IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J", MUMBAI

BEFORE AMIT SHUKLA (JUDICIAL MEMBER)
AND
MS. PADMAVATHY S. (ACCOUNTANT MEMBER)

I.T.A. No.1903/Mum/2015
(A.Y 2010-11)

M/s Strides Arcolab Limited 201, Devavrata, Sector 17, Vashi Navi Mumbai-400 703 **PAN ; AADCS8104P**	vs	The Deputy Commissioner of Income Tax, Circle 15(3)(2), Mumbai
APPELLANT		**RESPONDENT**

Assessee represented by	Shri Nitesh Joshi / Ketan Ved
Department represented by	Shri Manoj Kumar – CIT DR

Date of hearing	21-04-2023
Date of pronouncement	23-05-2023

O R D E R

This appeal is against the final order of assessment passed by Deputy Commissioner of Income-tax-15(3)(2), Mumbai under section 143(3) read with section 144C of the Income-tax Act, 1961 (in short, 'the Act') dated 31/01/2015 for the assessment year 2010-11.

2. The assessee is engaged in the business of manufacturing of pharmaceutical formulations. For the assessment year 2010-11, the assessee filed the return of income on 14/10/2010 declaring a loss of Rs.203,83,86,890/-. The case was selected for scrutiny and statutory notices were duly served on the assessee. Since the assesse had international transactions with its Associated Enterprises (AEs), a

reference was made to the Transfer Pricing Officer for determination of arm's length price (ALP) of the international transactions. The TPO, vide order dated 29/01/2014 made the following transfer pricing adjustments:-

1.	Interest on delayed export receivables	Rs. 17,96,119/-
2.	Interest on share application money	Rs.56,63,59,478/-
3.	Guarantee Commission	Rs. 8,77,76,150/-
4.	Sale of Shares of Strides SA Pharmaceuticals Pty.Ltd	Rs. 1,14,66,873/-
	Total	**Rs.66,73,98,920/-**

3. The Assessing Officer passed a draft assessment order incorporating transfer pricing adjustments. The Assessing Officer further made the following disallowances:-

1.	Disallowance u/s 10B	Rs.11,44,12,969/-
2.	Disallowance of weighted deduction u/s 35(2AB)	Rs. 5,84,54,070/-
3.	Disallowance of premium on FCCB	Rs.55,44,94,544/-
4.	Disallowance under section 14A	Rs. 3,64,12,003/-

4. The Assessing Officer also made adjustment to the book profit under section 115JB towards the amount disallowed under section 14A and also towards the provision for leave encashment and doubtful debts. Aggrieved, the assessee filed objections before the DRP. The Ld.DRP gave partial relief to the assessee with respect to the notional interest on share application money, guarantee commission, and upheld the TP adjustment towards interest on receivables and sale of shares of Stripes SA Pharmaceuticals Pty Ltd. On the Corporate tax disallowance / additions made by the Assessing Officer, the Ld.DRP upheld the disallowance of deduction under section 10B, disallowance of weighted deduction under section 35(2AB), disallowance of premium on FCCB and disallowance under section 14A. With regard to the adjustment made by the Assessing Officer to the book profits under

section 115JB, the Ld.DRP gave a direction to exclude the provision made towards leave encashment while arising at the book profit. The assessee is in appeal before the Tribunal against the final order of assessment passed by the Assessing Officer pursuant to the directions of the Ld.DRP.

5. The Assessee raised the following effective grounds of appeal:-

"Grounds of Appeal

The grounds mentioned hereinafter are without prejudice to one another.

I. Transfer Pricing

1. The learned Assessing Officer ("AO"), the learned Transfer Pricing Officer ("TPO") and the Honorable Dispute Resolution Panel ("DRP") grossly erred in law and facts in determining the arm's length price ("ALP") of the international transactions of the Appellant and making an adjustment of Rs. 51,72,93,360/-under section 92CA of the Income Tax Act, 1961 ("the Act") with respect to:

• Interest on delayed export receivables-Rs. 17,96,419/-;

• Share application money - Rs. 48,22,30,068/-;

• Guarantees provided to Associated Enterprises ("AEs") - Rs. 2,18,00,000/-; and

• Upward adjustment on account of sale of Shares to AE - Rs. 1,14,66,873/- [although the learned AO inadvertently mentioned amount as Rs. 1,44,66873/-in the final order].

2. Imputation of interest on delayed realization of export proceedings Rs. 17,96,419/-

The learned AO/ the learned TPO erred in facts and law in imputing and the Hon'ble DRP erred in confirming the imputation of interest on the delayed realization of export proceeds from the AEs and in doing so have grossly erred:

2. in ignoring the fact that the Appellant followed the same policy of not charging any interest on the delayed realization of export proceeds from sales made to both AE and Non AE

2.2 in subjecting a hypothetical/notional income to tax by way of imputing interest on delayed realization of receivables of the Appellant;

2.3 *Without prejudice to the above, the learned TPO/learned AO erred inadopting and the Hon'ble DRP erred in confirming the interest rate at 8 per cent, with arbitrary assumptions, for the purpose of imputation of interest on such receivables; and*

3. *Without prejudice to the grounds mentioned in ground 2; the learned TPO/ learned AO and the Hon'ble DRP have erred in computing interest on a gross basis i.e. without taking into consideration some of the export proceeds which have been realized before due date.*

4. Imputation of Interest on balance of Share application money pending allotment - Rs. 48,22,30,068/-

The learned AO/ the learned TPO and the Hon'ble DRP erred in facts and law in imputing the interest on share application money pending allotment, and in doing so have grossly erred:

4.1 *that re-characterization of the transactions (treating share application money as loan) / which is not permissible under the transfer pricing provisions i.e. Section 92-92F of the Act;*

4.2 *in failing to appreciate the clear distinction between a "loan" and an "investment";*

4.3 *in ignoring the fact that the shares were subsequently allotted by the Associated Enterprises during FY 2012-13 and FY 2013-14 and hence the share application money invested by the Appellant could not be deemed as granting of loan.*

4.4 *in failing to appreciate the fact that only real income can be brought within the ambit of taxation;*

4.5 *in failing to appreciate the business rationale/expediency at the time of remitting the O amount; and*

4.6 *in adopting the rate of interest at 8 per cent, with arbitrary assumptions, for purpose of imputation of interest on share application money and levy thereon.*

5. *Without prejudice to the grounds mentioned in ground 2 and 4 above, even assuming at the same time denying, should there be a levy of interest, such interest ought to 0£ have been computed based on the prevalent LIBOR rate during the year.*

6. Guarantee Commission charged on corporate guarantees given on behalf of Associated Enterprises - Rs. 2,18,00,000/-

The learned AO/ the learned TPO and the Hon'ble DRP erred in facts and law in imputing guarantee commission with respect to corporate guarantees provided by (^ the Appellant to the banks of AEs, and in doing so have grossly erred:

6.1 in ignoring the fact that the guarantee given were for the limited purpose of providing comfort to the applicable parties and that no cost was incurred by the Appellant in extending such guarantee;

6.2 in failing to appreciate that the corporate guarantees provided were during the course & of the business of the Appellant with a view to protect the commercial interests of the Appellant and also to preserve and protect the Appellant's investments.

6.3 in assuming that various risks in the form of country risk, currency risk, and & administration costs in respect of the guarantees provided are borne by the Appellant;

in comparing the corporate guarantee fees charged by banks in India instead of referring to the guarantee fees charged in the countries where the AEs are located and adopting such rates;

6.4 in comparing the corporate guarantee fees charged by banks in India instead of referring to the guarantee fees charged in the countries where the AEs are located and adopting such rates..

6.5 in subjecting a hypothetical income to tax by way of charging a commission of 1.75% as corporate guarantee fee / commission, which is unwarranted and arbitrary in nature;

7. Upward adjustment to the consideration received towards the sale of investment to the Associated enterprise - Rs. 1,14,66,873

That on the facts and circumstances of the case, the learned AO, the learned TPO erred in making and the Hon'ble DRP in confirming the upward adjustment towards the consideration received on account of sale of investment in subsidiary to the Associated enterprises and thereby taxing notional income of Rs. 1,14,66,873/- and in doing so have grossly erred:

7.1 in failing to appreciate the fact that the underlying transaction, does not fall within the ambit of international transaction in the year of disposal of investment i.e. FY 2009-10, therefore, the transfer pricing provisions were not applicable to the same.

7.2 In failing to appreciate the fact that Appellant had sold the investment in its subsidiary, only to comply with the RBI regulations, as per which there was restriction to hold more than two direct wholly owned overseas subsidiaries by an Indian enterprise..

7.3 In failing to appreciate the fact that the investments in Strides SA Pharmaceuticals Pty Ltd was sold to Linkace Limited, a step down

wholly owned subsidiary of the Appellant, which was a part of internal re-structuring to streamline and simplify the overseas structure of the Appellant and which was solely implemented to comply with the RBI regulations.

7.4 In not taking cognizance of the valuation report obtained by the Appellant from an independent valuer which was prepared in accordance with standard valuation principles and which was furnished during the course of the transfer pricing / DRP proceedings

7.5 Grossly erred in arriving at the value per share based on the financials of Strides SA Pharmaceuticals Pty Ltd pertaining to the period December 2010 (being FY 2010-11) ^ instead of adopting the value per share in the year of transfer.

7.6 The Learned AO while passing the final order has erred in considering the amount at (Rs. 1,44,66,873/- instead of Rs. 1,14,66,873/- being the amount of adjustment proposed by the TPO.

II. <u>Corporate Tax</u>

1. Disallowance of deduction claimed under section 108 of the Act of Rs. 11,44,12,969/-

1.1. The learned AO in erred in disallowing and the Hon'ble DRP erred in facts and law in confirming the disallowance of the deduction of Rs. 11,44,12,969/- claimed under section 10B of the Act in respect of profits of 'Strides Technology & Research Division' ('STAR unit') towards production and sale of dossiers.

1.2. The learned AO erred in concluding and Hon'ble erred in Confirming that the profits of STAR unit are not eligible for deduction under section 10B of the Act on the basis that the Appellant is merely granting the license to manufacture products by utilizing the 'Dossier' and the activity of preparation of dossier cannot be treated as 'manufacture or production of an article or thing' without appreciating facts of the case.

1.3. The Hon'ble DRP and the learned AO erred in not considering the activity of producing the 'Dossier' as manufacture or production of an article or thing. The Hon'ble DRP and the AO ought to have appreciated the fact that the production of dossier comprises of capturing results of series of activities carried out in STAR which itself tantamount of production and qualifies for the purpose of deduction under section 10B of the Act.

1.4. The learned AO has failed to differentiate the facts of the case of the Appellant for AY 2010-11 with that of AY 2007-08 and grossly erred

in reaching the conclusion which is similar to that of AY 2007-08 while disallowing the deduction under section 10B of the Act.

1.5. Without prejudice to the above, the Hon'ble DRP and the learned AO erred in failed to appreciate that the activity of compilation of 'Dossier' inter alia include to manufacture of exhibit batches and which is a vital activity in production of Dossier.

1.6. Without prejudice to the above, the Hon'ble DRP and the learned AO failed to appreciate the fact that the activities of STAR unit fall under information technology enabled products or services for the purpose of deduction under section 10B of the Act as notified by CBDT vide Notification No. SO 890(E) dated 26/09/2000.

1.7. Without prejudice to the above, the Hon'ble DRP and the learned AO have erred in not appreciating that, the definition of 'information Technology Enabled Services' as per provisions of the Act is very wide and covers any product or service and includes any data processing and is not restricted to computer software.

2. Disallowance of premium payable on redemption of Foreign Currency Convertible Bonds ('FCCB') of Rs. 53,75,81,482/-

2.1. The learned AO erred in disallowing and the Hon'ble DRP erred confirming the disallowance the expenditure of Rs. 53,75,81,482/- being premium payable on redemption of FCCB on the ground that the said expenditure is a mere provision towards the liability which is arising on maturity i.e. in future and hence not allowable as deduction in FY 2009-10 as the expenditure neither fructified nor was ascertainable.

2.2. The Hon'ble DRP and the learned AO failed to appreciate that FCCBs are characterized as debt and cannot partake the characteristic of equity capital. The bond holders are not and cannot be treated on par with equity shareholders.

2.3. The Hon'ble DRP and the learned AO grossly erred in appreciating the fact that the interest/redemption premium on FCCBs are a charge on the Appellant and hence arepaid irrespective of the profitability of the company unlike the payment of dividend which is payable only in the case of profitability and appropriation of profits earned by the Appellant.

2.4. The Hon'ble DRP and the learned AO failed to appreciate that the premium payableon redemption of FCCBs is indeed equivalent to interest on loans and in the nature of normal business expenditure;

2.5. The Hon'ble DRP and the learned AO failed to appreciate that the right to convert theBonds to shares vested only with the Bondholders and not the Appellant.

2.6. The Hon'ble DRP and the learned AO have erred in holding that premium on C^ redemption of FCCB is only a contingent liability without appreciating the fact that theAppellant has actually redeemed the FCCBs amount in April 2010 and June 2012 and that no amount has been converted into shares. .

2.7. The Hon'ble DRP and the learned AO ought to have allowed the FCCB premium, which is nothing but in the nature of interest expenditure, in the respective years, on accrual Basis.

2.8. Without prejudice to the above, in the event the premium is not allowable as C- deduction in the year of accrual, the same shall be allowed as deduction in the yearof redemption of FCCBs as the same have been actually redeemed at premium by the Appellant

3. Disallowance of FCCB issue expenses of Rs. 1,69,13,062/-.

3.1. *The learned AO and the learned DRP erred in disallowing FCCB issue expenses of Rs. 1,69,13,062/- being l/5th of the issue expenses on FCCB.*

3.2. The Hon'ble DRP and the learned AO have erred in not appreciating the fact the l/5th / of total issue expenses was allowed in the Appellant's own case for AY 2006-07,AY 2007-08 and AY 2009-10 by Hon'ble DRP.

4. Disallowance under section 14A of Rs.3,64,12,003/-.

4.1. The Hon'ble DRP and the learned AO have erred in law and on facts by invoking Section 14A of the Act to earning exempt income. Section 14A of the Act read with Rule 8D in determining expenditure in relation to earning exempt income.

4.2. The Hon'ble DRP and the learned AO failed to appreciate that the Appellant during the financial year relevant AY 2010-11, the Appellant has not earned any exempted L, income so as to apply provisions of section 14A of the Act.

4.3. The learned AO grossly erred in invoking provisions of section 14A r.w.Rule 8D , without appreciating the fact that there ought to be nexus between exempt income earned and 'expenditure incurred' thereon. In the absence of any exempted income (being earned, the question of expenditure having nexus / connection with income earned does not apply.

4.4. The Hon'ble DRP and the learned AO have erred in not appreciating that the disallowance u/s 14A read with Rule 8D is to be in relation to the income which does not form part of the total income and the disallowance can be done only by taking into consideration the investment which has given rise to this 'exempted income' , which does not form part of the total income

4.5. The Hon'ble DRP and the learned AO ought to have appreciated that the investments O held by the Appellant in domestic companies were made out of commercial expediency and entirely for business reasons and not to earn dividend income.

4.6. The Hon'ble DRP and the learned AO have erred in not appreciating the fact, the Appellant has been able to obtain a business advantage leveraging on the market presence and manufacturing / marketing capabilities etc. of the companies in which the Appellant has made investments

4.7. The Hon'ble DRP and the learned AO have erred in not appreciating the fact that the Appellant had not earned any dividend income from the investment that is exempt from tax during AY 2010-11.

***4.8.** Without prejudice to the above, the learned AO has erred in considering bank charges and commission amounting to Rs. 7,41,12,689/- as interest for the purpose of computing disallowance under section 14A read with Rule 8D.*

5. Re-computation of book profits under section 115JB of the Act

5.1. While passing the final order, the learned AO erred in not taking cognizance of the directions of the Hon'ble DRP with regard to the additions made on account of provision for leave encashment for the purpose of computation of book profit under section 115JB of the Act. The Hon'ble DRP had directed to exclude the provision for leave encashment, which was apparently mistakenly added back by the AO while computing the book profit under section 115JB of the Act.

6. Rectification of mistake apparent from records

The final order passed by the learned AO is suffering from certain mistakes apparent from records particularly with regard to the computation of total income and tax liability thereon. The Appellant reserves its right to raise such grounds relating to the same.

7. ***Initiation of penalty proceedings under section 271(1)(C) of the Act***
The learned AO has erred in law and facts in initiating penalty proceedings under Section 274 read with Section 271(l)(c) of the Act

The Appellant craves leave to add, alter and modify the above grounds during the course of the appeal.

For the above and any other grounds which may be raised at the time of hearing, it is prayed that necessary relief may be provided."

5.1 The assessee also raised additional grounds with respect to the following:-

"1 : 0 Re.; Disallowance u/s. 14A while computing 'book profits' u/s. 115JB of the Income-tax Act, 1961:

1 : 1 The Assessing Officer and the Dispute Resolution Panel have erred in increasing the 'book profits' for the purpose of section 115JB of the Income-tax Act, 1961 ('the Act') by an amount of Rs. 3,64,12,003/- being the disallowance u/s. 14A of the Act read with Rule 8D of the Income-tax Rules, 1962.

1 : 2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, no disallowance u/s. 14A of the Act is called for and the Assessing Officer and the Dispute Resolution Panel ought to have held as such.

1 : 3 The Appellant submits that the Assessing Officer be directed to delete the disallowance made u/s. 14A made to the 'book profits' and to re-compute its total income and tax thereon accordingly."

5.2 The assessee further raised the following additional grounds of appeal:-

"ADDITIONAL GROUND OF APPEAL

I : Re.; Disallowance of weighted deduction u/s. 35(2AB) of the Income-tax Act, 1961 f'the Act');

1 : 1 The Assessing Officer and the Dispute Resolution Panel have erred in disallowing the claim of weighted deduction u/s. 35(2AB) of the Act on the ground that the Appellant has failed to submit necessary documentary evidences.

1 : 2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, it is entitled to claim weighted deduction u/s. 35(2A8) of the Act and hence the action of

the Assessing Officer and the Dispute Resolution Panel in this regard is incorrect, erroneous and not in accordance with the law.

1 : 3 The Appellant submits that the Assessing Officer be directed to grant weighted deduction u/s. 35(2AB) of the Act and to re-compute its total income and tax thereon accordingly.

1 : 4 Without prejudice to the aforesaid, the Assessing Officer erred in not granting deduction of Rs. 1,05,10,765/- towards capital expenditure incurred in terms of section 35(1)(iv) of the Act.

2 : 0 Re.: Credit for advance-tax granted short by Rs. 3,16,50f 152/-

2 : 1 The Assessing Officer has erred in granting credit for advance-tax short by Rs. 3,16,50,152/-."

6. The Ld.AR submitted that the assessee has raised the additional grounds, which do not involve verification of any new facts and, therefore, prayed for admission of the same.

7. The Ld.DR vehemently argued that the additional grounds should not be admitted for the reason that the assessee had revised original grounds of appeal more than once and could have added these additional grounds along with while revising the original grounds.

8. We have heard the parties on the admission of additional grounds. The additional grounds do not require examination of new facts otherwise than on record. Therefore, 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)**, the additional grounds for substantial cause and justice is taken on record and we proceed to dispose of the same on merits.

9. Transfer Pricing Grounds:

9.1 Interest on delayed receivables

9.1.1 The Transfer Pricing Officer (TPO) noticed that assessee is having some receivables outstanding from the AE and imputed interest @8% after considering

30 days' grace period as per the terms of payment allowed by the assessee to its AE. The assessee submitted before the Ld.DRP that the details of invoice-wise realization had been submitted before the TPO, which have not been considered by the Ld.TPO. The assessee also submitted that the interest @8% has been charged on adhoc basis. The Ld.DRP did not accept the submissions of the assessee and upheld the adjustment.

9.1.2 Before us, the Ld.AR submitted a table showing the details of receivables along with the realization. The Ld.AR submitted that in most of the cases, the amount has been realized well before the grace period which fact has not been considered by the Ld.TPO. The Ld.AR also submitted that the TPO has used the cost of capital rate for charging interest which is not correct.

9.1.3 The Ld.DR supported the orders of the lower authorities. The Ld.DR submitted that interest on delayed payments is a separate international transaction and the TPO was correct in making adjustment of interest on delayed receivables. With regard to the submission of the Ld.AR that the assessee is not charging any interest for non AE receivables, the Ld.DR submitted that the assessee could not submit the details of delay in export proceeds from non AEs and therefore, the claim that no interest is charged on non AE transactions is to be verified.

9.1.4 We heard the parties and perused the materials on record. The details of receivables and the subsequent realization as submitted by the Ld.AR is extracted below:-

Sl No	Name of the AE	Amount in INR	Remarks	Average Realisation period after considering Grace Period	Average credit period
1	Ascent Pharmahealth Asia Pte Ld	56.783		**-63**	79

2	Arcolab SA, Geneva	-	No Delay in realization of Sale proceeds	**-92**	90
3	Ascent Pharmahelath Limited	-	No Delay in realization of Sale proceeds	**-85**	90
4	Co-Pharma	1,96,643		**-156**	176
5	Akorn Strides LLC	3,31,032		**-37**	60
6	Drug House of Australia (Asia) Pte Ltd	-		**-37**	60
7	LABORATORIES DOMAC S.L.	1,01,958		**60**	60
8	Strides Arcolab Polska sp.z.o.o.	2,81,713		**26**	30
9	Sagent Strides LLC	-	No Delay in realization o sale proceeds	**-80**	63
10	Strides Vital Nigeria Limited	9,40,097		**-15**	180
11	Strides Pharma Cyprus Limited	1,79,001		**-36**	117
12	Strides Pharma Cyprus Limited	1,79,001		**-36**	117
	Total interest on Delayed realisation of sale proceeds	**20,77,227**		**-47**	**93**

9.1.5. From the above, it is noticed that the average realization period of the assessee is (-)47 days which would mean that on an average, the realization happens well before the due date. We also notice that only two instances where there has been a marginal delay of 60 days and 26 days. Considering the nominal delay in the realization period and the overall average realization period being well before the grace period, in our view, there is no requirement to charge any interest towards receivables and, therefore, we hold that the TP adjustment made in this regard should be deleted. This ground is allowed in favour of the assessee.

9.2 Interest on share application money

9.2.1 The TPO observed that the assessee has given share application money to Stripes Acrolab International, UK and also to Starsmore Ltd, Cyprus. The TPO charged interest @8% on the share application money and imputed interest as per below working:-

Particulars	Starsmore Ltd	Strides Acrolab Internal Ltd
Opening Balance	486,64,50,167	244,96,00,836
Additional Investment by assessee	2,03,08,676	
Allotted during the year	40,87,50,000	
Amount refunded by AEs during the year	32,46,73,729	
Closing Balance	439,33,35,114	244,96,00,836
Average	462,98,92,640	244,96,00,836

Sr.No.	Name of AE	Avg. Bal	Interest @8.00% p.a.
1	Starsmore Limited	4,629,892,640	37,03,91,411
2	Strides Acrolab International Limited	2,449,600,836	19,59,63,067
	Total		56,63,50,478

9.2.2 The assessee submitted before the DRP that the assessee had invested share application money in its subsidiaries and the application money has been converted into equity shares in subsequent years. The assessee further submitted that the intention for advancing the money was to subscribe to the shares of the AEs and the refunds if any, received by the assessee was in the regular process relating to share allotment. The assessee argued before the DRP that TPO should not have re-characterised the share application money as loan and should not have imputed interest. The DRP, however, upheld the interest by relying on its own finding in assessee's own case for A.Y. 2009-10. The DRP held that the assessee has not brought any material on record to show that the AE intended to issue shares to the assessee and that the assessee has been giving money to its AEs interest free through interest free loans by way of share application money. The DRP directed the Assessing Officer to re-compute the interest based on the funds actually invested in the period and the funds were available with the AE.

9.2.3 Before us, the Ld.AR submitted that the issue is more or less settled now for the reason that the Hon'ble ITAT in assessee's own case for A.Y.S 2008-09, 2014-15 & 2015-16 has considered a similar issue and has deleted the interest.

9.2.4 The Ld.DR also submitted that details have not been provided with regard to whether the AEs raised this capital for its own business or kept it earmarked for share allotment. The Ld.DR also brought to our attention that there has been substantial delay in the return of share application money where there has been no allotment which shows that the nature of this transaction is actually in the form of an interest free advance and, therefore, the TPO is justified in imputing the interest on the same.

9.2.5 We heard the parties and perused the materials on record. We notice that the co-ordinate bench bench of the Tibunal in assessee's own case for A.Y. 2014-15 has considered a similar issue and held that –

> *14. We have heard both the parties, perused the materials available on record and gone through orders of the authorities below along with case laws cited by the Id. AR for the assesses. At the outset, it needs mention that it has been held by the Hon'ble Bombay High Court in the case of DIT v/s Besix Kier Dabhoi -(2012) 210 Taxman 151 (Bombay) that the Revenue has no power to re-characterize a transaction entered into by the Assessee. Therefore admittedly, the AO or the TPO are not empowered to convert and re-characterize a transaction of share application into a loan transaction. This aspect of the matter and this judgment has been overlooked by the DRP in its order for earlier year. As such, it could not be followed. Secondly, the remittance of the said share application money was approved and supervised by the RBI and the purpose of remittance as approved was investment in share capital. As such, there is no dispute to the fact that the amounts paid were on account of investment in share capital of the associates*

or subsidiaries. We further note that even otherwise the transaction of issue of shares is a capital account transaction and not a revenue account transaction and therefore could not be said to result in any income per se. We further notice that the co-ordinate benches of the Tribunal have also taken a view that no imputation of interest could be made on a transaction of share application money paid to subsidiaries. The coordinate bench of Mumbai Tribunal in the case Agro Ltd. v/s DCIT - ITA No. 1452 / Mum / 17 (supra) has held as follows:

> *18. We have heard the rival submissions of both the parties 3nd perused the material on record. The undisputed facts are that the assesses has advanced money as share application money to Golden Harvest a foreign AE to set up a plant in free trade zone in Shafjah. It is also undisputed that the AE could not convert the share application money into share capita/ by issuing shares to the assassee as the permission from the free trade zone authorities with whom the AE was registered was pending and this was the only sole reason for not issuing the shares in favour of the assessee. Now the issue before us is whether the share application money could be treated as loan and could be subjected to the transfer pricing provisions. After perusing the facts on record and going through the decision relied on by the Ld.AR, we find that no income has accrued from the share application money to the assessee and therefore such transactions could not be subjected to transfer pricing provisions. The Hon'ble Jurisdictional Bombay High Court in the case of Shell India Markets Pvt Ltd. vs. ACIT and others has also held that the provisions of chapter 10 of the Act would apply only when income arises from the international transactions. The relevant portion of the said order is reproduced as under:-*
>
> > *"9. We shall now consider the above submissions on behalf of the Revenue. So far as the availability of alternative remedy is concerned, the petitioner has at the beginning of today's hearing itself undertaken to withdraw its objection on the issue of jurisdiction before the Dispute Resolution Panel. This was accepted by us before considering the issue on the merits. Moreover, this petition was filed on April 24, 2013, challenging the impugned orders dated January 30, 2013, of the*

Transfer Pricing Officer and the draft assessment order dated March 28, 2014, of the Assessing Officer, on the issue of jurisdiction. This issue has been decided in Vodafone IV and would be binding on all authorities within the State till the apex court takes a different view on it. Therefore, in view of the fact that the Revenue does not dispute that the issue on the merits stands covered by the decision ofVodafone IV it would serve no useful purpose by directing the petitioner to prosecute its objections before the Dispute Resolution Panel and the Dispute Resolution Panel disposing of the same in accordance with Vodafone IV. Thus, in the present facts the distinction sought to be made on the ground of alternative remedy is not such as to warrant not entertaining the petition.

10. The second distinguishing feature from that of Vodafone IV, as canvassed by the Revenue, is that Form 3CEB in respect of the transaction of issue of shares to its associated enterprises, is not disclosed as an international transaction. This the petitioner was obliged to do as the transaction is an international transaction. ' This was in fact done by the petitioners in Vodafone IV. This stand by the Revenue is a little curious as in Vodafone IV the Revenue contended that as the petitioners therein had filed Form 3CEB in respect of issue of shares to its associated enterprise, they had submitted to the jurisdiction of Chapter X of the Ac! and cannot now contend that the proceeding to tax such shortfall on capital account is without jurisdiction, in this case, an exactly opposite stand is being taken by the State. The State is expected to be consistent and not change its stand from case to case. Be that as it may, the petitioner herein had not disclosed the transaction in Form 3CEB as, according to the petitioner, it was not an international transaction for the reason that it did not give no rise to any income. The fact that the petitioner chose not to declare issue of shares to its non-resident associated enterprises in Form 3CEB as in its understanding it fell outside the scope of Chapter X of the Act now stands vindicated by the decision of this court in Vodafone IV. If the petitioner did not file a particular transaction in Form SCEBwhen so required to be filed, the consequences of the same as provided in the Act would follow.

However, the mere not filing of Form 3CEB on the part of the petitioner would not give jurisdiction to the Revenue to tax an amount which it does not have jurisdiction to tax. Therefore, we do not find any substance in this objection also.

11. The last objection taken by the Revenue was that in view of the variation in the shareholding pattern amongst different shareholders of the petitioner during the year clearly brought the issue of shares within clause (e) of the Explanation to section 92B of the Act. In terms of the above provision an international transaction would include a transaction of restructuring entered into by an enterprise with an associated enterprise. Mr. Pardiwala, learned counsel appearing for the petitioner, points out that there has been no restructuring of the organization but there has been a mere change in the shareholding of different shareholders of the petitioner. However, in the present facts we need not examine this for the reason that even if it is assumed that it is an international transaction, the jurisdictional requirement for Chapter X of the Act to be applicable is that income must arise. In this case, admittedly following Vodafone IV no income has arisen. Thus, the jurisdictional requirement for application of Chapter X of the Act is not satisfied.

12. As held in Vodafone IV, the jurisdiction to apply Chapter X of the Act would occasion only when income arises out of international transaction and such income is chargeable to tax under the Act. The issues raised in the present petition are identical to the issues which arose for consideration before this court in Vodafone IV. Therefore, following the aforesaid decision we set aside the order dated January 30, 2013, of the Transfer Pricing Officer to the extent it holds that the arm's length price of issue of equity shares is Rs. 183.44 per share as against Rs. 10 per share as declared by the petitioner and consequent deemed interest brought to tax on the amount not received when benchmarked to the arm's length price. Accordingly, we set aside the draft assessment order dated March 30, 2013, to the extent it seeks to bring to tax the arm's length price of the share issued by the petitioner to its non-resident associated enterprises and also deemed interest

which is sought to be brought to tax on the ground of non- receipt of the consideration equivalent to the arm's length price by the petitioner on issue of equity shares. It is further clarified that the petitioner's objection before the Dispute . Resolution Panel filed on April 25, 2013, on all issues save and except the issue covered by this order would be considered by the Dispute Resolution Panel on its own merits."

19. The Hon'ble Bombay High Court further in the case of Equinox Business Parks (P.) Ltd. vs. Union of India has held as under:

"This has been accepted by the Revenue and is evident from the order of DRP dated 30 October 2014 in Petitioner's case for A.Y. 2010-11. In the A. Y.2010-11 also the Petitioner had issued CCDs and equity-shares and the basis was identical to the present Petition. The Revenue sought to tax the Petitioner in terms of Chapter X of the Act. However, the Petitioner objected to the Draft Assessment order before DRP. On 30 October 2014. DRP issued directions under Section 144C(5) of the Act to the Assessing Officer for the A.Y. 2010-11 and on identical facts qua equity shares and CCDs holding as under:

"3.4 We find that the issue under consideration of applying Transfer Pricing Provisions on 'issue of shares' has been decided in favour of the assesses by the Hon'ble Bombay High Court in the case of M/s Vodafone India Services Private Limited in Writ Petition number 871 of 2014 dated 10th October 2014. The honorable High Court has held that the amounts received on issue of shares is a capital account transaction not separately brought within the definition of 'income' as per the provisions of section 2(24) as well as sections 4 & 5 of the Act. Therefore, such capital account transaction not falling within a statutory exception cannot be brought to tax. Even income arising from international Transaction between AE must satisfy the test of income under the Act and must find its home in one of the above heads i.e. charging provisions. There is no charging section in

chapter X of the act. Only if there is income which is chargeable to tax under the normal provisions of the act, then alone Chapter X of the act could be invoked. Further, since there is no income arising from the transaction of issue of shares, the provisions of chapter X would not apply. The Hon'ble Bombay High Court in the said case has quashed and set aside as Being without jurisdiction, null and void, f^g reference made by the TPO, and the order of the TPO making a transfer pricing adjustment on issue of shares. Respectfully following the decision of the jurisdictional Bombay High Court,, the adjustment proposed by the' TPO on account of issue of shares is deleted. Accordingly, ground of objection number 16 of the assessee is allowed. "

20. We, therefore, respectfully following the ratio laid down by the Hon'ble Bombay High Court, reverse the direction of DRP and direct the AO to delete the addition on account f notional interest of Rs.2,44,20,173/-.

15. Similar view is also taken in other judgments relied on by the Ld. AR. Since, no contrary judgments have been brought to our notice, relying on the above stated judgments, we direct the AO to delete the impugned adjustment made by the TPO as affirmed by the DRP towards notional interest on share application money for belated allotment of equity shares."

9.2.6 We also notice that similar view has been held by the Tribunal in assessee's own case for A.Ys 2008-09 & 2015-16. Considering the facts being identical for the year under consideration also, respectfully following the above decision, we hold that no interest shall be imputed on the share application money. It is ordered accordingly.

9.3 Imputing commission with respect to Corporate Guarantee

9.3.1 During the assessment proceedings, the assessee submitted the details of corporate guarantees before the TPO. The TPO charged 1.75% towards bank guarantee commission and accordingly made a transfer pricing adjustment. The assessee submitted before the Ld.DRP that TPO did not give any basis but merely relied on the directions of the DRP for A.Y. 2009-10. The assessee further relied on the decision of the ITAT, Mumbai in the case of Godrej Sara Lee & Nimbus Communications Ltd vs CIT (ITA No.429/Mum/201) wherein the Tribunal has directed the Assessing Officer to recompute the ALP of guarantee commission @0.5%. The Ld.DRP did not accept the objection of the assessee and upheld the rate charged by the TPO. The Ld.DRP also did not consider the submissions of the assessee that the guarantee given to Stripes Farmaceutica Participacoes Ltda, Brazil was provided in F.Y. 2010-11 and hence, not applicable to A.Y. 2010-11. The Ld.DRP also did not consider the plea of the assessee to restrict the adjustment for the period for which the guarantee was provided in the case of Starsmore Ltd.

9.3.2 Before us, the Ld.AR reiterated the submissions made before the lower authorities. The Ld.AR also brought to our attention that the co-ordinate bench of the Tribunal in assessee's own case for A.Y. 2008-09 has restricted the adjustment of guarantee commission on corporate guarantee to 0.5% and accordingly prayed for a similar direction.

9.3.3 The Ld.DR, on the other hand, submitted that the claim of the assessee to charge guarantee commission @0.5% is misplaced because the percentage is to be decided based on specific facts and cannot be applied in all the cases. Accordingly, the Ld.DR supported the action of the lower authorities.

9.3.4 We have heard the parties and perused the material on record. We notice that the co-ordinate bench in assessee's own case has considered a similar issue and held that –

> *029. We have carefully considered rival submission and orders of lower authorities. We find that scope of Section 92B has further been expanded by addition of explanation by the finance act 2012 with retrospective effect from 1/4/2002 which specifically provides that international transaction includes the guarantee. Therefore, it cannot be said that corporate guarantee issued to associated enterprise is not an international transaction. Therefore, We are inclined to agree with the submission of the Ld. DR that providing corporate guarantees to overseas AE"s is an international transaction.*
>
> *030. Now the issue is what is the arm"s-length price of the corporate guarantee commission to associated enterprises. The coordinate bench on identical facts and circumstances in case of Everest Kanto cylinders [Everest Kento Cylinder Ltd. [IT Appeal No. 7073 (Mum.) of 2012, dated 23-11-2012]] has held that guarantee commission should be charged @ 0.5% p.a. for providing corporate guarantee for the purpose of determining arm"s length price. Both the parties could not give us any reason to deviate from the above arm"s-length price as held by the coordinate bench, which has been upheld by the honourable Bombay High Court. The case of Asian Paints [supra} cited before us for benchmarking @ 0.20 % has different and distinguishing facts. Further corporate guarantee commission is to be charged at that amount of Guarantee given and cannot be reduced to the extent of amount of borrowings by the AE as both are separate and distinct facts. Considering the various decisions in this regard, we direct the AO to limit the adjustment to 0.5% p.a. on the amount of corporate guarantee provided based on the period for which the guarantee was operative in respect of each of the AE"s during the year under consideration. The learned transfer-pricing officer is directed to compute the arm"s-length price of the corporate guarantee at the rate of 0.5%. Accordingly ground number 4 of the appeal is allowed with above directions."*

9.3.5 The facts for the year under consideration being identical, respectfully following the above decision, we direct the TPO to recompute the guarantee commission @0.5% for the year under consideration also. Further, we notice that the assessee has raised specific objection before the Ld.DRP with regard to Stripes Farmaceutica Participacoes Ltd, Brazil that the guarantee was provided only in the next year and not in the year under consideration. However the DRP has not given any specific finding in this regard. We therefore direct the TPO to examine factually as to the year in which the guarantee was provided to Stripes Farmaceutica Participacoes Ltd, Brazil while recomputing the guarantee commission.

9.3.6 We also notice that the plea of the assessee before the DRP that the guarantee commission should be restricted for the period of guarantee has not been considered and the TPO in the case of Starmore Ltd has computed the adjustment for the entire year though guarantee was provided only on 17th March, 2010. In this regard, we direct the TPO to consider period of guarantee while re-computing the guarantee commission as per the directions in this order.

9.4 Upward adjustment to the consideration received towards sale of investments to AE.

9.4.1 During the year under consideration, the assessee has sold its entire investments in Stripes SA Pharmaceuticals P Ltd, South Africa to its group concern, Linkace Ltd. The assessee submitted before the TPO that the transfer was done to comply with the RBI regulations which did not allow the assessee to have more than two directly wholly owned subsidiaries. The assessee submitted a valuation report in which the share price was in the range of Zar 1371-1515 per share. The assessee has adopted a value of the Zar 1470 which gets converted at

Rs.9204/- which amounted to Rs.46,94,036/- as sale consideration. The TPO recomputed share value at Zar 5061.82 based on the financials of Stripes SA Pharmaceuticals P Ltd, South Africa for December,2010 and accordingly arrived at an adjustment of Rs.1,44,66,847/- which is as under:-

Particulars	Amount in Zar	Amount in Rs.
Total investment	749,822	4,694,036
Number of shares allotted	510	510
Value per share	1,470	9,204
Book value per share on Dec 2010	5,061,82	31,688
ALP of total investment (510*5061,82)	25,81,528	1,61,60,883
Sale value of investments		4,494,036
Variation / Adjustment		1,14,66,847

9.4.2 The assessee submitted before the DRP that as per the valuation report based on net effect value method and discounted cash flow method, the share price is in the range of Zar 1371 to Zar 1515 and the price charged is within this range and accordingly, the transaction was considered to be at arm's length. The assessee also submitted that the TPO while recomputing the valuation, has taken into consideration the revaluation reserve also which should not be included for the purpose of arriving at the share price. The assessee further submitted that sale of investments in Stripes SA Pharmaceuticals Pty Ltd, South Africa is part of internal re-structuring to streamline and simplify the overseas structure of the assessee and was not intended to be a tax saving exercise. The DRP, after considering the submissions of the assessee re-worked the valuation of shares using discounted cash flow method to arrive at value per share at Zar 4754.32. The DRP concluded

that since the value adopted by TPO at Zar 5061.82 is reasonably close to the value as computed by the DRP, the DRP upheld the valuation adopted by the TPO.

9.4.3 The Ld.AR submitted that the said sale of shares was done to comply with the RBI regulations which did not allow the assessee to have more than 2 direct wholly owned subsidiaries. It is submitted that the sale of shares is nothing but an internal restructuring and to simplify the overseas structure and the entity whose shares have been sold i.e. Strides SA to its step down wholly owned subsidiary only i.e. Linkace Ltd. The value of shares Strides SA remains with the Assessee Company since it continues to be the step down subsidiary of the assessee Company as on date. Further, the valuation was carried out and as such no specific method for valuation was prescribed. The Net Asset Value ('NAV') method is appropriate for valuation of shares. Reliance can be placed in this regard on the following wherein NAV method has been considered as a method for valuation of shares:

- Rule 11UA of the Income-tax Rules, 1962
- Shedule II of the Gift Tax Act, 1958
- Wealth-tax Act, 1957

The Ld AR also submitted that the annual accounts as on 31 December 2009 of Strides SA Pharmaceuticals (Pty) Ltd should be considered and not as on 31 December 2010 as the transaction was done on 15 December 2009. Further, the Revaluation reserve ought o be excluded while computing the NAV. In this regard the Ld AR place reliance on Proviso to Explanation 1 to section 50B of the Act and also on the relevant provisions of The Companies Act and Sick Industrial Companies (Special Provisions) Act to submit that the revaluation reserve ought to

be excluded while arriving at the price at which the transaction is to take place and accordingly the same is within arm's length.

9.4.4 The Ld.DR, on the other hand, supported the orders of the authorities below. He further submitted that the assessee has not benchmarked this transaction in the first place. The TPO has determined the value by NAV method and determined the adjustment. The DRP has taken the DCF method and determined the adjustment. The assessee has claimed that the value was determined by a registered valuer which should be accepted. The assessee took weighted average of the value from NAV and the DCF method during TP and DRP proceedings. The Ld.DR further contended that the assessee has claimed that the revaluation reserve must be not taken into account while calculating the value of the shares. However, the DRP has taken the DCF method and has held that this was closer to the value arrived by the TPO and is thus not unreasonable as given in para 6.21 of the DRP order on page 26. This shows that the value is similar as determined by both the methods and therefore the stand of the TPO is justified and the adjustment be sustained.

9.4.5 We have heard the rival submissions and perused the materials available on record. The assessee while arriving at the valuation of shares has adopted NAV method in which the revaluation reserve was excluded and accordingly concluded that the value at which the shares have been transferred is within arm's length. The TPO has considered the financials of Stripes SA Pharmaceuticals Pty Ltd, South Africa as of December 2010. The key contentions of the assessee are that the TPO has taken the financials of wrong year and that the revaluation reserve should be excluded for the purpose of arriving at NAV. In this regard the ld AR submitted the definition of "Net Worth" under various Acts including Companies Act 2013

etc., as per which "Net worth" means paid up capital and free reserves. It is also submitted that the Hon'ble Supreme Court in the case of G L Sulatania & Another vs The Securities Exchange Board of India & Others (Civil Appeal No 1672 of 2006) while considering the issue of exclusion of revaluation reserve while computing net worth held that *"As per paragraph 6.2 of the CCI Guidelines only genuine reserve should be included while calculating the true net worth of the company. Therefore return on Net worth should have been calculated after deducting the revaluation reserve"*

10. The ld AR also submitted a working where the value of shares as per NAV method as of 31st December works out to ZAR 635 i.e.Rs.3973. We notice that the TPO while arriving at the value of the shares had not given any working as to how the value of ZAR 5061.82 was arrived at but has just stated that the value is based on the financials as of 31st December 2010. We also notice that the DRP has proceed to compute the value of shares by applying a DCF method by stating that the DCF is the most appropriate method. In our considered view, the valuation method adopted by the assessee cannot be rejected without scrutinizing the valuation done by the assessee though the DRP is well within its rights to examine the methodology adopted by the assessee and/or underlying assumptions and if not satisfied, it can challenge the same and suggest necessary modifications/alterations provided the same are based on sound reasoning and rationale basis. However on perusal of records we notice that no such specific findings is given by the DRP. In view of these discussions, we deem it fit to remit the issue back to the AO/TPO with a direction to examine the NAV method of valuation as adopted by the assessee afresh excluding the revaluation reserve for the year ended 31st December 2009 and decide in accordance with law. Needless to say that the assessee be given a reasonable opportunity of being heard. It is ordered accordingly.

11. Corproate Taxes

11.1 Disallowance of deduction claimed u/s 10B

11.1.1 The assessee, during the year under consideration, claimed deduction of Rs.11,44,12,959/- under section 10B in respect of STAR division which is engaged in contract manufacturing and research division. The assessee submitted before the assessing officer that star is registered and approved as EOU carrying on the operations relating to pharmaceutical business process outsourcing facility in research and development and STAR commodities, generic version of product of re-formulating existing innovative product. The assessee also made a detailed submission on the nature of activity carried through the star facility that this reformulated generic version of the product is produced / manufactured as a prototype and later, all the technical and other data relating to the product is compiled in the form of a dossier and submitted to the regulatory authorities for approval. Further, the assessee admits that this product development activity is a process related activity, the final outcome of which is recorded in a document called Dossier. The said document records the detailed method followed in the manufacture of the product from sourcing of raw material to the final product. The process so developed is sold to the customers by the assessee, who submits the process recorded in the dossier before the regulatory authorities concerned after whose approval they get the right to sell the product in a particular territory. It was also admitted by the assessee that with the sale of the products, the right to manufacture does not pass on to the buyer i.e., assessee's customer but vests with the assessee itself.

11.1.2 The Assessing Officer denied the deduction of 10B by observing that from the assessee's submission it is seen that the assessee's activity as far as above

area of work is concerned, comprises of development of generic version of products by reformulating an existing innovative product. The relevant extract from the order of the Assessing Officer is as given below

*"The assessee's activity comprises of entire process involved in drug development which is summarized and compiled in the form of document which is technically known as a 'Dossier'. Thus the said activity of the 'process development' is neither an article nor a thing, but only comprises of development of manufacturing process of a product and its stability and safety a for human consumption etc. And in this entire process/activity what is important and central to the whole thing is the process and not the 'compilation of data', which is termed technically as a "Dossier", which the assessee claims to be a 'Good' or 'Article'. The said compilation of the process and data is then produced by the buyer or party giving the contract to the assessee for development of said process before Regulatory Authorities for approval of the pharmaceutical product developed and once the approval is granted by the Regulatory authority concerned then the new drug can be marketed legally in that territory starting that day. Further, as seen from the assessee's reply, the assessee admits that it is still the owner of the process of drug manufacture and the right to manufacture continue with the assessee itself. From this it is evident that what the assessee is selling is not the 'process of manufacture' but only granting the facility / license in respect of manufacture of Pharmaceutical products by utilizing the said process in certain territories in return for which the assessee is paid the fees / Development Income, on which the assessee is claiming deduction u/s 10B. Further, the assessee's contention that the amount received by the assessee in return for this development process is called 'Development Income' and not 'Fees' as stated by the Assessing Officer is of no relevance, since the nature of said income is not determined by the AO based on the nomenclature used by the assessee for consideration received. Thus, since the granting of such a facility / license to manufacture and sell within a territory, using the process developed by the assessee is what the activity on which the assessee is earning income, the same can by no stretch of imagination be treated as 'manufacture or production of an **article or thing and export thereof**. Coming to the various decisions relied on by the assessee, the assessee cannot derive any strength from the said decisions since the same deal with the issue of manufacture or production and are not given in the context of determining whether a process can be considered as an 'article or thing'. Coming to the alternative argument put forth by the assessee dossier amounts to providing*

Information Technology Enabled Services (1TES) the same is also of no avail to the assessee since the said services pertain to software and computer related services and not to other processes. Hence the assessee's claim of deduction u/s 10B of Rs. 11,44,12,969/- in respect of its 'Contract Manufacturing & Research Division' (STAR unit), is disallowed. Accordingly, the claim of deduction u/s 10B of the Act stands restricted by Rs.11,44,12,969/-. "

11.1.3 On further objections filed before the DRP, the Ld.DRP held that the findings of the Assessing Officer that assessee is not engaged in the activity of manufacture / production of computer software and the preparation of dossier does not amount to providing ITeS services, is correct, and accordingly, upheld the denial of deduction under section 10B of the Act.

11.1.4 The Ld.AR submitted that the issue is covered in favour of the assessee in assessee's own case for A.Y. 2007-08 & 2008-09. The Ld.DR, on the other hand, supported the orders of the lower authorities.

11.1.5 We heard the parties and perused the materials on record. We notice that the co-ordinate bench in assessee's own case for A.Y. 2007-08 has considered a similar issue and held that –

041. We have considered the rival submissions and perused the material available on record. We find that the Co–ordinate Bench of the Tribunal in assessee"s own case in Strides Pharma Science Ltd. v/s ACIT, in ITA no.8614/Mum./2011, for the assessment year 2007–08, vide order dated 08.06.2018, allowed the deduction claimed by the assessee under Section 10B of the Act by observing as under:–

> *"12. From the facts of the present case, it is clear that the fundamental requirement in all the agreement is creation of dossier, which is compilation of the relevant technical education to enable manufacture of product. Dossier has all the attributes of product being an article or thing and it is creation specifies the requirement of a production. In fact, creation of dossier entails the actual production of the formulation initially in the laboratory and therefore upto a batch size. In similar circumstances Hon"ble*

Supreme Court in the case of scientific Engineering House Pvt Limited vs CIT (1986) 157 ITR 86 (SC) held that the compilation of technical knowhow is an article to be considered as capital asset eligible for depreciation. Similarly, the Mumbai Tribunal also in the case of ISBC Consultancy Services Ltd. VS DCIT (2002) 88 ITD 134 (Mum) held that the customization of software amounted to manufacture and entitled to deduction under Section 10A of the Act. In view of the above given facts and circumstances, we are of the view that the assessee is entitled to deduction under Section 10B as it has established that the relevant conditions of section 1OB that there must be a production of article or thing and export of such article . or thing and consideration thereof brought into India within the time permissible under the foreign exchange regulations are fulfilled and accordingly allowable. We allow this issue of assessee's appeal."

042. The learned D.R. could not show us any reason to deviate from the aforesaid order and no change in facts and law were alleged in the relevant assessment year. Thus, respectfully following the order passed by the Co–ordinate Bench of the Tribunal in assessee"s own case cited supra, wedirect the Assessing Officer to allow the deduction claimed under section 10B of the Act. Accordingly, ground no.6, raised in assessee"s appeal is allowed."

11.1.6 The facts being identical for the year under consideration, respectfully following the above decision of the co-ordinate bench, we hold that the assessee is entitled for deduction under section 10B of the Act in respect of STAR division.

11.2 Disallowance of FCCB Premium

11.2.1 The Assessing Officer noticed that assessee has claimed a sum of Rs.55,44,94,544/- being 1/5th of the FCCB premium though the same was not debited to the P&L account. The assessee submitted before the Assessing Officer that the assessee has issued bonds to the extent of USD 40 million and that the redemption premium has been calculated at 6.8% on semi annual basis. It was submitted that the assessee has claimed the said premium over a period of 5 years and that the bonds are convertible into shares on or after May 18, 2005 though

none of the bonds were offered for conversion as of 31st March 2009. The assessee had also submitted that as per the offered document, the liability towards principal amount and the redemption premium is crystallised in the year of issue, but is discharged in the year of redemption. The assessee further submitted that when a company issues FCCB, it incurs a liability to pay larger amount than what has been borrowed and that higher amount payable will be for the purpose of its business in order to generate funds for its business activity. Accordingly, the assessee submitted that FCCB premium be allowed as a deduction.

11.2.2 The Assessing Officer did not accept the submissions of the assessee for the reason that the premium on redemption of FCCB is not equivalent to interest on loan since the bonds have an option of being converted into shares. The Assessing Officer held that incurring premium is only a notional expenditure in the current year and is contingent on the bond holder exercising the option of not converting the bond into share which may or may not take place. The assessing officer relied on the decision of the DRP for A.Y. 2007-08 in this regard and accordingly disallowed the premium on redemption. The DRP upheld the decision of the Assessing Officer for the reason that the FCCB premium is a provision for liability which has not been incurred during the year and, therefore, cannot be allowed as a deduction. The DRP relied on its own decision in assessee's own case for A.Y. 2009-10 in this regard.

11.2.3 Before us, the Ld.AR submitted that the same issue has been considered by the co-ordinate bench in assessee's own case for A.Ys 2007-08 and 2008-09 where the issue is held in favour of the assessee. We heard the Ld.DR who supported the order of the lower authorities.

11.2.4 We notice that the co-ordinate bench in assessee's own case for A.Y. 2008-09 has considered similar issue and held that –

053. We have heard the rival contentions and gone through the facts and circumstances of the case. The learned Counsel for the assessee explained the facts that the assessee company has issued FCCB (listed in Singapore Stock Exchange) to the extent of US$ 40 million. These bonds carry an interest rate of 0.5% p.a. and are redeemable on April 19, 2010 at 136.78 percent of the principal amount. Further, these bonds are convertible into shares by bond holders on or after May 18, 2005 and only at the option of bond holders. The total issue expense relating to the issue of FCCB is USD $ 10,77,926 claimed in equal instalments over a period of 5 years. Further, we find that these bonds may be redeemed only in full at any time on or after 18th April 2008 but before 19th April 2010 with a redemption premium of 6.8% p.a. As on 31 December 2005 the additional amount (including exchange fluctuation) which is payable on redemption was provided for under Debenture Redemption Reserve with a corresponding adjustment to Securities Premium Account . Further, none of the bonds were offered for conversion as on 31st March 2007. Further, the FCCB issue expenses have been allowed as a deduction in the Company's own case for the AY 2006-07. Based on GAAP principles and the relevant Accounting Standards , the premium needs to be accrued; consequently the liability has been accrued in the books in the year of receipt of FCCB funds. Premium on redemption amounting to USD 16 Million has been accrued in the financials for the year ending 31 December 2005 based on the office circular. The liability is crystallized in the year of issue; however, it is discharged in the year of redemption.During the course of hearing, the learned A.R. submitted that identical issue was decided in favour of the assessee by the Co–ordinate Bench of the Tribunal in assessee"s own case for the preceding assessment year.

054. The learned D.R. vehemently relied on the orders passed by the lower authorities.

055. We have considered the rival submissions and perused the material available on record. We find that the Co–ordinate Bench of the Tribunal in assessee"s own case in Strides Pharma Science Ltd. v/s DCIT, in ITA No.8540/Mum/2010 for the assessment year 2006-07, vide order dated 31.03.2017 and in ITA no. 8614/Mum./2011, for the assessment year 2007–08, vide order dated 08.06.2018, had deleted the said disallowances."

> *056. The learned D.R. could not show us any reason to deviate from the aforesaid order and no change in facts and law were alleged in the relevant assessment year. Thus, respectfully following the order passed by the Co–ordinate Bench of the Tribunal in assessee"s own cases cited supra, we are of the view that the assessee has rightly claimed the liability as expense direct the Assessing Officer to delete the said disallowance u/s 37(1) of the Act. Accordingly, ground no.10 and 11, raised in assessee"s appeal is allowed.*

11.2.5 The deduction claimed by the assessee for the year under consideration is a continuation of 1/5th of FCCB premium as claimed in AY 2008-09 and therefore the issue is covered by the above decision of the coordinate bench. It is also relevant here to note that the DRP in assessee's case for AY 2013-14 has directed the AO to allow the premium on redemption of FCCB of USD 100 Mn as a deduction provided the assessee withdraws the claim in 2009-10 to 2013-14. We accordingly direct the AO allow the deduction claimed by the assessee towards FCCB premium u/s. 37(1) of the Act taking into consideration the directions of the DRP for AY 2013-14.

11.3 Disallowance of FCCB issue expenses

11.3.1 The Assessing Officer has disallowed FCCB issue expenses which is included as part of FCCB premium expenses to the tune of Rs.,69,13,062/-. The assessee submitted before the DRP that the Assessing Officer has erroneously disallowed the issue expenses also while disallowing the FCCB premium amount. The D upheld the disallowance by stating that expenditure towards issue expenses have not been incurred during the assessment year 2010-11 and accordingly cannot be allowed.

11.3.2 The Ld.AR submitted that the issue under consideration is covered in favour of the assessee by the decision of the co-ordinate bench in assessee's own case for A.Y. 2008-09 where it has been held as that of the findings as extracted above. The Ld.AR accordingly prayed for similar direction.

11.3.3 We heard the parties. We notice that the issue of disallowance of FCCB issue expenses have also been considered by the co-ordinate bench in assessee's own case for A.Y. 2008-09 and the relevant part of the decision have been extracted in the earlier part of this order. Respectfully following the same, we hold that the FCCB issue expense is allowable.

11.4 Disallowance u/s 14A

11.4.1 The Assessing Officer noticed that the assessee had shown huge investments in the statement of accounts for 31.03.2009 and 31.03.2010. The Assessing Officer called on the assessee to explain why a disallowance under section 14A read with rule 8D should not be made considering the claim of exempt income. The assessee submitted that no exempt income had been claimed by it during the year under consideration and that the investments made were not out of borrowed funds. The assessee, therefore, submitted that no disallowance under section 14A is warranted. The Assessing Officer made an addition of Rs.3,64,12,003/- by relying on the decision of Hon'ble Bombay High Court in the case of Godrej & Boyce Mfg. Co Ltd 328 ITR 81 (Bom). The Assessing Office had worked out the disallowance by applying rule 8D(2)(ii) for Rs.2,99,55,589/- and the disallowance under rule 8D(2)(iii) at Rs.64,66,414/-. The assessee submitted before the DRP that the investments were made for commercial expediency and not to earn exempt income. The assessee further submitted that no expenditure has been incurred directly or indirectly in relation to such investments

during the year under consideration. The assessee also submitted that the assessee has not earned any dividend income from investments made during the year. The Ld.DRP upheld the disallowance by rejecting the claim of the assessee that the investments were made out of own funds and also that no disallowance could be made in the year in which no exempt income had been earned.

11.4.2. The Ld.AR reiterated the submissions made before the lower authorities to state that the assessee has not earned any exempt income during the year under consideration and, therefore, no disallowance under section 14A ought to have been made. The Ld.AR drew our attention to the decision of the co-ordinate bench in assessee's own case for A.Y. 2008-09 where the issue is held in favour of the assessee. Reliance in this regard is also placed on the decision of the Hon'ble Delhi High Court in the case of PCIT vs Delhi International Airport (2022) 144 Taxmann 80 (Del) wherein it has been held that provisions of section 14A would not be applicable with no exempt income was received or receivable during the relevant previous year. The Ld.AR also placed reliance on the decision of the Hon'ble Delhi High Court in the case of PCIT vs Era Infrastructure India Ltd (2022) 141 taxmann.com 289 to submit that the amendment made to section 14A of Finance Act, 2022 is prospective and not applicable in assessee's case for the year under consideration.

11.4.3 We heard the parties and perused the material on record. We notice that the co-ordinate bench in assessee's own case for A.Y. 2008-09 has considered the issue of disallowance under section 14A and held that –

> *060. We have considered the rival submissions and perused the material available on record. We find that the assessee during the course of assessment proceedings, has raised the following submissions:–*

> *i) The assessee has made investment in domestic companies and mutual funds out of the cash generated from its business operations and not from loan funds;*
>
> *ii) The assessee has not incurred any interest or any other expenditure for making the aforesaid investment;*
>
> *iii) The assessee has not earned any exempt income from its equity investments during the year; and*
>
> *iv) The disallowance under section 14A of the Act should not exceed the actual expenditure incurred by the assessee (and debited to Profit & Loss Account) for earning the exempt income.*

061. We find that while making a further disallowance under section 14 A of the Act, over and above suo–motu disallowance offered by the assessee, the Assessing Officer has not considered any of the submissions made by the assessee which have bearing on the issue. We also noticed that the Co–ordinate Bench in assessee"s own case in Strides Pharma Science Ltd. v/s DCIT, in ITA no. 7370/Mum/2018, for the assessment year 2014–15, vide order dated 07.02.2020 and in ITA no. 7992/Mum/2019, for the assessment year 2015–16 vide order dated 06.04.2022 has restored the issue to the file of the Assessing Officer by observing as under:–

> *"30. …….. The sum and substance of ratio laid down by above judgments is that only those investments which yield exempt income needs to be considered for computation of average value of investments. In this case, we notice that the Assessee has himself disallowed an amount of Rs.21,27,797/- which has not been found to be accepted by the AO or the DRP. Further, the facts with regard to total investments and investments which yield exempt income is not readily available before us. We, therefore, are of the considered view Strides Arcolab Ltd.; A.Y. 08-09 that ends of justice would be met if the disallowance is made after re- computing average value of investment by considering only those investments which yield exempt income. Hence, the matter is restored to the AO to re-work the disallowance in line of our discussions given hereinabove."*

062. The other related issue is the disallowance made under section 14A of the Act has also been added back to the profits while computing the book profit under section 115JB of the Act.

063. We have considered the rival submissions and perused the material available on record. We find that the Co–ordinate Bench of the Tribunal in

assessee"s own case in Strides Pharma Science Ltd. v/s DCIT, in ITA no.7370/Mum./2018, for the assessment year 2014–15, vide order dated 07.02.2020 and 7992/Mum/2019, for the assessment year 2015-16, vide order dated 06.04.2022 has deleted the addition made to book profit computed under section 115JB of the Act by observing as under:–

> *"34.We have heard both the parties, perused materials available on record and gone through orders of the authorities below along with case laws cited by the ld. AR for the assessee. After considering the facts of the case and the various judgements cited supra, we are ofthe opinion that no addition to book profits u/s 115JB could be made on the basis of disallowance u/s 14A read with Rule 8D of the Income Tax Rules, 1962. This legal proposition is supported by the decision of Hon;ble Bombay High Court in case of CIT v/s Bengal Finance and Investments – (ITXA No. 337 of 2013 Bombay High Court), where it was held that computation contemplated under clause (f) of explanation (1) to section 115JB is to be made without resorting to computation as contemplated u/s 14A r.w.r 8D of the Income Tax Rules, 1962. A similar ratio is laid down by special Bench of ITAT,Delhi in the case of DCIT vs. Vireet Investments Pvt Ltd(Supra). We, therefore, respectfully following the ratio laid down by High Courts and Tribunal, direct the AO to delete addition made to book profit computed u/s 115JB, towards disallowances computed u/s 14A of the Income Tax Act, 1961."*

064. In view of the above, we deem it appropriate to restore this issue to the file of the Assessing Officer for denovo adjudication in accordance with the directions of the Co– ordinate Bench of the Tribunal in the orders cited supra and the law applicable after consideration of the submissions of the assessee. Further, we a l s o direct the Assessing Officer to delete the addition of disallowance under section 14A while computing book profit under section 115JB of the Act. Accordingly, ground no.12, raised in assessee"s appeal is allowed for statistical purpose."

11.4.4 For the year under consideration, the AO and the DRP have not considered the submissions of the assessee and fact being identical to AY 2008-09, respectfully following the decision of the coordinate bench in assessee's own case supra we remit the issue back to the AO for a fresh consideration. The AO is directed to keep in mind the decisions of the Hon'ble Delhi High Court in the case

of Delhi International Airport (supra) and Era Infrastructure (surpa) after giving a reasonable opportunity of being heard to the assessee.

11.5 Adjustments made to book profits

11.5.1 The DRP, while considering the objection of the assessee with respect to adjustments made in the book profits with respect to disallowance made under section 14A and leave encashment, gave a direction to the Assessing Officer to exclude the component of leave encashment from the workings of the profit for the purpose of MAT computation.

11.5.2 The Ld.AR during the course of hearing brought to our attention that the Assessing Officer, while passing the final assessment order did not follow the direction and, therefore, prayed for a direction in this regard. We accordingly direct the Assessing Officer to consider the directions given by the DRP and re-compute the book profits accordingly.

11.6 Disallowance of weighted deduction under section 35(2AB)

11.6.1 The assessee had debited sum of R.8,53,95,845/- to the P&L Account towards expenditure incurred on scientific research and had claimed a weighted deduction of Rs.14,38,59,915/- under section 35(2AB). The Assessing Officer did not allow the weighted deduction to the assessee for the reason that the assessee has not obtained the expenditure approval for the items of expenditure in respect of which it had claimed weighted deduction from DFIR. Therefore, the Assessing Officer allowed only 100% of the amount of expenditure incurred and disallowed a sum of Rs.5,84,64,070/- being the balance claimed as deduction. The assessee,

before the DRP submitted that it had incurred the revenue expenditure to the extent debited to the P&L Account and also incurred a capital expenditure of Rs.1,05,10,765/- and claimed weighted deduction towards both the amounts. The assessee submitted that it is entitled to claim weighted deduction since the assessee had carried out research and development activities from approved facilities which is certified by the DSIR in Form 3M. The assessee further submitted that the non receipt of required approval was a procedural delay and since the R&D facility is approved, the assessee is entitled for a weighted deduction. The DRP, after considering the submissions of the assessee held that –

> *"9.4 We have considered the facts of the case and the submissions made by the assessee. It is an undisputed fact and also admitted by the assessee that the expenditure approval has not been obtained from the prescribed authority which is a precondition for claiming the specified deduction under section 35(2AB) of the Act. Since the assessee has not fulfilled the condition prescribed in the provisions of section 35(2AB), weighted deduction as claimed by it cannot be allowed.*
>
> *9.5 However, the assessee has also claimed that expenditure of Rs.1.05 crores related to capital expenditure and should be allowed u/s 35(1)(iv) of the Act. We find that the assessee had made no such claim in the return of income filed. In. fact, the said expenditure now claimed as allowable u/s 35(1)(iv) was claimed u/s 35(2AB) of the I. T Act, 1961. The assessee has also not shown before us that all the conditions for the claim of the expenditure now made u/s 35(1)(iv) of the Act are 'satisfied. In nbview of the aforesaid reasons the claim made by the assessee cannot be accepted. The action of the Assessing Officer of disallowing the claim of deduction to the extent of Rs.5,84,64,070/- is upheld."*

11.6.2 Ld.AR submitted that the claim towards weighted deduction under section 352AB is done on the basis of approval of the R&D facilitity of DSIR. The Ld.AR also brought to our attention that similar view has been held by the co-ordinate bench of the Tribunal in assessee's own case for A.Y. 2002-03 bearing

ITA No.1727/Mum/2006 dated 16/12/2015 and the same has been affirmed by the Hon'ble Bombay High Court vide order dated 4th February, 2019. The Ld.AR also submitted that in assessee's own case for A.Y. 2002-03, 2003-04, 2004-05, which have been affirmed by the Hon'ble Bombay High Court have also held the issue in favour of the assessee. The Ld.AR further relied on the following decisions:-

- Ultratech Cement Ltd vs DCIT (2022) 139 taxmann.com 151
- ACIT vs Reliance Life Science Pvt Ltd (2021) 128 taxmann.com 468
- Omni Active Health Technologies Ltd vs ACIT (2020) 117 taxmann.com 229
- Cummins India Ltd vs DCIT (2018) 96 taxmann.com 576

11.6.3 The ld AR without prejudice also submitted that the AO while allowing the 100% of the expenditure did not allow Rs.1,05,10,765 incurred by the assessee towards capital expenditure and that the same shall be allowed in terms of section 35(1)(iv) of the Act.

11.6.4 The Ld.DR vehemently argued that the expenditure which is not approved by the prescribed authorities cannot be eligible for weighted deduction and in this regard made a detailed submission which has been taken on record. With regard to the plea of the ld AR that the issue may be set aside to the Assessing Officer for verification of expenditure for weighted deduction, the ld DR submitted that the Assessing Officer has no authority to verify the expenditure as has been held by the Hon'ble Karnataka High Court in the case of Tejas Networks Ltd., vs DCIT (2015) 60 taxmann.com 309 and therefore without the certificate from DSIR the assessee can be allowed only 100% of the expenditure incurred.

11.6.5 We heard the parties and perused the materials on record. Before proceeding further, we will look at the relevant provisions of section 35(2AB), Rules and the Guidelines for approval by DSIR of the in-house R&D facility :-

Section 35(2AB):

(*1*) Where a company engaged in the business of bio-technology or in *any business of manufacture or production of any article or thing, not being an article or thing specified in the list of the Eleventh Schedule*]] incurs **any expenditure on scientific research (not being expenditure in the nature of cost of any land or building) on in-house research and development facility as approved by the prescribed authority**, then, there shall be allowed a deduction of a sum equal to *one and one-half* times of the expenditure so incurred.

Explanation.—For the purposes of this clause, "expenditure on scientific research", in relation to drugs and pharmaceuticals, shall include expenditure incurred on clinical drug trial, obtaining approval from any regulatory authority under any Central, State or Provincial Act and filing an application for a patent under the Patents Act, 1970 (39 of 1970).

(*2*) No deduction shall be allowed in respect of the expenditure mentioned in clause (*1*) under any other provision of this Act.

(*3*) No company shall be entitled for deduction under clause (*1*) unless it enters into an agreement with the prescribed authority for co-operation in such research and development facility and for audit of the accounts maintained for that facility.

(*4*) The prescribed authority shall submit its report in relation to the approval of the said facility to the Director General in such form and within such time as may be prescribed.

(*5*) No deduction shall be allowed in respect of the expenditure referred to in clause (*1*) which is incurred after the 31st day of March,2012.

(6) No deduction shall be allowed to a company approved under sub-clause (*C*) of clause (*iia*) of sub-section (1) in respect of the expenditure referred to in clause (*1*) which is incurred after the 31st day of March, 2008.

(emphasis supplied)

Provisions of Sec.35(2AB) were introduced by the Finance Act, 1997 w.e.f. 1.4.1988. It is worthwhile noticing that while expenditure on scientific research whether done in house or outsourced were eligible to deduction of 100% of the expenditure prior to 1.4.1988 u/s.35(1) of the Act, the legislature thought it fit to give more benefits for in house scientific research and preferred to give a weighted deduction of 150% of the expenditure on scientific research. The statement of objects and reasons for introduction of the aforesaid provisions makes this purpose evident and it reads thus:

> "**Weighted deduction in respect of expenditure on in-house R&D**
>
> Under section 35 of the Income-tax Act, certain deductions are allowed in respect of expenditure on scientific research.
>
> The Bill proposes to introduce a new sub-section(2AB) to allow a company, a deduction of a sum equal to 1-1/4th times the sum paid on any expenditure incurred by a company on scientific research including an expenditure of capital nature related to the business. This deduction will be available to the companies having in-house Research & Development facility approved for the purpose of this section by the prescribed authority and engaged in the business of manufacture or production of any drugs, pharmaceuticals, electronic equipment, computers, telecommunication equipment, chemicals or any other article or thing notified in this behalf. It is also proposed that no deduction shall be allowed in respect of expenditure on land and building. It is also proposed that the company shall enter into an agreement of co-operation and audit with the prescribed authority before approval of the research and development facility.
>
> The proposed amendment will take effect from 1st April, 1998 and will, accordingly, apply in relation to assessment year 1998-99 and subsequent years."

In terms of Sec.35(2AB)(4), the prescribed authority has to submit its report in relation to the approval of the said facility to the Director General in such form and within such time as may be prescribed. Income Tax Rules, 1962 (Rules) prescribes

the procedure for approval of the prescribed authority and the manner in which report has to be prepared by the prescribed authority.

The relevant rules in so far as it concerns to deduction u/s.35(2AB) of the Act are provided in Sub-Rule(1B), (4), (5A) and 7A of Rule 6 of the Rules. These rules read as follows:

> "(1B) For the purposes of sub-section (2AB) of section 35, the prescribed authority shall be the Secretary, Department of Scientific and Industrial Research.";
>
> "(4) The application required to be furnished by a company under sub-section(2AB) of section 35 shall be in Form No.3CK.";
>
> "(5A) The prescribed authority shall, if he is satisfied that the conditions provided in this rule and in sub-section (2AB) of section 35 of the Act are fulfilled, pass an order in writing in Form No. 3 CM:
>
> Provided that a reasonable opportunity of being heard shall be granted to the company before rejecting an application.
>
> "(7A) Approval of expenditure incurred on in-house research and development facility by a company under sub-section (2AB) of section 35 shall be subject to the following conditions, namely:-
>
> (a) The facility should not relate purely to market research, sales promotion, quality control, testing, commercial production, style changes, routine data collection or activities of a like nature;
>
> (b) The prescribed. authority shall submit its report in relation to the approval of inhouse Research and Development facility in Form No. 3CL to the Director General (Income Tax Exemptions) within sixty days of its granting approval;
>
> (c) The company shall maintain a separate account for each approved facility; which shall be audited annually and a copy thereof shall be furnished to the Secretary, Department of Scientific and Industrial Research by 31st day of October of each succeeding year;

Explanation:-For the purposes of this sub-rule the expression "audited" means the audit of accounts by an accountant, as defined in the Explanation below sub-section (2) of section 288 of the Income-tax Act, 1961.

(d) Assets acquired in respect of development of scientific research and development facility shall not be disposed off without the approval of the Secretary, Department of Scientific and Industrial Research"

11.6.6 In terms of Sub-Rule (4) of Rule-6, the application required to be furnished by a company under sub-section(2AB) of section 35 shall be in Form No.3CK. The said Application contemplates annexure of Directors declaration and declaration by the Auditor. The form of declaration to be given by the Auditor is important and it reads thus:

AUDITOR'S CERTIFICATE

I have audited the accounts of the in-house R&D Centre of M/s ________________________ located at ____________________ which is approved U/S 35(2AB) by the Prescribed Authority (Secretary, DSIR).

I certify that:

a) The company has maintained separate accounts for the R&D Centre approved by DSIR U/S 35(2AB).

b) The accounts have been satisfactorily maintained. The expenditure certified are also in consonance with DSIR guidelines.

c) The firm has extended full co-operation to me in carrying out the audit of the accounts of the R&D Centre. The expenditure of Rs. ------------ reported for the financial year ----------relevant to the assessment year -------------- as detailed out in Appendix II to Annexure IV of DSIR guideline at para `4' is correct to the best of my knowledge and belief as per the result of the audit of the approved R&D Centre carried out by me. Also R&D capital expenditure is reflected on page ----and revenue

expenditure on page ---- in the audited financial statement/annual report It is further certified that the expenditure claims do not include the following: -

i. Expenditure on outsourced R&D activities.

ii. Expenditure purely related to market research, sales promotion, quality control, testing, commercial production, style changes, routine data collection or activities of a like nature.

iii. Lease rent paid for research farms or research labs.

iv. Capitalized expenditure of intangible nature.

v. Expenditure on foundation seeds multiplication, demonstration crops and grow out test etc. beyond breeder seed development.

vi. Foreign patent filing expenditure.

vii. Consultancy expenditure, retainership, contract manpower / labour.

viii. Building maintenance, Municipal taxes and rental charges being paid.

ix. Any interest component on loans for R&D.

x. Clinical trial activities carried out outside the approved facilities.

xi. Contract research expenses duly certified by chartered accountant.

xii. Expenditure on any payments made to members of the board of Directors or any other part time employees working for R&D.

Signature & Seal of the Statutory Auditor

Date :

Place:

11.6.7. The auditor is required to specifically certify in terms of clause (i) to (xii) that the expenditure claimed does not include certain specified expenditure. Though a plain reading of the statutory provisions of Sec.35(2AB)(1) shows that the prescribed authority has to approve only the in house research and development

facility and not expenditure so incurred on scientific research the other surrounding circumstances coupled with the purpose of introduction of Sec.35(2AB) of the Act seems to suggest that expenditure would be allowed only to the extent of what is certified by the DSIR. This becomes clear on a reading of Rule 7A(3) of the Rules, which mandates audited accounts being given to the DSIR. Further Form 3CK prescribes that the expenditure on scientific research has to be certified by chartered accountant and the form of certificate as given in the DSIR guidelines clearly specifies that only those expenditure would be eligible for weighted deduction u/s.35(2AB) of the Act. It may be eligible for deduction u/s.35(1) at normal rate of 100% as normal expenditure on scientific research but not weighted deduction of 150% u/s.35(2AB) of the Act. This distinction between normal deduction and weighted deduction is discernible from a reading of the entire statutory provisions of Sec.35 of the Act.

11.6.8 In assessee's case, there is no dispute that the assessee has fulfilled all the conditions for the purpose of section 35(2AB). This fact has been accepted by the revenue which is evidenced by the AO's order of assessment where he has allowed deduction towards the impugned amount @ 100% as against the 150% claimed by the assessee. Therefore the issue for consideration is limited to whether the expenditure claimed by the assessee as incurred towards scientific research is eligible for weighted deduction since the assessee's facility from where the expenditure is incurred is approved by DSIR.

As already seen, once the assessee submits the details of expenditure as certified by the Director and the Auditor, the DSIR is required to certify the same in Form 3CL certifying the amount eligible for weighted deduction. It is very relevant here to note that there was an amendment with effect from 01.07.2016 to Rule 6(7A)(b)

of the Income Tax Rules whereby it has been laid down that the prescribed authority, i.e., DSIR shall quantify the quantum of deduction to be allowed to an Assessee u/s.35(2AB) of the Act. Prior to such substitution, the above provisions merely provided that the prescribed authority shall submit its report in relation to the approval of in-house R & D facility in Form No.3CL to the DGIT (Exemption) within 60 days of granting approval. Therefore prior to 1.7.2016 there was no legal sanctity for Form No.3CL in the context of allowing deduction u/s.35(2AB) of the Act. This view has been held by the various judicial pronouncements as relied on by the ld AR including the decision of the Pune Bench of the Tribunal where in the case of Cummins India ltd (supra) it has been held that –

> "45. The issue which is raised in the present appeal is that whether where the facility has been recognized and necessary certification is issued by the prescribed authority, the assessee can avail the deduction in respect of expenditure incurred on in-house R&D facility, for which the adjudicating authority is the Assessing Officer and whether the prescribed authority is to approve expenditure in form No.3CL from year to year. Looking into the provisions of rules, it stipulates the filing of audit report before the prescribed authority by the persons availing the deduction under section 35(2AB) of the Act but the provisions of the Act do not prescribe any methodology of approval to be granted by the prescribed authority vis-à-vis expenditure from year to year. The amendment brought in by the IT (Tenth Amendment) Rules w.e.f. 01.07.2016, wherein separate part has been inserted for certifying the amount of expenditure from year to year and the amended form No.3CL thus, lays down the procedure to be followed by the prescribed authority. Prior to the aforesaid amendment in 2016, no such procedure / methodology was prescribed. In the absence of the same, there is no merit in the order of Assessing Officer in curtailing the expenditure and consequent weighted deduction claim under section 35(2AB) of the Act on the surmise that prescribed authority has only approved part of expenditure in form No.3CL. We find no merit in the said order of authorities below.
>
> 46. The Courts have held that for deduction under section 35(2AB) of the Act, first step was the recognition of facility by the prescribed authority and entering an agreement between the facility and the prescribed authority.

Once such an agreement has been executed, under which recognition has been given to the facility, then thereafter the role of Assessing Officer is to look into and allow the expenditure incurred on in-house R&D facility as weighted deduction under section 35(2AB) of the Act. Accordingly, we hold so. Thus, we reverse the order of Assessing Officer in curtailing the deduction claimed under section 35(2AB) of the Act by ₹ 6,75,000/-. Thus, grounds of appeal No.10.1, 10.2 and 10.3 are allowed."

11.6.9 We also notice that the coordinate bench of the Tribunal in the case of UltraTech Cement Ltd. vs DCIT [2022] 139 taxmann.com 151 (Mumbai - Trib.) has considered a similar issue and held that

112. We have heard the rival contentions and perused the material on record. To understand the controversy, it's important to examine the requirements of section 35(2AB)(1) which reads as under :

"(2AB)(1) Where a company engaged in the business of bio-technology or in any business of manufacture or production of any article or thing, not being an article or thing specified in the list of the Eleventh Schedule incurs any expenditure on scientific research (not being expenditure in the nature of cost of any land or building) on in-house research and development facility as approved by the prescribed authority, then, there shall be allowed a deduction of a sum equal to one and two times of the expenditure so incurred."

113. It is clear from the provisions of section 35(2AB) that once R&D facility is approved by the DSIR, the expenses incurred by the assessee have to be allowed. If the law wanted the expenditure to be approved by the prescribed authority, same would have been expressly provided in the section.

114. The Bangalore Tribunal in case of *Natural Remedies (P.) Ltd.* v. *Asstt. CIT* [IT Appeal No. 704 (Bang.) of 2020, dated 1-1-2021] has held that for the period prior to the Income-tax (Tenth Amendment) Rules, 2016, with effect from 1-7-2016, which amended rule 6(7A) of the IT Rules, deduction u/s 35(2AB) of the IT Act has to be allowed on the basis of the expenditure as recorded by the assessee in the books of account. Relevant finding of the Tribunal is reproduced below:

"8.5 In view of the aforesaid reasoning and in the light of judicial pronouncements, cited *supra*, we hold that in the present case since the deduction is with reference to assessment year 2016-2017 (where the law applicable is the 1st day of April, 2016), which is prior to the Income-tax (Tenth Amendment) Rules, 2016, with effect from 1-7-2016 of rule 6(7A) of the I.T. Rules, deduction u/s 35(2AB) of the I.T. Act has to be

allowed on the basis of the expenditure as recorded by the assessee in the books of account. Admittedly, the Assessing Officer has not disputed the correctness of the claim of expenditure incurred on Scientific Research. The contention of the DR that the amendment to Rule 6(7A) is procedural cannot be accepted, since the amended rule stipulates a condition that apart from approval of in-house R & D facility of assessee, the expenditure also has to be quantified by the prescribed authority for weighted deduction u/s 35(2AB) of the I.T. Act. Therefore, the amended Rule 6(7A) effect the substantive right of the assessee and cannot be termed merely as procedural. Moreover, the coordinate Bench of Bangalore Tribunal in case of *M/s. Mahindra Electric Mobility Ltd.* v. *ACIT* (*supra*) and *M/s. Indfrag Limited* v. *ACIT* (*supra*) have clearly held that prior to 1-7-2016 Form 3CL has no legal sanctity and it is only w.e.f. 1-7-2016 with the amendment to Rule 6(7A) of the I.T. Rules, that the quantification of weighted deduction u/s 35(2AB) of the I.T. Act has significance. Therefore, we hold that the deduction u/s 35(2AB) of the I.T. Act be granted as claimed by the assessee instead of restricting it to the quantum of claim as mentioned in .Form No. 3CL by the prescribed authority. It is ordered accordingly."

115. As can be noted above, the Tribunal relied on another decision of the same Bench in the case of *Mahindra Electric Mobility Ltd.* v. *Asstt.CIT* [ITA No. 641 (Bang.) of 2017, dated 14-9-2018] wherein it was observed as under:

"20. From the above discussion it is clear that prior to 1-7-2016 Form 3CL had no legal sanctity and it is only w.e.f 1-7-2016 with the amendment to Rule 6(7A)(*b*) of the Rules, that the quantification of the weighted deduction u/s.35(2AB) of the Act has significance. In the present case there is no difficulty about the quantum of deduction u/s.35(2AB) of the Act, because the AO allowed 100% of the expenditure as deduction u/s.35(2AB)(1)(*i*) of the Act, as expenditure on scientific research. Deduction u/s.35(1)(*i*) and sec.35(2AB) of the Act are similar except that the deduction u/s.35(2AB) is allowed as weighted deduction at 200% of the expenditure while deduction u/s.35(1)(*i*) is allowed only at 100%. The conditions for allowing deduction u/s.35(1)(*i*) of the Act and under sec.35(2AB) of the Act are identical with the only difference being that the Assessee claiming deduction u/s.35(2AB) of the Act should be engaged in manufacture of certain articles or things. It is not in dispute that the Assessee is engaged in business to which sec.35(2AB) of the Act applied. The other condition required to be fulfilled for claiming deduction u/s.35(2AB) of the Act is that the research and development facility should be approved by the prescribed authority. The prescribed authority is the Secretary, Department of Scientific Industrial Research, Govt. of India (DSIR). It is not in dispute that the Assessee in the present case obtained approval in Form No. 3CM as required by Rule 6 (5A) of the Rules. In these facts and circumstances and in the light of the judicial precedents on the issue, we are of the view that the deduction u/s.35(2AB) of the Act ought to have been allowed as weighted deduction at 200% of the expenditure as claimed by the Assessee and ought

not to have been restricted to 100% of the expenditure incurred on scientific research. We hold and direct accordingly and allow the appeal of the Assessee."

11.6.10. Similar view has been taken by various other Tribunals in the following cases:

i. *Indfrag Ltd.* v. *Asstt. CIT* [IT Appeal No. 98 (Bang.) of 2018, dated 30-7-2020]

ii. *Sun Pharmaceutical Industries Ltd.* v. *Pr. CIT* [2017] 77 taxmann.com 202/162 ITD 484 (Ahd. - Trib.) - This has been subsequently confirmed by Hon'ble Gujarat High Court

iii. *Cummins India Ltd.* v. *Dy. CIT* [2018] 96 taxmann.com 576 (Pune - Trib.)

117. The AO in the present case has not disputed the correctness of the claim made by the assessee. In view of the above discussions and judicial precedents on this issue, we hold that the claim of the assessee must be granted as made in its return of income. It cannot be restricted to the extent of claim as approved in Form No. 3CL by DSIR since there was no such requirement either under the Act or in the Rules for the assessment year 2011-12. We accordingly allow the appeal of the assessee Company on this ground and direct the AO to delete the disallowance in this regard.

11.6.11 A similar view is held by the coordinate bench in assessee's own case in earlier assessment years. In view of these discussions and respectfully following the above judicial pronouncements we hold that the assessee should be allowed the weighted deduction as has been claimed in the return of income and accordingly direct the assessing officer to delete the disallowance made in this regard.

11.7 Additional Ground- Credit for advance tax short granted.

11.7.1 The Ld.AR submitted that the Assessing Officer did not grant credit for full amount of advance-tax paid by the assessee and prayed for a direction in this regard. We accordingly direct the Assessing Officer to examine the facts and allow credit accordingly.

11.8 Additional Ground 3 : Levy of interest under section 234C

11.8.1 In this regard, it is submitted that the interest under section 234C is leviable on the returned income whereas the Assessing Officer has charged the same on the assessed income and prayed for a direction in this regard. Accordingly, we direct the Assessing Officer to consider charging of interest u/s 234C on the returned income only.

11.9 Disallowance of 14A while computing book profits computed u/s 115JB

11.9.1 The ld AR submitted that the AO has considered the disallowance made u/s.14A while recomputing at the book profits u/s.115JB. The ld AR also submitted that the issue is covered by the decision of the coordinate bench in assessee's own case for AY 2008-09.

11.9.2 We heard the ld DR. We have while considering the issue of disallowance u/s.14A had extracted the relevant observations of the coordinate bench in the earlier part of this order and said observations of also address the issue of section 14A disallowance being considered for the purpose of section 115JB. Respectfully following the above decision we direct the AO to delete the addition of disallowance under section 14A while computing book profit under section 115JB of the Act.

12. In result the appeal of the assessee is allowed.

Order pronounced in the open court on this 23/05/2023

Sd/- **sd/-**

(AMIT SHUKLA)	**(PADMAVATHY S)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dt : 23rd May, 2023
Pavanan

<u>प्रतिलिपि अग्रेषितCopy of the Order forwarded to</u> :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.

3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

Asstt. Registrar / Senior Private Secretary
ITAT, Mumbai