V/s HDFC Bank Ltd. (366 ITR 505)** as well as in **Pr.CIT V/s Premier finance & trading co. Ltd. (262 ITR 341)**. The Ld. AR further submitted that the disallowance u/s 14A could not be adjusted in the Book-Profits computed u/s 115JB as per the decision of Special Bench of Delhi Tribunal in **ACIT V/s Vireet Investment (P) Ltd. (165 ITD 27)** as well as the recent decision of Hon'ble Karnataka High Court in **Sobha Developers Ltd. V/s DCIT (2021; 125 Taxmann.com 72)**.

9.3 Upon perusal of assessee's financial statements as placed on record, it could be gathered that the assessee has sufficient opening and closing free funds in the shape of share capital and reserves to make the investments. The free funds are way more than the investments made by the assessee and therefore, as per cited decisions, the presumption would run in assessee's favor that the investments were made out of free funds available with the assessee. Further, in terms of cited decision of special bench, no such disallowance could be made while computing Book-Profits u/s 115JB. Therefore, the additional disallowance as made by Ld. AO while computing income under normal provisions as well as while computing Book-Profits u/s 115JB is not sustainable in law. The Ld. AO is directed to delete the same. This ground stand allowed.

10. Claim of Education Cess

10.1 In this additional ground, the assessee seek deduction of education cess and secondary & higher education cess amounting to Rs.105.97 Lacs in terms of the decision of Hon'ble Bombay High Court in **Sesa Goa Ltd. Vs. JCIT (117 Taxmann.com 96)** and the decision of Hon'ble Rajasthan High Court in **Chambal Fertilizers and Chemicals Ltd. V/s JCIT (ITA No.52/2018 dated 31/07/2018)**.

10.2 After going through these decisions, we find that this issue is covered in assessee's favour. The Hon'ble Bombay High Court in the case of **Sesa Goa Ltd. Vs. JCIT (117 Taxmann.com 96)** has held that while the income tax is not allowable as deduction in view of Sec.40(a)(ii) of the Act, the expression 'Cess' cannot be read into the said provisions and hence the amount of education cess and higher and secondary education cess are allowable as deduction in computing the income of the assessee. Therefore, Ld. AO is directed to verify the claim of the assessee and allow the deduction in terms of the cited decision. This ground stand allowed for statistical purposes.

11. Erroneous levy of interest u/s 234C on tax liability determined under MAT provisions

11.1 The Ld. AR has submitted that the assessee has paid taxes under MAT provisions and accordingly, it has paid interest u/s 234C for Rs.20.64 Lacs. However, no interest is leviable in such a case as per the decision of Hon'ble Supreme Court in **CIT V/s Kwality Biscuits Ltd. (284 ITR 434; 26/04/2006)** as well as the decisions of Hon'ble Bombay High Court in **Snowcem India Ltd V/s DCIT (313 ITR 170; 05/01/2009)** and **CIT V/s Natural Gems Ltd (327 ITR 269; 24/03/2009)** which were holding the field at that point of time. However, in the subsequent

decision, Hon'ble Supreme Court in **JCIT V/s Rolta India Limited (330 ITR 470; 07/01/2011)** has held that interest is leviable even if the tax was paid under MAT provisions. Post this judgment, Hon'ble Bombay High Court in **PCIT V/s Mangalore Refinery & Petrochemicals Ltd. (117 Taxmann.com 391; 17/03/2020)** has held that interest u/s 234B and 234C is not chargeable in respect of tax liability determined under MAT provisions for AY 2005-06. It was observed that Apex Court's decision in Rolta (supra) was rendered much later in the year 2011 and at the time of payment of advance tax by the assessee for the subject year, the decision of the Karnataka HC in Kwality Biscuits Ltd. (supra) rendered in 1999 (holding that assessee was not required to pay advance tax on book profits) was holding the field. Similarly, Mumbai Tribunal in **Rockline Developers Pvt. Ltd. V/s ITO (ITA No. 6595/Mum/2014; 01/01/2016)** held as under:

"We have heard the rival submissions and perused the material before us. We find that the levy of interest u/s. 234B and 234C in case of companies governed by MAT provisions was finally settled by the Hon'ble Apex Court on 7.1.2011, that before that the assesseees were under bona-fide belief that they had not to pay adv tax as per the provisions of Sec.207/208 of the Act, that after 07.1.2011 position became very clear that the assesseees to be taxed u/s.115 JB would also have to pay advance tax. Considering the peculiar facts and circumstances of the case, we are of the opinion that interest should be levied for the *default of March installment only and not for the earlier three instalments. The AO is directed to recalculate the interest accordingly.*"

11.2 Finding considerable strength in the above arguments, we admit this ground of appeal. Accordingly, we direct Ld. AO to bring on record the relevant factual matrix for this issue and adjudicate the issue of levy of interest u/s 234C in the light of above judicial pronouncements. This ground stand allowed for statistical purposes.

Conclusion

12. The assessee's appeal stand partly allowed whereas the revenue's appeal stand dismissed.

13. ITA No. 6840/Mum/2018, Assessee's Appeal for AY 2011-12

13.1 It is admitted position that the facts as well as issues are substantially the same in this year and therefore, our adjudication as in AY 2010-11 shall also be equally applicable for this year. In the said background, the material facts are that the assessee has been assessed for this year u/s 143(3) r.w.s. 144C(3) on 21/05/2015 pursuant to the directions of Ld. Transfer Pricing Officer-2(1)(2), Mumbai. The assessee has been saddled with various corporate additions / adjustments which form the subject matter of assessee's appeal. This appeal arises out of the order of Ld. CIT(A)-56, Mumbai dated 05/09/2018.

13.2 Though the assessee has raised various grounds, however, ground nos.1 & 2 have not been pressed during hearing and therefore, these grounds stand dismissed. The remaining ground as urged before us read as under: -

DEDUCTION U/S 35(2AB) W.R.T. ROHA AND GOA UNIT-III R&D UNITS

3) The Ld CIT(A) erred in not admitting additional evidence u/r 46A w.r.t. claim of weighted deduction u/s 35(2AB) of Rs.8,12,58,420/- on total expense of Rs.4,06,29,210/- pertaining to R & D at Roha unit.

4) The Ld CIT(A) erred in not admitting claim of weighted deduction u/s 35(2AB) of Rs.57,20,838/- on total expense of Rs.28,60,419/-pertaining to R & D at Goa Unit-III.

5) The Ld CIT(A) erred in not granting weighted deduction u/s 35(2AB) on Roha and Goa Unit-III R&D units on the ground that there is no Form 3CM without appreciating that as R & D activity was being carried out and DSIR Approval was in existence and thus in the facts of the present case Form 3CM was not a mandatory requirement and hence deduction u/s 35(2AB) may be granted.

6) The Ld CIT(A) erred in not granting weighted deduction u/s 35(2AB) on Roha and Goa Unit-III R&D units without adjudicating the merits of the case.

7) The Ld CIT(A) erred in not considering Form 3CK filed by the Company with DSIR.

DISALLOWANCE OF PROMOTIONAL ITEMS TO STOCKISTS AND DOCTORS WITH NAME OF ASSESSEE'S PRODUCTS EMBOSSED ON ITEMS AND DISALLOWANCE OF GIFT ON OCCASSIONS

8) The Ld CIT(A) erred in disallowing promotional items given to stockists of Rs.2,47,23,103/- u/s 37(1) without appreciating that said expenses are incurred wholly and exclusively for business and Assessee has proved that same are incurred for business purpose and hence, disallowance may be deleted.

8.1) Without prejudice to the above, the Ld CIT(A) erred in disallowance of entire expense on promotional items given to stockists of Rs.2,47,23,103/- u/s 37(1) though he accepted that same were legally allowable.

9) The Ld CIT(A) erred in disallowing promotional items given to doctors with name of Assessee's products embossed on them of Rs.21,34,34,269/- and gifts on occasions of Rs.13,71,745/- u/s 37(1) without appreciating that said expenses are incurred wholly and exclusively for business and Assessee has proved that same are incurred for business purpose and hence, disallowance may be deleted.

9.1) Without prejudice to above, the Ld CIT(A) erred in disallowing entire expense on promotional items given to doctors with name of Assessee's products embossed on them and gifts on occasions u/s 37(1) though he accepted that same were legally allowable.

DISALLOWANCE OF BALANCE PUBLICITY EXPENSES, ADVERTISEMENT EXPENSES AND SALES PROMOTION EXPENSES

10) The Ld CIT(A) erred in remanding the issue of balance publicity expenses, advertisement expenses and sales promotion expenses amounting to total of Rs.1,19,060,255/- to Ld AO though Ld CIT(A) has no power to do so and thus said direction may be set-aside and balance publicity expenses, advertisement expenses and sales promotion expenses may be allowed.

DISALLOWANCE OF ALLEGED BOGUS PURCHASE

11) The Ld CIT(A) erred in disallowed alleged bogus purchases of Rs.1,03,12,048/- without appreciating that purchases were genuine and purchases of articles were made in the regular course of business duly supported by the goods received note from its godown, bills received from the supplying parties (who at that material point of time were not declared as defaulters by the Sales Tax department), payment by A/c Payee cheques, bank certificate reflecting amount credited to party's A/c, stock register, dispatch advice alongwith lorry receipts and distribution of articles so purchased in its normal course of business, and hence the disallowance may be deleted.

ALLOCATION OF CERTAIN CORPORATE EXPENSES TO S.80IB/80IC UNITS

12) The Ld CIT(A) erred in holding that interest to others of Rs. 85,61,097/- needs to be partly allocated to S. 80IB / 80IC units without appreciating that entire interest expenses pertains to Head Office and no allocation is called for.

13) The Ld CIT(A) erred in holding that depreciation on plant and machinery [excluding ETP] and pallet trucks of Rs.10,25,085/- needs to be allocated to S.80IB / 80IC units without appreciating that said depreciation pertains to Head Office exclusively and no allocation is called for.

DEDUCTION U/S 80IB/ 80IC ON SCRAP SALES

14) The Ld CIT(A) erred in not granting deduction u/s 80IB / 80IC on scrap sales of Rs.12,46,295/- without appreciating said income is derived from business undertaking and is thus eligible for deduction u/s 80IB / 80IC.

13.3 Similar to AY 2010-11, the assessee has filed additional grounds of appeal, vide letter dated 26/10/2020. The same are admitted as in AY 2010-11. The additional grounds read as under: -

1.0 That on the facts and in the circumstances of the case, the disallowance, imposition of tax and interest with reference thereto, the quantification of taxable income and the tax liability, has been grossly unjustified, erroneous and unsustainable and necessary direction be given to the Ld. AO to give appropriate relief in accordance with law.

2.0 That on the facts and in the circumstances of the case, Education Cess & Secondary and Higher Education Cess on Income Tax and Dividend Distribution Tax may kindly be allowed as a deduction in computing total income under the normal provisions of the Act.

3.0 That on the facts and in the circumstances of the case, the Ld. A.O. ought not to have made proportionate disallowance pertaining to interest u/s 14A under the normal provisions of the Act since the appellant had sufficient interest free funds available to make such tax free investment.

4.0 That on the facts and in the circumstances of the case, disallowance u/s 14A made under the provisions of section 115JB of the Act may kindly be allowed.

5.0 That on the facts and in the circumstances of the case, export incentives received under Focus Product Scheme (FPS)/Market Linked Focus Product Scheme (MLFPS) of the Foreign Trade Policy being in the nature of capital receipt may kindly be excluded in the computation of total income under the normal provisions of the Act as well as in computing Book Profits u/s 115JB of the Act.

After due consideration of material on record, our adjudication would be as given in succeeding paragraphs.

14. Gr. Nos. 3 to 7 : Deduction u/s 35(2AB) for Roha & Goa-III Units

14.1 Similar to AY 2010-11, relying upon survey action, Ld. AO denied deduction claimed by the assessee against Roha & Goa-III units on the allegations that no R&D activity was carried out at these units.

14.2 During appellate proceedings, the assessee furnished additional evidences in the shape of DSIR approval for in-house R & D activities at these units for the period 01/04/2008 to 31/03/2018, patents filed by the assessee for products (Amlodipine and Lornoxicam) developed at Roha R & D unit along with affidavit of all the five officials clarifying their earlier statements and confirming that R&D activity took place outside Jogeshwari unit also. In the remand report, Ld. AO could not give any

adverse comment on these additional evidences but again denied the deduction on the ground that the assessee failed to submit Form 3CM for R&D Units. The Ld. CIT(A) confirmed the disallowance on the basis of non-availability of Form 3CM and also refused to admit the affidavits. Aggrieved the assessee is in further appeal before us.

14.3 Facts being similar as in AY 2010-11 qua this issue, our findings & adjudication as in AY 2010-11 shall *mutatis-mutandis* apply to this year also. Accordingly, we direct Ld. AO to grant deduction as claimed by the assessee u/s 35(2AB) on Roha & Goa-III units. The grounds raised by the assessee stand allowed.

15. Gr. Nos. 8 to 10 : Disallowance of Publicity, Advertisement and Sales Promotion Expenses

15.1 In this year, the assessee has debited publicity expenses of Rs.3431.58 Lacs. The disallowance as made by Ld. AO and confirmed by Ld. CIT(A) could be summarized as under: -

Sr.	Details of Publicity Expense	Amount (Rs.)	Order of CIT(A)
I.	Promotional items given to other than Doctors		
1.	Promotional items given to stockists	2,47,23,103	Disallowed
2.	Market research and related reports for own use	64,48,894	No decision
3.	Given to our employees	35,33,411	-do-
4.	Misc. items given at contests, sales promotion camps & others	4,94,828	-do-
	Total(I)	3,52,00,236	
II.	Promotional items given to Doctors		
1.	Printed literature and booklets containing product information	3,39,98,677	Allowed subject to verification by AO
2.	Prescription pad/ Chit block	98,70,631	Allowed subject to verification by AO

3.	Diwali gifts & sweets	94,20,602	No decision
4.	Books/Journals/Reference article	66,08,454	Allowed subject to verification by AO
5.	Calendars/ New Year Diaries /Greeting Cards	45,81,960	-do-
6.	Gift given for child patients	47,18,880	-do-
7.	Product sample box	6,29,715	No decision
8.	Pens	98,10,215	Allowed subject to verification by AO
9.	Gifts on occasion	13,71,745	-do-
10.	Medical Utility Items given for use in Dispensary	1,35,13,014	-do-
11.	Brand Reminders	21,34,34,269	Disallowed
	Total (II)	30,79,58,162	
	Grand Total (I + II)	34,31,58,398	

The assessee has also incurred Advertisement expenses of Rs.18.40 Lacs and Sales Promotion expenses of Rs.135.90 Lacs. The Ld. AO has disallowed aggregate expenses under these three heads for Rs.3585.89 Lacs primarily on the contention that such expenses are nothing but gift items given to doctors in contravention to the prohibition imposed by Medical Council of India (MCI) Rules as applicable from 10/12/2009. The disallowance was reduced by an amount of Rs.102.63 Lacs since separate disallowance was made in that respect on account of alleged bogus purchases. In other words, the entire expenditure of Rs.3483.26 Lacs was disallowed in the assessment order.

15.2 The Ld. CIT(A), relying on the findings of AY 2010-11, confirmed the disallowance of Rs.2134.34 Lacs stated to be incurred by the assessee on various items distributed as brand reminders to doctors and another disallowance of Rs.247.23 Lacs as promotional items given to stockiest in the absence of confirmation from recipients and correct and

complete description and demonstration of nature of gifts proving it as an item for medical / pharmaceutical business. We find that the facts qua this issue are quite identical as in AY 2010-11. The assessee has filed requisite details in support of the claim. Therefore, applying our adjudication for AY 2010-11, the additions of these two items stand deleted.

15.3 The addition of Rs.844.69 Lacs (item nos. II-1 & 2, 4 to 6 & 8 to 10) has been remanded back to the file of Ld. AO for verification of the fact that transaction of procurement of material / service is genuine and pertains to medical / pharmaceutical field. These items are similar to items dealt by us in AY 2010-11. Therefore, taking the same view, we would hold that these expenses were allowable deduction and accordingly, Ld. AO is directed to allow the deduction of these items.

15.4 With respect to items aggregating to Rs.205.27 Lacs (I-2 to 4 & II-3 & 7) as well as sales promotion expenses of Rs.135.90 Lacs and Advertisement expenses of Rs.18.40 Lacs, it could be seen that these items are in the nature of routine sales promotion / marketing expenses. The advertisement expenses of Rs.18.40 Lacs pertain to cost of advertisement issued by the assessee in various journals. Vide reply dated 07/03/2015, the assessee has already furnished copies of bills. The complete detail of sales promotion expenses of Rs.135.90 Lacs was also furnished in the said reply. The expense of Rs.64.48 Lacs has been spent on Market Research and Report, the details of which was also furnished. The expense of Rs.35.33 Lacs was spent on promotional items given to the employees. The amount of Rs.94.20 Lacs has been spent on Diwali Gifts and Sweets. After going through the nature of these expenses, it could very well be observed that these expenses were

incurred to promote the business of the assessee and are eligible for deduction u/s 37(1). The complete detail of the expenditure was furnished before lower authorities along with requisite documentary evidences. In such an eventuality, the disallowance of the same could not be held to be justified, from any angle. Therefore, we direct Ld.AO to allow the deduction of these expenses.

15.5 In nutshell, the disallowance of Rs.3483.26 Lacs as made by Ld.AO is not sustainable. By deleting the same, we allow ground nos.8 to 10 of the appeal.

16. Gr. No.11 : Addition on account of alleged bogus purchases

16.1 Similar to AY 2010-11, the assessee has been saddled with addition of Rs.103.12 Lacs of suspicious purchases pursuant to receipt of certain information from Sales Tax Department, Maharashtra on the basis of which it was alleged that the assessee made suspicious purchases aggregating to Rs.103.12 Lacs from 3 entities as detailed in the assessment order. The Ld. AO disallowed the same on the basis of assessment proceedings of AY 2010-11. The Ld. CIT(A) confirmed the addition against which the assessee is in further appeal before us.

16.2 Since facts are pari-materia the same as in AY 2010-11 qua this issue, we estimate the addition of 12.5% against these purchase which comes to Rs.12,89,006/-. The balance addition stand deleted. The ground stand partly allowed.

17. Allocation of Corporate Expenses to 80-IB / 80-IC Units

In this year, the deduction claimed by the assessee for Goa (ORS), Goa (Unit-III) and Baddi unit has been disturbed by reallocation of expenses as done in AY 2010-11. The Ld. CIT(A) has granted partial relief to the assessee. Aggrieved, the assessee is in further appeal before us

wherein the only grievance of the assessee is reallocation of Depreciation (other than ETP) and depreciation on Pallet Trucks / Trolley. The Ld. AR has submitted that these assets pertain to head office only and does not have any connection with 80-IB/80-IC units. Similar submissions are with respect to allocation of interest. Concurring with same, we direct Ld. AO to examine the submissions of the assessee and re-adjudicate the same on similar lines as per our directions in AY 2010-11. Ground Nos. 12 & 13 stand allowed for statistical purposes.

18. Deduction u/s 80-IB / 80-IC on scarp sale

The Ld. AO has also denied the deduction on scarp sale. This issue has been adjudicated by us in assessee's favor in AY 2010-11. Therefore, following the same, we direct Ld. AO to consider the scrap sale while computing deduction u/s 80-IB/80-IC. Ground No.14 stand allowed.

Additional Grounds of Appeal

19. Disallowance u/s 14A

19.1 The assessee earned exempt dividend income of Rs.926.94 Lacs and offered suo-moto disallowance of Rs.68.33 Lacs in the return of income. Since the assessee had sufficient own funds, no interest was disallowed u/s 14A. However, rejecting the same, Ld. AO, applying Rule 8D(2)(ii), computed interest disallowance of Rs.19.06 Lacs and added the same to assessee's income under normal provisions as well as while computing Book-Profits u/s 115JB. Aggrieved, the assessee is in further appeal before us.

19.2 This issue is quite identical as adjudicated by us in AY 2010-11. Therefore, taking the same, the additional disallowance of Rs.19.06 Lacs as made by Ld. AO in normal income as well as while computing Book-Profits u/s 115JB stands deleted. The ground stand allowed.

20. Claim of Education Cess

20.1 In this additional ground, the assessee seek deduction of education cess and secondary & higher education cess amounting to Rs.87.64 Lacs in terms of the decision of Hon'ble Bombay High Court in **Sesa Goa Ltd. Vs. JCIT (117 Taxmann.com 96)** and the decision of Hon'ble Rajasthan High Court in **Chambal Fertilizers and Chemicals Ltd. V/s JCIT (ITA No.52/2018 dated 31/07/2018)**.

20.2 As directed in AY 2010-11, the issue is admitted and restored back to the file of Ld.AO on similar directions. The Ld. AO is directed to verify the claim of the assessee and allow the deduction in terms of the cited decisions. This ground stand allowed for statistical purposes.

21. Deduction of Export Incentives

21.1 It has been submitted by Ld. AR that the assessee has credited to its Profit & Loss Account, certain export incentives in the form of Focus Market Scheme (FMS) / Market Linked Focus Product Scheme (MLFPS) under the Foreign Trade Policy amounting to Rs.52.04 Lacs. The same is stated to be included under the head 'export incentives' in the Statement of Profit & Loss Account. The Ld. AR submitted that incentive was granted as the assessee made export to various potential new markets and not for all markets. The incentive was given for exploring the new market from a long-term perspective. Therefore, applying the purpose test, the said incentive would be capital in nature and not includible in normal income as well as while computing Book-Profits u/s 115JB. The Ld. AR drew attention to the scheme to submit that the objective of scheme was to promote export of products which have high intensity / employment potential so as to off-set infrastructural inefficiencies and other associated cost involved in marketing of these

products. Considering the purpose test as per the scheme, the aforesaid subsidies / incentives are capital in nature and not chargeable to tax under normal provision of the Act as well as under Book profit u/s 115JB. Reliance has been placed on various judicial decisions including the decision of **Hon'ble Rajasthan High Court in the case of PCIT v. Nitin Spinners Ltd.(2020; 116 Taxmann.com 26)** as well as the decision of Hon'ble Apex Court in **CIT V/s Ponni Sugars & Chemicals Ltd. (306 ITR 392)**. For the proposition that capital receipts which do not have any element of income or profit embedded therein are neither chargeable to tax under the Income Tax Act nor can be included in the Profit & Loss account prepared under Part-II and Part-III of Schedule-VI of the Companies Act, reliance has been placed on the decision of Hon'ble High Court of Calcutta in **Pr.CIT V/s Ankit Metal and Power Ltd. (2019; 416 ITR 591)** and the decision of Delhi Tribunal in **Malana Power Co. Ltd. (ITA No. 3957/1550/Del/2015)**.

21.2 After going through the cited decisions, prima facie, we concur with the submissions of Ld. AR that considering the purpose test, the subsidies received by the assessee would be capital in nature and therefore, would not form part of normal income as well as Book-Profit u/s 115JB. Therefore, we direct Ld. AO to bring the facts of the issue on record and verify the claim of the assessee and adjudicate the issue in the light of cited judicial pronouncements. The ground stand allowed for statistical purposes.

22. Erroneous levy of interest u/s 234C on tax liability determined under MAT provisions

This issue is quite similar to issue raised in AY 2010-11. Therefore, taking the same view, we admit this ground of appeal and direct Ld. AO

to bring on record the relevant factual matrix for this issue and adjudicate the issue of levy of interest u/s 234C. This ground stand allowed for statistical purposes.

23. The assessee's appeal for AY 2011-12 stands partly allowed in terms of our above order.

Conclusion

24. The assessee's appeal for AYs 2010-11 & 2011-12 stands partly allowed whereas revenue's appeal stand dismissed.

Order pronounced on 08th October 2021

Sd/-

(Mahavir Singh)

उपाध्यक्ष / Vice President

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 08/10/2021
Sr.PS, Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.

Sr. No.	Details	Date	Initials	Designation
1	Draft dictation sheets are attached	Directly Typed on Computer / Laptop		Sr.PS/PS
2	Draft dictated on	Not Applicable/		Sr.PS/PS
3	Draft Placed before author	Not Applicable		Sr.PS/PS
4	Draft proposed & placed before the Second Member			JM/AM
5	Draft discussed/approved by Second Member			JM/AM
6	Approved Draft comes to the Sr.PS/PS	02.11.2021		Sr.PS/PS
7	Order pronouncement on	08.10.2021		Sr.PS/PS
8	File sent to the Bench Clerk	02.11.2021		Sr.PS/PS
9	Date on which the file goes to the Head clerk			
10	Date on which file goes to the AR			
11	Date of Dispatch of order			