

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'D' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**

**ITA No.289/Mum/2023
(Assessment Year :2015-16)**

**ITA No.290/Mum/2023
(Assessment Year :2013-14)**

**ITA No.291/Mum/2023
(Assessment Year :2016-17)**

**ITA No.293/Mum/2023
(Assessment Year :2014-15)**

M/s. Medley Pharmaceuticals Ltd. D-2, Medley Houses 16 th Road, MIDC Area Andheri (E) Mumbai – 400 093	Vs.	Dy. Commissioner of IncomeTax-10(2)(2) Mumbai
PAN/GIR No.AAACM2764J		
(Appellant)	..	(Respondent)

**ITA No.306/Mum/2023
(Assessment Year :2018-19)**

**ITA No.305/Mum/2023
(Assessment Year :2013-14)**

Asst. Commissioner of Income Tax- 2(2)(1) Mumbai	Vs.	M/s. Medley Pharmaceuticals Ltd. D-2, Medley Houses 16 th Road, MIDC Area Andheri (E) Mumbai – 400 093
PAN/GIR No.AAACM2764J		
(Appellant)	..	(Respondent)

ITA No.292/Mum/2023
(Assessment Year :2018-19)

M/s. Medley Pharmaceuticals Ltd. D-2, Medley Houses 16 th Road, MIDC Area Andheri (E) Mumbai – 400 093	Vs.	National Faceless Assessment Centre Delhi
PAN/GIR No.AAACM2764J		
(Appellant)	..	(Respondent)

Assessee by	Shri Prakash Jotwani
Revenue by	Smt. Riddhi Mishra
Date of Hearing	08/06/2023
Date of Pronouncement	28/06/2023

आदेश / O R D E R

PER BENCH:

In all the aforesaid appeals, one of the common grounds raised is disallowance of sales promotion expenses and apart from that, there are disallowance made u/s 14A and disallowance of claim u/s. 35(2AB) of the Income Tax Act. Since most of the issues are common arising out of identical set of facts and finding given therein, therefore, same were heard together and are being disposed of by this consolidated order.

2. We first take up the cross appeal for A.Y.2013-14.

The brief facts are that Assessee Company is in the business of manufacturing and selling of pharmaceutical products. The assessee had manufacturing facilities at five locations namely Daman Unit I, Daman Unit II, Daman Unit III, Daman Unit IV and Jammu, in respect of which assessee was eligible to claim exemption of profits at the rate of 30% u/s.80IB of the Act.

3. Ground No.1 in assessee's appeal relates to disallowance of sales promotion expenses of Rs.9,67,49,900/-. During the year relevant for A.Y.2013-14, assessee has incurred sales promotion expenses of Rs.22,72,39,633/- out of which ld. AO had disallowed Rs.15,15,23,628/- after allowing the expenses aggregating to Rs.7,57,16,006/-. These expenses include payment of small gifts made to non-doctors, payment made to doctors for less than Rs.1000/- and payment made to the doctors excess of Rs.1000/-. The details of which are as under:-

i) Paid to non-doctors	= Rs. 4,67,67,944/-
(ii) Paid to doctors/non-doctors (amount <Rs. 1000)	=Rs. 5,11,43,097/-
(iii) Paid to doctors	<u>= Rs. 5,36,12,586/-</u>
	<u>Rs.15,15,23,627/-</u>

4. Before us ld. Counsel for the assessee had submitted a chart giving details of total amount claimed under various heads of sales promotion expenses, amount allowed, amount disallowed etc which for the sake of ready reference is reproduced hereunder:-

Particulars	Total Amount	Allowed	Disallowed	Out of disallowed expenses			Total Disallowed
				Paid to Others	Below Rs.1000	To Doctors	
Advertisement & Publicity	10,463,801	10,463,801					-
Leave Behind A/C	11,409,836		11,409,836	11,409,836			11,409,836 Allowed & remanded to AO by CIT(A) for verification
Product Reminder	27,403,126		27,403,126	5,350,870	22,052,255		27,403,126 Allowed & remanded to AO by CIT(A) for verification
Retail Push Scheme	9,178,737	9,178,737					-
Visual Aid A/C	4,768,437	4,768,437					-
Continuous Medical Education (CME) Expenses A/C	13,006,957	52,205	12,954,752	12,317,377		637,375	12,954,752 Allowed & remanded to AO by CIT(A) for verification
Travelling (Conference)	3,999,966		3,999,966	3,402,255		597,711	3,999,966 Allowed Rs.30,06,000 and remanded to AO for verification
Doctors Expenses	8,911,776		8,911,776	3,726,028	99,085	5,086,664	8,911,777
Overseas Expenses A/C	41,780,703	41,780,703					-
Star Functions Expenses A/C	2,509,953	2,509,953					-
Doctors Gift	53,126,680		53,126,680		5,835,843	47,290,837	53,126,680
Mobile Repairing	6,962,171	6,962,171					-
Gifts	33,717,492		33,717,492	10,561,578	23,155,914		33,717,491
Total	22,22,39,633	75,716,006	151,523,627	46,767,944	51,143,097	53,612,586	151,523,627

5. The Id. AO has discussed this issue in detail for each of the assessment year and by and large his reasoning for making the disallowance are same which can be summarized in the following manner:-

- Assessee manufactures and sells pharma products which can be sold only when it is prescribed by medical practitioners.
- Giving of freebies to doctors and its admissibility of such expense can be determined by the law of the land..
- MCI in exercise of powers confirmed by section 33 of Indian Medical Council Act, 1956 have issued regulations to be adhered to by Medical Professionals (Pg 3-7 of assessment order), thereby bearing doctors to receive freebies from Pharma companies
- The CBDT Circular no.5/012 dated 01.08.2012 details the inadmissibility of expenses incurred in providing freebies to Medical Practitioner.
- Explanation to sec 37(1) inserted with effect from 01.04.1962 states that any expense incurred which is an offence or which is prohibited by law, shall not be deemed to have been incurred and no deduction shall be allowed in respect of such expenditure.
- Expression prohibited by law has the same contextual import as the expression forbidden by law.
- MCI guidelines, though applicable to doctors, would be applicable to the Pharma Company also and relied on P&H HC in 344 ITR 476.
- Demanding of gifts, travel facility, hospitality, cash or monetary grant from pharma sector was bad on the part of doctors and paying it was equally bad on part on pharma companies.
- In view thereof, the AO disallowed a sum of Rs.13,45,68,910/- without giving any breakup incurred for

providing gifts, travel facilities and hospitality to medical practitioners including a sum of Rs.2,31,55,914/- and thus made an addition of Rs.15,15,23,628/- in the final computation made in the order.

6. The ld. CIT(A) has given part relief, however he noted that, now in view of the decision of Hon'ble Supreme Court in the case of **Apex Laboratories Ltd vs. DCIT (LTU) [2022] 135 taxmann.com 286 (SC)**, this issue of any incentive or gift given to doctors has to be disallowed. In sum and substance his findings are summarised as under:-

- Though in A.Y 2012-13, the ITAT has given relief to the assessee, however the Supreme Court in the case of Apex Laboratories Ltd by its order dated 22.02.2022, have held that incentives (freebies) given to Doctors had a direct result of exposing the recipients to the odium of sanctions, leading to a ban of their practices of medicines. Thus since Supreme Court has decided the issue against on this issue, the entire disallowance made by the AO is to be confirmed.
- Sec 37(1) was amended from 01.04.2022, effective from A.Y 2022-23, in which an Explanation 3 to 37(1) was added which further clarifies that it also includes providing benefit of perquisite in whatever form, which is in violation of any law or rule or regulation or guidelines. Since explanation inserted seeks to clarify explanation, it shall apply from retrospective effect from 01.04.1962 and thus even on this count, the disallowance is to be confirmed.
- However since a sum of Rs.5,47,73,728/- details of which are at are not incurred on doctors, such expenses being leave behind material, product reminders, CME conference, travelling conferences (other than doctors), such expenses,

since may not be in nature of payment made to doctors, and should be allowed by AO, subject to verification.

- The assessee has challenged the disallowance of Rs.9,67,49,900/- (being Rs.15,15,23,628/- less Rs.5,47,73,728/-) confirmed by the CIT(A). The revenue has challenged the allowance of claim by CIT(A) of Rs.5,47,73,728/- on the ground that this issue was not raised by the assessee before AO nor did it file documentary evidence for the same. Alternately the assessee has also filed an additional ground that, disallowance of sales promotion, if any, is eligible for exemption u/s 801B and has relied on CBDT Circular for the same.

7. Now before us, ld. Counsel has submitted the details of sales expenses, he pointed out that out of disallowance of Rs.15,15,23,627/- made by the ld. AO, the ld. CIT(A) has given relief subject to verification of the following sums which are as under:-

1. Leave behind A/C	1,14,09,836/-
2. Product reminder	2,74,03,126/-
3. Continuous Medical Education(CME)	1,29,54,752/-
4. Travelling (Conf) other than doctors	<u>30,06,000/-</u>
	5,47,73,714
	=====

8. He further submitted that, assessee before the ld. AO and ld. CIT(A) has tried to bifurcate the expenses into “**payment made to others**” (non-doctors) and ‘**Payment made to Doctors**’ which were below Rs.1000/-, i.e. which is not in violation of MCI guidelines and “**payment made to doctors exceeding Rs.1,000/-.**” He submitted that in so far as product reminder is concerned, these were unit price being less than Rs.1000/-

which Id. CIT (A) has allowed subject to verification. Thus, in principle Id. CIT (A) has allowed expenses of doctors and others which were less than Rs.1,000/-. However, with regard to the balance amount he held that same are to be disallowed without giving any clear cut findings. The breakup is as under:-

<u>Particulars</u>	<u>Pd to others</u>	<u>Below Rs.1000/-</u>	<u>Pd to Doctors</u>
Doctors Expenses	37,26,028	99,085	50,85,664
Doctors Gifts	-	58,35,843	4,77,90,837
Gifts accounts	1,05,61,578	2,31,55,914	-
	<u>1,42,87,606</u>	<u>2,72,90,842</u>	<u>5,28,76,501</u>
	=====	=====	=====

9. The Id. Counsel further contended that any payment made to others and items whose unit price is less than Rs. 1000/- comprises of the following:-

i. Leave Behind A/C:

These expenses are incurred on product literature, magazines, and articles etc., which explain the product of the assessee. These are not of gift nature but information of the product. It is in the form of printing a/c of leaflets etc.

ii. Product Reminder:

These are small gifts which most of them would bear the logo of the company.

iii. Continuous Medical Education (CME):

These are educational expenses. The assessee hires spaces in which the sale staff alongwith doctors are called and given

lectures and clinical meeting on the drugs manufactured by the assessee.

iv. Travelling Conference:

These expenses are normally incurred on the employees of the company to attend conferences, lecture meetings, clinical meetings etc.

v. Doctors Expenses:

They are small sweets, flowers, expended for various kinds of people like wholesalers, retailers, sales staff, chemists and also doctors.

vi. Doctors Gifts:

They are of 2 types. One less than Rs.1000/- and the other whose value is more than Rs.1000/-. All details have been provided.

vii. Gifts and Gift Cards:

These are gifts of small value, normally less than Rs.1000/-, incurred on chemists, wholesalers etc. Gift Cards are given to chemists as per the scheme entered with them. Gift cards are given only to Retailers to push the sales of their, products. The scheme clearly envisages this. There is zero element of Doctor involves in this scheme.

10. Thus, ld. Counsel submitted that out of sum of Rs.9,67,49,000, a sum of Rs.5,28,76,501/- has been incurred on doctors for conferences some petty items and travel cost for attending the conference, etc., however, none of these expenses were in the nature of any freebies or any personalized gift items. Therefore, these should not be considered for the purpose of disallowance. In any case, he submitted that if at all the decision

of the Hon'ble Supreme Court in the case of Apex Laboratories Ltd is to be applied, then sum of Rs.5,28,76,501/- only can be disallowed and the balance amount of Rs.1,42,87,606/- paid to others and a sum of Rs.2,72,90,842/- paid whose unit value is less than Rs.1000/- cannot be disallowed. He further clarified that the expenses made for unit price of less than Rs.1000/- cannot be disallowed even as per the MCI regulation, because it does not prohibit making of such expenses. Further, these gifts which are made for unit price less than Rs.1000/- are like cello pens, face masks, table mats, hand wash, stethoscopes, thermometer, hand towel, umbrella, serving bowls, shirts, sanitizer bowls, ball pens, aprons etc. A cursory glance at these expenses will show, it does not give the color of gift or hospitality, which would compel a medical practitioner to prescribe the medicine of the pharma companies. Even the Supreme Court was hearing of a case of gold coins etc., gifted to doctors and did not lay down any embargo or disallowance for articles whose unit value was less than Rs.1000/-. He also contended that there are no MCI regulations as of today. He further contended that such items would not classify as gifts made to doctors as these items were bought in bulk and given to retailers, chemists, wholesalers and doctors. Thus, the expense for less than Rs.1000/- should not be sent back to AO to verify like in last year as done by the Tribunal but should be allowed fully and also for expenses incurred on others which is a sum of Rs.1,42,87,606/- since the expenses are not made to doctors at all, except for the heading in

the assessee's books of accounts, and they cannot be disallowed by invoking the Supreme Court decision.

11. Without prejudice, ld. Counsel submitted that assessee has already raised an additional ground that if at all disallowance of sales promotion expenses has been made, it will result into enhancement of taxable profits and for such enhanced income, assessee is liable for exemption u/s.80IB @30%, which ld. CIT(A) ought to have granted exemption in respect of enhanced expenses, profits on account of disallowance of certain sales promotion expenses. He further pointed out that in A.Y.2010-11 and 2011-12, the Tribunal has held that any amount which stands disallowed towards sales promotion expenses will be eligible for benefit u/s.80IB.

12. Before us ld. CIT DR submitted that now it is a very well settled law that any kind of sales promotion expenses paid to doctors are disallowable u/s.37(1) as held by the **Hon'ble Apex Court in the case of Apex Laboratories Ltd.** supra. She further submitted that MCI guidelines which were the basis for issuing **CBDT Circular No.5 of 2012 dated 01/08/2012** has held that any payment made to doctors in violation of MCI regulation has to be disallowed in the case of pharmaceutical companies. She further pointed out that MCI regulations lays down prohibition for all kind of expenses incurred by the pharmaceutical companies and doctors including which are less than Rs.1,000/- Nowhere, MCI guidelines lays down that gifts of Rs.1,000/- is

permitted and therefore, would be eligible for deduction. Once the expenses prohibited by the law, deduction cannot be granted.

13. On the details of expenses Ld. CIT DR submitted that these details have neither been verified by the ld. AO and it is not clear as to which of these items have been paid to the doctors which have been classified as 'paid to others'. This Tribunal in assessee's own case for the A.Y. 2010-11 & 2011-12 in ITA No.1210 & 1211/Mum/2019 vide order dated 23/05/2023 wherein the Tribunal had set aside the issue to the file of the ld. AO for verification and therefore, for this year also, same should be remanded back even to examine the expenses which are less than Rs.1,000/-. Her contention was that, even for the expenses which has been claimed by the assessee for the unit price of less than Rs.1,000/-, one needs to see that, whether if any particular doctor was given these petty gifts and promotional item which has exceeded Rs.1,000/- in a year. Ld. CIT DR in so far as the department's appeal is concerned which CIT(A) has set aside the issue to AO to examine is incorrect as ld. CIT (A) does not have a power to set aside the issue to the ld. AO. Thus, in so far as payment made to non doctors matter needs to be restored back to the file of the ld. AO.

14. In rejoinder, ld. Counsel submitted that in this year, full details were submitted before the ld. AO and the ld. CIT (A) vide letter dated 24/02/2016 and 21/11/2019. Copies of which have been filed also before this Tribunal in the paper book. Thus,

contention of the ld. CIT DR cannot be accepted that these details were not furnished before the lower authorities. He further submitted that the ld. CIT (A) has categorically held that payments which were made to others did not fall into the category of payment made to the doctors. He had only directed the ld. AO to verify the assessee's contention and if found to be correct and the same should be allowed. Thus, it is not a case of set aside which has been pleaded by the ld. CIT DR that the ld. CIT (A) does not have a power to set aside the issue to the ld. AO. In fact, it is not a case of set aside but giving relief subject to verification.

15. We have heard rival submissions and perused the relevant finding given in the impugned orders as well as material referred to before us. The main controversy in the grounds raised by the assessee as well as in the Revenue's ground which is part disallowance of sales promotion expenses of Rs.5,47,73,728/- with regard to payment to others, the issue is, whether, firstly, payment made to others i.e. non-doctors and payment below Rs.1,000/- to both doctors and others can be allowed as deduction u/s. 37; and secondly, whether whole of the amount claimed can be allowed.

16. In so far as payment made to doctors, it has been contended that same should not be disallowed for the reason that these were not in the nature of freebies. However, the reason for disallowance of sales promotion expenses is mainly the MCI

guidelines and regulations which are embargo put on medical professionals thereby restraining the doctors to receive any freebies or gifts from pharmaceutical companies. Based on these MCI guidelines, CBDT Circular No.5/012 supra has been issued wherein it has been categorically stated that expenses incurred in providing freebies to medical practitioners in violation of MCI guidelines to the doctors falls in the nature of expenses prohibited under the law. Another reason for making the disallowance is that, now the Hon'ble Supreme Court in the case of Apex Laboratories Ltd. vide its order dated 22/02/2022 have held that incentives / provisions given to doctors entails disallowance in view of the CBDT Circular.

17. Another point which has been raised is that, Section 37(1) which has been amended from 01/04/2022 effective from A.Y. 2022-23 by which *Explanation 3* to Section 37(1) has been added which further clarifies that, *it also includes providing benefit of perquisite in whatever form, which is in violation of any law or rule or regulation or guidelines.*

18. Now after the decision of the Hon'ble Supreme Court in the case of **Apex Laboratories supra**, there cannot be any doubt that any kind of gifts of freebies given to the doctors in violation of MCI guidelines and CBDT Circular needs to be disallowed. Even though on the facts of that case items and freebies were gold coin, TV and expensive items given to the doctors, but the principle laid down by the Apex Court is that any gifts or freebies

in violation of CBDT Circular and MCI Guidelines needs to be disallowed and accordingly on this point the argument of the Ld. Counsel is rejected. Thus, payment made to doctors in violation of MCI Guidelines are disallowed, except for those items which have value of less than Rs. 1000/-, as in our opinion it is not in violation of MCI Guidelines. Before us, ld. Counsel for the assessee has given the details of various expenses under various heads which has been categorized as **“paid to others”** (non-doctors) and payment to the doctors which were below Rs.1,000/-. In so far as payment made to others, the details of which has been provided in the paper book and is also not controverted by the authorities below and even the ld. CIT (A) has stated that these are paid to the outside parties and none of these payments are in violation of any guideline or circular or the judgment of the Hon’ble Supreme Court. It is also not the case of the ld. AO that these expenditures incurred were for the non-business purpose. Thus, we agree with the contention of the ld. Counsel that in so far as the payment which has been paid to others, same is not in the nature of violation of MCI guidelines or CBDT Circular or by the judgment of Hon’ble Supreme Court.

19. Now coming to the payment of items whose unit price is less than Rs.1,000/-, from the perusal of the submissions and details it is seen that these are very small items under various heads which is evident from the table given above. Most of these expenses are on account of ‘leave behind account’, which is in the nature of expenses incurred on product literature,

magazines, articles etc, which explain the product of the assessee. These are not *per se* any kind of gift but information of the product which is in the form of printing of leaflets etc. Similarly, the product reminder is very small item of gifts which bear the logo of the company. This also cannot be treated as gift of freebies to the doctors. Similarly, educational expenses, conference expenses incurred on the employees of the company and not to the doctors to attend conferences, lecture meetings, clinical meetings etc. Small items of flowers and sweets given to the doctors at the time of conference and to the various kinds of other people like wholesalers, retailers, sales staff and chemist cannot be treated as expenses to doctors. In so far as gifts and gift cards are concerned, these are the amounts mostly paid to Chemist, wholesalers, etc., to push the sales of their products and not to doctors. Under this head also, there is no element of doctor involved in this scheme. Now, the issue coming to the expenditure incurred on doctor gifts which has been stated under two heads, i.e., one, less than Rs.1,000/- and other whose value is more than Rs.1,000/-. The gifts which are less than Rs.1,000/- said to be given to the doctors are in the nature of like cello pens, face masks, table mats, hand wash, stethoscopes, thermometer, hand towel, umbrella, serving bowls, shirts, sanitizer bowls, ball pens, aprons etc. bearing logo of the company. These expenses does not give any colour of gift or hospitality expenses or is any kind of freebies which can be said to be in violation of any regulation of MCI. It has been contended that these small items do not classify as gift made to doctors as

these items are bought in bulk and given to retailers, chemists, wholesalers and doctors alike. Even the judgment of Hon'ble Supreme Court, the issue which was related to the case were gold coins, expensive TVs and expensive items were given to the doctors as the gift and does not contain any kind of finding or principle which has been laid down that first such a petty item of small ball pens, face masks, table mats, hand wash, sanitizers etc. fall into that category.

20. Now coming to the MCI guidelines which was amended in 2009 which has been greatly relied upon by the CIT DR before us that MCI guidelines prohibits any kind of gift paid to the doctors and there is no such clarification given in such guideline that something given below Rs.1,000/- is not prohibited. From the perusal of the amendment notification issued by MCI dated 10/12/2009 which is the basis for issuance of CBDT Circular, where it has been stated that a medical practitioner shall follow and adhere to the following stipulations:-

(a) Gifts: A medical practitioner shall not receive any gift from any pharmaceutical or allied health care industry and their sales people or representatives.

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

(c) Hospitality: A medical practitioner shall not accept individually any hospitality like hotel accommodation for self and family members under any pretext.

(d) Cash or monetary grants: A medical practitioner shall not receive any cash or monetary grants from any pharmaceutical and allied healthcare industry for individual purpose in individual capacity under any pretext. Funding for medical research, study etc. can only be received through approved institutions by modalities laid down by law / rules/guidelines adopted by such approved institutions, in a transparent manner. It shall always be fully disclosed.

(e).....

(f).....

(g).....

(h).....

20.1 Thereafter, the same very regulation has illustrated the action which is to be taken if any medical practitioner has found in violation of the aforesaid regulation. Under the head 'gifts' 'travel facilities', 'hospitality' and 'cash or monetary grant', the action which has been suggested for gifts for more than Rs.1,000/- upto Rs.5,000/- is censure and then anything more than Rs.5,000/-, certain action for removal from practice for certain period has been given. Even though based on that MCI guideline, medical practitioner shall not receive any gifts, travel facility, hospitality and cash or monetary grant, however, for taking into any cognizance or any action, the monetary limit which has been prescribed is more than Rs.1,000/-. The guidelines itself does not treat any small amount less than Rs.1,000/- as a violation for which any action can be taken, then it cannot be held that it is in violation of MCI guidelines and therefore, these are illegal or disallowable expenditure. We have already noted the nature of such gifts and none of these gifts given under common heads can be said to be entailing any

action against the medical practitioner which even MCI guidelines does not treat it as a violation. The whole purpose of intention of MCI guidelines was to regulate code of conduct for doctors and the relationship with the pharmaceutical and allied health sector industries and what the medical practitioners are supposed to follow and adhere. If MCI guidelines does not treat it as prohibitive of an amount which is less than Rs.1,000/-, it cannot be held that it is a gift of freebies which has been prohibited by law so as to fall within the ambit and scope of Explanation 1 to Section 37(1). Even the CBDT Circular No.5/2012 supra have referred to Indian Medical Council Regulation dated 10/12/2009 imposing a prohibition on the medical practitioner and has been laid down that such violation will fall into the category of expenses prohibited by the law. If the MCI guidelines itself does not prohibit anything given below Rs.1,000/-, then it cannot be reckoned as any expenditure prohibited by the law and therefore, in our opinion it cannot be disallowed. Accordingly, we hold that expenses to the extent of below Rs.1,000/- aggregating to Rs. 2,72,90,842/- cannot be disallowed and the same is directed to be deleted. Similarly, payment made to others of Rs.1,42,87,606/- is directed to be deleted.

21. Now coming to the payment made to the doctors which are above Rs.1,000/-, we find that it is clearly in violation of MCI guidelines read with CBDT Circular and also said CBDT Circular has been upheld by the Hon'ble Supreme Court in the case of

Apex Laboratories Ltd. therefore, the amount paid to the price in excess of Rs.1,000/- of Rs. 5,28,76,501/- is confirmed.

22. In so far as Revenue appeal is concerned, it only pertains to sales promotion expenses not relating to doctors which we have only given our finding that these expenses cannot be disallowed. Firstly, it is the payment made to others and secondly, nowhere it has been held by the ld. AO as these are not in the nature of business expenditure incurred during the course of carrying on the business as sales promotion expenses. In the result, ground No.1 raised by the assessee is partly allowed and ground No.2 raised by the Revenue is dismissed.

23. In so far as additional ground is concerned, we find it is an undisputed fact that assessee is eligible for claim of deduction u/s.80IB and any kind of disallowance will only go to enhance the taxable profit and therefore, assessee is eligible for claim of deduction u/s.80IB of 30%. This issue has also been decided in favour of the assessee by the Tribunal in assessee's own case for the A.Y.2010-11 & 2011-12 in ITA No.1210 & 1211/Mum/2019 dated 23/05/2023. Accordingly, additional ground raised by the assessee is allowed.

24. In ground No.2, assessee has challenged the disallowance u/s.36(1)(va). This ground has not been pressed and therefore, the same is treated as dismissed as not pressed.

25. Coming to the disallowance u/s.14A of Rs.29,69,642/-, assessee's contention has been that dividend income which has been offered for tax and the same has been assessed also by the ld. AO and therefore, once there is no exempt dividend income claimed then 14A cannot be invoked. From the perusal of the assessment order and the ld. CIT (A), nowhere it has been disputed that assessee has not claimed any exempt income. Albeit dividend income has been offered to tax, then ostensibly no disallowance u/s.14A can be made. Accordingly, same is deleted.

26. In Revenue's appeal, ground No.2 relates to disallowance of claim u/s. 35(2AB) is Rs.8,16,60,702/-. The brief facts are that assessee has been running a R&D unit at Daman which was recognized as an approved in house scientific research centre by DSIR (Department of Scientific and Industrial Research) for the purpose of sec 35 (2AB). On 15.09.2012, it also started a R&D facility in Mumbai. The application for the same was made in prescribed form on 04.05.2013 to DSIR. However the DSIR sent approval in Form 3CM recognizing the Mumbai R&D facility u/s 35 (2AB) w.e.f 27.11.2013 to 31.03.2015. The assessee had incurred expenditure during the year of Rs.4,08,30,350/-. Accordingly, it claimed 200% deduction on the same. The AO rejected the claim on the ground that the assessee did not furnish certificate for this period.

27. In appeal before the CIT (A), the assessee contended that as per Independent Auditor certificate dated 31.10.2013 the auditor

had certified the R&D expenditure for the Mumbai In- house research facility. The screenshot of the DSIR portal was also filed showcasing the application in prescribed form on 04.05.2013. The approval however came late and for the period 27.11.2013 to 31.03.2015 was mentioned. The CIT (A) held that the lack of approval would not bar the allowance of such expenditure and allowed the claim, subject to verification.

28. The DR has contended that CIT (A) does not have the power of set aside and CIT (A) did not allow the claim u/s 35(2AB) but u/s 37(1). Before us ld. Counsel submitted that now this issue stands covered by the decision of the Hon'ble Gujarat High Court in the case of **Claris Life Science Ltd reported in 326 ITR 251 and Delhi High Court** in the case of **Sadan Vikas India Ltd reported in 335 ITR 117** have held that 35 (2AB) nowhere provides that expenditure will be allowed from the date of approval. Rather it nowhere suggests that the expenses would be allowable as a deduction only from the date of approval or only from a cut-off date. Once the facility is approved, the entire expenditure so incurred on R&D has to be allowed as a weighted deduction.

29. After considering the aforesaid submissions, we find that, it is an undisputed fact that R & D unit at Daman had been recognised and approved in-house scientific research centre by DSIR for the purpose of Section 35(2AB). It has also certified the R & D facility in Mumbai for which application was made in the prescribed form on 04/05/2012 to DSIR and has sent the

approval in form 3CM recognizing the Mumbai R & D facility u/s.35(2AB) w.e.f. 27/11/2013 to 31/03/2015. Further, independent certificate from the Auditor who has certified the R & D expenditure has also been filed. Now this issue is covered by the decision of the Hon'ble Gujarat High Court as well as the Hon'ble Delhi High Court cited supra who had clearly held that assessee would be entitled to weighted deductions and the approval has been given in form 3CM. The relevant observation of the Hon'ble Gujarat High Court in the case of CIT vs. Claris Lifesciences Ltd 326 ITR 251 reads as under:-

“7.....The lower authorities are reading more than what is provided by law. A plain and simple reading of the Act provides that on approval of the "R & D" facility, expenditure so incurred is eligible for weighted deduction.

8. *The Tribunal has considered the submissions made on behalf of the assessee and took the view that section speaks of :*

- (i) development of facility;*
- (ii) incurring of expenditure by the assessee for development of such facility;*
- (iii) approval of the facility by the prescribed authority, which is "DSIR"; and*
- (iv) allowance of weighted deduction on the expenditure so incurred by the assessee.*

9. *The provisions nowhere suggest or imply that "R & D" facility is to be approved from a particular date and in other words, it is nowhere suggested that date of approval only will be cut-off date for eligibility of weighted deduction on the expenses incurred from that date onwards. A plain reading clearly manifests that the assessee has to develop facility, which presupposes incurring expenditure in this behalf, application to the prescribed authority, who after following proper procedure*

will approve the facility or otherwise and the assessee will be entitled to weighted deduction of any and all expenditure so incurred. The Tribunal has, therefore, come to the conclusion that on plain reading of section itself, the assessee is entitled to weighted deduction on expenditure so incurred by the assessee for development of facility. The Tribunal has also considered rule 6(5A) and Form No. 3CM and come to the conclusion that a plain and harmonious reading of rule and Form clearly suggests that once facility is approved, the entire expenditure so incurred on development of "R & D" facility has to be allowed for weighted deduction as provided by section 35(2AB). The Tribunal has also considered the legislative intention behind above enactment and observed that to boost up R & D facility in India, the Legislature has provided this provision to encourage the development of the facility by providing deduction of weighted expenditure. Since what is stated to be promoted was development of facility, intention of the Legislature by making above amendment is very clear that the entire expenditure incurred by the assessee on development of facility, if approved, has to be allowed for the purpose of weighted deduction.

10. *We are in full agreement with the reasoning given by the Tribunal and we are of the view that there is no scope for any other interpretation and since the approval is granted during the previous year relevant to the assessment year in question, we are of the view that the assessee is entitled to claim weighted deduction in respect of the entire expenditure incurred under section 35(2AB) of the Act by the assessee."*

29.1 This judgment has also been followed by the Hon'ble Delhi High Court in the case of CIT vs. Sandan Vikas (India) Ltd supra. Accordingly, the ground raised by the Revenue is dismissed.

30. Lastly, with regard to ground No.3 depreciation on R & D facility amounting to Rs.2,21,77,754/-, it was an alternative claim before the ld. CIT(A) that benefit u/s.35(2AB) was not allowable and depreciation on R & D assets should be allowed

u/s.35(1) i.e. @100%. Once the benefit of Section 35(2AB) has been given this issue and the ground raised by the Revenue is purely academic and accordingly, the same is dismissed.

31. Coming to the Appeal for A.Y.2014-15, in assessee's ground No.1, similar disallowance of sales promotion expenses of Rs.6,41,45,592/- has been taken. During the year relevant for A.Y.2014-15, assessee has incurred sales promotion expenses of Rs.24,17,96,312/- out of which ld. AO had disallowed Rs.7,75,31,882/-. These expenses include payment made to non-doctors, payment made doctors / non-doctors for less than Rs.1000/- and payment made to the doctors. The details of which are as under:-

i) Paid to non-doctors	= Rs. 1,66,22,575/-
(ii) Paid to doctors/non-doctors (amount <Rs. 1000)	=Rs. 4,49,473/-
(iii) Paid to doctors	= <u>Rs. 6,04,59,834/-</u>
	<u>Rs.7,75,31,882/-</u>

32. Before us ld. Counsel for the assessee has made same submissions and had also submitted a similar chart giving details of total amount claimed under various heads of sales promotion expenses, amount allowed, amount disallowed etc., under various heads which for the sake of ready reference is reproduced hereunder:-

Particulars	Total Amount	Allowed	Disallowed	Out of disallowed expenses			Total Disallowed
				Paid to Others	Below Rs.1000	To Doctors	
Advertisement & Publicity	8,544,711	8,544,711	-				
Leave Behind A/C	12,169,873	12,169,873	-				
Product Reminder	69,391,278	67,587,323	1,803,956	1,031,895	3,439	768,625	1,803,959 Allowed & remanded to AO by CIT(A)
Retail Push Scheme	4,321,824	4,321,824	-				
Visual Aid A/C	5,146,603	5,146,603					
Conference Expenses A/C	14,262,774	4,700,001	9,562,773	5,079,381	8,709	4,474,683	9,562,773 Allowed & remanded to AO by CIT(A)
Travelling (Conference)	1,780,692	-	1,780,692	1,290,968	16,024	473,699	1,780,692 Allowed & remanded to AO by CIT(A)
Doctors Expenses	8,754,807	-	8,754,807	3,957,503	144,668	4,652,636	8,754,807
Expenses for rural patient camps	11,390,389	11,390,389	-				
Overseas Expenses A/C	29,953,986	29,953,986	-				
Star Functions Expenses A/C	2,716,772	2,716,772	-				
Doctors Gift	62,292,194	6,901,410	55,390,784	5,226,774	73,816	50,090,190	55,390,781
Mobile Reporting Expenses	10,831,539	10,831,539	-				
Gifts	238,870	-	238,870	36,054	202,816		238,870 Allowed & remanded to AO by CIT(A)
Total	241,796,312	164,264,431	77,531,882	16,622,575	449,473	60,459,834	77,531,882

33. The ld. AO has given exactly similar observations for making the following disallowance:-

a. Product Reminder	18,03,956
b. Conference Expenses A/C	95,62,773
c. Travelling (Conference)	17,80,692
d. Doctors Expenses	87,54,807
e. Doctors Gift	553,90,784
f. Gifts	2,38,870
	<hr/>
	7,75,31,882
	=====

34. Now before us assessee has contended that out of disallowance of Rs.775,31,852/- made by the ld. AO, ld. CIT(A) has given relief subject to verification of the following sums which are as under:-

1. Product reminder	18,03,959/-
2. Travelling (Conf) other than doctors	17,80,692/-
3. Conference Expenses	95,62,779/-
4. Gifts A/C.	2,38,870/-
	<hr/>
	1,33,86,290/-
	=====

34.1 Here also similar segregation is done, i.e., payment made to others, payment below Rs1,000/- and payment to the doctors, the details of these figures are as under:-

Particulars	<u>Pd to others</u>	<u>Below Rs.1000/-</u>	<u>Pd to doctors</u>
Doctors Expenses	39,57,503	144,668	46,52,636
Doctors Gifts	52,26,774	73,816	5,00,90,190
	<hr/>	<hr/>	<hr/>
	91,84,237	218,484	5,47,42,826

Accordingly, in view of the finding given in A.Y.2013-14, we hold that in so far as made to others in items of unit whose unit price is less than Rs. 1,000/- are allowed and payment made to the doctors for sum aggregating to Rs.5,47,42,826/- is confirmed. This disallowance of Rs.5,47,42,826/- is subject to

allowing the claim of deduction u/s.80IB @ 30% which has been already allowed by the Tribunal.

35. Similarly, with regard to disallowance u/s.14A of Rs.24,02,215/-, again in this year also dividend income has been offered for tax and the same has been assessee as such, therefore, no disallowance u/s.14A can be made.

36. Ground no. 2, relating to disallowance U/S 35(2AB)of Rs. 1,79,92,643/-, this ground is similar to ground no. 2 of Revenue's appeal for A.Y. 2013-14 at para 29. Since similar issue has been allowed by us in favour of the assessee, therefore following the same this ground of assessee is allowed.

37. In so far as additional ground is concerned, we find it is an undisputed fact that assessee is eligible for claim of deduction u/s.80IB and any kind of disallowance will only go to enhance the taxable profit and therefore, assessee is eligible for claim of deduction u/s.80IB of 30%. This issue has also been decided in favour of the assessee by the Tribunal in assessee's own case for the A.Y.2010-11 & 2011-12 in ITA No.1210 & 1211/Mum/2019 dated 23/05/2023. Accordingly, additional ground raised by the assessee is allowed.

38. Coming to the Appeal for A.Y.2015-16, in assessee's ground No.1, similar disallowance of sales promotion expenses of Rs.7,38,30,272/- has been taken. During the year relevant for A.Y.2015-16, assessee has incurred sales promotion expenses of Rs. 2,24,45,786/- out of which ld. AO had disallowed Rs.7,38,30,272/-. These expenses include payment made to non-

doctors, payment made doctors / non-doctors for less than Rs.1000/- and payment made to the doctors. The details of which are as under:-

i) Paid to non-doctors	= Rs. 1,33,15,877/-
(ii) Paid to doctors/non-doctors (amount <Rs. 1000)	=Rs. 28,59,605/-
(iii) Paid to doctors	= <u>Rs. 5,76,54,790/-</u>
	<u>Rs.7,38,30,272/-</u>

39. Before us ld. Counsel for the assessee had submitted a chart giving details of total amount claimed under various heads of sales promotion expenses, amount allowed, amount disallowed etc which for the sake of ready reference is reproduced hereunder:-

Particulars	Total Amount	Allowed	Disallowed	Out of disallowed expenses			Total Disallowed
				Paid to Others	Below Rs.1000	To Doctors	
Advertisement & Publicity	12,665,703	12,665,703	-				
Leave Behind A/C	20,338,120	20,338,120	-				
Product Reminder	63,929,835	61,692,755	2,237,080	-	-	2,237,080	2,237,080
Retail Push Scheme	1,504,927	1,504,927	-				
Visual Aid A/C	8,214,207	8,214,207	-				
Continous Medical Education (CME)	10,119,042	-	10,119,042	9,627,684	8,179	483,179	10,119,042
Travelling (Conference)	4,380,285	-	4,380,285	1,050,817	12,178	3,371,289	4,380,285
Gifts and Reward (Employee)	2,401	2,401	-				
Patient Camps	22,601,277	22,601,277	-				
Doctors Expenses	3,248,863	-	3,248,863	2,637,376	170,903	440,583	3,248,863
Overseas Expense A/C	9,604,269	9,604,269	-				
Doctors Gift	53,845,003		53,845,003	-	2,668,345	51,176,659	53,845,003
Mobile Reporting Expenses	10,414,100	10,414,100	-				
Star Function Expenses A/C	3,574,140	3,574,140	-				
Sales Promotion Exp (Others)	3,615	3,615					
Total	224,445,786	150,615,514	73,830,272	13,315,877	2,859,605	57,654,790	73,830,273

40. Out of total disallowance of Rs.7,38,30,272/-, the bifurcation of the sum is as under:-

<u>Particulars</u>	<u>Pd to others</u>	<u>Below Rs.1000/-</u>	<u>Pd to doctors</u>
Doctors Expenses	26,37,379	1,70,903	4,40,583
Doctors Gifts	-	26,68,345	5,11,76,659
Product Reminder	-	-	22,37,080
Continous Medical Education (CME)	96,27,684	8100	4,83,179
Travelling(Conference)	10,50,817	12,178	33,17,289
	133,15,880	285,95,526	5,76,54,790

41. Thus, in view of the finding given in A.Y.2013-14 and 2014-15 payment paid to others of Rs.1,33,15,880/- and payment below Rs.1,000/- is of Rs.2,85,95,526/- is allowed and payment of Rs.5,76,54,790/- is confirmed subject to claim of deduction u/s.80IB @30% of such disallowance.

42. In ground No.2, disallowance u/s.14A of Rs.39,06,497/- has been challenged on the ground that dividend income has been offered for tax which has been assessed as such by the ld. AO and therefore, no disallowance u/s.14A can be made. Accordingly, the disallowance made u/s.14A is deleted.

43. Coming to the Appeal for A.Y.2016-17, in assessee's ground No.1, similar disallowance of sales promotion expenses of Rs.9,67,25,892/- has been taken. During the year relevant for A.Y.2016-17, assessee has incurred sales promotion expenses of Rs. 27,10,13,057/- out of which ld. AO had disallowed

Rs.9,67,25,892/- . These expenses include payment made to non-doctors, payment made doctors / non-doctors for less than Rs.1000/- and payment made to the doctors. The details of which are as under:-

i) Paid to non-doctors	= Rs. 5,15,10,265/-
(ii) Paid to doctors/non-doctors (amount <Rs. 1000)	=Rs. 29,083/-
(iii) Paid to doctors	= <u>Rs. 4,51,86,544/-</u>
	<u>Rs.9,67,25,892/-</u>

44. Before us ld. Counsel for the assessee had submitted a chart giving details of total amount claimed under various heads of sales promotion expenses, amount allowed, amount disallowed etc which for the sake of ready reference is reproduced hereunder:-

Particulars	Total Amount	Allowed	Disallowed	Out of disallowed expenses			Total Disallowed
				Paid to Others	Below Rs.1000	To Doctors	
Advertisement & Publicity	2,415,047	2,415,047	-				
Leave Behind A/C	15,820,806	15,820,806	-				
Product Reminder	70,995,992	68,093,430	2,902,562	2,224,172	-	678,390	2,902,562
Retail Push Scheme	13,196,322	13,196,322	-				
Visual Aid A/C	5,771,095	5,771,095	-				
Continous Medical Education (CME)	10,357,412	6,396,095	3,961,317	520,691	2,685	3,437,941	3,961,317
Travelling (Conference)	1,302,025	141,591	1,160,434	495,056	3,898	661,480	1,160,434
Patient Camps	14,122,586	14,122,586	-				
Doctors Expenses	4,449,399	3,344,750	1,104,649	403,119		701,530	1,104,649
Overseas Expenses A/C	31,327,161	31,327,161	-				
Doctors Gift	43,016,647	1,019,717	41,996,930	2,267,228	22,500	39,707,203	41,996,930

Gift card given to chemist	45,600,000		45,600,000	45,600,000			45,600,000
Mobile Reporting Expenses	9,467,063	9,467,063	-				
Star Functions Expenses A/C	3,171,503	3,171,503	-				
Sales Promotion Exp (Others)							
Total	271,013,057	174,287,165	96,725,892	51,510,265	29,083	45,186,544	96,725,892

45. Out of total disallowance of Rs.9,67,25,892/-, bifurcation has been made by the assessee with regard to payment made to others, payment below Rs.1,000/- and payment made to doctors which are as under:-

<u>Particulars</u>	<u>Pd to others</u>	<u>Below Rs.1000/-</u>	<u>Pd to</u>
<u>doctors</u>			
Doctors Expenses	4,03,119	-	7,01,530
Doctors Gifts	22,67,22	822,500	3,97,07,203
Product Reminder	22,24,172	-	6,78,390
Continous Medical Education (CME)	5,20,691	2,685	34,37,941
Travelling(Conference)	4,95,056	3,898	6,61,480
Gift cards to chemists	4,56,00,000	-	-
	<u>5,15,10,265</u>	<u>29,083</u>	<u>4,51,86,544</u>

46. Thus, the payment made to others and payment made below Rs.1,000/- is allowed and the payment made to the doctors of Rs.4,51,86,544/- is confirmed. However, on such disallowance which is under the enhancement of taxable issue, assessee is eligible for deduction u/s.80IB as given in the earlier years.

47. Ground No.2 raised relates to depreciation of Rs.21,85,857/- on capital expenditure incurred u/s.35(2AB). However, this issue

is related to disallowance of Section 35(2AB) because this was purely on alternative ground that in case 35(2AB) is not allowed and depreciation should be allowed. Therefore, it is dismissed as academic.

48. Ground No.3 relates to disallowance u/s. 35(2AB) of Rs.6,85,17,808/-. It is similar to the ground raised in A.Y.2013-14 and 2014-15 and therefore, our finding given therein will apply in this year also and accordingly, disallowance of claim u/s.35(2AB) is deleted.

49. Lastly, with regard to ground No.4 relates to disallowance u/s.14A of Rs.76,50,826/- has been made despite assessee has not claimed any exempt income on dividend income and the same has been offered to tax and therefore, no disallowance u/s.14A can be made, same is therefore, directed to be deleted.

49. In so far as additional ground is concerned, we find it is an undisputed fact that assessee is eligible for claim of deduction u/s.80IB and any kind of disallowance will only go to enhance the taxable profit and therefore, assessee is eligible for claim of deduction u/s.80IB of 30%. This issue has also been decided in favour of the assessee by the Tribunal in assessee's own case for the A.Y.2010-11 & 2011-12 in ITA No.1210 & 1211/Mum/2019 dated 23/05/2023. Accordingly, additional ground raised by the assessee is allowed.

50. Coming to the Appeal for A.Y.2018-19, in assessee's ground No.1, similar disallowance of sales promotion expenses of

Rs.12,16,66,016/- has been taken. During the year relevant for A.Y.2018-19, assessee has incurred sales promotion expenses of Rs. 33,34,57,588/- out of which ld. AO had disallowed Rs.21,40,72,187/-. These expenses include payment made to non-doctors, payment made doctors / non-doctors for less than Rs.1000/- and payment made to the doctors. The details of which are as under:-

i) Paid to non-doctors	= Rs. 12,65,53,110/-
(ii) Paid to doctors/non-doctors (amount <Rs. 1000)	=Rs. 7,54,98,022/-
(iii) Paid to doctors	= <u>Rs. 1,20,21,055/-</u>
	<u>Rs.21,40,72,187/-</u>

51. Before us ld. Counsel for the assessee had submitted a chart giving details of total amount claimed under various heads of sales promotion expenses, amount allowed, amount disallowed etc which for the sake of ready reference is reproduced hereunder:-

Particulars	Total Amount	Allowed	Disallowed	Out of disallowed expenses			Total Disallowed
				Paid to Others	Below Rs.1000	To Doctors	
Advertisement	2,524,158	2,524,158	-				
Leave Behind A/C	15,280,089	15,280,089	-				
Product Reminder	75,969,945		75,969,945	1,565,640	74,404,305		75,969,945 Allowed and remanded to AO by CIT(A)
Retail Push Scheme	54,140,706	54,140,706	-				
Visual Aid A/C	6,054,603	6,054,603	-				
Conference Exp	13,810,637		13,810,637	8,792,049		5,018,588	13,810,637 Allowed and remanded to AO by CIT(A)

Travelling (Conference)	2,625,544		2,625,544	1,793,407	15,545	816,591	2,625,544 Allowed and remanded to AO by CIT(A)
Doctors Expenses	2,042,639		2,042,639	209,194	194,669	1,638,776	2,042,639 Allowed and remanded to AO by CIT(A)
Overseas Expenses A/C	10,435,151	10,435,151	-				
Star Functions Expenses A/C	5,809,500	5,809,500					
Doctors Gift	5,704,422		5,704,422	273,820	883,503	4,547,099	5,704,422
Gift card given to chemist	113,919,000		113,919,000	113,919,000			113,919,000
Mobile Reporting Expenses	6,873,676	6,873,676	-				
Patients Camps	14,598,183	14,598,183	-				
Continous Medical Education CME	3,669,335	3,669,335					
	333,457,588	119,385,401	214,072,187	126,553,110	75,498,022	12,021,055	214,072,187

52. The Id. AO has made disallowance of Rs.12,16,66,061/- for which bifurcation has been given. Thus, disallowance has been made in the following manner:-

Particulars	Pd to others	Below Rs.1000/-	Pd to doctors
Doctors Expenses	2,09,194	1,94,669	16,38,776
Doctors Gifts	2,73,820	8,83,503	45,47,099
Gifts cards to chemist	11,39,19,000	-	-
	<u>11,44,02,014</u>	<u>10,78,172</u>	<u>61,85,875</u>

53. In view of the finding given in the earlier years payment of Rs.11,44,02,014/- payment made to others and payment below Rs.1,000/- of Rs.10,78,172/- is deleted and payment made to doctors of Rs.61,85,875/- paid to doctors are confirmed.

54. In this year, since no additional ground has been taken u/s.80IB, therefore, to extent of payment made to the doctors, the same is confirmed.

55. In ground No.2 raised for wrong income determined as per intimation u/s. 143(1). The brief facts are as under:-

a. During the captioned AY, income was wrongly determined as per intimation u/s 143(1) at Rs.69,52,04,880/- as against Rs.62,09,31,870/- as per return of income, resulting in a difference of Rs.7,42,73,010/-.

b. The breakup of such difference comprised of:

i.Rs.4,91,213/- (late deposit of employees contribution to Provident Fund)

ii.Rs.5,90,86,577/- (Royalty Expenses incurred)

iii.Rs.1,46,95,217/- (Ind-AS adjustments)

c. A rectification application u/s 154 dated 07.10.2021 was filed before the concerned AO n order to delete the addition of Rs.7,42,73,010/-. However, no rectification order giving effect to the same was passed by the AO.

d. Accordingly, a ground of appeal with respect to such a discrepancy / difference was raised at the CIT(A) stage along with other issues as regards the assessments order passed u/s 143(1) instead of filing a separate appeal. However, the CIT(A) failed to adjudicate on the same merely because he was of the view that an intimation order u/s 143(1) is a separate

appealable order, and accordingly dismissed it (Pg 19 of the CIT(A) order dated 02.12.2022)

e. Since a rectification application was made u/s 154 of the Act, no specific appeal u/s 246 was made against the 143(1) intimation order. Further, since the AO has repeated the same in the 143(1) intimation order, the appellant submits that this adjustment should be deleted or sent back to the AO along with the 154 application which is pending before it.

f. Aggrieved by the same, the assessee is now in appeal before the Hon'ble ITAT.

56. Before us, ld. Counsel has submitted as under:-

i. Late deposit of Rs.4,91,213/- of employees contribution to Provident Fund disallowed in intimation order u/s 143(1). (Issue covered against the assessee)

ii. Royalty expense of Rs.5,90,88,577/- disallowed in 143(1) resulting in double disallowance:

a. In pursuance of the assessee's own case, i.e. for ITA No.3159, 3277, 3278 and 3283/MUM/2011, Royalty paid by the company claimed as revenue expense had been disallowed, because the same was held to be a capital expense and accordingly depreciation on the same was supposed to be allowed year on year.

b. Following the directions of the Hon'ble ITAT, the assessee during the year under consideration, voluntarily disallowed Gross Royalty of Rs.5,90,86,577/- had to be disallowed and depreciation thereon of Rs.3,42,07,188/- (this included

depreciation on royalty expenditure of previous years as well as current year).

- c. Since capital expenses of Rs.5,90,86,577/- had to be disallowed and depreciation thereon on Rs.3,42,07,188/- had to be allowed, the net figure of Rs.2,47,89,389/- (Rs.5,90,86,577 – Rs.3,42,07,188) had been voluntarily disallowed by the assessee in its return of income itself.
- d. However, the AO, CPC Bangalore additionally disallowed a further sum of Rs.5,90,86,577/- being the capital expenditure spent towards royalty. This resulted in a double disallowance of the same expense (i.e. once voluntarily by the assessee and second by AO, CPC Bangalore)
- e. Therefore, the assessee prays that the disallowance made by the AO, CPC Bangalore ought to be deleted.

3. Ind-AS adjustments (notional in nature) totaling Rs.1,46,95,217/- disallowed in intimation order u/s 143(1):

- a. The assessee follows Ind-AS method of accounting due to which there are certain notional adjustments which are debited/credited to the P&L A/C of the company being Rs.1,46,95,217/-.
- b. The break up of Ind-AS adjustments are as follows:
 - i. Rs.1,21,07,765/- being Fair Valuation adjustments of Investments designated as Fair Value through P&L A/C.

ii. Rs.4,408/- being Net Amortization of Guarantee commission.

iii. Rs.25,83,044/- being Dividend on fair valuation of Investments of preference shares in subsidiary companies.

c. It is contended that there is no accrual of the above income and merely a book entry is passed in the books of accounts of the company in order to comply with the Indian Accounting Standards (Ind-AS). Further, the aforesaid Ind-AS adjustments have been disclosed in the return of income in schedule BP.

d. Reliance in this regard has been placed on the decision of Hon'ble Supreme Court in the case of **CIT Vs Shoori Vallabhdas & Co (46 ITR 144)** wherein it was held that if income, which does not materialize.

e. However, The AO, CPC Bangalore erred by not considering and allowed these adjustments as a deduction while computing the income from business or profession in the intimation u/s 143(1) of the act.

f. The assessee therefore prays and submits that since the aforesaid Ind-As adjustments are notional in nature and following the view of Hon'ble Supreme Court, the same should be allowed as a deduction while computing the Income from Business or Profession under the provisions of the act and accordingly the addition of Rs.1,46,95,217/- be deleted.

Further, contentious issues cannot be disallowed u/s 143(1). Since this appeal is against disallowance made u/s 143(3) r.w.s. 143(1), the appellant submits that it has no objection, if

this issue is set aside for De Novo Consideration. Since the order of the AO u/s 143(3) is merged with the intimation issued u/s 143(1) and since the rectification application is still pending. The appellant contends that these contentions issues, disallowance/addition, being made in 143(1) intimation, should either be deleted or sent back to CIT(A) for adjudication.

57. We have heard both the parties and also perused the relevant material placed on record. In so far as late deposit of Rs.4,91,213/- of employees contribution to provident fund disallowed in intimation order u/s.143(1), same stands covered against the assessee in view of the decision of the Hon'ble Supreme Court in the case of **Checkmate Services (P) Ltd. Vs. CIT reported in (2022) 448 ITR 518 (SC)**. Hence, this disallowance is confirmed.

58. Now in so far as Royalty expenses of Rs.5,90,88,577/- and depreciation thereon of Rs.3,42,07,188/- which included depreciation of the previous year or current year had to be allowed and the net figure of Rs.2,47,89,389/-itself has been disallowed by the assessee against return of income itself. Accordingly, the disallowance made by the ld. AO CPC by making disallowance u/s. 143(1) has to be deleted and the ld. AO is directed to allow the depreciation.

59. Similarly with regard to adjustment of Rs.1,46,95,217/-, the break-up of these adjustments had already been given above, which are being fair value adjustment of investment, net amortisation of guaranteed commission and dividend on fair value of investments which are nothing but merely a book entry based on the books of accounts of the company in order to comply with new Indian Accounting standards. However, CPC Bangalore had allowed these investments / deduction while computing the disallowance under the head business or profession. Since these are contentious issues which cannot be disallowed under prima facie made u/s.143(1). Accordingly, he set aside the issue for *de novo* consideration once intimation u/s.143(3) and also required application is still pending, accordingly, we remit this matter back to the file of the ld. CIT(A) to decide this issue afresh in accordance with law.

60. In so far as disallowance u/s.14A is concerned of Rs.29,69,642/-, assessee's contention has been that dividend income which has been offered for tax and the same has been assessed also by the ld. AO and therefore, once there is not exempt dividend income then 14A cannot be invoked. From the perusal of the assessment order and the ld. CIT(A), nowhere it has been disputed that assessee has not claimed any exempt income. Albeit dividend income has been offered to tax, then ostensibly no disallowance u/s.14A can be made. Accordingly, same is deleted.

61. In Revenue's appeal in ground No.1, Revenue has challenged part disallowance of sales promotion expenses wherein Revenue stated that ld. CIT (A) does not have power to set aside. In this issue, we have already decided in assessee's appeal that the payment made to others cannot be disallowed and ld. CIT(A) has merely asked ld. AO for verification and accordingly, the ground raised by the Revenue is dismissed.

55. Ground No.2 relates to dividend income u/s. 14A. Once the assessee has declared dividend income of Rs.16.89 lakhs as taxable even though it is an exempt income, no disallowance u/s.14A can be made. Since we have already deleted the disallowance u/s.14A, this issue on this ground is dismissed.

62. In the result, all the appeals of the assessee are partly allowed and all the appeals of the Revenue are dismissed.

Order pronounced on 28th June, 2023.

Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER

Mumbai; Dated 28/06/2023
KARUNA, sr.ps

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

//True Copy//

(Asstt. Registrar)
ITAT, Mumbai