IN THE INCOME TAX APPELLATE TRIBUNAL
BENGALURU "B" BENCH, BENGALURU

Before Smt. Beena Pillai, Judicial Member
and
Ms. Padmavathy S., Accountant Member

IT(TP)A No. 460/Bang/2016 (Assessment Year: 2011-12)		
M/s. Astra Zeneca Pharma India Ltd. N1 12th Floor, Manyata Embassy Business Park, Rachenahalli Outer Ring Road Bengaluru 560045 PAN – AABCA1722B	vs	DCIT (LTU), Circle -1 JSS Towers, 100 Feet Ring Road Banashankari III Stage Bengaluru 560085
(Appellant)		(Respondent)

IT(TP)A No. 446/Bang/2016 (Assessment Year: 2011-12)		
DCIT (LTU), Circle -1 JSS Towers, 100 Feet Ring Road Banashankari III Stage Bengaluru 560085	vs	M/s. Astra Zeneca Pharma India Ltd. N1 12th Floor, Manyata Embassy Business Park, Rachenahalli Outer Ring Road Bengaluru 560045
(Appellant)		(Respondent)

Assessee by:	Shri Nageswar Rao, Adv.
Revenue by:	Shri Manjunath Karkihalli, CIT-DR

Date of hearing:	23/11/2022
Date of pronouncement:	30/11/2022

O R D E R

Per: Padmavathy, A.M.

These cross appeals by the assessee and the revenue are against the final order of assessment passed by the DCIT (LTU), Circle-1, Bengaluru under Section 143(3) r.w.s. 144C of the Income Tax Act, 1961 (the Act) dated 20.01.2016 for AY 2011-12.

2. The assessee is part of the Astra Zeneca group based in U.K. The activities of the assessee are broadly classified into manufacturing and trading of pharmaceutical products. The assessee as per the Transfer Pricing (TP) study is engaged in the coordination business of clinical trial activities on behalf of the Associated Enterprise (AE) namely Astra Zeneca AB Sweden. For the assessment year 2011-12, the assessee filed the return of income on 30.11.2011 admitting a total income of Rs.103,50,22,080/-. The case was selected for scrutiny under CASS and a notice under Section 143(2) of the Act was duly served upon the assessee. Since the assessee had several international transactions, a reference was made to the Transfer Pricing Officer (TPO) for determination of arm's length price (ALP). The TPO re-characterised the activities of the assessee as Clinical Research Organisation (CRO) doing clinical trial activity on its own account and not coordination of clinical trial activity. Accordingly, the TPO arrived at the TP adjustment of Rs.2,66,60,541/-. The AO while passing the draft assessment order, besides the TP adjustments, made the following disallowances: -

a)	Cost of samples -	Rs. 3,47,65,606
b)	Literature provided to doctors	Rs. 10,41,09,945
c)	Conference expenses of doctors	Rs. 16,86,162
d)	Travelling & Conveyance to doctors	Rs. 14,70,500
e)	Gifts and donations to doctors	Rs. 17,30,335

3. On further objections raised, the DRP gave partial relief to the assessee whereby the disallowance towards cost of samples and literature provided to the doctors were deleted. In respect of TP adjustments, the directions of the DRP reduced the TP adjustment to Rs.46,99,767/-.

4. Aggrieved by the final order of assessment the assessee is in appeal before the Tribunal. The Revenue is in appeal against the relief given by the DRP which is given effect in the final order of assessment.

5. We will first adjudicate the Revenue appeal(**IT(TP)ANo. 446/Bang/2016**).The revenue raised the following grounds

> 1. The directions of DRP is opposed to law and facts of the case.
>
> 2. The Hon'ble DRP has erred in giving decision in favour of the assessee without giving opportunity of being heard to the revenue as per provision of sec. 144C(11).
>
> 3. The Hon'ble DRP has erred in excluding AE as well AS Non AE segments on the ground of RPT when RPT is non AE segment is zero.
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> 4. The Hon'ble DRP has erred in excluding M/s. Lotus Labs Pvt. Ltd as a comparable on the ground that it fails RPT filter when the TPO has considered only the non-AE segment of the comparable wherein RPT is zero and hence qualifies RPT filter.
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> 5. The Hon'ble DRP has erred in facts and laws in rejecting M/s. Lotus Labs Pvt. Ltd as a comparable when the TPO has considered the revenue, costs and profit margins of non-AE segment which has no RPT.
>
> 6. The Hon'ble DRP has erred in giving relief to the taxpayer on the basis of taxpayer's submission that the comparable is following December end FY ignoring the fact that the TPO has provided March 2011 financials to the taxpayers along with show cause notice.
>
> 7. Whether the decision of Hon'ble DRP is within the purview of Sec.144C of the IT Act.

8. Out of the 7 grounds raised by the revenue the effective grounds contended are Ground Nos. 4 & 5 with regard to the exclusion of Lotus Labs as comparable by the DRP. The rest of the grounds are either general or not pressed and dismissed accordingly.

9. One of the international transactions provided by the assessee is “provision of global clinical trial services”. The profile of the assessee in respect of global clinical trial coordination is detailed in the TP study of the assessee which is placed on record at pages 217 to 803 of the paper book filed by the assessee. The FAR analysis is also placed on record at page 246 to 250 of the paper book I. The list of comparable finally selected by the assessee in its TP study and its average margin is in the range of 4.85% to 15.79% with a

median of 9.71% (page 289 to 292 of the paper book-I). Since the assessee's margin as per the TP study was determined at 16.50% (page 290 of the paper book-I filed by the assessee), the assessee sought to justify the ALP of the international transactions undertaken by the assessee in respect of "provision for global clinical trial services".

10. The TPO re-characterised the activities of the assessee as CRO and accordingly based on fresh research of comparables added "Lotus Labs" to the list of comparables. Further the TPO reworked the margin of the assessee by considering the reimbursement of expenses received from AE as part of revenue, the workings of which is given below: -

Global Clinical Trial Services (3CEB Report)	31,191,959
Recovery of expenses (3CEB Report)	93,995,337
Total Revenue	125,187,296
Segmental Result (refer to note 7 of sch 17)	7,311,316
Operating Cost	117,875,980
OP/OC	6.20%

11. The assessee objected to the inclusion of Lotus Labs as comparable on the ground that the data used is obtained u/s.133(6) which was not available to the assessee and that the related party transactions (RPT) of the company is very high thereby failing the RPT filter. The assessee also raised contentions with respect to treating the recovery of expenses from AE on cost-to-cost basis as operating revenue and also the reverse working of operating cost by considering the entire segmental profits which includes coordination of clinical trial segment and the co-promotion services segment. The TPO did not accept the contention of the assessee and based on the final set of comparables as listed below arrived at the arm's length margin of 28.82%.

1	Biocon Limited – Contract research segment	17.01%
2	Max Neeman – Clinical Research segment	53.51%
3	Syngene International Ltd	17.84%
4	Lotus labs Ltd	24.46%

	Average	28.20%

12. Considering the assessee's operating cost as given in earlier paragraph the TP adjustment was arrived at as per below working: -

Operating cost	117,875,980
Arm's Length Price @128.82% of Operating Cost	151,847,837
Price Received	125,187,296
Shortfall being adjustment	**26,660,541**

13. On further appeal the DPR accepted the contention of the assessee with respect to exclusion of Lotus Labs by relying on its decision in assessee's own case for AY 2010-11 where the company was excluded on the ground that the same fails the RPT filters. The relevant extract of the DRP directions are as given below: -

> It is submitted that the TPO has provided the assessee with the audited financial statements of Lotus Labs for the year ending March 2011 from which the RPT of Lotus Labs works out to 73.84% as tabulated below: -
>
> | Nature of transaction | March 2011 |
> |---|---|
> | Service income received (A) | 620,979,066 |
> | Total revenue (as per segmental details) (B) | 841,012,636 |
> | **RPT percentage (A/B)** | **73.84%** |
>
> It is further submitted that for AY 2010-11, the Assessee had filed objections before the Dispute Resolution Panel ("DRP") regarding the acceptance of Lotus Labs as a comparable for the relevant assessment year. The assessee submitted that the Lotus Labs had significant related party transactions i.e. 74.92% and thus must be excluded as a comparable. Vide its directions dated 27 November, 2014, the DRP appropriately directed the TPO/AO to exclude Lotus Labs as a comparable due to significant RPT. The DRP also held that since Lotus Labs maintains its books of accounts for the year ending December (calendar year as a financial year), it is not suitable for comparability.
>
> **Having heard the submissions** we are of the view that if the related party transactions are more than 25% of the total revenue, such company cannot be retained as comparable. This issue was considered by the DRP for the A.year 2010-11 and the DRP held that the company Lotus Labs needs to be excluded for the RPT filter failure and different financial year filter. It held that "we have perused the Annual Reports and convinced that the RPT are more than 25% of the total revenue and therefore the above company cannot be retained as a comparable. It is also noticed from the Annual Report that the above company is maintaining the

> account for December end financial year and therefore not suitable for comparability. In view of the exclusion of the above company from comparables, other issues of functional differences etc., becomes academic in nature. Accordingly we direct the assessing officer to exclude the above company from the comparable". As the facts are same for this year too we consider the company lotus labs has to be excluded, accordingly we direct the AO to exclude the above company from comparables.

14. With regard to the contention of the assessee for considering reimbursement of expenses as part of operating revenue the DRP held that a margin of 5% should be considered for TP purposes on the cost to cost reimbursements by relying on the decision of the Hon'ble ITAT, Hyderabad In the case of **M/s Kirby Building Systems India Limited** in **ITA No. 1759/Hyd/2012,** and in **ITA 262/Hyd/2014** According to the above directions of the DRP the TPO in the order giving effect arrive at the TP adjustment by applying 5% on Rs.9,39,95,337/-, i.e. Rs.46,99,767/-.

15. Revenue is in appeal against the exclusion of Lotus Labs. The learned D.R. submitted that the TPO has rightly characterised the activities of the assessee as CRO and therefore he supported the inclusion of Lotus Labs.

16. The learned A.R., on the other hand, relied on the decision of the coordinate bench of the Tribunal in assessee's own case for AY 2010-11 where the exclusion of Lotus Labs has been confirmed by the Tribunal.

17. We have heard the rival contentions and perused the material on record. We notice that the coordinate bench in assessee's own case ((IT(TP)A No.82 & 170/Bang/2015 dated 14.10.2022) has considered the same issue of exclusion of Lotus Labs and held as under: -

> 10. We have heard rival submissions and perused the material on record. We are of the view that Lotus Labs cannot be accepted as a comparable as it has significant RPT as per the financials of Lotus Labs for December

2010 sourced from the Ministry of Corporate Affairs Website and the year ending March 2010. The RPT worked out as under:-

Nature of transaction	December 2010	March 2010
Service income received (A)	61,05,21,550 (Refer page 1013 of paper book-III (320318981+ 248649911+40919609+ 633049)	53,79,19,528 (Refer page 1043 of paper book-III (197418806+ 312980622 27520100)
Total revenue (as persegmental details (B)	81,48,46,730 (refer total revenue under segmental details in page 1011 of paper book-III)	67,46,59,036(refer Totalrevenueunder Segmentaldetailsin Page 1043 of paper book-III)
RPT percentage (A/B)	74.92%	79.73%

11. The above working of RPT was not controverted by Revenue, even before the Tribunal. Therefore, Lotus Labs was rightly rejected by the DRP and not taken as a comparable. In this context, we would also like to state that the Tribunal in assessee's own case for assessment year 2009-2010, has remanded the issue of Lotus Labs RPT to the files of the TPOfor verification. The TPO while giving effect to the Tribunal order for assessment year 2009-2010, had excluded Lotus Labs as a comparable after verifying the facts from the financial statement and noting that the company has significant RPT transaction. Therefore, in the light of the aforesaid reasoning, the Revenue's appeal is dismissed.

18. For the year under consideration the DRP has worked out the related party transaction of the assessee to be 73.84% and the same is supported by the Annual Reports placed on record in page 897-898 of paper book. Therefore the company fails the RPT filters for the year under consideration also. Accordingly respectfully following the decision of the coordinate bench in assessee's own case we see no reason to interfere with the decision of the DRP. This ground of the Revenue is dismissed.

ITA No. 460/Bang/2016

19. The assessee raised the following grounds –

Grounds raised by the assessee

Based on the facts and circumstances of the case and in law, AstraZeneca Pharma India Limited respectfully craves leave to prefer an appeal against the order passed by Deputy Commissioner of Income Tax, LTU, Circle — 1 ("AO"), dated 20 January 2016, under section 143(3) read with section 144C of the Income Tax Act, 1961 ("Act"), in pursuance of the directions issued by the Hon'ble Dispute Resolution Panel ("Panel"), Bengaluru dated 30 December 2015 under section 144C(5) of the Act on the following grounds:

On the facts and circumstances of the case and in law:

1 The order of the learned AO is based on incorrect interpretation of law and therefore is bad in law.

2 The learned AO has erred in assessing the total income at Rs. 1,05,92,69,030 as against returned income of Rs 1,03,35,20,700 computed by the Appellant.

3 The learned AO has erred in law and on facts, in determining a sum of Rs. 1,03,97,300 as balance tax payable by the Appellant.

Corporate Tax Grounds

Disallowance of travel and conference expenses and gifts and donations paid to doctors

4 The learned AO/ Hon'ble Panel has erred, in law and on facts, in disallowing the amount of Rs. 48,87,017 in respect of travel and conveyance, conference expense and gifts and donations.

5 The learned AO/ Hon'ble Panel has erred, in law and on facts, in applying the CBDT Circular No 5/2012 ("CBDT Circular") dated 1 August 2012 without considering whether there has been any violation of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 ("IMC Regulations") and without granting sufficient opportunity to submit the factual/ technical arguments.

6 The learned AO/ Hon'ble Panel has erred, in law and on facts, in applying the CBDT Circular without appreciating that the IMC Regulations are only applicable to medical practitioners and shall not extend to pharmaceutical and allied healthcare companies.

7 The learned AO/ Hon'ble Panel has erred, in law and on facts in applying the CBDT Circular without appreciating that there was no violation of the IMC Regulations and therefore no part of the above amount of Rs. 48,87,017 in respect of travel and conveyance, conference expense and gifts and donations can be validly disallowed.

8 Without prejudice to grounds 4 to 7, the learned AO/ Hon'ble Panel has erred in law by retrospectively applying the CBDT Circular to the subject AY without considering the fact that the CBDT Circular is effective only from 1 August 2012 and hence applicable from AY 2013-14.

Disallowance of contribution towards gratuity fund

9 The learned AO has erred, in law and on facts, in disallowing Rs. 72,87,811 pertaining to contribution towards gratuity fund which was paid by the Appellant before the due date of filing of return of income for the AY 2011-12 without granting sufficient opportunity to submit the factual/ technical arguments.

10 The learned AO has erred, in law and on facts, in disallowing Rs. 72,87,811 pertaining to contribution towards gratuity fund which was paid by the Appellant before the due date of filing of return of income for the AY 2011-12 without appreciating/ giving effect to the directions issued by the Hon'ble Panel to allow the above expenditure after verifying the necessary facts.

11 The learned AO has erred, in law and on facts, in disallowing Rs. 72,87,811 pertaining to contribution towards gratuity fund on the ground that the Hon'ble Panel does not have the authority to issue directions to the AO under section 144C(8) of the Act to conduct further enquiry without appreciating the fact that such contribution was already disclosed as part of Tax Audit Report for the AY 2011-12.

Disallowance of expenditure incurred under Voluntary Retirement Scheme ("VRS")

12 The learned AO has erred, in law and on facts, in disallowing one fifth of Rs. 1,46,60,167 i.e Rs. 29,32,033 pertaining to amount paid to employees by the Appellant under VRS during the FY 2010-11 on the ground that the same has not been specifically disclosed in the Tax Audit Report for AY 2011-12.

13 The learned AO has erred, in law and on facts in disallowing one fifth of Rs. 1,46,60,167 i.e Rs. 29,32,033 pertaining to amount paid to employees by the Appellant under VRS during the FY 2010-11 without appreciating/ giving effect to the directions issued by the Hon'ble Panel to allow the above expenditure after verifying the amount claimed in the original and revised return of income.

14 The learned AO has erred, in law and on facts, in disallowing one fifth of Rs. 1,46,60,167 i.e Rs. 29,32,033 pertaining to amount paid to employees by the Appellant under VRS on the ground that VRS expenditure is not reflected in the audited financials for FY 2010-11 and Hon'ble Panel does not have the authority to issue directions to the AO under section 144C(8) of the Act to conduct further enquiry without appreciating the fact that the amount of Rs. 1,46,60,167 was voluntarily disallowed by the Appellant in filing revised return of income and the Hon'ble Panel had issued directions to allow one-fifth of this expenditure after verifying the original and revised return of income.

15 Without prejudice to grounds 12 to 14, the AO has erred in law and on facts, in disallowing VRS expenses by not considering the original and revised computation of income for the AY 2011-12, the details of VRS payments made to employees along with Form 16 issued to such

employees and also the fact that applicable tax was withheld from VRS payments made to employees

Disallowance of Rs. 59,41,704

16 The learned AO has erred, in law and on facts, in disallowing Rs. 59,41,704, which were disallowed under section 40(a)(ia) of the Act in AY 2010-11, however tax on which was withheld and deposited with the Central Government during the subject AY 2011-12 and hence allowable as deduction.

17 The learned AO has erred, in law and on facts, in disallowing the amount of Rs. 59,41,704 without considering the revised directions issued by the Hon'ble Panel under Rule 13 of the Income tax (Dispute Resolution Panel) Rules, 2009 directing the AO to allow deduction for the above expenditure.

Transfer Pricing Grounds

18 The learned AO/ Hon'ble Panel have erred, in law and in facts, by not accepting the economic analysis undertaken by the Appellant with respect to recovery of expenses from associated enterprises and making a TP adjustment of Rs. 46,99,767.

19 The learned AO/ Hon'ble Panel have erred, in law and in facts, by concluding that the Appellant has rendered services as part of recovering the third party cost, incurred on. behalf of the associated enterprises amounting **to** Rs. 9,39,95,337 without evaluating the nature of the third party expenses and accordingly levying 5% mark-up on third party expenses.

20 The learned TPO/ AO/ Hon'ble Panel have erred, in law and in facts in not accepting the functional and economic analysis undertaken by the Appellant and in characterizing the Appellant as a Clinical Research Organization ("CRO") as opposed to a mere coordinator of clinical trial activities being carried out in India on behalf of its AE.

General Grounds

21 The learned AO has erred in law and on facts, in levying interest under section 234C of the Act on income declared in the original return of income as against the income declared in the revised return of income resulting in excess levy of Rs. 11,221 (Rs. 7,43,319 *less* Rs. 7,32,098).

22 The learned AO has erred, in law and on facts, in levying interest of Rs 18,33,124 under section 234D of the Act.

Each of the ground is referred to separately, which may kindly be considered independent and without prejudice of each other.

23 Ground Nos. 1 to 3 and 21& 22 are general and do not warrant separate adjudication.The assessee raised Ground Nos. 4 to 8 with regard to

disallowance of travel and conveyance expenses and gifts and donations paid to doctors. During the course of hearing the learned A.R. submitted that Ground Nos. 5 & 6 are not pressed and hence the same are dismissed as not pressed.

24 With regard to Ground Nos. 4 and 7 the AO disallowed the below expenses by relying on Board Circular No. 5/12 dated 01.08.2012: -

i	Cost of samples distributed	3,47,65,606
ii	Travel & Conveyance provided to Doctors	14,70,500
iii	Literature provided to Doctors	51,56,108
iv	Conference expenses of Doctors borne	16,86,162
v	Gifts & donations provided to Doctors	17,30,335
	Total	4,48,08,711

The DRP gave relief to the assessee with regard to cost of samples distributed and literature provided to the doctors. Accordingly the following disallowances survive post the DRP directions

I	Travel & Conveyance provided to Doctors	14,70,500
Ii	Conference expenses of Doctors borne	16,86,162
iii	Gifts & donations provided to Doctors	17,30,335
	Total	48,87,017

25 The learned A.R. submitted that by incurring these expenses to doctors the assessee has not violated the MRI regulations. The learned A.R. also submitted that the expenses incurred by the assessee towards doctors is not hit by the judgement of the Hon'ble Supreme Court in the case of Apex Laboratories Pvt. Ltd. vs. DCIT (2022) 442 ITR 1. The learned A.R. relied on the decision of the coordinate bench in assessee on case for AY 2010-11 wherein the Hon’ble tribunal has reproduced the elaborate submissions made by the assessee and prayed that the same submissions can considered for the year under consideration also since there is no change in the facts of the issue. The relevant extract of the submissions made are given below –

Although detailed bifurcation of abovementioned expenses incurred alongwith nature of expenses were furnished before the lower authorities such expenditure was disallowed in entirety without appreciating that such expenses were not violative of MCI regulations. AO did not verify whether the expenses incurred by the Appellant falls within the ambit of MCI regulations but disallowed the entire expenditure relying onCircular5/2012withoutspecificallyhighlightingastohow each expense is violative MCI Regulations and CBDTcircular. Both the authorities failed to examine and find how details/documents filed by the Appellant justify disallowance. Disallowance was made under section 37 of the Act on a mistaken notion/presumption without verification of same in context of MCI regulations.

In this context to understand the issue involved.it is pertinent to note that the Hon'ble Courts before decision of Hon'ble Supreme Court in case of M/s Apex Laboratories Pvt. Ltd. v. DCIT (SLP No. 2320712019)) held that MCI Regulations are not applicable on Pharmaceutical companies and the expenses incurred by such companies are not violative of CBDT circular. During this phase assessments were on adhoc summary basis and critical evaluation of expenditure was not carried out in present appellant's case also. After decision of Hon'ble Supreme Court it has become necessary to critically evaluate each of the expenditure to see if disallowance is justified.

Without prejudice to above. during the course of assessment proceedings for assessment year 2016-17. AO specifically raised a query in relation to expenses incurred on doctors (notice enclosed as Annexure 6 to application for admission of additional evidences @ Pg 65-67) and Appellant filed details/ information in response to such notice/query (submission enclosed as Annexure 6to application for admission of additional evidences @ Pg 69-77). It may kindly be appreciated that the assessing officer after analysing the nature of expenses (similar to expenses incurred in assessment year 2010-11) in the context of MCI guidelines and the CBDT Circular 05/2012 dated 01.08.2012 accepted the claim of the assessee and did not make any disallowance in the assessment order (enclosed as Annexure 7 to application for admission of additional evidences @Pg78-86). This is because even if criteria as laid down in CBDT circular as also MCI regulation (as now affirmed in decision by Hon'ble Supreme Court) is applied. expenditure incurred towards contractual obligation with doctors and employee doctors of pharma companies does not call for disallowance.

It is pertinent to point out that the Hon'ble Supreme Court in case of M/s Apex Laboratories (which is otherwise distinguishable on facts) has ultimately upheld the validity of the CBDT circular which was considered

by the assessing officer while concluding assessment proceedings for assessment year 2016-17. Even otherwise, the decision of Hon'ble Supreme Court in the case of Apex Laboratories is distinguishable on facts (as highlighted in the subsequent paras) which needs to be analysed/examined by the assessing officer. In the present case. it is reiterated that the assessing officer has failed to examine the nature of expenses incurred by the assessee and has proceeded to disallow the same on conjecture and surmises. Thus in larger interest of justice and to ensure that disallowance is only in accordance withlaw. It becomes necessary to examine the exact nature of the expenditure from all these angles discussed hereinabove. To facilitate the same. additional evidences are being placed by way of details/documents on sample basis. We crave leave to file more complete details/documents before AO if the verification aspect is set aside/ remanded to Ld. AO. Accordingly, it is respectfully prayed that the issue may kindly be remanded and AO may kindly be directed to verify/examine such details/documents for all the above aspects.

Detailed submission justifying each expense incurred by the Appellant not being violative of MCI Regulations and CBOT circular is submitted hereinbelow:

Travel & Conveyance

AppellantincurredRs.11,04,735ontravellingandconveyance of doctors/ professors of high repute who have been hired by the Appellant as consultants to speak! make presentations at the seminars/ conferences conducted by the Appellant on various topics. We wish to mention that these expenses are not violative of MCI regulations for the reasons highlighted herein below:

- MCI regulations only covers the expenses incurred for medical professionals who are delegates and not those who act as guest speakers. Relevant portion of the Regulations (enclosed as Annexure 2 to application for admission of additional evidences @ Pg 34-49) states asunder:

Travel Facilities - A medical practitioner shall not accept any travel facility inside the country or outside, including rail, air. ship, cruise tickets, paid vacations etc. from any pharmaceutical or allied healthcare industry or their representatives for self and family members for vacation or for attending conferences, seminars, workshops, CME programme etc as a delegate.

- Travel and conveyance expense was incurred majorly for doctors. Who are on the payroll of Appellant and a declaration from the Appellant confirming the same has been enclosed as Annexure 3 to

application for admission of additional evidences @ Pg50.

 Considering the above, Appellant wishes to mention that any expenditure like travel etc incurred on doctors in the capacity of them being employees/ contractual service providers ofthe Appellant and not 'delegates' would not be violative of MCI regulations and deserves to be allowed as business expenditure.

 Even otherwise, Appellant also submits that travelling and accommodation facility is provided to certain doctors under agreement (apart from the employees) are not in the nature of freebies as the same have been incurred for availing the services of the doctors under a contractual obligation/ arrangement MCI regulation itself allows medical practitioners to work for pharmaceutical and allied health care industries in advisory capacities, as consultants and in doing so amedical practitioner should adhere to the certain guidelines/ safeguard. MCI regulations does not prohibit medical practitioners from accepting travel costs while acting as speakers/ consultants and providing consultancy services. Hence, CBDT Circular would not be applicable and provisions of section 37 of the Act cannot be invoked.

 In addition to the above. it may kindly be appreciated that the Appellant entered into an agreement with such doctors for availing professional! consultancy services under which apart from paying profession fee to such doctors. Appellant is also obliged to incur cost of travelling and accommodation. With regard to such arrangement/ expenses incurred. "it is submitted that such expenses would not come under the ambit of "freebies" as mentioned in IMC Regulations/ CBDT Circular, since such expenses have been incurred based on specific contractual arrangement entered with doctors and not given gratis to medical practitioners which alone is prohibited by IMC Regulations/ CBDT Circular. Even though the term "freebies" has not been defined under the Act, the same can be understood from common parlance as something that is given to another person for gratis without any obligation to incur such expense and without expecting any reciprocal service from the other person. Sample copies of agreements entered with doctors are enclosed as Annexure 4 to application for admission of additional evidences @; Pg 51- 62.

 Considering that the doctors are hired as speaker/ consultant to provide presentations at the seminars/ conference conducted by the Appellant. the travel and accommodation expenses incurred by the Appellant while availing such services of doctors have been incurred in the course of conducting its normal business operations and

hence.eligiblefordeductionundersection37oftheAct.

Gifts & donations

- Break-up of gifts & donations expense reveals that it includes the following expenses:

  Conference expense of INR 50,94,395
  Publicity and literature expenseofINR22,19,264,and
  Other marketing expense of INR38,25,933.

- Conference expense includes expenses incurred on meals. accommodation, travel. conveyance. books and literature. sponsorship. audio visual set up hired. etc. On perusal of such details. it may kindly be appreciated that expenses in the nature of meals, accommodation, travel, conveyance,. etc. incurred on doctors are covered under the contractual agreement entered with them or are expenses incurred on employee doctors who are otherwise not covered within the prohibitions imposed under the MCI regulations. That apart. expenses in the nature of books, literature, sponsorship, audio visual set up, etc. are not incurred on any doctor in order to promote the Applicant's products. These expenses are incurred in the course of business and cannot be treated as freebies.

- Publicity and literature expenses also includes webcast charges. which are not specifically prohibited under the MCI regulations. Sample copy of invoices are enclosed as Annexure 5 to application for admission of additional evidences @ Pg63- 64.

In Appellant's own case for A Y 2011-12 (Page 816 to 859 of the paperbook) and AY 2012-13 (Page 860 to 881 of the paperbook). DRP has directed the learned AO to allow deduction of expenses pertaining to Publicity and Literature. basis the reason that such expenses are not specifically covered by the MCI Regulations (i.e. cannot be categorised as Gift. Travel facility. Hospitality. Cash or Monetary grant) and such expenses are required to be incurred by the Appellant so that the medical practitioners stay abreast of developments on various medicines manufactured/ sold by the Appellant and also the diseases which can be cured by such medicines.

With regard to other marketing expense. we wish to mention that it majorly includes payments to State Chemist and Drug Association in the nature of Product Information Service Charge which is paid in

order to publish the information on the Appellant's products and the payment is made based on the standard rates framed by these associations. We wish to submit that the above expenditure is not specifically prohibited in the MCI regulations.

Even otherwise, expenses incurred by theassessee would not be hit by the decision of Hon'bleApex Court in case of M/s Apex Laboratories Pvt. Ltd. v. DCIT (SLPNo. 2320712019) which is distinguishable on facts.

Post issuance of directions dated 27.11.2014 by DRP and during the pendency of the present appeal before the Hon'ble Tribunal, Hon'ble Supreme Court in the case of Apex Laboratories Pvt Ltd. v. DCIT (2022] 135 taxmann.com 286, under the facts of that taxpayer, held freebies/gifts given to doctors to be not allowable under section 37 of the Act.

In this case, taxpayer gifted expensive gifts such as hospitality, conference fees, gold coins, LCD TVs, fridges, laptops, etc. to medical practitioners to promote its nutritional health supplement 'Zincovit'. In Appellant's case, the expenditure is towards contractual obligations with some doctors for seeking their services in lieu of remuneration. In fact, in the agreement entered with the doctors. it is specifically mentioned that the latter will not prescribe Astra's products for gaining any business advantage for AstraZeneca (Refer Pg 52, 56, 60 of application for admission of additional evidence). It is settled law that decision of Courts has to be read in context of facts of the case. Expenses incurred in Appellant's case under a contractual obligation for receiving consultancy services of doctors are clearly distinguishable from facts of the case decided by Hon'ble Supreme Court (supra).

Expenses incurred by appellant when examined in context would be clearly not in violation of the regulations framed by the Medical Council. Accordingly, it is prayed that the same deserve to be allowed.

Ground of appeal no. 7: Without prejudice to the above,Amendment to IMC Regulations are not applicable prior to 10 December 2009

Hon'bleITATinAssessee'sowncaseforAY2009-10hasheld that no disallowances of expenditure incurred by the Assessee on doctors prior to the amendment of IMC regulations i.e. prior to 10 December 2009 can be made(Page 1251 of Legal Paper book -IV) Assessee submits that the CBDT Circular dated should not be applied retrospectively as the amendment to the IMC Regulationswaseffectivefrom10December2009. The break-up of

expenses are as follows (refer page 1500 of Legal Paperbook Vol5):

Particulars	Pre Amendment	Post Amendment	Total
Travel Conveyance provided doctors	7,64,447	3,40,288	11,04,735
Conferen &Sympos and other marketing expenses	14,16,528	75,03,799	89,20,327
Publicity and	8,54,977	13,64,286	22,19,263
Total	30,35,953	92,08,373	1,22,44,3

Reliance in this regard is placed on the below decisions:

- ACIT vs M/s. Geno Pharmaceuticals Limited(ITANo.12/P J12014) (Page1088oftheLegalPaperbook-III)
- State of Bombay vs Vishnu Ramachandra (AIR1961SC307) (Page 1094 of Legal Paperbook - Ill)
- Ritesh Aggarwal and Others vs SEBJ and Others(20088SCC 205) (Page 1108 of Legal Paperbook - III)
- CJ Paul and Others vs District Collector and Others (200914 SCC 564) (Page 1117 of Legal Paper book -III)

That apart. even if expenses incurred by the assessee during pre-amendment are directed to allowed. the expenses incurred post amendment would include expenses which are otherwise not violative of MCI Regulation as also CBDT circular for reasons already explained herein above. Therefore. same may kindly be directed to be allowed a deduction after examination byLd.AO. In this regard. it is respectfully prayed that the issue of disallowance of expenditure incurred on doctors may kindly be restored to the file of assessing officer for fresh examination / verification."

26 The learned AR submitted that for AY 2010-11, the Hon'ble Tribunal has remitted the issue back to the AO for examination of additional evidence and allow the claim accordingly. The learned AR also submitted that for the year under consideration also, the assessee is filing additional evidences and prayed that the same may be admitted.

27 The learned D.R. submitted that the issue is covered by the decision of the Hon'ble Supreme Court in the case of Apex Laboratories Pvt. Ltd. (supra) The learned DR further submitted that since the detailed of expenses are

furnished by the assessee before the Tribunal the matter may be restored to the AO to examine whether such expenditure incurred by the assessee is violative of provisions of MIR regulations on the dictum laid down by the Hon'ble Apex Court.

28 We have heard the rival contentions and perused the material on record. The additional evidence furnished by the assessee providing the details of expenditure and the breakup incurred on doctors goes to the root of the dispute, therefore for substantial justice the same is admitted and taken on record for adjudication. We notice that the similar issue is considered by the coordinate bench in assessee's own case and held that -

> 19. We have heard rival submissions and perused the material on record. The assessee has filed additional evidence under Rule 29 of the Income Tax (Appellate Tribunal) Rules, 1963 for admission of additional evidence. The additional evidence is details of break-up of expenses, such as travelling, conveyance, gift and donations provided to Doctors aggregating to Rs.1,22,44,326. It was stated that though the assessee had submitted before the lower authorities such details, were not segregated under various heads. It is pertinent to note that prior to the judgment of the Hon'ble Apex Court in the case of M/s.Apex Laboratories Pvt. Ltd. v. DCIT (supra), many of the judicial pronouncements had held that MCI Regulations are not applicable on pharmaceutical companies and expenses incurred by such companies are not violative of CBDT Circular. During this phase of assessment, there were only adhoc summary basis evaluation of expenditure. In the present case also there is no critical evaluation of the expenses and post the Hon'ble Supreme Court judgment, the dictum laid down, same needs to be followed and each of the expenditure needs to be evaluated to see if the disallowance is justified. It is also important to note that for the assessment year 2016-2017, the A.O. had raised query in relation to the expenditure incurred on the Doctors by the assessee. The assessee filed detailed response to such notice and the A.O. after analyzing the nature of expenses (which is claimed by the assessee similar to the expenditure incurred for the relevant assessment year) in the context of MCI Guidelines and CBDT Circular No.5/2012 dated01.08.2012 accepted the claim of the assessee. Copy of the order in assessee's own case for assessment year 2016-2017, is placed on record as additional evidence. Therefore, it was claimed that even if the criteria as laid down in CBDT Circular and also the MCI Regulation (as

> now affirmed by the Hon'ble Apex Court is applied), the expenditure incurred towards contractual obligation with Doctors and employees of pharmaceutical companies does not call for disallowance. In the present case, the A.O. had primarily made disallowance by referring the CBDT Circular No.5/2012 dated 01.08.2012. The A.O. has not critically examined the nature of expenditure incurred by the assessee. In the larger interest of justice, in view of the latest judgment of the Hon'ble Apex Court, which has examined the very same issue, it becomes necessary to examine the exact nature of expenses incurred by the assessee for Doctors from all angles. Therefore, for substantial question and cause, the additional evidence are taken on record. Since the additional evidence is taken on record, necessarily, the matter needs fresh verification by the A.O., especially in the light of the recent judgment of the Hon'ble Supreme Court in the case of M/s.Apex Laboratories Pvt. Ltd. v. DCIT (supra). For the aforesaid purpose, the issues raised in grounds 4 to 8 are allowed for statistical purposes. It is ordered accordingly.

29 It is submitted that for the year under consideration also the facts are identical and accordingly, respectfully following the above decision of the coordinate bench we remit the issue back to the AO to examine the nature of expenditure incurred by the assessee and to verify the issue afresh in the light of the recent judgement of the Hon'ble Supreme Court in the case of Apex Laboratories Pvt. Ltd. (supra). Ground Nos. 4 to 7 are allowed for statistical purposes.

30 Vide Ground No. 8 the assessee made a without prejudice submission that the CBDT circular is only prospective and applicable from AY 2013-14. Since we have decided the issue and remitted to AO for fresh examination this ground has become academic and does not warrant separate adjudication.

31 Next issue is with respect to disallowance of contribution towards gratuity funds (Ground 9 to 11). The assessee incurred Rs.4,63,24,847 (4,63,24,847 – 72,87,811) towards contribution to gratuity fund and paid to the said fud before the due date for filing return of income. The same was also disclosed in the tax audit report. It was therefore submitted that the entire

amount is eligible for deduction u/s. 36(1)(va) of the Act. However, the assessee by inadvertence claimed only Rs.3,90,37,036 while filing the return which was rectified by filing revised return where the entire amount of Rs.4,63,24,847 was claimed as a deduction.

32 The AO noted that Rs.72,87,811 pertaining to contribution towards gratuity fund has not been specifically disclosed in the tax audit report and accordingly disallowed the same. The DRP directed that amount paid before the due date for filing the return was allowable deduction. The AO, however, upheld the disallowance on the ground that no further enquiry can be made by the AO in view of section 144C(8) of the Act.

33 Before us, the ld. AR submitted that pursuant to the DRP directions, the assessee placed all the evidence before the AO and revised computation of income. The contribution was made before the due date for filing the return and hence the entire amount was an allowable deduction as per Hon'ble Supreme Court decision in the case of *Goetze (India) Ltd. V. CIT, 284 ITR 323 (SC)*.

34 The learned D.R. did not have any objection.

35 We have heard the rival contentions and perused the material on record. We noticed that the AO has not examined the details as per the directions of the DRP and has admitted that gratuity payment required further enquiry. The AO has made disallowance considering the provisions of Section 144C(8) of the Act and sustained the disallowance. Since the AO has not verified the details of gratuity based on the details furnished by the assessee we remit the issue back to the AO with a direction to examine the details of payment of gratuity and decide the allowability accordingly. This ground is allowed for statistical purposes.

36 Ground Nos. 12-15 are with regard to disallowance of expenditure incurred under Voluntary Retirement Scheme (VRS). The assessee in the original return inadvertently claimed deduction of entire VRS payment of Rs.1,46,60,167 instead of 1/5th of the amount i.e. Rs.29,32,033 as per section 35DDA of the Act. The assessee filed revised return rectifying the same. The AO disallowed the same on the reason that same was not disclosed in the tax audit report. The DRP directed the AO to verify the facts in the revised return. The AO disallowed 1/5th of the amount in the revised return without verification of the evidence in view of section 144C(8) of the Act.

37 Before us, the ld. AR submitted that the auditor has inadvertently mentioned the deduction claimed as NIL u/s. 35DDA which was a technical mistake. It was submitted that a defect in Form 3CD cannot lead to denial of deduction claimed. In view of the Supreme Court decision in the case of *Goetze (India) Ltd. (supra)*, it was prayed that the assessee's claim may be allowed.

38 The learned D.R. did not have any objection.

39 We have heard the rival contentions and perused the material on record. We noticed that the AO has not examined the details as per the directions of the DRP and has made disallowance considering the provisions of Section 144C(8) of the Act and sustained the disallowance. Since the AO has not verified the details of spends towards VRS payments based on the details furnished by the assessee we remit the issue back to the AO with a direction to examine the details of and decide the allowability accordingly. These grounds are allowed for statistical purposes.

40 Ground Nos. 17 & 18 with respect to disallowance under Section 40(a)(ia) of the Act was not pressed and hence dismissed as not pressed.

41 The assessee raised Ground Nos. 19 to 21 with regard to transfer pricing adjustment. Ground Nos. 19 to 20 relate to the DRP making TP adjustments @ 5% of the expenses reimbursed by the AE and Ground No. 20 is with regard to re-characterisation of assessee as a Clinical Research Organisation (CRO).

42 During the course of hearing the learned A.R. submitted that for the year under consideration the re-characterisation of assessee as CRO will not be contested if the issue raised in ground 19 & 20 are held in favour of the assessee. The learned AR accordingly prayed that Ground no.20 can be left open. 4,95,00,000

43 During the year under consideration the assessee has recovered an amount of Rs.0.495 crores being external cost incurred towards clinical trial expenses. These expenses are recovered from the AE on cost to cost basis. The assessee in the transfer pricing study has excluded this recovery of cost both from the revenue and accordingly arrived at a margin for coordination of clinical trials at 16.5% of cost (OP/OC) in the TP study. The TPO noticed that in Form 3CEB the assessee had mentioned that an amount of Rs.9,39,95,337 have been recovered from AE on a cost to cost basis. The assessee submitted this entire cost did not pertain to clinical trial scheme and accordingly should not be considered while computing margin of the clinical trial segment. However, the TPO did not consider the submissions and added the said recovery of expenses to the revenue from clinical trial services and accordingly reworked the margin of the assessee at 6.20% in order to make the transfer pricing adjustment

44 The DRP held that the TPO's action to include the recovery of expenses to the revenue from clinical trial services is incorrect. However, the DRP held the reimbursement of expenses as a separate international transaction and proposed a margin of 5% to be at arm's length on recovery of cost and made

the TP adjustment accordingly. The relevant portion of the directions of the DPR is extracted below: -

> **Having considered the submission, it** is noticed by us that the recovery of expenses was shown in separate international transaction in the 3CEB report, the assessee also in response to the show cause notice objected to the inclusion of such revenue for ALP adjustment which have been reproduced by the TPO in page 20 of the order passed by him , however, without recording any finding on the assessee's objection, the amount of 9,39,95,337/- has been considered as part of the total revenue for making the ALP adjustment, we do not agree with this approach of the TPO, however, it cannot be denied that the assessee has not rendered any service for the cost which have been recovered from the AE, therefore, in our view for such services, the assessee should have recovered such amount on the cost. The Hon'ble ITAT, Hyderabad in the case of **M/s Kirby Building Systems India Limited** in **ITA No. 1759/Hyd/2012,** and in **ITA 262/Hyd/2014** in respect of assessment year 2008-09 and 2009-10, in paragraph 10 of the order held that "considering the fact that some services are certainly required and assessee has to incur cost in the beginning thereby extending some credit facility, we are of the opinion a mark up of 5% on the above reimbursement cost would justify the fact of the case." Similar circumstances exist in the case of Asseessee and therefore , **respectfully following the decision of the Hon'ble ITAT, Hyderabad, we direct the Assessing Officer to adopt a mark up of 5% on the recovery cost of 9,39,95,337/-**

45 The ld. AR submitted before us that the subject matter of appeal is adhoc mark up on recovery of expenses on cost to cost basis from AE on two grounds viz., firstly, the recovery of cost pertaining to manufacturing and trading segment which is a ‘pass through’ cost and hence does not require any mark up. Secondly, in case a mark up is necessary in law, adhoc 5% mark up needs to be deleted as the same is within the tolerance limit prescribed. However, the TPO/DRP without referring to any evidence filed by the assessee has proceeded on a mere presumption to make a TP adjustment to the transaction of recovery of expenses on cost to cost basis.

46 It was submitted that details at page 804 of PB Vol.I show the nature of expenses and that the recovery was from certain group companies which was different from the one to which the coordination services for clinical trial

services were provided. In any case, these aspects are not challenged in its appeal by the department. It was further submitted that the ITAT in the case of *FedEx Express Transportation and Supply Chain Services India Pvt. Ltd. V. DCIT* has held that the taxpayer merely provides coordinating services and has not incurred any direct costs or performed any direct functions, deployed assets or undertaken risks. It was held that the payments made by the taxpayer to third parties on behalf of AE has been reimbursed by the AE as pass through costs for determining profit margin. Relying on the Delhi High Court decision in the case of Li & Fung Case, it was held that the payment made by the assessee to the third party on behalf of AE which was reimbursed by the AE cannot be included in the total cost of the assessee for determining the profit margin.

47 Without prejudice to the above, it was submitted that in case mark-up of 5% on the recovery of expenses is levied, the assessee would still be at arm's length margin as per the provisions of section 92C(2) of the Act and therefore TP adjustment would accordingly be at NIL.

48 The ld. DR supported the orders of the lower authorities.

49 We have heard the rival contentions and perused the material on record. The DRP has accepted the contention of the assessee that the receipts from AE towards reimbursement of expenses should not be part of the total revenue of the assessee. However the DRP has attributed a margin of 5% by stating that the assessee has rendered some service and therefore the payments needs to be marked up. The contentions of the assessee with regard to the receipts are that this is a cost to cost recovery of expenses paid i.e. pass through cost and that the payments are made on behalf of and recovered from certain group companies which were different from the one to which coordination of clinical trial services are rendered. It is also noticed that the assessee has not routed the

payments and the recovery through the Profit and loss account. In the case of FedEx Express Transportation and Supply Chain Services India Private Limited (supra) the Mumbai Bench of ITAT has relied on the decision of the Delhi High Court in the case of Li and Fung India Pvt Ltd vs CIT' in Income Tax Appeal No.306 of 2012, judgment and order dated 16.12.2013, to hold that the compensation paid to the assessee is based on functions performed by it to the AE on the operation costs incurred by it and not on the cost of services sourced from the third party in India. The relevant extract of the decision of the Hon'ble High Court as relied on by the Tribunal is given below –

> 39. The TPO"s determination enhanced LFIL"s cost base for applying the operating profit over total cost margin. LFIL"s compensation model is based on functions performed by it and the operating costs incurred by it and not on the cost of goods sourced from third party vendors in India. Allotting a margin of the value of goods sourced by third party customers from Indian exporters/vendors to compute the appellant's profit is unjustified. This Court is of opinion that to apply the TNMM, the assessee's net profit margin realized from international transactions had to be calculated only with reference to cost incurred by it, and not by any other entity, either third party vendors or the AE. Textually, and within the bounds of the text must the AO/TPO operate, Rule 10B(1)(e) does not enable consideration or imputation of cost incurred by third parties or unrelated enterprises to compute the assessee's net profit margin for application of the TNMM. Rule 10B(1)(e) recognizes that "the net profit margin realized by the enterprise from an international transaction entered into with an associated enterprise is computed in relation to costs incurred or sales effected or assets employed or to be employed by the enterprise ..." (emphasis supplied). It thus contemplates a determination of ALP with reference to the relevant factors (cost, assets, sales etc.) of the enterprise in question, i.e. the assessee, as opposed to the AE or any third party. The textual mandate, thus, is unambiguously clear.
>
> 40. The TPO"s reasoning to enhance the assessee's cost base by considering the cost of manufacture and export of finished goods, i.e., ready-made garments by the third party venders (which cost is certainly not the cost incurred by the assessee), is nowhere supported by the TNMM under Rule 10B(1)(e) of the Rules. Having determined that (TNMM) to be the most appropriate method, the only rules and norms prescribed in that regard could have been applied to

determine whether the exercise indicated by the assessee yielded an ALP. The approach of the TPO and the tax authorities in essence imputes notional adjustment/income in the assessee's hands on the basis of a fixed percentage of the free on board value of export made by unrelated party venders.

xxx xxx xxxx

50. In light of the above circumstances, this Court is of the opinion that the TPO"s addition of the cost plus 5% markup on the FOB value of exports among third parties to LFIL"s calculation of arm's length price using the TNMM is without foundation and liable to be deleted. The appeal is allowed and the order dated 25/11/11 of the ITAT Tribunal, Delhi Branch is liable to be and is accordingly set aside. The questions of law framed are answered in favour of the assessee, and against the revenue. The appeal is allowed in the above terms."

50 It is not in dispute that the payments received by the assessee from AE towards reimbursement of expenses incurred on behalf AE should not be part of the operating cost. In revenue's appeal this issue as held by the DRP has not been contended. We notice that the DRP has arrived at the margin of 5% by relying on the judgement in the case of Kirby Building Systems (supra) without going into the details of how the same is applicable to assessee's case in terms functions, assets and risk (FAR) analysis and without any bench marking. In the said case the issue involved was not a pure reimbursement of cost but cost sharing exercise in implementing ERP systems in the group and therefore is distinguishable from assessee's case. In assessee's case our attention was drawn to the fact that the services are rendered by the third party and the assessee raises a back to back debit notes supported by the relevant third party invoices which goes to evidence that it is merely a pass through cost. It is also submitted that the expenses such communication expenses, Conference and symposium expenses, printing & stationery, salary cost, Travel and conveyance, legal and professional fees are paid by the assessee to third party and recovered on cost-cost basis from AEs. Following table is the breakup of the expenses as submitted by the assessee below the lower authorities –

Nature of expenses	Purpose of recovery of expenses
	and IT support charges. As per the AZ group policy, these charges has been recovered from AEs on cost to cost basis.

Given the above, the **nature** of the recovery of expenses and the amount received from its AEs against each head is provided as under:

Name of AEs	Nature of expenses	Amount (Rs.)
AZ Singapore	Communication expenses	1,23,254
	Conference and symposia	2,01,612
	Contribution to provident and other funds	20,11,626
	Depreciation	40,337
	Insurance	24,679
	Legal and professional fees	55,71,898
	Other expenses	3,771
	Other liabilities	14,97,485
	Printing & Stationery	3,58,198
	Publicity and literature	277
	Rent	-2,485
	Repairs and maintenance-Others	10,830
	Salaries, wages and bonus	96,10,600
	Stores, spare parts and loose tools consumed	27,062
	Travel and conveyance	15,82,041
	Workmen and staff welfare, others	3,34,798
TOTAL (A)		**2,13,95,983**
AstraZeneca Plc, United Kingdom	Communication expenses	10,386
	Conference and symposia	670
	Contribution to provident and other funds	4,87,346
	Legal and professional fees	6,53,80,997
	Other liabilities	996
	Salaries, wages and bonus	5618370
	Stores, spare parts and loose tools consumed	8,872
	Travel and conveyance	5,44,843
	Workmen and staff welfare, others	14,093
TOTAL (B)		**7,20,66,573**
AstraZeneca US	Conference and symposia	4,471
	Travel and conveyance	3,88,195
	Workmen and staff welfare, others	922
TOTAL (C)		**3,93,588**
AstraZeneca Pharmaceuticals Co. ltd, China	Travel and conveyance	1,39,193
TOTAL (D)		**1,39,193**
GRAND TOTAL (A+B+C+D)		**9,39,95,337**

51 In our view whether the mark- up of the cost of the services rendered by the Third Party can be applied for determining the ALP in the hands of the assessee should be examined from the angle of whether by making the payment on behalf of AE the assessee is performing any function or deploying any assets or has born any risks. It is also important to examine whether the services are rendered by the third party to the AEs and the assessee's role is limited the extent of only routing the payments and that there is no service rendered by the assessee to the AE warranting an ALP adjustment. The DRP has not examined these facts based on the details furnished and has calculated an adhoc margin of 5% without any bench marking analysis and without attributing any reasons as to why the reimbursement is a separate international

transaction. We also notice that the DRP has not considered the assessee's submission that the entire expenses incurred on behalf of AE does not pertain to coordination of clinical trial segment since the AEs who have reimbursed the expenses are not those to whom clinical trial services are rendered by the assessee. In view of these discussions we are of the considered view that the issue should be remitted back to the DRP to examine the various details and submissions furnished by the assessee and decide the issue in accordance with law. The DRP is directed to keep in mind the decision of the Hon'ble Delhi High Court in the case of Li and Fung India Pvt Ltd (supra) while deciding the issue. Accordingly this ground is allowed in favour of the assessee for statistical purposes.

52 In the light of our decision above with regard to the TP adjustment Ground no 21 with regard to recharacterisation of the assessee as CRO has become academic and is left open.

53 Ground no.22 with regard to interest u/s.234C it is contended that the interest is not computed on the income as per the revised return filed by the assessee. Accordingly we direct the AO to verify and compute the interest in accordance with law.

54 The assessee raised Ground no.23 is consequential not warranting separate adjudication.

55 The assessee raised Ground No.24 to 26 as additional grounds. However during the course of hearing the assessee did not press of ground no 24 and 25 and therefore these grounds are dismissed as not pressed.

56 The additional grounds no.26 reads as under: -

I. **Additional legal ground to claim deduction of refund of excess taxes paid on distribution of dividend during the year**

With regard to the additional legal ground relating to refund of excess taxes paid on distribution of dividend, it is submitted that the Appellant out of abundant caution had not claimed the refund of said payments for the year under consideration in the absence of clarity in respect of the said issue. However, recently, the **Hon'ble Delhi Income-tax Appellate Tribunal in case of Giesecke & Devrient (India) Pvt Ltd (1TA No. 7075/DEU2017)** dated 13 October 2020, following the co-ordinate bench judgment in the case of Maruti Suzuki India Ltd (961/DEU2014), has held that tax rates specified in Double Taxation Avoidance Agreement ("DTAA") in respect of dividend must prevail over dividend distribution tax ("DDT").

In light of the above judicial development, the Appellant wishes to file an additional legal ground of appeal (enclosed as **Annexure 1)** for claiming refund of excess taxes paid on distribution of dividend.

Your Honours would appreciate that additional legal grounds can be raised at appellate stages. It is submitted that the additional ground of appeal in respect of the above issue is purely legal ground. In view of the above, the Appellant requests your Honours to admit the additional ground of appeal. In respect of the above proposition, we rely on the following decisions:

- National Thermal Power Co. Ltd. (229 ITR 383) (SC)
- Jute Corporation of India Ltd. (187 ITR 688) (SC)
- Ahmedabad Electricity Co. Ltd. (199 ITR 351) (Born FB)
- M/s Wheels India Ltd (ITA No 251/Mds/2010) dated 14 March 2014
- All Cargo Global Logistics Ltd. vs. DCIT — ITAT Special Bench-ITA No. 5018/Munn/2010 dated 21 May 2012

In view of the above, the Appellant requests your Honours to consider the additional ground of appeal enclosed herewith and decide the same on merits.

57 The additional ground raised is pure legal issue, which does not require investigation of new facts. Hence, placing reliance on the judgment of the Hon’ble Apex Court in the case of National Thermal Power Co. Ltd. v. CIT (1998) 229 ITR 383 (SC), we admit the additional grounds.

58 We heard the heard the rival submissions and perused the material on record. The ld AR in support of the above line of reasoning, relied on a decision of the coordinate bench in the case of Giesecke & Devrient India Pvt

Ltd Vs ACIT [(2020) 120 taxmann.com 338 (Del). We however notice that the correctness of the aforesaid decision has been doubted by another Division Bench at Mumbai in the case of DCIT, Mumbai Circle 11(3)1), Mumbai Vs. Tata Oil India (P) Ltd., and an order of reference dated 23.6.2021 recommending constitution of a Special Bench to decide the issue has been made to the Hon'ble President of the Tribunal. We find that on this issue, there has been conflicting views and the matter has been referred by the Mumbai Bench of ITAT for constitution of a larger Bench. In the light of the development, we are of the view that it would be just and appropriate to set aside this issue to the AO for consideration afresh in the light of the law and the outcome of the decision of larger bench on the issue after affording the assessee opportunity of being heard.

59 In the result, the revenue appeal is dismissed and the appeal filed by the assessee is partly allowed.

Dictated and pronounced in the open Court on 30th November, 2022.

Sd/-	Sd/-
(Beena Pillai)	**(Padmavathy S)**
Judicial Member	**Accountant Member**

Bengaluru, Dated: 30th November, 2022

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *DRP-1, Bengaluru*
4. *The CIT -*
5. *The DR, ITAT, Bengaluru*
6. *Guard File*

By Order

//True Copy//

Assistant Registrar
ITAT, Bengaluru

n.p./*Desai S Murthy /*