आयकर अपीलीय अधिकरण
मुंबई पीठ "जे" मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य,एवं
श्री ओम प्रकाश कांत, लेखाकार सदस्य के समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J" BENCH
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER

आ.आ.सं. २६३३/मुंबई/२०१५ (नि.वं. २००९—१०)
ITA No.2633/MUM/2015 (A.Y.2009-10)

M/s Wockhardt Ltd.
Wockhardt Towers,
Bandra Kurla Complex, Bandra (E)
Mumbai-400 051
PAN No. AAACW2472M ..... अपीलार्थी/Appellant

बनाम Vs.

Deputy Commissioner of Income Tax
Range 10 (1), Aayakar Bhavan,
Mumbai-400 020 ..... प्रतिवादी/Respondent

आ.आ.सं. २७३८/मुंबई/२०१५ (नि.वं. २००९—१०)
ITA No.2738/MUM/2015 (A.Y.2009-10)

Deputy Commissioner of Income Tax
Range 10 (1), Aayakar Bhavan,
Mumbai-400 020 ..... अपीलार्थी/Appellant

बनाम Vs.

M/s Wockhardt Ltd.
Wockhardt Towers,
Bandra Kurla Complex, Bandra (E)
Mumbai-400 051
PAN No. AAACW2472M ..... प्रतिवादी/Respondent

निर्ध्यारिती द्वारा / Assessee by	:	Shri Ronak Doshi &Ms Jinal jain
कर विभाग द्वारा / Revenue by	:	Shri Rakesh Ranjan, CIT DR & Shri Samuel Pitta

सुनवाई की तिथि / Date of hearing : 15/11/2022
घोषणा की तिथि / Date of pronouncement : 10/02/2023

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

These cross appeals by the assessee and the Revenue are directed against the order of Commissioner of Income Tax Appeals-58 Mumbai, [hereinafter referred to as the "CIT(A)"], dated 09/02/2015 for the assessment year 2009-10.

2. The gist of grounds raised by the assessee in appeal is as under:

I. *Addition on account of arm's length adjustment to income from interest on loans advanced to subsidiaries.*
II. *Disallowance of weighted deduction under section 35(2AB) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") on expenses of Rs.27,31,73,947/-.*
III. *Disallowance under section 14A of the Act amounting to Rs.74,57,370/-*
IV. *Disallowance of freebies u/s 37(1) amounting to Rs.70,89,734/-.*
V. *Disallowance under section 14A under computation of book profits under section 115JB.*

The assessee has also raised an additional ground of appeal, the same reads as under:

"Additional I: Order passed under section 143(3) r.w.s. 144C of the Income Tax Act, 1961 is barred by limitation.

1) *On facts and circumstances of the case and in law, the Assessing Officer erred in passing the assessment order after expiry of time prescribed under section 153 of the Act and thus, the assessment order passed is barred by limitation and ought to be quashed.*
2) *The Appellant humbly prays that the order be quashed."*

3. The Revenue in its appeal has assailed the findings of the CIT(A) on following grounds:

"1. On the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in deleting the addition of Rs2.41.02.350/- representing upward adjustments on account of Guarantee Fee income received in relation to guarantee provided on loans to its AE in UK to ALP recommended by the Transfer Pricing Officer (TPO) without appreciating the fact that the Guarantee Commission is charged at the rate of 0.75% of loan amount by HSBC Mumbai, India."

2. On the facts and in the circumstance of the case and in law, the Ld. CIT(A) erred in holding that the benchmarking of interest rates on foreign currency loans would be LIBOR based and not rupee loan based thereby overlooking the high opportunity cost lost by the assessee company through foreign A lending as against other competitive domestic lending"

2.1 On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in directing the AO to adopt the External Commercial Borrowing guidelines of the RBI as a benchmark ignoring that the ECB guidelines are for inward borrowing whereas the case facts pertain to outward lending to assessee's AEs."

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the imputation of notional interest of Rs.17,82,00,000/- on infusion of additional funds to the wholly owned subsidiary of the assessee"

3.1 On the facts and in the circumstances of the case and in law, the Ld CIT(A) erred in admitting and not remanding the additional evidence furnished by the assessee to the AO and thereby violated the provisions of Rule 46A of IT Rules."

4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that the deduction u/s 80IB & 80IC of the Act amounting to Rs.5,56,08,362/- should be granted without allocating R & D Expenses and interest expenses to units eligible for grant of deduction in spite of the fact that the assessee has allocated interest cost to units on the basis of turnover."

5. On the facts and in the circumstances of the case and in law, Ld. CIT(A) erred in allowing the assessee's claim of weighted deduction u/s 35(2AB) amounting to Rs 27,31,73,947/- which was not allowed by the AO for want of form 3CL from the appropriate authority DSIR for the current year under reference."

6. On the facts and in the circumstance of the case and in law, Ld. CIT(A) erred in deleting the addition made by the AO u/s 40(a)) amounting to Rs. 13,90,04,355/-without appreciating the fact that the payments were made by the assessee to non-residents on account of pilot bio-study, clinical research, where as per section 195 of the Act, the assessee is liable to withhold tax on such payments which the assessee did not do so."

7. On the facts and in the circumstance of the case and in law, Ld. CIT(A) erred In deleting addition of Rs.323,96,93,037/- representing provision for marked to market (MTM) unrealised losses for calculation of book profit u/s 115JB"

8. On the facts and in the circumstance of the case and in law, Ld. CIT(A) erred in deleting addition of Rs.99,96,694/- representing provision for gratuity for calculation of book profit u/s 115JB of the Act."

9. The appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of appeal.

10. The appellant prays that the order of CIT(A) on the above ground be set aside and that of the assessing officer be restored."

4. The brief facts of the case as emanating from records are: The assessee is engaged in the business of manufacturing and trading of pharmaceutical FDFs and APIs. Apart from India, the asssessee has its manufacturing facilities in US, UK, France and Ireland. During the period relevant to the assessment year under appeal, the assessee had entered into following international transactions with its Associate Enterprise (AEs).

Sr. No.	*Nature of Service*	*Amount (Rs.)*	*Method adopted by assessee*
FDF SEGMENT:			
1	*Regulatory Service Fees*	*2,94,87,512*	*TNMM*
2	*Export of FDF*	*371,84,26,480*	*TNMM*
3	*Import of Ingredients*	*2,95,84,123*	*TNMM*
	TOTAL	***377,74,98,115***	
OTHER TRANSACTIONS:			
4	*Management Fees*	*15,62,76,434*	*TNMM*
5	*Receipt of Interest on loan*	*11,01,68,832*	*LIBOR/EURIBOR*
6	*Receipt of Royalty*	*5,89,31,993*	*CUP*
7	*Payment of Royalty*	*2,77,96,335*	*CUP*
8	*Guarantee Fees Income*	*49,93,990*	*CUP*
9	*Transfer of shares with Wockardt EU*	*19,73,80,000*	*CUP*
10	*Recovery of expenses/Reimbursement of expenses*	*2,01,07,325*	*At cost*
11	*Import of fixed assets*	*2,70,49,839*	*At cost*

5. The Transfer Pricing Officer (TPO) vide order dated 30/01/2023 made following adjustments:

Nature of transaction	***Adjustment (Rs.)***
Guarantee fee	***2,41,02,350***
Interest on loan advanced to AEs	***4,98,99,490***

Interest on deemed loan/receivable	***17,82,00,000***
Total Adjustment proposed to be made	***25,22,01,840***

In assessment proceedings, the AO made certain additions/disallowances. Aggrieved by the assessment order dated 30/05/2013 passed u/s 143(3) r.w.s 144C (3)(a) of the Act, the assessee filed an appeal before the CIT(A). The First Appellate Authority vide impugned order accepted the appeal of assesse in part, hence, present cross appeals by the assessee and the Revenue.

6. In ground no. 1 of appeal, the assessee has assailed arm's length adjustment to interest income received on loans advanced to subsidiaries. The Revenue has raised corresponding ground in ground no. 2 of its appeal. During the period relevant to assessment year under appeal, the assessee has advanced loans to its subsidiaries. The details of loans advanced and the interest charged from subsidiaries/AEs is as under:

Name of AE	*Amount of Loan*	*Interest Amount Rs.*	*Interest rate charged*	*CUP used to Benchmark*
ES Pharma, Germany	*Euro 3019144*	*1,57,50,167*	*5.97*	*European Central Bank 5.16%*
CP Pharma, UK	*GBP 5215490*	*1,74,69,365*	*7.44*	*Bank of England 7.03%*
Wockardi-EU, Switzerland	*$ 2000000*	*13,75,104*	*6.89*	*Swiss National Bank 3.17%*
Wockardt Holding, USA	*$ 1,80,00,000*	*2,54,89,005*	*Libor + 3.75% (8.55)*	*Libor + 2*
Morton Grove Pharma, USA	*$ 20,00,000*	*24,39,502*	*Libor + 3.75% (8.45)*	*Libor + 2*

6.1 The assessee has charged interest from its subsidiaries using LIBOR/EURIBOR as base rate. The contentions of the assessee before the Assessing Officer (AO) and the TPO was that banks/financial institutions follow the same practice in line with RBI guidelines. The TPO was not convinced with the submissions of the assesse. The TPO observed that the RBI has prescribed prime lending rate on year to year basis and the

BPLR for the Financial Year 2008-09 was ranging between 12.5% to 12.75% for an unsecured loan of more than Rs.2,00,000/- . The TPO further observed that in an uncontrolled scenario when an Indian entity is advancing long term unsecured loans to an overseas entity, it has to take into account, the currency risks, entity risks, and sovereign risks. The TPO applied interest rate of 12.5% on the unsecured loans advanced by the assessee to its AE's and thus made upward adjustment of Rs.498,99,490/-. The CIT(A) following the decisions of its predecessor in AY 2008-09 decided the issue in similar terms. In AY 2008-09 CIT(A) had held that if the average maturity period of loans advanced to AEs is 3 years to 5 years than the rate of interest be adopted as 6 months LIBOR + 150 BP. And in case average maturity period of loans is more than 5 years, the rate of interest 6 months LIBOR + 250 BP be adopted.

6.2 We find that in AY 2008-09, the assesse carried this issue in appeal to the Tribunal. The Tribunal decided the issue observing as under:

> *"9. We have considered the rival submissions of the ld. representatives of the parties and perused the order of the lower authorities During the relevant periode for the assessment year under consideration the assessee in its TPSR reported receipt of interest of Rs 6,25,23,143/ received against loan given to its overseas subsidiaries. The assessee charged interest @ LIBOR + margin rates. The TPO worked out interest income @ 12.5% and works out interest of Rs. 10,56,96,252/- and accordingly suggested upward adjustment of Rs 4,31,73,109/ (Rs. 10,56,96,252/ minus Rs 6,25,23,143/-) On appeal before ld CIT (A), it was directed that if the loan period is three years and up to five years then the rated of interest be adopted as 6 month LIBOR plus 150 basis points and in case of average period of loan is more than five years, the rate is 6 month LIBOR plus 250 basis points may be adopted The Hon'ble jurisdictional High Court in CIT Vs Tata Autocomp (supra) held that where the assessee advances loans to its associated enterprises (AE's) situated in Germany, rate of interest was to be determined on the basis of rate prevailing in Germany where loan has been consumed.*
>
> *10. Considering the decision of jurisdictional High Court* ***the AO/TPO is directed to recompute the interest on the basis of rate prevalent in the countries where loan was received****. In the result the ground of appeal raised by the assessee is allowed and resultantly the ground of appeal raised by the revenue has become infructuous."*
>
> (Emphasized by us)

6.3 We find that addition made in respect of interest on loans advanced to be subsidiaries is identical to the one decided by the Tribunal in assessee's own case in

the immediate preceding assessment year. No contrary material has been placed on record by the Revenue. Following the order of Co-ordinate Bench, the ground no. 1 of assessee's appeal is allowed and the ground no. 2 raised in appeal by the Revenue is dismissed.

7. In ground no. 2 of appeal, the assessee has assailed disallowance of weighted deduction u/s 35(2AB) of the Act. The Revenue in ground no. 5 of its appeal has assailed relief granted by the CIT(A) on the issue.

7.1 During the year under consideration, the assessee claimed deduction at the rate of 150% on capital expenditure of Rs.5.37 crores and Revenue expenditure of Rs.176.58 crores of inhouse R & D unit. The assessee had paid consultancy charges on clinical trials to third parties. The AO held that clinical trials and bio studies payments made to out siders would not qualify for weighted deduction at the rate of 150% of such expenditure. The CIT(A) following the decision of its predecessor in A.Y. 2008-09 dismissed this ground of appeal. The learned AR submitted that in AY 2008-09 the Tribunal after placing reliance on the decisions of the Hon'ble Gujrat High Court in the case of CIT Vs. Cadila Pharmaceuticals ltd in Tax Appeal No.39 of 2015 decided on 23/01/2015 and PCIT Vs. Sun Pharmaceuticals Industries ltd. in R/Tax Appeal No.92 of 2020 decided on 25/02/2020 had restored the issue to AO. The AO till date has not passed order giving effect to the Tribunal order, therefore, this issue be decided by the Tribunal instead of restoring it to AO.

7.2 We find that in A.Y. 2008-09, the issue was examined by the Tribunal and was restored back to the file of AO. The relevant extract of the findings of the Tribunal on this issue are as under:

> *"22. We have considered the submission of the parties and perused the order of the tax authorities below. During the relevant period under assessment year the assessee the assessee claimed weighted deduction under section 35(2AB) The assessing officer after issuing show cause and receiving reply concluded that all the clinical trial are got conducted by assessee through third parties and the payment made to third parties are*

not qualified for weighted deduction The Id CIT(A) followed the order of Tribunal in AY 2004-05 and dismissed the appeal of the assessee. However, we have noted that in AY 2006-07, the Tribunal by following the order for AY 2007-08 restore the issue to the file of assessing officer by passing the following order.

> *"6. We have considered rival submissions and perused the material on record. On a perusal of the impugned order of learned Commissioner (Appeals) and, more particularly, his finding in Para-8 to 8.4 of the impugned order, it is very much clear that he has fully allowed the claim of the assessee under section 35(2AB) of the Act. Therefore, we fail to understand how the assessee can be aggrieved with the decision of learned Commissioner (Appeals). Be that as it may, the Revenue has also challenged the decision of learned Commissioner (Appeals) on the issue of deduction claimed under section 35(2AB) of the Act. Undisputedly, the research and development activity in respect of which the assessee has claimed deduction under section 35(2AB) of the Act were not carried out in assessee's own in-house. research and development facility Therefore, the issue which arises for is, whether the expenditure incurred for carrying out research and development activity outside by way of out sourcing or otherwise can be eligible for deduction under section 35(2AB) of the Act? As per the provision contained under section 35(2AB) of the Act weighted deduction can be allowed in respect of expenditure-on scientific research carried out in the in- house research and development activity as approved by the prescribed authority. Therefore, going by the plain meaning of the words used in section 35(2AB) of the Act, only those expenditures which are incurred in the in-house research and development facility are eligible for deduction. In fact, while dealing with identical issue in assessee's own case in the assessment years 2002-03 to 2004-05 in ITA no 2522 to 2524/Mum/2009, dated 13th April 2012, the Tribunal decided the issue against the assessee. However, while deciding the same issue in assessee's own case in assessment year 2007-08, in ITA no.5557/Mum/ 2012, dated 5th January 2018, the Tribunal has restored the issue to the Assessing Officer for fresh adjudication keeping in view various decisions cited by the assessee including the decision of the Hon'ble Gujarat High Court in Cadila Healthcare Ltd (supra). Therefore, following the decision of the Tribunal in assessment year 2007-08, we are inclined to restore the issue to the Assessing Officer for de novo adjudication keeping in view the ratio laid down in the decisions to be cited by the assessee including the decision of the Hon'ble Gujarat High Court in Cadila Healthcare Ltd. (supra). While doing so, the Assessing Officer is also directed to examine the ratio laid down by the Hon'ble Supreme Court in Commissioner of Customs v/s Dilip Kumar & Co. & Ors. vide judgment dated 30th July 2018, in Civil Appeal no 3327 of 2007. Needless to mention, the Assessing Officer must afford reasonable opportunity of being heard to the assessee before deciding the issue. These grounds are allowed for purposes."*

23. Considering the decision of the Tribunal in assessment year 2006-07, we respectfully following the same we are inclined to restore the issue to the Assessing Officer for adjudication afresh as per the direction date 12.06.2019 in ITA No. 1967/Mum/2011. In

the result the ground of appeal raised by both the parties are allowed for statistical purpose."

7.3 A perusal of the order of CIT(A) shows that the facts in assessment year under appeal and in A.Y. 2008-09 are similar. The learned AR of the assessee has prayed for deciding the issue instead of restoring it to AO. After examining the assessment order, we find that the AO has rejected the claim of assessee at the outset without verifying the veracity of quantum. In so far as admissibility of assessee's claim, we hold that in principle the assessee has merit in the claim. For the purpose of examining the expenditure and quantification the issue has to be restored to AO. Thus, following the order of Co-ordinate Bench, for A.Y. 2008-09 (supra) the ground no. 2 raised in appeal by the assessee is allowed for statistical purpose. No relief was granted by the CIT(A) to the assessee on this issue, hence, ground no. 5 raised in appeal by the Revenue is misconceived, hence, dismissed.

8. In ground no. 3 of appeal, the assessee has assailed disallowance u/s 14A of the Act. The assessee has received dividend income of Rs.18,450/- and the same was claimed to be exempt u/s 10(35) of the Act. The AO invoked provisions of Rule 8D for computing disallowance u/s 14A of the Act at Rs.74,75,317/-. The learned AR submits that disallowance u/s 14A be restricted to the extent of dividend income earned.

8.1 It is no more res-integra that disallowance u/s 14A of the Act cannot exceed the exempt income earned during the relevant Financial Year. Hence, the AO is directed to restrict the disallowance u/s 14A of the Act to Rs.18,450/-. i.e. the dividend income earned by assessee during the period relevant to assessment year under appeal. Ground no. 3 of appeal is thus, allowed protanto.

9. In ground no. 4 of appeal, the assessee has assailed expenditure incurred on alleged freebies u/s 37(1) of the Act. The learned AR of the assessee submits that during the period relevant to assessment year under appeal, the assessee has incurred expenditure in the nature of sales promotion expenses, gifts and giveaways amounting

to Rs.17,89,734/- and has claimed the same as expenditure allowable u/s 37(1) of the Act. The AO disallowed the aforesaid expenditure by placing reliance on CBDT Circular No. 5/2012 dated 01/08/2012 stating it to be expenditure prohibited by law. The learned AR submits that the 'Indian Medical Counsel' (Professional Conduct, Etiquette and Ethics) Regulations, 2022 (in short "MCI Regulations') were amended in 2009. By way of amendment clause 6.8 was inserted. The said clause prohibited medical practitioners to accept gifts, hospitality, cash or monetary grants etc. from pharmaceutical companies. The said amendment comes into force from publication of notification in the Official Gazette i.e. 14/12/2009. The said amendment is prospective in nature and thus, would have no application to the AY 2009-10. The learned AR asserted that any expenditure incurred by pharmaceutical companies towards gifts to medical practitioners prior to publication of amendment in Official Gazette would be allowable as expenditure u/s 37(1) of the Act. The learned AR placed reliance on the decision of Chennai Bench of the Tribunal in the case of Apex Laboratories (P) ltd. Vs. DCIT 164 ITD 81.

9.1 The learned AR to distinguish the decision rendered by the Hon'ble Apex Court in the case of Apex laboratories (P) ltd. Vs. DCIT 442 ITR 1 (SC) furnished written submissions. The relevant extract of same is reproduced herein below:

> *"6. In the case of **Apex Laboratories (P) Ltd [2022) 442 ITR I (SC)**, the Hon'ble Supreme Court proceeded with the admission of both parties to the said decision that 'there was violation of MCI regulations and the Board Circular' and the entire decision of the Hon'ble Supreme Court is based on this very admission Nowhere in the said decision there appears any reference to the violation of law of IMC Regulations' to be in dispute The only dispute the Hon'ble Supreme Court was called upon to decide was whether IMC Regulations are applicable to pharmaceutical companies or not even prior to CBDT Circular i.e. from the date of amended IMC Regulations.*
>
> *7. In the present case, no authority under IMC has proven any violation in Appellant's case till date.*
>
> *8. It is a settled legal position that the decision of a court carries a precedence and is binding only in respect of issues which it was called upon to decide and not any other issue. It is neither desirable nor permissible to pick out a word or a sentence from the judgment of the Court, divorced from the context of the question under consideration*

and treat it to be the complete law declared by the Court. A decision of the Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a latter case, the Courts must carefully try to ascertain the true principle laid down by the decision of the Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by the Court, to support their proceedings. This is what precisely ***the Hon'ble Supreme Court*** *has held in* ***CIT vs. Sun Engineering Works (P) Ltd. [1992] 198 ITR 297 (SC) (Refer LPB-4 Page No. 485-500).***

9. The Appellant submits that in order to trigger disallowance u/s 37(1) applying Explanation 1 thereto, the question as to whether there is any infraction of law or whether the expenditure is incurred for any purpose which is an offence or which is prohibited by law, has to be first decided/determined by the authority or the court empowered to do so under the respective law and no other person or authority can determine such violation.

10. For example, the income tax authorities under the Income-Act 1961 can 'alone' determine the violations of provisions of the Act, if any, on the part of any assessee and no other authorities/regulators. Similarly, for regulating the functions of Banking companies, it is the RBI who is the regulator, for securities compliance, it is the SEBI who is the regulator, for Insurance companies, it is the IRDA who is the regulator, for foreign exchange related aspects, it is the RBI who is the regulator. So on and so forth. If this is not so, then there was no need for these regulators, the penal provisions under the respective law etc. and the powers of such regulators would be just redundant."

9.2 Without prejudice to the primary submissions, the learned AR advanced an alternate proposition that Explanation 1 to section 37(1) of the Act, can be invoked only in respect of expenditure pertaining to an Act of assessee which has been established to be in violation of law or prohibited by law by the relevant authority under the governing law. To support his alternate contention, the learned AR placed reliance on following decisions.

1) Union of India Vs. B. V. Gopinath and others (2014) 1SSC 351;
2) Golder Vs. Great Boulder Mines 33TC 55.

9.3 Per contra, the learned DR strongly supported the findings of the AO/CIT(A) in disallowing freebies to medical practitioners u/s 37(1) of the Act. The learned DR submitted that the Hon'ble Supreme Court of India in the case of Apex laboratories (P) ltd. (supra) has in an unambiguous manner held that CBDT Circular No.5/2012 would apply retrospectively from 2009 i.e. from the date of amendment of MCI Regulations.

The Hon'ble Court further held that MCI Regulations apply to both i.e. medical practitioners and the pharmaceutical companies. The learned DR prayed for dismissing ground no. 4 of the appeal by assessee.

9.4 We have heard the submissions made by rival sides on the issue. The assessee has given freebies to the medical practitioners amounting to Rs.70,89,934/- in the period relevant to AY under appeal and has claimed the same as business expenditure u/s 37(1) of the Act. The AO/CIT(A) disallowed the same holdings that freebies to the medical practitioners cannot be allowed as expenditure as it is prohibited by CBDT Circular (supra) and MCI Guidelines.

9.5 Before deciding this issue in the instant case, it would be relevant to refer to the facts and decision in the case of Apex Laboratories (P) Ltd. (supra). In the said case the AO disallowed expenses claimed by assessee under the head "Sales Promotion Expenses" and "Other Selling Expenses" on the ground that the same were in the nature of gifts/freebies to the Medical Practitioners and the same were against the Medical Council Act, 1956 and amended MCI Regulations. The CIT(A) granted part relief to the assessee on the ground that the amendment to MCI Regulations is effective from 14/12/2009, therefore till 14/12/2009, the gifts/freebies to the Doctors and Medical Practitioners did not fall within the purview of Explanation to Section 37(1) of the Act. In other words the CIT(A) in AY 2010-11 allowed the claim of assessee from 01/04/2009 to 13/12/2009 and rejected the claim of assessee from 14/12/2009 (i.e. from the date of publication of amendment in Official Gazette) to 31/03/2010. Against the said findings of CIT(A), the assessee in ITA No. 1153/Madras/2014 and the Revenue in ITA No. 1343/Madras/2014 carried the issue in appeal before the Tribunal. The Tribunal after considering the decision of Hon'ble Himachal Pradesh High Court in the case of Confederation of India Pharmaceutical Industry (SSI) Vs. CBDT reported as 353 ITR 288 (HP) upheld the findings of CIT(A) and dismissed both the appeals vide order dated 29/01/2018.

The assessee carried the issue further in appeal before the Hon'ble Madras high Court in Tax Case Appeal No. 723 of 2018. The Hon'ble High Court dismissed the appeal of assessee vide judgment dated 18/03/2019. The assessee further agitated the issue before Hon'ble Supreme Court of India. The Hon'ble Apex Court affirming the decision of High Court inter alia held:

- CBDT Circular 5/2012 dated 01/08/2012 is clarificatory in nature, and effective from the date of implementation of Regulation 6.8 of the 2002 Regulations, i.e. from 14/12/2009.

- The Pharmaceutical companies gifting freebies to doctors etc. is clearly "prohibited by law" and not allowed to be claimed as a deduction u/s 37(1) of the Act.

Thus, to sum up, view taken by the CIT(A) was approved by the Hon'ble Supreme Court of India.

9.6 Now, reverting to the facts of present case, the assessment year under appeal is 2009-10 relevant FY 2008-09. MCI Regulations were amended w.e.f. 14/12/2009, whereby Regulation 6.8 was inserted prohibiting Medical Practitioners to accept freebies, gifts etc. from pharmaceutical companies. The period in the instant appeal is prior to the amendment. The Hon'ble Supreme Court in the case of Apex Laboratories Ltd. (supra) has held that CBDT Circular 5/2012 being clarificatory would apply retrospectively from the date of amendment to MCI Regulations i.e. w.e.f. 14/12/2009. Thus, from the decision rendered in the case of Apex Laboratories (P) ltd., it is unambiguously clear that the amended MCI Regulations would not apply to the AY 2009-10. Hence, for the impugned AY the assessee's claim of deduction of freebies to the Medical Practitioners would be allowable u/s 37(1) of the Act as amendment to MCI Regulations is a subsequent event, effective from 14/12/2009. Ergo, the assessee succeeds on ground no. 4 of appeal on primary contention. The other propositions mooted by the AR of assessee have become academic at this stage.

10. In ground no. 5 of appeal, the assessee has assailed disallowance u/s 14A r.w.r. 8D cannot be made while computing book profit u/s 115 JB of the Act. In support of his submission, the learned AR placed reliance on following decisions:

1) CIT Vs. Bengal Finance and Investment Pvt. Ltd in ITA No.337 of 2013 decided by Hon'ble Bombay High Court;
2) ACIT Vs. Vireet investment Pvt. Ltd. 165 ITD 27 (Special Bench) (Delhi)

10.1 The Special Bench of Tribunal in the case of Vireet Investment Pvt. Ltd (supra) has held that computation u/s 115JB(2), Explanation I (f) has to be made without resorting to computation of disallowance made u/s 14A r.w.r. 8D. The view taken by Special Bench has been approved by the Hon'ble Karnataka High Court in the case of PCIT Vs. Atria Power Corporation ltd. 142 taxmann.com 412. In the result, ground no. 5 of the appeal is allowed.

11. The assessee has raised an additional ground challenging validity of assessment order passed u/s 143(3) r.w.s. 144C of the Act. As per the assessee, the assessment order suffers from limitation. The learned AR fairly stated that this ground for the impugned AY has been decided against the assessee by the Tribunal vide separate order dated 11/10/2022.

11.1 The Co-ordinate Bench vide separate order dated 11/10/2022 has dismissed additional ground of appeal. The operative part of the same is reproduced for the sake of completeness:

> *"9).....Therefore, so far as choice between a division bench decision of a non-jurisdictional High Court and a single judge bench of a non-jurisdictional High Court is concerned, it is clear that a simple objective criterion of choice will require the division bench decision to be preferred over the single judge bench decision. Therefore, even though the decision of the Hon'ble Madras High Court, in Vedanta Ltd's case (supra), cannot be said to per incuriam, for the simple reason that a Hon'ble High Court judgment does not constitute a binding precedent for any other Hon'ble High Court other than the Hon'ble High rendering such a judgment, the judgment of Hon'ble Andhra Pradesh High Court in the case of Zuari Cements Ltd (supra) being a division bench decision of Hon'ble non- jurisdictional High Court, is required to be followed even if it is contrary to a single*

bench judgment of another High Court in the case of Vedanta Ltd (supra). The impugned assessment order thus cannot be said to be barred by limitation. We uphold the impugned assessment order on this count, and decline to interfere in the matter on this jurisdictional ground. As we are deciding this issue on this short ground alone, all other contentions on merits remain open.

10) The additional ground of appeal is dismissed. As no arguments were advanced by the on the remaining grounds of appeal, we deem it fit and proper to direct the Registry to fix for hearing on the other grounds of appeal taken by the parties. As one of us (i.e. the Vice President) is retiring, on superannuation, next month, it will come up before the regular bench. Let the matter come up for hearing on 14 November 2022, and issue notices for the same Ordered, accordingly."

12. **In the result, appeal by the assessee is partly allowed.**

13. In ground no.1 of appeal, the Revenue has assailed the findings of CIT(A) in deleting addition on account of corporate guarantee fee. The assessee has charged guarantee commission from its AE on corporate guarantees extended at the rate of 0.75% of the loan availed from HSBC Bank, UK. The TPO determined arm's length rate for guarantee commission at the rate of 2.847% per annum and made adjustment accordingly. The CIT(A) deleted the adjustment made by the TPO and restricted the guarantee commission to 0.75%. The learned DR vehemently defended the findings of the TPO and the AO. The learned DR submits that the law laid down in the case of Everest Kanto Cylinders Ltd. 378 ITR 57 (Bombay) of charging guarantee commission at 0.5% cannot be a standard mark. The contemporary data should be adopted for benchmarking the transactions. Per contra, the learned AR vehemently supported the findings of the CIT(A).

13.1 Both sides heard. We find that the assessee has charged guarantee commission from its overseas AE at the rate of 0.75% based on a letter obtained from HSBC Bank, Mumbai. The Hon'ble jurisdictional High Court in the case of Everest Kanto Cylinders ltd. Vs. DCIT (supra) has approved 0.5% guarantee commission at arm's length. In the instant case, the assessee has charged guarantee commission from its AEs at 0.75%. We find no infirmity in the findings of CIT(A) on this issue. Hence, the findings of CIT(A) on this issue are upheld, ground no.1 of appeal by the Revenue is dismissed.

14. In ground no. 3 of appeal, the Revenue has assailed deleting notional interest on infusion of additional funds. The learned AR of the assessee submits that the relief was granted to the assessee by the CIT(A) in preceding assessment year. The CIT(A) has only allowed consequential relief in the impugned assessment year. The Revenue has not disputed the fact that the relief is already granted to the assessee in earlier assessment year i.e. AY 2008-09 and it is only the consequent relief that has been allowed to the assesssee in the assessment year under appeal. Thus, in facts of the case, the ground no. 3 raised in appeal by Revenue is dismissed.

15. In ground no. 4 of appeal, the Revenue has assailed allocation of R & D expenses for the purpose of section 80IB and 80IC of the Act to the qualifying units. We find that similar issue had come up before the Tribunal in assessee's own case in AY 2008-09 (supra). The Tribunal decided the issue in favour of the assessee by observing as under:

> *"18. We have considered the submissions of the parties and perused the order of the tax authorities below During the relevant period under assessment year the assessee the assessee claimed deduction under section 80IB of Rs. 23.36.103/ and under section 80IC of Rs.141,65,46,365/- respectively. On show cause notice on the issue, the assessee contended that similar deduction is allowed in the earlier years by Tribunal and furnished the copy of the orders for earlier years. The assessing officer took his view that R&D expenditure to the industrial undertaking on which deductions under section 80IB & 801C are claimed, on which the expenditure is not contributed to the earning of the income for which deduction is claimed. The assessing officer allocated interest cost to the units on turnover basis. The ld CIT(A) granted relief to the assessee by following the order of the Tribunal for various earlier years. We have noted that on similar ground of appeal the Tribunal in assessee's own case for AY 2007-07 passed the following order:*
>
> > *"17. We have considered rival submissions and perused the material on record The learned Counsels appearing for the parties have agreed that the issue has been decided in favour of the assessee by the Tribunal in the preceding assessment years. It is noticed, identical dispute arose in assessee's own case for the assessment years 2001-02, 2002-03, 2003-04, 2004-05 and 2005-06. In the latest passed for the assessment year 2007-08, in ITA no 5557/ Mum./2012, dated 5th January 2018, the Tribunal, following its own decision for the earlier assessment years, has upheld the decision of learned Commissioner (Appeals) by dismissing the ground raised by the Revenue Facts being identical, respectfully following the consistent view of the Tribunal in the preceding assessment years in assessee's own case, we uphold the decision of learned Commissioner (Appeals) by dismissing the ground."*

19. Considering the consistent view of the Tribunal on identical set of facts and respectfully following the view of the Tribunal in the preceding assessment years in assessee's own case, we uphold the decision of ld. CIT(A). In the result the ground of appeal is dismissed."

15.1 It is not disputed by the Revenue that the facts in the impugned assessment year are in any manner distinguishable. Hence, following the decisions of Co-ordinate Bench for the preceding assessment year, ground no. 4 of appeal is dismissed for parity of reasons.

16. In ground no. 6 of appeal, the Revenue has assailed deleing of addition made u/s 40 (a)(i) of the Act amounting to Rs.13,90,04,355/-, in respect of payments made to non-residents on account of pilot bio-study, clinical research. The learned AR pointed that this issue is decided by the Tribunal in assessee's own case in Departments Appeal ITA No.5378/MUM/2013 for AY 2008-09 decided on 09/03/2020.

16.1 We find that the issue raised in appeal by the Revenue is perennial. The Tribunal decided the issue in AY 2005-06 in ITA No.7383/MUM/2010 vide order dated 14/03/2012 and AY 2006-07 in ITA No.1875/MUM/2011 vide order dated 12/06/2019. In AY 2008-09, the Tribunal following the decisions rendered in AY 2006-07 held as under:

"26. We have considered the submissions of the parties and perused the order of the tax authorities below. During the assessment the assessing officer noted that the assessee claimed expenses of Rs. 6,94,82,607/- on payment to non- resident on account of bio study, clinical research without deducting tax at source. The assessing officer after issuing show cause notice disallowed the expenditure by taking view that similar expenditure was disallowed in earlier years as the assessee is liable to deduct tax under section 195. The Id CIT(A) deleted the additions by following the order of Tribunal in AY 2007-08, wherein it was payment to non-resident for conducting bio equivalence study are not taxable in India and not subject to withholding tax under section 195 of the Act. We have seen that similar view was taken by Tribunal in AY 2006-07 by following the order of Tribunal in AY 2007-08. Therefore, we affirm the order of Id CIT(A). In the result we do not find any merit in the ground of appeal raised by the revenue and the same is dismissed."

The CIT(A) has granted relief to the assessee, following the order of his predecessor, which in turn had followed the order of Tribunal in assessee's own

case for AY 2007-08. We find no infirmity in the findings of CIT(A) on this issue. Hence, ground no. 6 of appeal is dismissed.

17. In ground no. 7 of appeal, the Revenue has assailed the findings of CIT(A) in deleting addition with respect to provision for "marked to market" for calculation of book profits u/s 115JB.

17.1 The learned AR pointed that this issue is covered by Tribunal order for AY 2008-09 in assessee's case in appeal by the Revenue. We find that the Co-ordinate bench has decided identical issue in AY 2008-09 dismissing the ground raised in appeal by the Revenue. The relevant extract of Tribunal order is reproduced herein below:

> *"29. We have considered the submissions of the parties and perused the order of the tax authorities below. The assessing officer while computing book profit added back provision of Rs, 51 Crore for marked to market loss without discussion or issuing show cause notice to the assessee. During the first appellate stage the assessee filed its detail submissions and relied on the decisions in CIT Vs Woodward Governor India (P) Itd (supra) and Apollo Tyres Ltd Vs CIT (supra). The Id CIT(A) after considering the submissions of the assessee observed that marked to market loss are on account of restatement of trading asset and liability and its ascertainment and computation is not disputed by assessing officer. The ld CIT(A) also held that after the decision in CIT Vs Woodward Governor India (P) Itd. (supra) marked to market loss is allowable deduction. And it cannot be termed as unascertained liability as has been provided in clause (c) of Explanation-1 to section 115JB(2). Accordingly cannot be added back to the book profit. No contrary fact or law is brought to our notice to arrive on other finding. Therefore, we affirm the action of Id CIT(A) and dismiss the ground of appeal raised by the revenue."*

No contrary material was brought to the notice by the Revenue. Hence, following the decision of Co-ordinate Bench, ground no. 7 of the appeal is dismissed.

18. The last ground in appeal by the Department is against deleting addition in respect of provision for gratuity for the purpose of calculating book profit u/s 115JB of the Act. The learned AR pointed that this issue is also decided by the Tribunal in AY 2008-09 in an appeal by the Department in assessee's case.

18.1 We find that the Tribunal has decided the issue in AY 2008-09. The relevant extract of the findings of Tribunal are as under:

> "32 We have considered the submissions of the parties and perused the order of the tax authorities below The assessing officer while computing book profit added back provision of gratuity of Rs 45,39,118/- without discussion or Issuing show cause notice to the assessee. During the first appellate stage the assessee filed its detail submissions and relied on the decisions Apollo Tyres Ltd Vs CIT (supra) The Id CIT(A) after considering the submissions of the assessee observed provisions of gratuity is based on the actuarial valuation and therefore ascertained liability. The assessing officer has not disputed actuarial valuation and cannot be treated unascertained liability as has been provided in clause (c) of Explanation-1 to section 115JB(2) No contrary fact or law is brought to our notice to arrive on other finding. Therefore, we affirm the action of ld CIT(A) and dismiss the ground of appeal raised by the revenue."

The facts in the impugned AY being similar, we see no reason to take a different view. For parity of reasons ground no. 8 of the appeal is dismissed.

19. In the result, appeal of the Revenue is dismissed.

20. To sum up, appeal of the assessee is partly allowed and that of the Revenue is dismissed.

Order pronounced in the open court on Friday the 10th day of February 2023.

Sd/-	**Sd/-**
(OM PRAKASH KANT)	(VIKAS AWASTHY)
लेखाकार सदस्य/ACCOUNTANT MEMBER	**न्यायिक सदस्य/JUDICIAL MEMBER**

मुंबई/Mumbai,
दिनांक/Dated: 10/02 /2023
Mahesh R. Sonavane

<u>प्रतिलिपी अग्रेषित of the Order forwarded to</u>:

1. अपीलार्थी/The Appellant ,

2. प्रतिवादी/The Respondent.
3. आयकर आयुक्त (अ)/ The CIT(A)-
4. आयकर आयुक्त/ CIT
5. विभागीय प्रतिनिधी, आय. अपी. अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाईल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asst. Registrar)/
Sr. Private Secretary
ITAT, Mumbai