आयकर अपीलीय अधिकरण, हैदराबाद पीठ में
IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD

BEFORE
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

आ.अपी.सं / ITA Nos.	निर्धारण वर्ष / A.Y.	अपीलार्थी / Appellant	प्रत्यर्थी / Respondent
1231/Hyd/2018	2011-12	Deputy Commissioner of Income Tax, Circle-17(1), Hyderabad	M/s.Dr.Reddy's Laboratories Limited, Hyderabad [PAN: AAACD7999Q]
1232/Hyd/2018	2013-14		
1285/Hyd/2018	2014-15		
1268/Hyd/2018	2011-12	M/s.Dr.Reddy's Laboratories Limited, Hyderabad [PAN: AAACD7999Q]	Deputy Commissioner of Income Tax, Circle-17(1), Hyderabad
1269/Hyd/2018	2013-14		Asst.Commissioner of Income Tax, Circle-17(1), Hyderabad
1328/Hyd/2018	2014-15		

निर्धारिती द्वारा/Assessee by: Shri K.R.Sekar &
Shri S.P.Chidambaram, ARs
राजस्व द्वारा/Revenue by: Shri Y.V.S.T.Sai, CIT-DR

सुनवाई की तारीख/Date of hearing: 04/07/2022
घोषणा की तारीख/Pronouncement on: 08/08/2022

आदेश / ORDER

PER K. NARASIMHA CHARY, JM:

Aggrieved by the orders passed by the learned Commissioner of Income Tax (Appeals)-5, Hyderabad ("Ld. CIT(A)"), in the case of M/s.Dr.Reddy's Laboratories Limited, ("the assessee") for the assessment years 2011-12, 2013-14 & 2014-15, both the assessee and the Revenue preferred these appeals. For the sake of convenience, we dispose-of these appeals by this common order by taking the appeals for the assessment year 2011-12 as lead cases.

2. Brief facts of the case are that the assessee is a company engaged in the manufacture and sale of bulk drugs, APIs formulation and other pharmaceutical products. For the assessment year 2011-12, the assessee filed the return of income on 30/11/2011 declaring total income of Rs. 3,29,13,07,551/-. During the year the assessee had international transactions exceeding Rs. 15 crores. Learned Assessing Officer, therefore, referred the determination of the Arms Length Price (ALP) and basing on the report of the Ld. TPO made an addition of Rs. 38,91,67,940/-. Apart from that the learned Assessing Officer made certain other additions, namely, Rs. 18,44,40,373/- by disallowing a portion of the expenditure on local Directors made and individual Director expenses, Rs. 1,97,68,555/- on account of disallowance of expenditure of capital nature claimed under the head maintenance expenditure, Rs. 26,81,34,709/- on account of claim of ESOPs, Rs. 13,52,09,061/- on account of deduction under section 10B of the Income Tax Act, 1961 (for short "the Act").

3. Challenging the action of the learned Assessing Officer, assessee preferred appeal before the Ld. CIT(A) and the Ld. CIT(A) allowed the appeal in part while granting relief in certain respects and confirming the balance. Insofar as the Ld. CIT(A) gave relief to the assessee, on various grounds, Revenue preferred ITA No. 1231/Hyd/2018, whereas challenging the additions that are sustained, assessee preferred ITA No. 1268/Hyd/2018. We shall now deal with various aspects in detail.

4. Ground No. 1 & 10 of Revenue's appeal are general in nature. Ground No. 2 of Revenue appeal relates to the transfer pricing adjustment on account of shortfall of interest on loans given to the Associated Enterprises (AEs) to the tune of Rs. 7,04,44,269/-. According to the assessee, they have granted loans to the AEs, which happened to be fully owned subsidiaries without there being any scope for default risk, based on commercial expediency with the terms and conditions within the regulatory framework of the RBI. Ld. TPO applied the rate of interest @ 7% and added a sum of Rs. 7,04,44,269/- as transfer pricing adjustment. Before the Ld. CIT(A), assessee pleaded that during the assessment year 2006-07, the Tribunal in their own case ruled that the basis of interest shall be LIBOR+2% which is equivalent to 7% for the assessment year 2006-07.

5. Ld. CIT(A) followed the view taken by his predecessor in assessee's own case for the assessment year 2012-13 and directed the learned Assessing Officer to adopt LIBOR rate applicable for the year under consideration + 200 basis points to arrive at the ALP.

6. We have gone through the orders dt. 28/04/2017 and 13/06/2018 in assessee's own case for the assessment years 2009-10 and 2010-11, and

2012-13 reported in (2017) 81 taxmann.com 398 and (2019) 102 taxmann.com 111 (Hyd. Trib). Vide paragraph No.36 in the order for the years 2009-10 and 2010-11, the Co-ordinate Bench dealt this issue and on a review of the case law on this aspect and also the view taken in assessee's own case for the earlier assessment years, held that LIBOR+200 basis points has to be adopted as ALP. This view is followed for the assessment year 2012-13 also. No other material is placed before us to take a contrary view.

7. In the absence of any compelling circumstances, we find it difficult to take any other view contrary to the established view taken in assessee's own case for the earlier assessment years. Hence, while respectfully following the same, we uphold the findings of the Ld. CIT(A) that LIBOR+200 basis points to be taken for determination of ALP in respect of interest on loans given to foreign AEs. Grounds No.1 & 2 of assessee's appeal and Ground No.2 of Revenue appeal are dismissed accordingly.

8. Now coming to Grounds No.3 & 4 of Revenue's appeal, we find that it is in respect of the corporate guarantee. Assessee provided corporate guarantee to the financial institutions on the loans taken by subsidiaries on commercial expediency basis by charging nominal value towards guarantee commission. According to the assessee, during the year, the banker extended the corporate guarantee on behalf of the assessee and charged commission of 0.5%. Ld. TPO, however, applied the rate at 1.3% on the opening guarantee held on 01/04/2010 + additions during the financial year 2010-11 and due to such rate, suggested adjustment at Rs. 31,65,80,957/-.

9. It was submitted before the Ld. CIT(A) that in assessee's own case for the assessment years 2009-10, 2010-11 and 2012-13, the Tribunal had taken the view that section 92B of the Act will not apply retrospectively and it applies only with effect from the assessment year 2013-14 and the same was accepted by the Tribunal. Ld. CIT(A) recorded that inasmuch as the decision of the jurisdictional Tribunal is binding, the transaction of corporate guarantee will not constitute international transaction within the meaning of section 92B of the Act and, therefore, the addition made on this score is directed to be deleted.

10. Ld. AR, while placing reliance on the decision reported in Micro Inc Ltd. Vs. ACIT (2015) 63 taxmann.com 353 (Ahd), Bharti Airtel Ltd Vs. ACIT (2014) 63 SOT 113 (Delhi) and ACIT Vs. Imami Ltd., ITA No.1958/Kol/2017, dt. 03-04-2019, DCIT Vs. Dishman Pharmaceuticals and Chemicals Ltd. [103 taxmann.com 271] (Ahd), M/s.Ucal Fuel Systems Ltd., Vs. ACIT, ITA No.725/Mds/2015 and Aaradhana Realities Ltd., Vs. ACIT, ITA No.1942/M/2015 argued that the issue of corporate guarantee is not an international transaction, and also that such a transaction involves no benchmarking as well. Per contra, learned DR, by placing reliance on the decision reported in Pr.CIT Vs. M/s. Redignton (India) Limited, (2020) 122 Taxmann.com 136 (Madras) submitted that inherent risk cannot be ruled out in providing guarantee and, hence, adjustments are required for corporate guarantee commissions.

11. We have gone through the order dated 10/12/2020 in Redington (India) Ltd (supra). In this decision Hon'ble Madras High Court held that Explanation to Section 92B inserted vide the Finance Act, 2012 with retrospective effect from 01/04/2002 also includes a corporate guarantee.

We thus hold that the tribunal's all foregoing orders (supra) must make way for higher wisdom and decline the assessee's first and foremost legal plea. We, for the sake of completeness, deem it appropriate to reproduce their lordships detailed discussion:

> *"68.From the Annual Report of the assessee, it was seen that the assessee had issued guarantees on behalf of its subsidiaries to the tune of Rs.464.36 crores and on behalf of others, to the tune of Rs.3.42 crores. The assessee was called to explain the same. The assessee stated that they had not issued any fresh guarantee during the Assessment Year 2009-10 and the guarantee is outstanding, is purely on account of the currency transition adjustment on restatement of guarantees outstanding at the closing rates prevailing on 31st March 2009 for disclosure in financial statement in compliance with the Accounting Standards. Further, the assessee stated that the outstanding guarantee issued by the assessee as on 31.03.2009 represents guarantee issued on behalf of the overseas subsidiaries in earlier years. Further, they stated that during the course of assessment proceedings in the relevant assessment years, the TPO made addition to the Corporate Guarantee issued during those years by adopting the bench mark rate based on the available internal comparable uncontrolled price charged by the bank at 0.85%. The assessee also issued Corporate Guarantee in favour of M/s.Parampara Wedding Cads and M/s. Baskar Digital Press. The TPO after taking note of the amended Section 92B, which was introduced with retrospective effect from 01.04.2002, examined the factual aspect and pointed out that though the assessee stated that they have not issued any fresh guarantee during the Assessment Year 2009-10, the guarantees were live and were not closed as on 31.03.2009 and the liability continued on the assessee as on 31.03.2009. Noting that providing such guarantee is one of the financial service rendered by the assessee for which it has to be remunerated appropriately and that concerned parties in whose favour these guarantees were extended, where Associated Enterprises of the assessee and the transactions were largely influenced by related parties, the Associated Enterprises benefited and consequently, the income would accrue only to such non-resident and to that extent, shifting of tax base from the country is bound to happen in such transaction and the assessee should have been remunerated appropriately. The Corporate Guarantee was to the tune of Rs.5574.13 lakhs and Bank Guarantee to the tune of*

Rs.40862.34 lakhs. Further, the TPO observed that there is no time period for expiry of the guarantee. Consequently, it will demand more commission charges than the commission charged by the Banks. That apart, the assessee had taken maximum risk in providing Bank Guarantee to their subsidiaries and the entire credit risk is owned by the assessee, the Indian Company and it has to be reimbursed at maximum percentage of fees. Further, the TPO noted as to the manner in which the Bank's charge commission on guarantees extended and observed that the Bank will insist upon cash deposits / guarantee deposits / asset mortgage etc., to extend guarantees on behalf of their clients. Further, it was pointed out that if a situation arises that the Bank Guarantee has to be invoked, when the Associate Enterprise is not in good financial position, obviously, the assessee is at risk and they claim that there is no risk in providing guarantees cannot be accepted. The TPO drew a comparison between the Guarantees issued by the Bank and Guarantees issued by the assessee on behalf of the Associated Enterprise to the Bank. It has been recorded that the Associated Enterprises of the assessee have not provided any security to the assessee. In the agreement / contract between the Associated Enterprises and the assessee, no condition has been imposed on the Associated Enterprises to pay the amount to the assessee and even in some agreements if it is mentioned, in the event of the Associated Enterprises financially becoming weak, the risk undertaken by the assessee becomes greater. Further, invoking a guarantee provided to an Associated Enterprise is very difficult as it depends on the financial condition of the Associated Enterprise and the law governing such transactions in that country and the assessee is bound by the provisions of FEMA and RBI guidelines. Therefore, the TPO concluded that the Bank commission charges cannot be compared for the commission charges that has been payable to the assessee by the Associated Enterprises and it is a clear financial services rendered by the assessee to their Associated Enterprise, which has to be compensated by proper commission charges. Accordingly, the TPO held 2% shall be charged as commission and proposed an upward adjustment to the income of the assessee to the tune of Rs.817.25 lakhs. In respect of the guarantees given to unrelated parties, the TPO held that 2% should be charged as guarantee commission and proposed an upward adjustment of Rs.111.48 lakhs to the income of the assessee. The DRP after hearing the assessee, held that the TPO has not given cogent reasons for taking a different stand than the stand taken by the Department in the earlier years as the same guarantee is continuing during the year under consideration and

therefore, there cannot be a different bench marking from that of the previous year. Accordingly, the DRP directed the TPO to adopt the same rate of guarantee commission as was adopted by the TPO in the preceding year.

69.The directions issued by the DRP were given effect to by the Assessing Officer vide Assessment Order dated 17.01.2014. The Tribunal held that the TP addition made against the Corporate and Bank Guarantee is not sustainable in law. This conclusion is by observing that the assessee has provided Corporate and Bank Guarantees for the overall interest of its business. It referred to the decision of the Delhi Tribunal in the case of Bharti Airtel Ltd., wherein it is held that Corporate Guarantee does not involve any cost to the assessee and therefore, it is not an international transaction even under the definition of the said term as amended by the Finance Act, 2012. The Tribunal is a final authority to render findings on fact. The Tribunal failed to give any reason as to how the decision in Bharti Airtel Limited would apply to the assessee's case. Furthermore, there was no record placed before the Tribunal by the assessee that they have not incurred any cost for providing Bank Guarantee. As observed earlier, the TPO has compared the nature of documentation executed by the assessee in favour of his Associated Enterprise to come to the factual conclusion that it is a financial service. This finding of fact has not been interfered by the DRP, but the DRP was of the view that the same treatment, which was given in the previous Assessment Year should be extended for the Assessment Year under consideration also and there is no reason given by the TPO for taking a divergent view. The finding that the very same transaction for the previous Assessment Year was subject matter of TP adjustment, has not been disputed by the Tribunal rather not even dealt with by the Tribunal. Therefore, the finding rendered by the Tribunal is utterly perverse.

70.The argument of the learned Senior counsel appearing for the assessee is that prior to the amendment brought about in Section 92B by Finance Act 2012, the Tribunal had decided that furnishing of a guarantee by an assessee was not an international transaction as it did not fall within any of the limbs of Section 92B. It is submitted that to get over the judicial pronouncement, the explanation was inserted. The argument is that Clause (c) of the Explanation supports the case of the assessee inasmuch as the Explanation makes it clear that giving of a Corporate Guarantee is not a service. Without prejudice to the said contention, it is submitted that only Corporate Guarantee is given by the assessee, which are in the nature of

lending are covered under clause (c) of Explanation 1 to Section 92B. Further, it is submitted that the nature of transactions covered by Clause (e) specifically include even those transactions which may not have a bearing on the profit, income, losses or assets of such enterprises at the time of transaction are covered if they have such a bearing at any future date. It is argued that the language used in the Explanation makes it clear that in so far as the transactions that fall within the main part of Section 92B are concerned, such transactions must have a bearing on profit, income, losses or assets of an assessee in the year in which the transaction is effected. In the assessee's case, the Corporate Guarantees represent a contingent liability and lay dormant and have no bearing on the current year's profits, income or losses of an assessee and Corporate Guarantee are not covered within the definition of international transaction. It is submitted that applying doctrine of fairness as explained by the Hon'ble Supreme Court of India in the case Vatika Township Private Limited, the explanation ought to be read as prospective in its application and retrospective in its effect such that it will also cover within its ambit guarantees issued prior to the introduction of the explanation by Finance Act 2012.

71.We find from the grounds of appeal filed by the assessee before the Tribunal, no ground was raised as regards the argument that the explanation added by Finance Act 2012, is to be construed as prospective in its application. Furthermore, the Tribunal has also not recorded in its order, more particularly, from Paragraph 92 that the assessee had argued on the issue regarding prospectivity / retrospectivity. Further, the assessee has not challenged the validity of the Explanation nor its applicability with retrospective effect. That apart, even before the DRP, such contention was not raised. The Hon'ble Supreme Court in Gold Coin Health Food Private Limited, while deciding the issue whether an amendment was clarificatory or substantive in nature or whether it will have retrospective effect held as follows:

14. The presumption against retrospective operation is not applicable to declaratory statutes In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is to explain an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended …….An amending Act

may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect (ibid., pp. 468-69).

15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, 7th Edn.), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated. (p. 388) The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right. (p. 392)

72. A new Enactment or an Amendment meant to explain the earlier Act has to be considered retrospective. The explanation inserted in Section 92B by Finance Act 2012 with retrospective effect from 01.04.2002 commences with the sentence For the removal of doubts, it is hereby clarified that –

73. An Amendment made with the object of removal of doubts and to clarify, undoubtedly has to be read to be retrospective and Courts are bound to give effect to such retrospective legislation.

74. The learned Senior Standing counsel for the Revenue referred to the decision in Co-operative Company Limited vs. Commissioner of Trade Tax in Civil No.2124 of 2007 dated 24.04.2007, wherein it was held that when an amendment is brought into force from a particular date, no retrospective operation thereof can be contemplated prior thereto. The explanation in Section 92B specifically has been given retrospective effect and it is clarificatory in nature and for the purpose of removal of doubts. This issue was considered by this Court in the case of Sudexo Food Solutions India Private Ltd.

75. The concept of Bank Guarantees and Corporate Guarantees was explained in the decision of the Hyderabad Tribunal in the case of

Prolifies Corporation Limited. In the said case, the Revenue contended that the transaction of providing Corporate Guarantee is covered by the definition of international transaction after retrospective amendment made by Finance Act, 2012. The assessee argued that the Corporate Guarantee is an additional guarantee, provided by the Parent company. It does not involve any cost of risk to the shareholders. Further, the retrospective amendment of Section 92B does not enlarge the scope of the term international transaction to include the Corporate Guarantee in the nature provided by the assessee therein. The Tribunal held that in case of default, Guarantor has to fulfill the liability and therefore, there is always an inherent risk in providing guarantees and that may be a reason that Finance provider insist on non-charging any commission from Associated Enterprise as a commercial principle. Further, it has been observed that this position indicates that provision of guarantee always involves risk and there is a service provided to the Associate Enterprise in increasing its creditworthiness in obtaining loans in the market, be from Financial institutions or from others. There may not be immediate charge on P & L account, but inherent risk cannot be ruled out in providing guarantees. Ultimately, the Tribunal upheld the adjustments made on guarantee commissions both on the guarantees provided by the Bank directly and also on the guarantee provided to the erstwhile shareholders for assuring the payment of Associate Enterprise.

76. In the light of the above decisions, we hold that the Tribunal committed an error in deleting the additions made against Corporate and Bank Guarantee and restore the order passed by the DRP".

12. We, therefore, while respectfully followed the ratio laid down by the Hon'ble Madras High Court in the case of Redington (India) Ltd (supra), hold that providing of a corporate guarantee is an international transaction and consequently no error is committed by the learned Assessing Officer / Ld. TPO in making transfer pricing adjustment on that score.

13. Now coming to the aspect of quantification of the corporate guarantee commission, by placing reliance on the decision reported in

Greatship (India) Ltd., Vs. DCIT (2021) 126 taxmann.com 47, learned AR prayed that internal bank rate @0.5% may be considered as ALP for corporate guarantee fee as against 1.3% charged by the Ld. TPO. Learned DR, however, submitted that at any rate, there are no reasons to interfere with the corporate guarantee fee @1.3% and the same may be confirmed. He took us to the relevant paragraph in the Ld. TPO's order at pg.No.8 and 9 thereof to the effect that having considered the DRP's decision to fix the corporate guarantee fee @0.7% for assessment year 2010-11 and earlier years, the Ld. TPO had taken a conscious decision to fix it @1.3% basing on the facts and circumstances of the case.

14. Be that as it may, it has come on record that for the assessment year 2010-11 and earlier years, the Ld. DRP determined the fee for corporate guarantee at 0.7%. There is no denial of the fact that this decision of the Ld. DRP was a considered one and based on record. Inasmuch as nothing contrary is brought to our notice compelling us to take a different view, we are of the considered opinion that 0.7% shall be the ALP towards fee for corporate guarantee and the learned Assessing Officer/Ld. TPO is directed to compute the corporate guarantee fee at 0.7&. Grounds No.3 & 4 of the Revenue's appeal are allowed accordingly.

15. Coming to Ground No.5 of Revenue's appeal, it is in relation to the transfer pricing adjustment on account profit share of marketing and distribution with DRL Inc to the tune of Rs. 6,12,204/-. Dr. Reddy's group was engaged in the development of product, namely, Sumatripton which ran into an infringement suit with Glaxo Group Ltd. (GSK) and in this connection, Dr. Reddy's group represented by Dr. Reddy's Laboratories Ltd., Dr. Reddy's Laboratories Inc settled with GSK for a stipulated

dismissal of the dispute and to launch the product in the US market under para IV as an authorised generic product, consequent to which settlement, Dr. Reddy's group had agreed to buy the finished product, namely, Sumatripton from GSK during the 180 days exclusivity period in the USA. As a part of the settlement with GSK, Dr. Reddy's Laboratories Inc (DRLI), to buy Sumatripton from GSK and market it in USA by agreeing to pay 50% in the gross profits representing the profit share to DRLI.

16. Ld. TPO, however, questioned the basis of determination of profit share of 50% assuming that the assessee has been filing numerous ANDAs and does not require the help of AE and on this premise, he apportioned 60% as profit share to India instead of 50% as per the agreement. On this account, Ld. TPO proposed adjustment to the tune of Rs. 6,12,204/-.

17. It is submitted before the Ld. CIT(A) in the appeal that the issue is squarely covered in assessee's own case for the assessment year 2009-10 and 2010-11 and after dealing with the same extensively, the Tribunal reached a conclusion that it falls in the exclusive domain of the assessee to agree for the profits @50%. Ld. CIT(A) followed the same and held the issue in favour of the assessee. There is no dispute on this proposition.

18. We have gone through the order dt. 28/04/2017 in assessee's own case for the assessment year 2009-10 and 2010-11 reported in (2017) 89 taxmann.com 398 (Hyd-Trib). A Co-ordinate Bench of this Tribunal dealt with the issue in extenso and while placing reliance on the decision reported in S.A. Builders Ltd. Vs. CIT [288 ITR 1] (SC) and held that the agreement between DRL India and DRLSA cannot be doubted. While

respectfully following the same, we answer this issue in favour of the assessee and dismiss Ground No. 5 of Revenue's appeal.

19. Grounds No. 6 & 7 of Revenue's appeal deal with disallowance of ESOP expenditure. Assessee allotted shares to its employees under expenditure on ESOP and accounted the ESOP cost as revenue expenditure, which the learned Assessing Officer treated as notional/capital in nature and disallowed the same to make an addition of Rs. 26,81,34,709/-. Before the Ld. CIT(A) assessee placed reliance on the decision of PVP Ventures Ltd., TC(A) No.1023/2005 to contend that the ESOP was governed by the guidelines issued by the SEBI and such expenditure incurred was an asset and liability and, therefore, is allowable. Ld. CIT(A) while following the decision of the jurisdictional Tribunal in assessee's own case for the earlier assessment years held that the difference between the market price of the shares and their issue price is expenditure in the hands of the assessee, by undertaking the issue shares at a discount the company does not pay anything to its employees but incurs the obligation of issuing shares at a discounted price at a future date and, therefore, it is allowable under section 37(1) of the Act.

20. Inasmuch as the issue stands covered in favour of assessee in their own case for the earlier assessment years, there are no reasons to take a contrary view for this year, and accordingly we hold the same in favour of the assessee and answer the issue stating that the ESOP expenses are revenue expenses and are to be allowed under section 37(1) of the Act.

21. Grounds No. 8 and 9 of Revenue's appeal are in respect of the non-allocation of expenses relating to Biological units to tax holiday units.

There is no dispute that in the assessment years 2008-09 to 2010-11 in assessee's own cases in ITA Nos. 1769, 1770 and 1771/Hyd/2017, a Co-ordinate Bench of this Tribunal upheld the findings of the Ld. CIT(A) to the effect that R&D expenditure relating to the Biologics deserves to be excluded and should not be apportioned against the units which are enjoying the benefit of deduction under various sections such as 10B, 80IB and 80IC of the Act. According to the Ld. CIT(A), the manufacture of Biological products requires separate technology, such products cannot be manufactured from traditional formulation plans, and, therefore, R&D expenditure relating to the Biologics are unit specific and is not related to the special units and can be excluded for apportionment of expenses. No material to contradict either the findings of the Ld. CIT(A) or the view taken by the Co-ordinate Bench in accepting the same is forthcoming. We, therefore, respectfully following the same, dismiss Grounds No.8 & 9 of Revenue's appeal.

22. Grounds Nos. 1 & 2 of assessee's appeal relate to the ALP of interest rate on the loans advanced by the assessee. These grounds are part of Ground No. 2 of Revenue's appeal discussed above, and are also dismissed.

23. Ground No. 3 of assessee's appeal relates to the disallowance of the expenditure incurred for repairs and maintenance of Plant & Machinery and the assessee has not pressed the same. Recording the same, we dismiss this ground since not pressed.

24. Ground No. 4 of assessee's appeal relates to the addition of Rs. 18,44,40,373/- by disallowing the expense which was incurred towards sponsorship on doctor's meet for the purpose of updating the doctors

about new molecules and developments in medicine field. According to the assessee, this expenditure was incurred at various places including in the branch offices outside India, and it is in the nature of doctors' conference, complements, registration, travel and stay, medical journal, books and equipment etc.

25. Learned Assessing Officer disallowed the same stating that these expenses are in violation of MCI regulations and the CBDT Circular No.5 of 2012 which treats these expenses as inadmissible under section 37(1) of the Act. On this premise, he added Rs. 18,44,040/-.

26. Ld. CIT(A) placed reliance on the regulation of Medical Council prohibiting the medical practitioners from availing the freebies and also Circular No.5/2012 dt. 01/08/2012 held that inasmuch as the activities for which the expenditure was incurred and the acceptance of such hospitality is prohibited one, such an expenditure is not to be allowed under section 37(1) of the Act.

27. It is argued before us by the learned AR that the expenses are directly benefiting the assessee and there is a catena of case law permitting the allowance of such an expenditure, and more particularly he placed reliance on the view taken in assessee's own case by a Co-ordinate Bench of this Tribunal for the assessment year 2012-13 and reported in (2019) 102 taxmann.com 111 (Hyd. Trib).

28. Be that as it may, this aspect has been considered by the Hon'ble Apex Court in the case of M/s. Apex Laboratores Pvt. Ltd., Vs. DCIT in SLP (Civil) No. 23207 of 2019 and the Hon'ble Apex Court by order dt. 22/02/2022 reported in [2022] 135 taxmann.com 286 (SC) held that the

incentives or the freebies to the doctors had a direct result of exposing the recipients to the odium of sanctions, leading to a ban on their practice of medicine; that those sanctions are mandated by law, as they are embodied in the code of conduct and ethics, which are normative, and have legally binding effect; that the conceded participation of the donor was plainly prohibited as far as their receipt by the medical practitioners was concerned; and that the medical practitioners were forbidden from accepting such gifts or freebies was no less a prohibition on the part of their donor. On this premise, the Hon'ble Supreme Court upheld the order of the Hon'ble High Court of Madras which confirmed the partial allowance of the amounts claimed as business expenditure under section 37(1) of the Act.

29. In view of this binding precedent rendered by the Hon'ble Apex Court, we are of the considered opinion that in order to qualify the expenditure as business expenditure, it is imperative on the part of the assessee to satisfy the learned Assessing Officer that the expenses are not in violation of the Medical Council's regulations and the circular issued by the CBDT. Assessment order reveals that under section 37(1) of the Act, an amount of Rs. 20,48,59,179/- was claimed as allowable expenditure, the assessee has already added a sum of Rs. 2,04,18,806/- in the computation of income and, therefore, the balance amount of Rs. 18,44,40,373/- was disallowed on the ground that such expense represents the expenditure which is purely personal in nature incurred on the doctors and other guests for travel, conveyance, lunch/dinner, gifts and complements etc., on the ground of business promotion but hit by the

Circular No.5/2012 and in violation of the provisions of the Indian Medical Council Regulations, 2002.

30. Nothing contrary to the observations of the learned Assessing Officer is brought to our notice to say that this particular expenditure covered under disallowance is something else than in the nature of freebies to the doctors hit by the CBDT Circular No.5/2012 and the provisions of Indian Medical Council Regulations, 2002. As a matter of fact, Ld. CIT(A) also returned the same finding in the impugned order. In view of the decision of the Hon'ble Apex Court in the case of M/s. Apex Laboratories (supra), we find that there is nothing illegality or irregularity committed by the authorities below. We accordingly uphold the findings of the Ld. CIT(A) and decline to interfere with his findings.

31. Now coming to Ground No. 5 of assessee's appeal, it relates to corporate overheads, ESOP and R&D expenditure to the units eligible for deduction under section 10B, 80IB and 80IC of the Act. Assessee claimed deduction under section 10B, 80IB and 80IC of the Act and while computing the deduction under these sections, profit derived from these eligible units was only taken into consideration and no allocation of expenditure of corporate overheads, ESOP and R&D expenditure was made. Learned Assessing Officer, however, apportioned such expenditure incurred by the assessee while computing deduction allowable under section 10B, 80IB and 80IC of the Act on the basis of turnover.

32. Ld. CIT(A) followed the view taken by his predecessor in assessee's case for the assessment year 2003-04 and also the decision of the Co-ordinate Bench of this Tribunal for such year in ITA No.739 and

655/Hyd/2007 wherein it was held that in the absence of identifying the expenditure of the export division, there is no basis other than allocating the total indirect cost on the basis of turnover. Ld. CIT(A) accordingly upheld the allocation of the corporate expenditure in the ratio of turnover as adopted by the learned Assessing Officer.

33. Apart from that, this aspect is considered by the Co-ordinate Bench of this Tribunal in assessee's own case for the assessment year 2007-08 in ITA No.1723/Hyd/2016 and while noticing and following the view taken by the Co-ordinate Bench of this Tribunal in ITA No. 2229/Hyd/2011 (AY.2007-08), wherein the Tribunal directed the learned Assessing Officer to allocate the net expenditure of the corporate entity amongst all the units on the basis of turnover. While respectfully following the consistent view taken in assessee's own case on this aspect, we uphold the findings of the Ld. CIT(A) but modify the same to the extent that while allocating the total indirect cost on the basis of turnover, the learned Assessing Officer will consider only the net expenses, as held in assessee's case for earlier assessment years.

34. Insofar as the ESOP and R&D expenses are concerned, it has been the case of the assessee that such an expenditure need not be allocated to the tax holiday units. Both the authorities below held that such an expenditure has to be allocated on the basis of turnover. Ld. CIT(A), however, directed the learned Assessing Officer to reduce the R&D expenses attributable to Biologics from apportionment to exempted/deductible units.

35. At the outset it is brought to our notice that in assessee's own case for the assessment year 2012-13, the Tribunal considered this issue in detail and noticed the decisions in the case of assessee in ITA No.1844 to 1846/Hyd/2017 and also in Microlabs Ltd., Vs. ACIT in ITA No.704/Bang/2008. A Co-ordinate Bench of this Tribunal followed the decision of the Hon'ble Apex Court in the case of CIT Vs. Vegetable Products Ltd., (1973) 88 ITR 192, held that the tax authorities were not justified in allocating R&D expenditure and ESOP cost against the profits of other eligible units wherein assessee claimed deduction under section 80IC of the Act. It is the submission on behalf of the assessee that the same was the case in respect of the assessment years 2008-09, 2009-10 and 2010-11 also where the Tribunal has taken a similar view.

36. No contrary view is brought to our notice and in the absence of any change of facts and circumstances, we deem it just and necessary to maintain the consistency of view in assessee's own case. We, therefore, while respectfully following the same, allow Ground No. 5 of assessee's appeal relating to corporate overheads, ESOP and R&D expenses in part and for statistical purposes.

37. Additional ground preferred by the assessee relates to the education cess and secondary and higher education cess which, according to the assessee is not being in the nature of tax and to be allowed under section 37(1) of the Act. Since this is a legal ground, it could be considered at the stage of this appeal also. This issue, however, did not come up for consideration before the authorities below. Assessee is placing reliance on the decisions in Chambal Fertilizers and Chemicals (2019) 107 taxmann.com 484 (Rajasthan) and Sesa Goa Ltd., 423 ITR 426 whereas

learned DR placed reliance on the decision of the Hon'ble Supreme Court reported in CIT Vs.K. Srinivasan [1972] 83 ITR 346 (SC) wherein the Hon'ble Supreme Court held that the term 'income-tax' as employed in section 2 includes surcharge and additional surcharge whenever provided.

38. According to the learned DR, there is a difference between the cess levied under indirect tax laws and the cess levied under direct tax laws. According to him, the education cess and the secondary and higher education cess form part of the expression 'tax' and, therefore, such an expense is not allowable under section 37(1) of the Act.

39. Inasmuch as this issue requires the attention of the learned Assessing Officer for verification of facts having a bearing thereon, we deem it just and proper to restore the same to the file of learned Assessing Officer to take a view basing on record. The ground is accordingly allowed for statistical purposes.

AYs. 2013-14 & 2014-15:

40. Assessee's appeal for this assessment year is ITA No. 1269/Hyd/2018 whereas the Revenue's appeal is ITA No. 1232/Hyd/2018. Most of the grounds in these appeals are covered by the grounds pleaded for the assessment year 2011-12. We, therefore, while making a reference to the covered grounds, proceed to deal with the other grounds which did not fall for consideration in the assessment year 2011-12.

41. Ground No.1 of assessee's appeal and Ground No.2 of Revenue's appeal for both the assessment years relate to the ALP of the interest rate and covered by the decision for the assessment year 2011-12. While

respectfully following the same, we uphold the directions of the Ld. CIT(A) and direct the learned Assessing Officer to adopt LIBOR+200 basis points as ALP of the interest on the loans given to the associated enterprises. Therefore, such grounds are dismissed for these assessment years also.

42. Coming to Grounds No. 3 and 4 of Revenue's appeals for both the years, they relate to the question whether or not the ESOP expenses are to be treated as capital expenses. This issue is covered by Grounds No. 6 and 7 of Revenue's appeal for the assessment year 2011-12. Following the view taken above, we hold that the ESOP expenses are revenue in nature and, therefore, these grounds are liable to be dismissed. Those are accordingly dismissed.

43. Coming to ground No. 5 and 6 of Revenue's appeals for both the years, they relate to the issue of non-allocation of expenses relating to biologics unit to tax holiday units. This issue is covered by Grounds No. 8 and 9 of Revenue's appeal for the assessment year 2011-12. Following the decision taken above, we hold that such expenses relating to biologics unit cannot be allocated to tax holiday units and accordingly these grounds are dismissed.

44. Ground No.2 in assessee's appeals for these two years relate to the issue of corporate guarantee and its quantification. In the preceding paragraph we held that the issue of corporate guarantee is an international transaction and quantified it @0.70% as the ALP. No change of facts. Hence, following the same, we allow Ground No.2 in these two assessment years in part.

45. Ground No.3 in both the appeals of the assessee is not pressed. The same is recorded. Hence dismissed.

46. Ground No. 4 in assessee's appeals for both the assessment years relates to the disallowance of marketing expenses incurred towards doctors' meet and the same is covered in assessee's appeal by Ground No. 4 for the assessment year 2011-12. Following the same, Ground No.4 in these two assessment years is also dismissed.

47. Ground No.5 in assessee's appeals for both the assessment years is identical to Ground No. 5 of assessee's appeal for the assessment year 2011-12. Following the same, we allow Ground No. 5 of assessee's appeal relating to corporate overheads, ESOP and R&D expenses in part and for statistical purposes for these two assessment years.

48. Ground No. 6 of assessee appeal for the assessment year 2014-15 relates to the weighted deduction under section 35(2AB) of the Act on certain expenses on the ground that the same was not certified by DSIR. Assessee incurred certain expenses to the tune of Rs. 5.81 Crores on the consultancy, legal and professional and retainer charges and Rs. 7.32 Crores towards salaries to the employees with a non-science qualification. Naturally this expense is not reflected in form 3CL, and basing on that the learned Assessing Officer disallowed the deduction in respect of the same.

49. In the appeal, Ld. CIT(A) held that the activity of the assessee falls in sub-clause (b) of sub-section (3) of section 35 of the Act and, therefore, the assessee needs to make a reference either to the Board for such expenditure which resulted in an activity for it to be considered into the domain of scientific research for the purpose of weighted deduction, or to

the DSIR which is the prescribed authority urging that such expense forms part of the expense on scientific research. Inasmuch as this expense, though incurred by the assessee is not on scientific research proper, the same is not allowable for weighted deduction. Hence, the assessee is before us.

50. On this aspect, assessee placed reliance on the decision reported in Omni Active Health Technologies Ltd. Vs. ACIT (2020) 117 taxmann.com 229 (Mumbai-Trib), Hon'ble High Court of Gujarat in CIT Vs. Claris Life Sciences Ltd., (2010) 326 ITR 251, Hon'ble High Court of Delhi in CIT Vs. Sandan Vikas (India) Ltd., (2011) 335 ITR 117 (Del), Ahmedabad Tribunal in Sun Pharmaceuticals Industries Ltd., Vs. Pr.CIT (2017) 77 taxmann.com 202/162 ITD 484 as approved by Hon'ble Gujarat High Court reported at 250 Taxman 270 and Pune Tribunal in Cummins India Ltd., Vs. Dy.CIT (2018) 96 taxmann.com 576 (Pune-Trib).

51. The Ld. DR argued that the context of the cases in Claris Lifesciences Ltd (supra) and Sandan Vikas (India) Ltd (supra), was the allowability of the weighted deduction for the period between the date of agreement of the Company with the DSIR and the approval of the DSIR by passing order under Form 3CM of the Rules. He submitted that, in these cases, the learned Assessing Officer held that the deduction for expenditure incurred only from the date of the approval, and not for the period earlier thereto but subsequent to the setting up of the in-house R&D facility. In this context, Hon’ble court held that when once the approval is given, the entire expenditure incurred by the assessee on development of facility has to be allowed for weighted deduction and the Hon’ble courts referred the “expenditure so incurred”. He further submitted that the Hyderabad

Tribunal in Electronics Corpn. of India Ltd. Vs. ACIT [2012] 28 taxmann.com 280 (Hyd.), a Coordinate Bench of this Tribunal, for the Assessment Year 2007-08, after considering the relevant provisions under section 35(2AB) and 35(3) of the Act held that the expenditure as approved by the DSIR in the certificate given by them in Form 3CL alone is to be granted weighted deduction, and this order dated 25/09/2012 was not brought to the notice of the Bench in the case of Cummins India Ltd (supra) and subsequent decisions following Cummins India Ltd (supra).

52. Ld. DR, therefore, submits that in the light of Rule 6 of the Rules the question that needs to be considered is what would amount to "entire expenditure so incurred by the assessee" for the purpose of weighted deduction under section 35(2AB) of the Act, namely, whether it is the expenditure approved by the prescribed authority under Rule 6(7A) of the Rules and reflected in Form 3CL, or it shall include the expenditure incurred by the assessee other than the one on scientific research on in-house R&D facility? At this juncture, he further submitted that in the case of CIT Vs. Vegetable Products Ltd., (1973) 88 ITR 192, the Hon'ble Apex Court held that the duty of the court is to read the section, understand its language and give effect to the same; that if the language is plain the consequences of giving effect to it are not factors to be taken into account in interpreting the provision; that it is for the legislature to step in and remove the absurdity if any; and that if two reasonable constructions of a taxing provisions are possible, that construction which favours the assessee must be adopted. Basing on this, he submitted that it is only when the language of the provision is ambiguous or capable of various interpretations than one, then only the adoption of interpretation which

favours the assessee, more particularly in cases of imposition of penalty, will occasion. According to him, the decision of the Hyderabad Bench of the Tribunal in the case of in Electronics Corpn. of India (supra) is in consonance with the provisions of law and the provision under section 35(2AB) of the Act read with Rule 6 of the Rule, as a matter of fact, is very plain.

53. On a perusal of the orders in Claris Lifesciences Ltd (supra) and Sandan Vikas (India) Ltd (supra), we find that the question involved in these matters was the allowability of the weighted deduction for the period between the date of agreement of the Company with the DSIR and the approval of the DSIR by passing order under form 3CM of the Rules; that the learned Assessing Officer held that the deduction for expenditure incurred only from the date of the approval, and not for the period earlier thereto but subsequent to the setting up of the in-house R&D facility; that in this context, Hon'ble court held that when once the approval is given, the entire expenditure incurred by the assessee on development of facility has to be allowed for weighted deduction; and that the Hon'ble courts referred the "expenditure so incurred".

54. Recently, a Co-ordinate Bench of this Tribunal dealt with this aspect in detail in Biological E Limited, Hyderabad Vs. DCIT in ITA No.1590/Hyd/2018, dt. 22/07/2022, after considering the provisions under section 35(2AB) of the Act, and the above decisions, held that the expenditure not reflected in form 3CL is not entitled for weighted deduction, and perhaps it may have to be considered under section 35(1) or section 37 of the Act as the case may be. For the sake of completeness, we extract the relevant observation of the Tribunal, here under,-

13. Under sub Rule 5A of the Rules, the prescribed authority shall, if he was satisfied that the conditions provided in Rule 6 and in Rule 35(2AB) of the Act are fulfilled, pass an order in writing in Form 3CM. This order passed in Form 5A is considered to be the approval of the in-house R&D facility. However, under Rule 6(7A) (b) of the Rules the prescribed authority is under obligation to submit the report in relation to the approval in Form 3CL to the Director General (Income tax exemptions) within 60 days of its granting approval. Further under Rule 6 (7A) (c), the company shall maintain a separate account for each approved facility, which shall be audited annually and a copy thereof shall be furnished to the approved authority by 31st day of October of each succeeding year. The assets acquired in respect of development of scientific R&D facility shall not be disposed of without the approval of the prescribed authority.

14. It is pertinent to note that all these requirements under Rule 6 (7A) of the Rules are the conditions prescribed for approval of expenditure. If it is the intention of the legislature that once the in-house R&D facility is approved, no approval of the expenditure is necessary, then there is no need of incorporating Rule 6(7A) of the Rules at all. It is only after the facility is approved and an order under Form 3CM was passed under Rule 6 (5A) of the Rules, the question of approval of expenditure incurred on in-house R&D facility under Rule 6 (7A) of the Rules arises.

15. Section 35(2AB) of the Act speaks of the allowability of weighted deduction in respect of the expenditure incurred on scientific research on in-house R&D facility as approved by the prescribed authority. It specifically reads that there shall be allowed a weighted deduction of the expenditure so incurred. The expression 'so incurred' has a definite relationship with the approved expenditure incurred in relation to the in-house R&D facility. A perusal of Rule 6 of the Rules clearly indicates that it relates to the prescribed authority for expenditure on scientific research. It does not say "Prescribed authority for approval of R&D facility". When the approval of the R&D facility by the prescribed authority is for a specific purpose of allowing weighted deduction in respect of the expenditure incurred on in-house R&D facility, it cannot be said that such an approval is confined merely to the in-house R&D facility, and has nothing to do with the quantum of expenditure.

16. Further the approval of the in-house R&D facility ends with issuance of Form 3CM under sub Rule 5A of Rule 6. If really the intention of the legislature, even prior to 01/07/2016, was to confine to the requirement of approval of the in-house facility, then there is

no further need to refer to the approval of expenditure incurred on in-house R&D facility under section 35(2AB) of the Act by way of Rule 6 (7A) of the Rules. By virtue of Rule 6(7A) of the Rules the prescribed authority is put under an obligation to verify whether certain conditions are satisfied before approving the expenditure. Rule 6 speaks of the expenditure and its approval and Form 3CL is only a Form of communication. Section 35(2AB) of the Act deals with the quantum of deduction that is allowable in respect of expenditure on scientific research and in respect of the business of biotechnology.

17. The essence of section 35(2AB) of the Act read with Rule 6 (5A) of the Rules is approval of the in-house R&D facility, whereas 35(2AB) of the Act read with Rule 6(7A) of the Rules is in relation to approval of the expenditure incurred on in-house R&D facility by a company, for weighted deduction. If the approval of the prescribed authority has nothing to do with the expenditure, but its role is confined only in respect of the in-house R&D facility, then the exercise of the prescribed authority under Rule 6(7A) of the Rules would be a redundant exercise because, if we go by the contention of the assessee, when once the in-house R&D facilities approved, all the expenditure, irrespective of the fact whether or not it is reflected in Form 3CL, would be qualified for weighted deduction. Rule 6 (5A) cannot be read to otiose Rule 6(7A) of the Rules. Both operate in their own fields and to say that the approval required under section 35(2AB) of the Act is only in respect of the in-house R&D facility but not in respect of the expenditure is violence to Rule 6(7A) of the Rules. Who else, other than the prescribed authority, can verify the propriety and benefit of incurring such expenses on the in-house R&D facility? It is only the approval of the prescribed authority that can give authenticity to the desirability of incurring the expenditure and deriving benefit out of such expenditure and that is the reason why Rule 6 prescribes the procedure for approval of the in-house R&D facility and the related expenditure thereon. Lest, as stated supra there is no need of Rule 6(7A) of the Rules at all or Form 3CL, for that matter. Accepting the argument of the Ld. AR, we are afraid, will attribute redundancy to the wisdom of legislature in prescribing Rule 6(7A) of the Rules and Form 3CL. Such an interpretation cannot be accepted because it militates against the purpose of prescribing Rule 6(7A) of the Rules and Form 3CL.

18. The argument of the assessee that the moment the approval is granted by the DSIR to the R&D facility and Form 3CM is issued, the role of DSIR comes to an end, does not come out of the provisions. At the cost of repetition, we would like to emphasise that

the technical competency about the need to incur the expenditure or the corresponding benefit derivable by the company rested with the prescribed authority only, and that the reason why Rule 6 and more particularly sub Rule 7A thereof prescribes the authority for approval of expenditure incurred on the in-house R&D facility and keeps the prescribed authority under an obligation to verify certain factors like the activities of the in-house R&D facility, maintenance of separate accounts, the approval of the expenditure that is eligible for weighted deduction under section 35(2AB) of the Act and to make it apart from the expenditure that is allowable under other provisions of the Act, it is necessary that such an expenditure must be incurred on scientific research on in-house R&D facility by the company engaged in the business of biotechnology, and the authority to determine such expenditure is provided by Rule 6(7A) of the Rules.

19. Even in respect of Form 3CL, even prior to the amendment thereof by the IT (10th amendment) Rules, 2016 w.e.f. 01/07/2016, vide item No. 9, the report to be submitted by the prescribed authority to the Director General (Income tax exemptions) under section 35(2AB) of the Act, shall contain the total cost of in-house research facility. By way of amendment for the purpose of electronic submission, the Form is made in a detailed manner for incorporation of the total cost of in-house research facility. There are no path breaking changes either in Rule 6(7A) of the Rules or in Form 3CL by way of the IT (10th Amendment) Rules, 2010, so as to impact the powers and duties of the prescribed authority or the right, liability or disability of the companies incurring expenditure on scientific research on in-house R&D facility.

20. When the entire exercise of section 35(2AB) of the Act read with Rule 6 particularly sub sections 5A and 7A thereof is in respect of the expenditure on scientific research which is allowable with weighted deduction, and the purpose of the prescribed authority is to have the technical competence to approve the in-house R&D facility and approval of the expenditure incurred in such in-house R&D facility, while looking at sub Rule 5A and 7A of Rule 6, it would be difficult to accept the contention of the assessee that the legislative intent behind section 35(2AB) of the Act read with Rule 6 (5A) and (7A) is that when once the facilities approved, it is the end of the matter and whatever the expenditure that is incurred by the assessee shall be allowed without any question with weighted deduction, thereby attributing redundancy to the exercise under Rule 7A. The expression "so incurred" occurring in section 35(2AB) of the Act denotes that the expenditure has nexus with the in-house

R&D facility, and the technical competence to decide whether such nexus exist between the expenditure and the in-house research facility rests with the prescribed authority to be approved under Rule 6(7A) to be communicated in Form 3CL. On a comprehensive reading of the provisions, we understand that the enquiry of the learned Assessing Officer as to any expenses said to have been incurred on the in-house R&D facility for the purpose of weighted deduction does not extend beyond the technically approved expenditure by the prescribed authority under Rule 6(7A) of the Rules and communicated by way of Form 3CL, and it is only in respect of such expenditure which is not to be found in Form 3CL, where the other provisions of the Act are applicable, the learned Assessing Officer's discretion steps in.

21. ... … …

22. The fact remains that the view taken by the Hyderabad Bench of the Tribunal in the case of Electronics Corpn. of India (supra) is applicable to the facts of the case, but this decision was not brought to the notice of Pune Bench of the Tribunal when this matter was considered in Cumins India Ltd., (supra). We are, therefore, not in agreement with the submissions on behalf of the assessee that prior to 01/07/2016 no power to quantify the expenditure incurred on in-house R&D facility was available with DSIR, after approval of the facility. As stated supra, Rule 6(7A) of the Rules was there in the statute book even prior to 01/07/2016 and earlier also it was reading that approval of expenditure incurred on in-house R&D facility by a company was subject to certain conditions. There has ever been a further requirement under Rule 6(7A)(c) of the Rules that the company shall maintain a separate account for each approved facility and it shall be audited annually, and a copy thereof shall be furnished to the Secretary, DSIR. If there is no power with the DSIR to determine/quantify the expenditure, there is no purpose of this particular provision. Apart from that, Rule 6(7A)(d) of the Rules requires that the assets acquired in respect of development of scientific R&D facility shall not be disposed of without the approval of the Secretary, DSIR. All the provisions under Rule 6(7A) of the Rules clearly indicate that there is a role for prescribed authority, namely, DSIR in respect of the expenditure, which includes both capital and revenue expenditure, that is incurred on in-house R&D facility by a company engaged in the business of biotechnology like the assessee.

> *23. Since we are of the view that the decision of Hyderabad Bench of the Tribunal in the case of Electronics Corpn. of India (supra) is applicable to the facts of the case which was not brought to the notice of the Bench at the time of deciding the case in Cumins India Ltd., (supra), and the provisions under sub Rule 6 of the Rules do not admit of any ambiguity, we find it difficult to hold that the requisite approval under section 35(2AB) of the Act is, therefore, only in respect of the in-house R&D facility but not in respect of expenditure and consequently, once the R&D facility is approved, entire expenditure, irrespective of the fact whether or not it is reflected in Form 3CL is eligible for weighted deduction. This position is amply clarified by Rule (5A) and (7A) of the Rules.*

55. Respectfully following the view taken by the Co-ordinate Bench of this Tribunal in Biological E Ltd. (supra), we are of the considered opinion that the expenditure not reflected in form 3CL is not eligible for weighted deduction. However, if this expense is genuinely incurred for business purpose, the assessee is entitled to claim deduction under other provisions of the Act than section 35(2AB) of the Act. The issue is, therefore, restored to the file of the learned Assessing Officer to verify the genuineness of the expense and if it is incurred for the business purpose, it has to be allowed under the Act for normal deduction. Ground No.6 is, therefore, treated as allowed for statistical purposes.

56. Lastly, the issue relating to the education cess and secondary and higher education cess was sent back to the file of the learned Assessing Officer to consider the facts and figures relating to such an issue and to take a view after hearing the assessee. We follow the same for these assessment years also.

57. In the result, appeals of the Revenue in ITA No.1231/Hyd/2018 is partly allowed, ITA Nos. 1232 & 1285/Hyd/2018 are dismissed. Appeals of

the assessee in ITA Nos. 1268, 1269 & 1328/Hyd/2018 are partly allowed for statistical purposes.

Order pronounced in the open court on this the 8th day of August, 2022

Sd/-	Sd/-
(LAXMI PRASAD SAHU)	**(K. NARASIMHA CHARY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad,
Dated: 08/08/2022

TNMM

Copy forwarded to:

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2. Dy.Commissioner of Income Tax, Circle-17(1), Hyderabad.
3. Asst. Commissioner of Income Tax, Circle-17(1), Hyderabad.
4. CIT(Appeals)-5, Hyderabad.
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