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

BEFORE SHRI VIKAS AWASTHY, HON'BLE JUDICIAL MEMBER AND SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA NO. 1154/MUM/2002 (A.Y: 1998-99)

Pfizer Limited (Earlier known as Wyeth Lederle Limited) The Capital, G-Block Bandra Kurla Complex Bandra (E), Mumbai -400012 **PAN: AAACP3334M**	*v.*	ACIT- Special Range 23 [Now the DCIT-Circle 7(3)] Aayakar Bhavan Mumbai- 400020
(Appellant)		**(Respondent)**

ITA NO. 3508/MUM/2010 (A.Y: 2004-05)

ACIT- LTU 28th Floor, Centre - 1 World Trade Centre Cuffe Parade, Mumbai	*v.*	M/s. Wyeth Limited (Formerly known as wyeth Lederle Ltd) RBC Mahindra Towers 4th Floor, A- Wing Dr G.M. Bhosale Road Worli, Mumbai- 400055 **PAN: AAACW2641Q**
(Appellant)		**(Respondent)**

Assessee Represented by	**:**	**Shri Vishal Kalra**
Department Represented by	**:**	**Smt. Sujatha Iyangar**
Date of conclusion of Hearing	**:**	**15.03.2023**
Date of Pronouncement	**:**	**09.06.2023**

O R D E R

PER S. RIFAUR RAHMAN (AM)

1. The appeal in ITA.No. 1154/Mum/2002 is filed by the assessee against order of the Learned Commissioner of Income Tax (Appeals)-VII, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 04.01.2002 for the A.Y.1998-99. Appeal in ITA.No. 3508/Mum/2010 is filed by the revenue against order of the Learned Commissioner of Income Tax (Appeals)-15, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 10.02.2010 for the A.Y.2004-05.

2. Since the issues raised in both these appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed off by this consolidated order.

ITA NO.1154/MUM/2002 (A.Y: 1998-99) – ASSESSEE APPEAL

3. Assessee has raised following grounds in its appeal: -

> *"1. The Commissioner of Income-tax (Appeals)-VII, Mumbai [hereinafter referred to as the CIT(A)] erred in holding that the Additional Commissioner of Income-tax, Special Range 23, Mumbai (Addl.CIT) was justified in disallowing commuted fees paid by your appellants to Atul Ltd. towards infrastructural facilities as capital in nature.*

Your appellants submit that on the facts and circumstances of the case CIT(A) should have held that this amount was allowable as revenue deduction in computing the business income.

Your appellants pray that the Addl.CIT be directed to grant them deduction in respect of payment made to Atul Ltd. in computing their business income.

2. The CIT(A) erred in confirming the disallowance of the amalgamation expenses amounting to Rs.15,70,111 incurred by your appellants.

Your appellants submit that on the facts and circumstances of the case the CIT(A) should have held that expenses on amalgamation were allowable as revenue deduction in computing their income.

Your appellants pray that the Addl.CIT be directed to grant them deduction of Rs. 15,70,111/- in computing their total income.

3. The CIT(A) erred in holding that the Addl.CIT was justified in reducing book written down value of assets transferred by them in the scheme of demerger from the opening block of asset for the purposes of computing depreciation allowable to them. Your appellants submit that on the facts and circumstances of the case and having regard to the provision of Section 43(6) of the Income- tax Act, 1961 (the Act) the CIT(A) should have held that for the purposes of computing depreciation admissible under the Act only the tax written down value is required to be reduced from the opening block of assets.

Your appellants pray that the Addl.CIT be directed to compute depreciation accordingly.

The CIT(A) erred in holding that while computing deduction under Section 80HHC of the Act, the Addl.CIT was justified in:

a) treating commission paid to Geoffrey Manners & Co. Ltd. [G.M.] as part of turnover.

Your appellants submit that, having regard to the transactions with GM. and your appellants the CIT(A) should have held that commission paid to G.M. is not to be regarded as part of turnover. Your appellants pray that the Addl.CIT be directed not to consider commission paid to G.M. as part of turnover.

b) including sale of scrap and unusable scrap material in the turnover of the business. Your appellants submit that the CIT(A) should have held that scrap sales and sale of unusable raw material cannot form part of total turnover.

Your appellants pray that the Addl.CIT be directed to exclude these from total turnover.

c) reducing the profits of business by 90% of

(i) the amount received as manufacturing charges;

(ii) amount received as miscellaneous receipts

Your appellants submit that the CIT(A) should have held that the amount received as manufacturing charges and miscellaneous receipts do not fall within the ambit of clause (baa) of Explanation to Section 80HHC(4A) of the Act.

Your appellants pray that the Addl.CIT be directed not to reduce 90% of the above receipts from the profits of the business in computing deduction under Section 80HHC of the Act.

5. The CIT(A) erred in holding that the Addl.CIT was justified in considering 2% of the dividend as expenditure for earning such income. The CIT(A) further erred in holding that Addl.CIT was justified in computing exemption under Section 10(33) of the Act accordingly.

Your appellants pray that the Addl.CIT be directed to grant exemption under Section 10(33) of the Act as claimed in the Return of Income.

Your appellants crave leave to add to, alter, amend, vary, omit or substitute the aforesaid grounds of appeal or add a new ground or grounds of appeal at any time before or at the time of hearing of the appeal as they may be advised."

4. We proceed to adjudicate the issues ground wise in this appeal.

5. With regard to Ground No. 1 which is in respect of disallowance of commuted fees paid by the Assessee to Atul Ltd. towards infrastructural facilities. Ld. AR brought to our notice relevant facts related to the ground and submitted that the assessee, during the subject assessment year, is engaged in manufacturing, sale and trading of pharmaceuticals, animal health and nutritional products. The assessee was earlier known as "Cyanamid India Ltd.". As per the Scheme of arrangement between "Cyanamid Agro Ltd." and "Cyanamid India Ltd." sanctioned by the Hon'ble Bombay High Court vide order dated 12.9.1997, the agricultural undertaking of Cyanamid India Ltd. was transferred to Cyanamid Agro Ltd. Further, under the scheme of amalgamation of Wyeth Laboratories Ltd., M/s. John Wyeth (India) Ltd. and Wyeth (India) Pvt. Ltd with Cyanamid India Ltd sanctioned by the Hon'ble Bombay High Court vide order dated 12.9.1997, the above three mentioned companies were merged with M/s. Cyanamid India Ltd. and the name of Cyanamid India Ltd. was changed to Wyeth Lederle Ltd., being the present assessee both the above-mentioned schemes were implemented on 1.1.1998 w.e.f. appointed date 1.4.96 (refer page 77 to 116 of paper book).

6. During the year, the assessee factory was located at Atul - Valsad in the state of Gujarat. Atul are the owners of the large chemical complex comprising land admeasuring about 1250 acres. M/s Cyanamid India Ltd (the assessee) had taken on lease land and premises admeasuring 90,000 sqmts approximately within the said complex. Atul Ltd over the years had developed various infrastructural facilities at their chemical complex which inter alia includes dams, water treatment plant, water supply lines, roads etc. The assessee had been using and enjoying infrastructural facilities at no significant cost or consideration from the time the original lease in 1966. Atul Ltd and the assessee held negotiations to pay such fees or compensation as is agreed to for use of infrastructural facilities. As a result of negotiations, an agreement dated February 14, 1997 was entered between Atul Ltd. and Cyanamid India Limited (refer copy of the agreement at pages 68-76 of the paper book). As per clause 3A(1) of the agreement, the assessee was required to pay a monthly fee of compensation of ₹.14,60,000 for the first year commencing from April 1, 1996. The monthly fee or compensation for the use of infrastructural facility was required to be upgraded as per clause 3A(ii) of the agreement.

7. The aforesaid agreement dated 14.2.1997 was modified vide letter dated February 4, 1998 (refer page 75-76 of the paper book) whereby it was agreed between the assessee and Atul Ltd. to commute the monthly fees payable at a sum of INR 15 crores less monthly fees already paid. Accordingly, net amount of INR 11,40,84,000 (ie., INR 15,00,00,000 less INR 3,59,16,000 already paid) was payable equally by the assessee and Cyanamid Agro Ltd. (being the resulting company consequent upon the demerger of agro undertaking of Cyanamid India Ltd.). Thus, the assessee was liable to pay a sum of INR 5,70,42,000 (ie., 50% of INR 11,40,84,000) which was paid by the assessee as under:

i. INR 3,20,42,000 in February 1998; and

ii. INR 2,50,00,000 in April 1998

8. During the subject year, the assessee has shown a sum of INR 3,20,42,000 (paid in February 1998 i.e., during the subject year) as advances recoverable in cash or in kind in the books of accounts. However, as the entire liability arises on account of modification of the original agreement carried out vide letter dated February 4, 1998, the entire sum was claimed as a deduction during the subject AY 1998-99. Further, in the subsequent year ended March 31, 1999, the total sum of INR 5,70,42,000 was taken to the Miscellaneous Expenditure carried

forward in the balance sheet and amortized the payment for 5 years and accordingly, 1/5th of the total amount of INR 5,70,42,000 was charged over a period of 5 years starting from the AY 1999-00. In this regard, it is submitted that in the subsequent years, the assessee is not claiming such amortized expenditure and the same is duly added back in the computation of income while calculating the business income as the same is already claimed as revenue expenditure in the subject AY 1998-99. It was also submitted that this fact may duly be verified from the computation of income of subsequent AY 1999-00 enclosed at pages 178-180 of the paper book filed for AY 1999-00.

9. During the assessment proceedings, Assessing Officer held that assessee has paid the amount of INR 5,70,42,000 for acquiring exclusive, unobstructed and uninterrupted use and enjoyment of the infrastructural facilities free from any other charge cost in future and the maintenance of the said facilities the sole obligation and responsibility of Atul Ltd. The assessee's right of enjoyment of the above facility continues so long as the Assessee continues to be the lessee. As per the agreement dated December 31, 1966 between M/s Atul Products Limited (lessor) and M/s Cyanamid India Ltd (lessee), the lessee is in possession of the part of the land admeasuring 12 Acres and 12.5 gunthas.

10. The aforesaid agreement dated December 31, 1996 vested in the Assessee along with the possession of a part of land, also all ways, passages, rights, easements and appurtenances' to the said piece of land. As per para 5 of Part II of the agreement the assessee was granted the right to use the demised land and the building and structure thereon for the purpose of manufacture of pharmaceuticals, chemicals and products which the assessee would manufacture according to the objectives stipulated in its memorandum. As per para 6 of Part II of the agreement, the Assessee was given the right for laying underground, overground or overhead pipes, drains, electric cable wires / boards, rail tracks and other such conveniences necessary for the assessee business. As per para 1 of Part III of the Agreement the assessee was granted the right of way or passage over the other adjoining property of the lessor so as to enable the employees of the Assessee to have passage to the world outside the demised land. Vide para 1 and 4 of Part IV of the Agreement the assessee was granted the right to construct any building or structure on the demised land for the purpose of carrying on its business. By the said agreement dated Dec 31, 1966, the lease agreement stood extended for a period of 99 years from Dec 1. 1960. (refer Para (iii) (a) & (iii)(b) of the AO order at pages 29-30 of the paper book).

11. The Assessing Officer concluded that the impugned sum of INR 5,70,42,000 was not connected at all with the manufacturing and business activity of the assessee's chemical complex. Assessing Officer held that the penultimate objective of these agreements was a civil township of executives and other employees of the Assessee and their families with all the facilities for all age groups that would radiate in each aspect of a living a corporate benchmark that few employers can be credited with A modern township with all the amenities on a massive land stretch that is permanent and durable. In case of Assessee. lease is of 99 years and thus permanent in nature (refer para (iii)(i) and (iii)(1)(ii) of the AO order at page 37 of the paper book).

12. The amount paid is disallowed as capital expenditure for not fulfilling the requirement envisaged u/s 37(1) of the Act (refer para (iii)(g) of the AO order at page 38 of the paper book). By paying the above amount, the assessee has acquired a right exclusive and unobstructed use of the said infrastructure for another period of 61 years (ie., from AY 98- 99 upto the year 2059) is the minimum which is likely to be extended upto infinite period by further extensions of lease, as is normally the practice with all long term leases. Thus the payment has been made 'once and for all' with a view to acquiring a right or

advantage for the lasting or enduring benefit of Assessee's business. It belongs to the domain of capital expenditure (refer para (iv) of the order at page 38 of the paper book)

13. The assessee has not debited the above amount as expenditure for the subject year, ie AY 1998-99. This year, the amount paid by the Assessee i.e., INR 3,20,42,000 has only been shown as an advance in the balance sheet without any debit to the profit and loss account. Subsequently, after paying the balance amount of INR 2,50,00,000 in April 1998, the Assessee has amortised the total amount of INR 5,30.42,000 under the head 'miscellaneous expenditure' over a period of 5 years from AY 1999-00. Thus, the Assessee in its accounts has itself treated the above payment as an 'advances' during this year and from AY 99-00 onwards it has been treated as capital expenditure amortised over 5 years.

14. The Assessing officer by considering the cumulative effect of the facts and law as discussed above, the deduction of ₹.5,70,42,000/- claimed by the assessee is disallowed, being capital in nature. (referpara (v) and (vi) of the order at page 39 of the paper book).

15. On appeal Ld.CIT(A), considering the submissions of the assessee, held that the expenditure was in the nature of enduring benefit. Ld.CIT(A) further held that the assessee, in its own accounts has not debited the above amount as expenditure for the subject AY 1998-99. The amount paid by the assessee amounting to INR 3,20,42,000 has been only shown as an advance in the balance sheet without any debit to the profit & loss account. Subsequently, after paying the balance amount of INR 2,50,00,000 in April 1998 the Assessee has amortised the total amount of INR 5,30,42,000 under the head 'miscellaneous expenditure' over a period of 5 years with effect from AY 1999-00. Thus, the Assessee in its accounts has itself treated the above payment as an 'advances' during the subject AY 1998-99 and from AY 1999-00 onwards, it has been treated as capital expenditure amortised over 5 years. There is another dimension to the issue that the Assessee is liable to make payments for the various items given in the "Second Schedule" to the agreement and these expenses relate to day-to-day running of the business and has been treated by the assessee as revenue expenditure. Ld. CIT(A) held that the Assessing Officer was justified in treating the payment of INR 5,70,42,000 as capital expenditures.

16. Being aggrieved, assessee is in appeal before us and Ld. AR of the assessee submitted that impugned expenditure is duly allowable as a deduction as per the provisions of section 37(1) of the Act. The expenditure covered in the agreement with Atul Ltd. relates to the use of infrastructural facility which is a business necessity and expediency and it is not personal in nature. Reliance in this regard is placed on the decision of the Hon'ble Gujarat High Court in the case of Sayaji Iron and Engg Co vs. CIT (2002) 253 ITR 749 wherein it is held that the companies are distinct assessable entities and hence cannot have any personal expense. Ld. AR submitted that Expense is not of capital nature, it is respectfully submitted that the expenditure covered under this agreement which relates to the use of infrastructural facilities is revenue in nature. In the present case, the Assessee had to pay monthly payments to Atul Ltd towards use of infrastructural facilities which had later converted into a lumpsum payment. The Assessee had not acquired any asset with the benefit of enduring nature. Merely on account of the fact that the parties to the contract have agreed to commute the expenses for the sake of convenience, will not change the nature of expenditure, accordingly, the expenditure of revenue nature will remain as it is and will not get converted into a capital expense. Reliance in this regard is placed on the

decision of Anglo-Persian Oil Company Ltd. v. Dale [1932] 16 Tax Cas. 253, wherein it has been said that if the payment of a lump sum closes the liability to make repeated and periodic payments in the future, it may generally be regarded as a payment of a revenue character.

17. He brought to our notice the decision in the case of Fenner Woodroffe & Co. Ltd. *v.* CIT [1976] 102 ITR 665 (Mad.), it has been observed by the Hon'ble Madras High Court that it is the aim and object of the expenditure that would determine the character of the sum, whether it is a capital or revenue expenditure and neither the source nor the manner of payment may be of any consequence.

18. Further, the magnitude of expenditure does not decide the nature of expenditure and allowability thereof. It is the real nature and quality of the payment and not the quantum or the manner of the payment which is decisive. In this regard, there are plethora of judgements passed by the various courts wherein it has been held that "Quantum of expenditure is not relevant factor-Whether the money paid is a revenue expenditure or capital expenditure depends not so much upon the facts as to whether the amount paid is large or small or whether it has been paid in lump sum or by instalments, as it does upon the purpose for which the

payment has been made and expenditure has been incurred it is the real nature and quality of the payment and not the quantum or the manner of the payment which would prove decisive".

19. Further, it is duly submitted that the allegation of the department that the lease is of 99 years and thus permanent in nature is absolutely baseless and incorrect. There are plethora of judicial precedents wherein it has been held that rental charges paid under the lease period of 99 years are revenue in nature and hence are allowable expenditure. Recently the Hon'ble Delhi High Court in the case of Coforge Ltd. *v.* ACIT: [2021] 436 ITR 546, has held that the entire lease rent of 90 years paid by the Assessee as a commuted and discounted one-time lease rent instead of paying it on yearly basis is revenue in nature.

20. It is submitted that Expenditure is incurred wholly and exclusively for the purpose of business. Further, it is duly submitted that the said expenditure has been incurred to obtain uninterrupted flow of infrastructure facility provided by Atul Ltd. It must be appreciated that such infrastructural facilities were required to be paid for day to day running of the business of Assessee. Thus, the expenditure is wholly and

exclusively for the purpose of the business. In view of above, the amount paid to Atul Ltd. is duly allowable under section 37(1) of the Act.

21. Further, Ld. AR of the assessee submitted that Treatment of expense in the books of account is irrelevant for determining tax allowability of such expense. It is respectfully submitted that the contention by the department that the expense was not debited to the profit and loss account and the Assessee itself amortized the same in the subsequent year is irrelevant for ascertaining the allowability of deduction of the expenditure. Reliance in this regard is placed on the decision passed by the Hon'ble Supreme Court in the case of Kedarnath Jute Mfg.Co. Ltd. *v.* CIT: [1971] 82 ITR 363 wherein it is held that entries in the books of accounts are not conclusive of the nature of expenditure i.e., revenue or capital and whether an assessee is entitled to a deduction or not would entirely depend upon the provisions of law and not treatment given to it in the books of accounts by the Assessee.

22. As already stated above, the entire liability of INR 5,70,42,000 arose on account of modification of the original agreement carried out vide letter dated February 4, 1998 and therefore, the entire sum was claimed as a deduction during the subject AY 1998-99. Further, in the

subsequent year ended March 31, 1999, the total sum of INR 5,70,42,000 was taken to the Miscellaneous Expenditure carried forward in the balance sheet and amortized the payment for 5 years and accordingly, 1/5th of the total amount of INR 5,70,42,000 was charged over a period of 5 years starting from the AY 1999-00.

23. Ld. AR of the assessee, with regard to Tax treatment in subsequent years, submitted that in the subsequent years, the assessee has not claimed such amortized expenditure and the same is duly added back in the computation of income while calculating the business income as the same is already claimed as revenue expenditure in the subject AY1998-99. This fact may duly be verified from the computation of income of subsequent A.Y.1999-00 enclosed at pages 178-180 of the paper book filed for A.Y.1999-00.

24. There are various decisions wherein it has been held that treatment in the books of accounts is irrelevant for determining the tax allowability of the expense.

25. Without prejudice to our above contention that the amount paid to Atul Ltd. towards the use of infrastructural facilities is fully allowable in

the subject AY 1998- 99, it is respectfully submitted that if the said amount is not allowed in the subject AY 1998-99 then the same should be duly allowed in the subsequent years on the basis of the amortization of the said expense made in the books of accounts as the same was suo moto disallowed by the Assessee in the subsequent AYs. This is because there should not be any double disallowance of the same amount.

26. Ld. AR of the assessee relied on the various judicial pronouncements:

> *"Merely on account of the fact that the parties to the contract have agreed to commute the expenses for the sake of convenience will not change the nature of expenditure.*
>
> *i. CIT vs HMT Limited: [1993] 109 CTR 392 (Kar)*
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> *ii. Coforge Ltd vs ACIT: [2021] 436 ITR 546(Del)*
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> *iii. ACIT vs Delhi International Airport Private Limited: [2018] 89 taxmann.com 326 (Delhi)*
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> *iv. CIT vs Gemini Arts Private Limited: [2002]254 ITR 201 (Mad)*
>
> *v. ACIT vs Balmer Lawrie & Co. Ltd: ITA No.2264/Kol/2017 (Kolkata)*
>
> *vi. DCIT vs Sun Pharmaceuticals Industries Ltd: 329 ITR 479 (Guj)*
>
> *Cases wherein It is held that it is the real nature and quality of the payment and not the quantum or the manner of the payment which would prove decisive*
>
> *i. M.K. Bros. (P) Ltd. vs CIT [1972] 86 ITR 38 (SC)*
>
> *ii. Travancore Sugars & Chemicals Ltd. vs*

iii. *CIT [1966] 62 ITR 566 (SC)*

iv. *CIT v. Madras Auto Services (P.) Ltd. 233 ITR 468 (SC)*

v. *Empire Jute Co. Ltd. v. CIT 124 ITR 1 (SC)*

vi. *Assam Bengal Cement Co. Ltd. Vs. Commissioner of ITC (27 ITR 34) (SC)*

vii. *CIT vs B.N. Elias & Co. (P) Ltd. [1987] 168 ITR 190 (Cal.)*

viii. *Gannon Norton Metal Diamond Dies Ltd. v. CIT [1987] 163 ITR 606 (Bom.)*

ix. *FennerWoodroffe& Ltd. v. CIT [1976] 102 ITR 665 (Mad.)*

Cases wherein it is held that treatment in the books of accounts is irrelevant for determining the tax allowability of the expense

i. *Kedarnath Jute Mfg Co. vs CIT: [1971] 82 ITR 363 (SC)*

ii. *Taparia Tools Ltd vs JCIT: [2015] 372 ITR 605 (SC)*

iii. *Coforge Ltd vs ACIT: [2021] 436 ITR 546 (Del)*

27. On the other hand, Ld.DR relied on the orders of the Authorities below.

28. Considered the rival submissions and material placed on record, we observe that the assessee has taken land and premises on lease admeasuring 90000 sqmts, which is situated within the industrial complex. They have agreed to utilize the facilities by entering into an agreement dated 14.2.1997 with a monthly compensation of Rs. 14.60 lakhs during the financial year 1996-97. Subsequently, assessee entered

into an another agreement dated 14.2.1997 and converted the monthly lease rental into commuted monthly fee payable at a sum of ₹.15 crores for a lease period of 99 years. The settlement of above amount was made as under:

> *The monthly payments made till the modified agreement entered are to be adjusted, accordingly, the assessee settled the net amount of Rs. 11,40,84,000/-. It is relevant to note that the assessee has already claimed the lease rent as an expenditure during the relevant years. The balance amount was settled by the assessee in two parts, 50% of monthly commuted amount and the first installment was made by making payment of Rs. 3,20,42,000 on Feb.1998, Rs. 2,50,00,000 in April 1998 and the second installment was made in the subsequent year (1999). The assessee has claimed the lease rent as well as the first installment in the AY 1998-99 and the second installment of Rs. 5,70,42,000/- was treated as miscellaneous expenses in AY 1999-00 and amortized in subsequent five assessment years.*

29. we observe that the issue in question has been considered by the Hon'ble Delhi High Court in the case of Coforge Ltd. *v.* ACIT [2021] 128 taxmann.com 99 and held as under:

> *"14. It is relevant to note that, vis-à-vis this aspect of the matter, while the Tribunal has agreed with the appellant/assessee, the one-time lease rent was incurred by it to run its business both, effectively and efficiently, the Tribunal has gone on to hold that the amount involved should be spread over the tenure of the lease, albeit, in equal proportion. The reasoning of the Tribunal is given in paragraph 9.6 to 9.9 of the impugned orders; the same is extracted hereafter. Signature Not Verified Digitally Signed By:VIPIN KUMAR RAI Signing Date:06.07.2021 10:14:02*
>
> > *"9.6 We have heard the rival submission and perused the relevant material on record. The assessee has filed a*

copy of the lease deed under reference. In terms of the lease deed, the assessee has made following payments to GNIDA:

(a) one-time lease premium of 2,83,56,515/-

(b) commuted one time lease rent of 77,98,042/-

9.7 As far as payment of one-time lease premium is concerned, the assessee has capitalized the said amount in its books of accounts. The Ground No. 4 of the appeal of the Revenue is factually incorrect because the premium has already been capitalized by the assessee and the issue in dispute is only in respect of the commuted one timely lease rent.

9.8 The Ld. CIT(A) after considering the decisions on the issue of when a particular expenditure has to be considered as capital expenditure, in the case of Empire Jute Co. Vs CIT 124 ITR 1 (SC); Lakshmiji Sugar Mills Co P Ltd Vs CIT 82 ITR 376 (SC) and Madras Auto Services (P) Ltd 233 ITR 468 (SC) allowed the claim of the assessee observing as under:

"8.5.2 The appellant submitted that it had claimed deduction of Rs.77,98,042 on account of payment of commuted lease rentals to Greater Noida Authority for Plot No. 2A taken on lease situated in Greater Noida Industrial Development Area District, Gautam Budh Nagar. The appellant had the option to either pay (a) the advance annual rent on yearly basis ; or (b) commuted one time lease rent for the period of lease and no lease rent would be payable by the appellant during the lease period. The appellant opted for option (b). The deed of lease was executed on 12th January, 2007. The lease term is of 90 years commencing from 12th January, 2007, with the right of the Greater Noida Industrial Development Authority reserved. It is submitted that the appellant under the lease deed with the Greater Noida Industrial Development Authority has agreed to develop SEZ in Greater Noida by constructing the project with integrated, ready to use office space and land and social

infrastructure, etc. The appellant is obligated under the lease deed to complete the construction of the whole project and facilities within 7 years. It is submitted that the object and purpose of such lease deed, is only to facilitate IT Industries and IT enabled services and expansion of the business of the appellant. That apart from the aforesaid benefit, which is in the revenue field, there is no advantage in the capital field as there is no acquisition of any capital asset inasmuch the plot of land is not under the ownership of the appellant and remains the property of Greater Noida Industrial Development Authority. It is submitted that payment of commuted lease rentals did not result in creation of a capital asset having enduring benefit in the capital field. The amount in question was essentially revenue expenditure allowable deduction.

8.5.3 Hon'ble Supreme Court in the case of Empire Jute Co. v CIT: 124 ITR 1, held that the test of enduring benefit is not certain or conclusive test in determining whether the expenditure is capital or revenue in nature and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case. The Supreme Court further laid down that what is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future.

8.5.4 In the case of Lakshmiji Sugar Mills Co. P. Ltd. v. CIT : 82 ITR 376, Hon'ble Supreme Court held that the contribution made by the assessee under a statutory obligation for the development of roads which were originally the property of the Government and remained so even after the improvement had been done, being

expenditure incurred for running of the business efficiently and conveniently and not for acquiring a capital asset was of revenue nature and not of a capital nature.

8.5.5 In the case of Madras Auto Service (P) I limited (233 ITR 468) the assessee tenant had spent the amounts in question in order to construct a new building after demolishing the old building. The new building, however, from inception was to belong to the lessor and not to the assessee. The assessee, however, had the benefit of the existing lease in respect of the new building at the agreed rent for a period of 39 years The assessee claimed deduction for the entire amount spent on construction of the building as revenue expenditure. Hon'ble Supreme Court in the said case observed:

"In order to decide whether this expenditure is revenue expenditure or capital expenditure, one has to look at the expenditure from a commercial point of view. What advantage did the assessee get by constructing a building which belonged to somebody else and spending money for such construction? The assessee got a long lease of a newly constructed building suitable to its own business at a very concessional rent. The expenditure, therefore, was made in order to secure a long lease of new and more suitable business premises at a lower rent. In other words, the assessee made substantial savings in monthly rent for a period of 39 years by expending these amounts. The saving in expenditure was a saving in revenue expenditure in the form of rent. Whatever substitutes for revenue expenditure should normally be considered as revenue expenditure. Moreover, the assessee in the present case did not get any capital asset by spending the said amounts The assessee, therefore, could not have claimed any depreciation. Looking to the nature of the advantage which the assessee obtained in a commercial sense, the expenditure appears to be revenue expenditure."

8.5.6 The above decisions of Apex Court are squarely applicable in the case of the appellant. In the case of the appellant, also it did not acquire title / ownership of any

capital asset. The plot of land on which construction would be carried on by the appellant under the lease deed of 99 years, would remain the property of Greater Noida Industrial Development Authority at all times. In lieu of incurring the expenditure, the appellant would be entitled to enjoy the property as a tenant under long term lease. Such an advantage even though, enduring in nature, could not be regarded as in the capital field as the expenditure only facilitates the carrying out of business more efficiently and profitably by making available suitable premises for the business of the appellant. The expenditure on account of commuted lease rentals paid by the appellant company has been incurred in respect of premises used wholly and exclusively for the purposes of the business of the company; and the same represents commuted payment in lieu of regular lease rental and hence is in the nature of revenue expenditure. In view of the above, the AO has erred in making the disallowance of the commuted lease rentals. The appeal is allowed in this ground no. 7 of appeal. Since appeal is allowed in ground no. 7 of appeal, therefore, the plea of the appellant in ground no. 8 of appeal is infructuous and not necessary to be adjudicated."

9.9 We find that the Ld. CIT(A) has distinguished the expenditure in the capital field and expenditure incurred only to facilitate the carrying of the business more efficiently and profitably, which is revenue in nature. The one- time premium paid by the assessee has already been considered by the assessee as capital expenditure. The assessee had the option to pay the lease rental on year-to-year basis or as a one-time expenditure. The assessee has substituted the revenue expenditure which was to be paid on year-to-year basis and the nature of the expenditure remained same though it has been paid as a composite payment. Thus, it is clear that the expenditure incurred by the assessee is not capital expenditure. The expenditure was to be incurred on year to year basis for the period of lease of 90 years. The lesser gave the assessee two option. The first option was

to pay on year to year basis and claim the same as revenue expenditure. The second option was provided by the lessor was to pay a composite amount for the period of lease as onetime payment. The lessor provided some benefit for making onetime payment. The assessee has chosen the second option and paid the entire lease rent of 90 years as composite onetime payment. Thus, in our opinion, the liability of 90 years has been paid in one year only. In such circumstances, the liability of lease rent relatable to year under consideration would be 1/90th of the amount paid and balance amount would be pre-paid advance rent only. The assessee is entitled to claim 1/90th of the amount every year till the period of lease of 90 years as revenue expenditure. Even according to the matching principles of income and expenditure the entire expenditure is not justified for allowance in one year (i.e. the year under consideration) when the income corresponding to expenditure of subsequent years will be reflected in relevant year only. The expenditure not being relatable to the year under consideration cannot be allowed as revenue expenditure in the instant year. For the year under consideration, only 1/90th of the amount of Rs.77,98,042/- has been incurred wholly and exclusively for the purposes of the business for the year under consideration. Accordingly, we allow 1/90th of Rs.77,98,042/- as revenue expenditure in the year and balance be characterized as advance rent in the financial statement as on 31.03.2007. Accordingly, the Ground Nos. 3 & 4 of the appeal of the Revenue are partly allowed."

[Emphasis is ours]

14.1. As is evident from the reasoning adopted by the Tribunal, the Tribunal while finding no difficulty with the stand of the appellant/assessee that, although, paying commuted and discounted one-time lease rent gave the appellant/assessee an enduring benefit, it allowed the appellant/assessee to run its business effectively.

14.2. Having said that the Tribunal, in our opinion, needlessly went on to direct that the amount incurred i.e. Rs. 77,98,042/- should be spread equally over the tenure of the lease. As correctly argued on

behalf of the appellant/assessee, this was not the stand of the revenue before the Tribunal. The stand of the revenue was that the one-time lease rent amount paid to GNIDA was capital expenditure and not that it needed to be deferred over the tenure of the lease. As has been correctly argued on behalf of the appellant/assessee, there is no concept of deferred revenue expenditure under the Act. An expenditure can be spread over a time span, only if it so provided, in the Act. Section 35DD of the Act, which we have discussed above, is one such example. The observations of the Supreme Court in Taparia Tools Ltd. vs. JCIT, (2015) 372 ITR 605 (SC), being relevant in this regard, are extracted for the sake of convenience.

> *"14. The High Court has also observed that it was a case of deferred interest option. Here again, we do not agree with the High Court. It has been explained in various judgments that there is no concept of deferred revenue expenditure in the Act except under specified sections, i.e. where amortization is specifically provided, such as Section 35-D of the Act.*
>
> *(Emphasis is ours)*
>
> *15. What is to be borne in mind is that the moment [the] second option was exercisedby the debenture holder to receive the payment upfront, liability of the assessee to make the payment in that very year, on exercising of this option, has arisen and this liability was to pay the interest @ Rs. 55 per debenture. In Bharat Earth Movers v. CIT [2000] 245 ITR 428/112 Taxman 61 (SC), this Court had categorically held that if a business liability has arisen in the accounting year, the deduction should be allowed even if such a liability may have to be quantified and discharged at a future date.*
>
> *Following passage from the aforesaid judgment is worth a quote:*
>
> *"The law is settled: if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the*

actual quantification may not be possible. If these requirements are satisfied the liability is not a contingent one. The liability is in praesenti though it will be discharged at a future date. It does not make any difference if the future date on which the liability shall have to be discharged is not certain."

(Emphasis is ours)

The present case is even on a stronger footing inasmuch as not only the liability had arisen in the assessment year in question, it was even quantified and discharged as well in that very accounting year.

16. Judgment in Madras Industrial Investment Corpn. Ltd. v. CIT [1997] 225 ITR802/91 Taxman 340 (SC) was cited by the learned counsel for the Revenue to justify the decision taken by the courts below. We find that the Court categorically held even in that case that the general principle is that ordinarily revenue expenditure incurred wholly and exclusively for the purpose of business is to be allowed in the year in which it is incurred. However, some exceptional cases can justify spreading the expenditure and claiming it over a period of ensuing years. It is important to note that in that judgment, it was the assessee who wanted spreading the expenditure over a period of time and had justified the same. It was a case of issuing debentures at discount; whereas the assessee had actually incurred the liability to pay the discount in the year of issue of debentures itself. The Court found that the assessee could still be allowed to spread the said expenditure over the entire period of five years, at the end of which the debentures were to be redeemed. By raising the money collected under the said debentures, the assessee could utilise the said amount and secure the benefit over number of years. This is discernible from the following passage in that judgment on which reliance was placed by the learned counsel for the Revenue herself:

"15.. The Tribunal, however, held that since the entire liability to pay the discount had been incurred in the

accounting year in question, the assessee was entitled to deduct the entire amount of Rs.3,00,000 in that accounting year. This conclusion does not appear to be justified looking to the nature of the liability. It is true that the liability has been incurred in the accounting year. But the liability is a continuing liability which stretches over a period of 12 years. It is, therefore, a liability spread over a period of 12 years. Ordinarily, revenue expenditure which is incurred wholly and exclusively for the purpose of business must be allowed in its entirety in the year in which it is incurred. It cannot be spread over a number of years even if the assessee has written it off in his books over a period of years. However, the facts may justify an assessee who has incurred expenditure in a particular year to spread and claim it over a period of ensuing years. In fact, allowing the entire expenditure in one year might give a very distorted picture of the profits of a particular year. Thus in the case of Hindustan Aluminium Corporation Ltd. vs. CIT, (1982) 30 CTR (Cal) 363: (1983) 144 ITR 474 (Cal) the Calcutta High Court upheld the claim of the assessee to spread out a lump sum payment to secure technical assistance and training over a number of years and allowed a proportionate deduction in the accounting year in question.

16. Issuing debentures at a discount is another such instance where, although theassessee has incurred the liability to pay the discount in the year of issue of debentures, the payment is to secure a benefit over a number of years. There is a continuing benefit to the business of the company over the entire period. The liability should, therefore, be spread over the period of the debentures."

17. Thus, the first thing which is to be noticed is that though the entire expenditure was incurred in that year, it was the assessee who wanted the spread over. The Court was conscious of the principle that normally revenue expenditure is to be allowed in the same year in which it is incurred, but at the instance of the assessee, who wanted spreading over, the Court agreed to allow the assessee that benefit when it was found that there

was a continuing benefit to the business of the company over the entire period.

18. What follows from the above is that normally the ordinary rule is to be applied,namely, revenue expenditure incurred in a particular year is to be allowed in that year. Thus, if the assessee claims that expenditure in that year, the IT Department cannot deny the same. However, in those cases where the assessee himself wants to spread the expenditure over a period of ensuing years, it can be allowed only if the principle of 'Matching Concept' is satisfied, which upto now has been restricted to the cases of debentures.

19. In the instant case, as noticed above, the assessee did not want spread over of thisexpenditure over a period of five years as in the return filed by it, it had claimed the entire interest paid upfront as deductible expenditure in the same year. In such a situation, when this course of action was permissible in law to the assessee as it was in consonance with the provisions of the Act which permit the assessee to claim the expenditure in the year in which it was incurred, merely because a different treatment was given in the books of account cannot be a factor which would deprive the assessee from claiming the entire expenditure as a deduction. It has been held repeatedly by this Court that entries in the books of account are not determinative or conclusive and the matter is to be examined on the touchstone of provisions contained in the Act [See - Kedarnath Jute Mfg. Co. Ltd. v. CIT [1971] 82 ITR 363 (SC); Tuticorin Alkali Chemicals & Fertilizers Ltd. v. CIT [1997] 227 ITR 172/93 Taxman 502 (SC); Sutlej Cotton Mills Ltd. v. CIT [1979] 116 ITR 1 (SC) and United Commercial Bank v. CIT [1999] 240 ITR 355/106 Taxman 601 (SC).

20. At the most, an inference can be drawn that by showing this expenditure in aspread over manner in the books of account, the assessee had initially intended to make such an option. However, it abandoned the same before reaching the crucial stage, inasmuch as, in the income tax return filed by the assessee, it chose to claim

the entire expenditure in the year in which it was spent/paid by invoking the provisions of Section 36(1)(iii) of the Act. Once a return in that manner was filed, the AO was bound to carry out the assessment by applying the provisions of that Act and not to go beyond the said return. There is no estoppel against the Statute and the Act enables and entitles the assessee to claim the entire expenditure in the manner it is claimed.

21.In view of the aforesaid discussion, we are of the opinion that the judgment andthe orders of the High Court and the authorities below do not lay down correct position in law. The assessee would be entitled to deduction of the entire expenditure of Rs. 2,72,25,000 and Rs. 55,00,000 respectively in the year in which the amount was actually paid. The appeals are allowed in the aforesaid terms with no orders as to costs."

14.3. We are also of the view that the Tribunal was wrong in applying the matching principle anddirecting that one-time lease rent should be spread equally over the tenure of the lease. As indicated hereinabove, the annual lease rent that the appellant/assessee was required to pay if it had chosen the said route, was Rs. 7,08,913/-. The commuted and discounted value of the one-time lease rent was eleven (11) times the annual rent; which in absolute terms was much lower than the amount that would have accrued as rent over the entire tenure of the lease i.e. 99 years. This was the option exercised by the appellant/assessee. As is evident, taking the present value or time value of the money into account, a lumpsum figure was proposed to the appellant/assessee for securing leasehold rights for 90 years. The lumpsum amount paid by the appellant/assessee, as adverted to above, was far less than the amount that it would have to pay if it were to choose the other option i.e. pay the lease rent on an annual basis for 90 years at the rate of Rs. 7,08,913/-.

14.4. The matching principle, which is an accounting concept, requires entities to report expenses, atthe same time, as the revenue. In other words, the revenue is matched with the expense, in the income and expenditure statement, for a particular period. Given the facts obtaining in this case, the

matching principle would have no applicability. The appellant/assessee chose to incur the liability of a crystallised amount in the period relevant to the AY in issue i.e. AY 2007-2008, and therefore, it was entitled to seek deduction of the amount which fulfilled the following attributes.

i. The expenditure was not in the nature of capital expenditure or a personal expense.

ii. It was expended fully and exclusively for the purposes of the business and;

iii. It did not fall within the realm of any provision of the Act which prohibited theappellant/assessee from claiming this deduction.

14.5. Thus, we are of the view that question nos. (i) and (ii), as framed in ITA 215/2020, should also be decided in favour of the appellant/assessee and against the revenue. It is ordered accordingly.

Conclusion:-

15. For the foregoing reasons, the above – captioned appeals are allowed. As indicated hereinabove, all four questions of law, as framed are decided in favour of the appellant/assessee, and against the revenue."

30. From the above decision, it is clear that the commuted one-time payment is allowed as revenue expenditure. However, the facts in the present case is distinct in terms of mode of settlement made by the assessee during the impugned assessment year and subsequent assessment year and treatment given by the assessee in its books of accounts. After considering the above facts on record (as discussed in para no 28), in our view, the inconsistent method adopted by the

assessee for the same nature of expenditure is not proper. The assessee has already claimed the lease rental in the respective assessment years and converted the terms of agreement subsequently. The payment made by the assessee for the fresh terms of agreement is no doubt revenue considering the fact that one-time payment for acquiring the long lease is considered as revenue by various Hon'ble High Courts (including Coforge Ltd). However, during the present assessment year, the assessee itself has treated the part payment made as an advance payment and the balance payment out of 50% commuted payment immediately in the subsequent year, however claimed the same as revenue expenditure. In our considered view, the assessee cannot claim two lease amounts in the similar nature in the same assessment year and treats differently in the subsequent assessment year. In our view, the assessee should be allowed to claim total renegotiated amount i.e., ₹.11,40,84,000/- as an deferred revenue expenditure and should be amortised in 5 equal installments, starting from AY 1999-00. Therefore, the ground raised by the assessee is partly allowed.

31. With regard to ground No. 2 which is in respect of disallowance of amalgamation expenses amounting to INR 15,70,111 incurred by the assessee. Ld. AR of the assessee brought to our notice relevant facts

related to the ground which is Pursuant to the shareholders' approval granted at the convened meeting of the Company held on 5th May, 1997 and the subsequent sanction of the Bombay High Court to the Scheme of Amalgamation on 12th September, 1997, the following companies amalgamated with the Assessee and the name of Assessee was changed to Wyeth Lederie Limited:

i. Wyeth Laboratories Limited
ii. John Wyeth (India) Limited
iii. Wyeth (India) Private Limited

32. The details of expenses incurred on account of aforesaid amalgamation for the subject year are as follows:

S.No.	Name	Amount (in INR)
1.	Lazard Credit Capital Limited amalgamation negotiations	46,323/-
2	Roger Perreira Press Co-coordinators	6,15,57/-
3.	Counsel Fees- Others	3,16,667/-
4	Solicitor Fees	3,28,787/-
5.	Meeting expenses	2,62,762/-
	Total	15,70,111/-

33. It is submitted that the above expenses are in the nature of professional fees and therefore allowable as revenue expenditure. It is submitted that the amalgamating companies were engaged in the manufacture of bulk drugs and pharmaceuticals like the Assessee. The

amalgamation would therefore certainly would lead to smooth and efficient conduct of the business and reduce the overhead costs for Assessee. It is therefore, submitted that the professional charges of Rs.15,70,111 incurred on account of aforesaid amalgamation be allowed as a revenue deduction

34. In support of the above contentions, Ld. AR relied on the following case laws: -

> *"Cases wherein legal and professional fees are allowable as revenue expenditure*
>
> *i. CIT vs Bombay Dyeing & Mfg. Co. Ltd: 219 ITR 521 (SC)*
>
> *ii. CIT Vs. Bush Boake Allen (India) Ltd. (135ITR 306) (Mad)*
>
> *iii. Madras Race Club Vs. CIT (151 ITR 675) (Mad)*
>
> *iv. Akme Electronics & Control (P) Ltd. (36 ITD 102) (Ahmedabad)*

35. On the other hand, Ld.DR relied on the order of the lower authorities.

36. Considered the rival submissions and material placed on record, we observe that the assessee has incurred certain expenses relating to the amalgamation which are in the nature of professional fees and other

related expenses. In the similar case, the Hon'ble Supreme Court held in the case of Bombay Dyeing & Mfg. Co. Ltd (supra) as under:

> *"1. These appeals are preferred against the judgment of the Bombay High Court rejecting an application under Section 256(2) of the Income Tax Act. The revenue had applied for referring the following two questions for the opinion of the High Court:*
>
> > *"(i) Whether on the facts and in the circumstances of the case, the Tribunal professional charges paid by the assessee company to its Solicitors for effecting the amalgamation of Nawrosjee Wadia ginning & pressing company with it, was of revenue nature and should be allowed as a deduction in the computation of its total income?*
> >
> > *…*
>
> *The facts concerning the first question are the following: a company named Nawrosjee Wadia Ginning & Pressing Company was amalgamated with the assessee-company. In that connection an expenditure of Rs.10,350/- was incurred by the assessee company towards the professional charges paid to the firm of Solicitors. In the assessment proceedings the said amount was claimed as a revenue expenditure. The assessee's case was that Nawrosjee Wadia Ginning & Pressing Company was engaged in the same business as the assessee. In other words, the business of both the companies were "complimentary". The directors of both the companies thought that it would be advantageous if both the companies are amalgamated. Accordingly, a scheme of amalgamation was evolved. It was submitted that the legal expenses incurred in connection with the said amalgamation are in the nature of revenue expenditure. The Income Tax Officer did not agree nor did the Appellate Assistant Commissioner. On further appeal, the Tribunal upheld the assessee's contention. It disagreed with the Revenue's contention that inasmuch as the said amalgamation resulted in acquisition of the other company by the assessee, which acquisition was in the nature of acquisition of a capital asset, the legal expenses incurred in that behalf partake the nature of capital expenditure. The Tribunal was of the opinion that "as both the companies were carrying on complimentary business and their amalgamation was necessary for the smooth and efficient conduct of the business", it is an expenditure laid out wholly and exclusively for the purpose of the business of the assessee. In view of the said finding and also in view of the decision of this Court in Bombay Steam Navigation Company Private Limited v.*

Commissioner of Income-Tax, Bombay (56 I.T.R. 52), we are of the opinion that the Tribunal was right in its conclusion. The decision in Bombay Steam Navigation also pertains to amalgamation of two shipping companies. The assessee-company took over the assets of the other company and part of the price was treated as a loan secured by a promissory note and hypothecation of all movable properties of the assessee company. The loan was to carry simple interest at 6 per cent. The question that arose in the said case was whether the interest paid upon the said loan was deductible as revenue expenditure. It was held by this Court that it was an expenditure deductible under Section 10(2)(xv) of the Income Tax Act. It was held that transaction of acquisition of the asset was closely related to the commencement and carrying on of the assessee's business and, therefore, interest paid on the unpaid balance of the consideration for the assets acquired had, in the normal course, to be regarded as expenditure for the purpose of the business which was carried on in the accounting periods. In the course of the judgment this Court referred to the earlier decision of this Court in State of Madras v. G.J.Coelho (53 I.T.R. 186) wherein it was held that the interest on the amount borrowed for acquiring a capital asset is deductible as revenue expenditure. It is true, that in the said decision this Court re-affirmed the well established principle that any expenditure laid out for acquiring an asset of a permanent character would be capital expenditure, held at the same time that inasmuch as the acquisition of the other company was in the course of carrying on of the assessee's business, the interest paid thereon was deductible under Section 10(2)(xv) of the Act. In this case too, the Tribunal has recorded a finding that the acquisition of Nawrosjee Wadia Ginning & Pressing Company was necessary for the smooth and efficient conduct of the assessee's business. Following the ratio of the aforementioned decisions of the Court, we hold that the expenditure incurred towards professional charges of the Solicitors firm for the services rendered in connection with the said amalgamation was in the course of carrying on of the assessee's business and, therefore, deductible as a revenue expenditure. In this view of the matter, it is not necessary for us to deal with the other decisions cited before us on this question."

37. In the light of above decisions, we direct the Assessing Officer to allow the claim of the assessee. Accordingly, the ground raised by the assessee is allowed.

38. With regard to Ground No. 3 which is in respect of Reduction of book written down value ("WDV") (instead of WDV as per the Income-tax Act) of the assets transferred in the scheme of demerger from the opening block of asset for the purposes of computing depreciation allowable to the assessee.

39. Brief facts related to the ground are, Under the Scheme of Arrangement sanctioned by the Hon'ble Bombay High Court, M/s.Cyanamid India Ltd (the assessee, a demerged company) transferred its fixed assets of agro division to M/s. Cyanamid Agro Ltd (resulting company) w.e.f. 1.4.96 at book WDV, the total of which works out to INR 3,41,78,000 as per schedule A to the said Scheme of Arrangement (refer page 122 of the paper book). For the purposes of computing depreciation under the Act, the assessee had reduced from its block of assets, WDV of the transferred assets as per the Act amounting to INR 2,04,13,040. In the assessment order passed under section 143(3) for previous AY 1997-98, it was held that, book values of the assets transferred to Cyanamid Agro Ltd. and not WDV as per the Act are required to be reduced from the opening block of assets. For the subject AY 1998-99, depreciation was granted on the basis of the WDV as determined by the AO while granting depreciation for AY 1997-98.

40. During assessment proceedings, Assessing Officer relying on the assessment order passed in Assessee's case for the previous AY 1997-98, allowed the depreciation for the subject AY 1998-99 at INR 2,79,08,088 (as against the depreciation claimed by the Assessee in the return of income amounting to INR 2,88,38,771) on the basis of opening WDV as on 1.4.97 as per the assessment order of last year.

41. Aggrieved with the order of the Assessing Officer, assessee preferred an appeal before the Ld.CIT(A) and Ld.CIT(A) relied on its previous order passed in Assessee's case for assessment year 1997-1998 and held the issue against the Assessee.

42. Aggrieved assessee is in appeal before us and Ld. AR of the assessee submitted that assessee 'case fall under the Explanation 2A to section 43(6) of the Act (as amended vide Finance Act, 2000) as the same is applicable with retrospective effect which provides for reducing the written down value of assets transferred in the scheme of demerger for the purpose of computing depreciation.

43. The Ld. AR submitted that on the date of transfer i.e. 1st April, 1996, the resulting company (ie, Cyanamid Agro Ltd.) was a wholly

owned subsidiary of the Assessee and accordingly for the purpose of computing depreciation, written down value of assets transferred was reduced from the block of assets as per Explanation 2 to Section 43(6)(c) of the Act.

44. As per Explanation 2 to section 43(6)(c) of the Act, in the case of transfer of block of assets from holding company to subsidiary company or vice versa or in the scheme of amalgamation, the actual cost of the block of assets in the case of transferee company shall be the written down value of the block of assets as in the case of transferor company for the immediately preceding previous year as reduced by the amount of depreciation actually allowed in relation to the said preceding previous year

45. Further, in the assessment order, the Assessing Officer relied on the order for previous AY 1997-98 wherein it has been mentioned that the stand taken in the assessment order is supported by the fact that the principle that book value of the assets should be reduced from the block of assets is vindicated by the assertion of Explanation 2A to clause 6 of Section 43 inserted by the Finance Act, 1999 wef 1.4.2000 which is reproduced as under:

> *"Explanation 2A-Where in any previous year, any asset forming part of a block of assets is transferred by a demerged company to the resulting company, then, notwithstanding anything contained in clause (1), the written down value of the block of assets of the demerged company for the immediately preceding previous year shall be reduced by the book value of the assets transferred to the resulting company pursuant to the demerger."*

46. The above stated Explanation 2A to clause 6 of section 43 of the Act was amended vide Finance Act, 2000, we f. 1.04 2000 which reads as under.:

> *"Explanation 2A Where in any previous year, any asset forming part of a block of assets is transferred by a demerged company to the resulting company, then, notwithstanding anything contained in clause (1), the written down value of the block of assets of the demerged company for the immediately preceding previous year shall be reduced by the [written down value of the assets]" transferred to the resulting company pursuant to the demerger ['substituted for "book value of assets" by the Finance Act, 2000, w.e.f. 1-April-2000]"*

47. In this regard, Ld. AR submitted that the above Explanation 2A to Section 43(6) has been amended by the Finance Act, 2000 with retrospective effect which provide for reducing the written down value of assets (and not book value of the assets) transferred in the scheme of demerger for the purpose of computing depreciation. Accordingly, the Assessee's case also falls under the amended Explanation 2A to section 43(6) of the Act which provides for reducing the WDV as per Income-tax Act and not book value of assets transferred. In this regard, the attention of your Honours is invited to the Finance Bill, 2000 which clarified that

the above provisions are being rationalized for clarity and to remove implementation difficulties. It is therefore submitted that the stand taken by assessee is in line with the legislative intent.

48. Further, in this regard, attention is also drawn to the Finance Bill, 1999 (refer pages 125 to 127 of the paper book) which clearly mentions that with a view to recognise demergers, slump sales and to rationalise the existing provisions of amalgamation, a number of amendments have been proposed on the basis of several broad principles. The first such principle stated therein is that demergers should be tax neutral and should not attract any additional liability to tax.

49. In view of above, it is clear that reducing the book value of assets from the block of assets in case of demerger was never the intention of the legislature as the scheme of demerger cannot result into the levy of any additional tax liability.

50. Further, Ld. AR submitted that on one hand, the resulting company has claimed depreciation on the tax written down value of assets acquired in the scheme of demerger and the Assessee has reduced tax

written down values from its block of assets, thus making the transaction tax neutral.

51. In support of the above contentions, Ld. AR of the assessee relied on the following case laws

> *"Cases wherein it is held that only tax WDV of transferred assets of demerged company would constitute WDV of the block of assets of resulting company and the amendment brought in Explanation 2B to section 43(6) is curative and thus, retroactive.*
>
> *i. Godrej Industries Limited vs ACIT: [2008] 26 SOT 445 (Mumbai)*
>
> *ii. DCIT VS Nirma Limited: 1599/Ahd/2013 (Ahmedabad) ITA No.1599/AHD/2013 (Ahmedabad)*
>
> *Cases wherein it is held that if amendment if curative in nature then it has a retrospective effect*
>
> *i. A.Y. Garments International (P) Ltd.vs DCIT: [2020] 117 taxmann.com 665 (Karnataka High Court)*
>
> *ii. CIT v. Alom Extrusions Ltd., [2009] 185 Taxman 416 (SC)*
>
> *iii. CIT v. Podar Cement (P) Ltd. [1997] 92 Taxman 541 (SC)*

52. On the other hand, Ld.DR relied on the order of the lower authorities.

53. Considered the rival submissions and material placed on record, we observe that the assessee has transferred certain assets to its demerged company. The controversy is, whether the value of the tax WDV or the book value of the transferred assets to the demerged company to be

reduced from the block of assets. In our considered view, this transaction of transfer of assets to its subsidiary company is revenue neutral and the value of assets transferred to the demerged company should be taken from the Tax depreciation schedule prepared under the Income Tax Act. As per the provision of the Act, section 43(c) explanation 2, the value to be transferred are the opening WDV after reducing the relevant depreciation before transfer of the assets to the demerged company. The value transferred to the subsidiary should be the same value which is reduced from the parent company. The assessing officer cannot treat differently. It is explained as under:

Original cost of the assets	*Rs. 1000*
Depreciation already claimed	*Rs. 200*
Net Block	*Rs. 800*
Depreciation before transfer	*Rs. 100*
WDV as on date of demerger	*Rs. 700*

54. The value to be transferred is Rs. 700, not the value of Net block of ₹.800 or original Book value. The demerged company should claim depreciation based on the WDV on the date of demerger. The Assessing Officer cannot alter the value other than the above mentioned value otherwise, the assessee will be deprived of the legitimate depreciation. The above example is exactly similar to the provisions mentioned

u/s.43(c) of the Act. Accordingly, the ground raised by the assessee is allowed.

55. With regard to Ground No. 4, which is in respect of deduction under section 80HHC. Ground no. 4 is reproduced below: -

> *"The CIT(A) erred in holding that while computing deduction under section 80HHC of the Act, the AO was justified in*
>
> *a) Treating commission paid to Geoffrey Manners & Co. Ltd. [GM] as part of turnover.*
>
> *b) Including sale of scrap and unusable scrap material in the turnover of the business*
>
> *c) Reducing profits of business by 90% of -*
>
> *The amount received as manufacturing charges;*
>
> *amount received miscellaneous receipts as*
>
> *The CIT(A) should have held that scrap sales and sale of unusable raw material cannot form part of total turnover"*

56. At the outset, Ld. AR of the assessee brought to our notice brief facts relating to the grounds and with regard to "sale of scrap", Ld. AR of the assessee submitted that subject issue has been decided in favour of Assessee vide order passed by the Hon'ble Mumbai Tribunal in Assessee own case for assessment year 1991-1992, 1994-1995 and 1995-1996 wherein it is held that scrap sales collected by the Assessee cannot form part of the total turnover for the purposes of deduction under section 80HHC. Accordingly, in view of above, it is respectfully submitted that

sale of scrap of INR 22,77,000 should not be included in the total turnover of the Assessee for the purpose of computing deduction under section 80HHC of the Act as they do not have a profit element therein.

57. With regard to Commission paid to Geoffrey Manners & Co. Ltd. [GM], it is submitted that GM is the major distributor of Assessee. The sales made to GM are on a principal-to-principal basis and there is no principal-agent relationship between them. It is submitted that the sales to GM are recorded on the basis of credit notes raised by GM on Assessee where GM sells these goods, in turn to other wholesalers, retailers or consumers by raising invoices on them. Hence, the credit notes received by Assessee are after deducting GM's commission which are recorded as sales. Therefore, commission is not booked as an expenditure.

58. He submitted that for the purpose of computation of deduction under section 80HHC, the turnover has been adopted from audited accounts. It is submitted that in substance, the payment to GM is in the nature of trade discount and hence reduced from the turnover which is in line with Accounting Standard 9 - Revenue Recognition.Therefore, wholesalers commission being in the nature of trade discount should not

be added to the total turnover for computing deduction under section 80HHC of the Act.

59. Ld. AR of the assessee submitted that the subject issue is decided in favour of the Assesseevide order passed by the Hon'ble Tribunal in the Assessee's own case for AY 1994- 95 and 1995-96 wherein it is held that the commission paid by the Assessee to the distributor 'GM' cannot form part of turnover of the Assesseefor computing deduction u/s 80HHC as there is no profit element accruing to the Assesseeout of the sale proceeds retained by the aforesaid distributor. (refer para 4-7 of the order at pages to of the case law compilation)

60. On the other hand, Ld. DR relied on the order of the lower authorities.

61. Considered the rival submissions and material placed on record, we observe from the record that identical issue is decided in favour of the assessee in the A.Y. 1994-95 and 1995-96. While deciding the issue, the Coordinate Bench of the Tribunal in ITA.No. 6011/Mum/1997 dated 13.02.2014 held as under: -

"3. The second ground of the assessee relates to computation of deduction u/s. 80HHC. The dispute is regarding including the following three items in total turnover for the purpose of calculating deduction u/s 80HHC

a) Sale of scrap

b) Sales tax

c) Commission paid to Geoffrey Manners & Co. Ltd

Regarding sale of scrap and sales tax, it was contended by the learned AR of the assessee that both these issues are fully covered in favour of the assessee by the Tribunal order in assessee's own case for AY 1991 92 as per ITA No. 5959/8/94 dated 16.4.2002 In this Tribunal order, reliance has been placed on the Judgement of the Hon ble Jurisdictional High Court in the case of CIT Vs. KantilalChhotalal reported in 246 ITR 439 and it was held that the scrap sales cannot be included in the total turnover and regarding sales tax, the Tribunal has followed the Judgement of the Hon'ble Jurisdictional High Court in the case of CIT Vs. Sudarshan Chemicals Industries Ltd. & Ors., 245 ITR 769 and it was held that sales tax collected by the assessee cannot form part of the total turnover for the purposes of section 80HHC. The learned DR also agreed and accordingly, we hold that the sale of scrap and sales tax collected by the assessee cannot form part of the total turnover for the purposes of section 80HHC

4. Regarding payment of commission to Geoffrey Manners & Co. Ltd., the Ld. AR of the assessee contended that it is not a case of payment of commission of the income of the assessee but is a case of diversion of the income the source itself. Our attention was drawn to the agreement dated 01. 05.63 between the assessee and Geoffrey Manners & Co distributor. It was contended that this agreement is a principal to principal agreement and as per clause No. 9 of the agreements appearing on page No. 4, only the net amount after deducting commission at the rate of 10% of net value of sale was receivable by the assessee from the distributor. Our attention was also drawn to clause No. 7 & 8 of the agreement and it was contended that the sale were to be affected by the distributor, payment was to

be collected by the distributor and rights of the company and obligation of the distributor are guided by article 9 of this agreement, as per which the net value of sales after deducting commission due thereon to the distributor was to be credited to the account of the assessee. The learned AR contended that although the agreement was not drafted perfectly as the same was drafted long back in the year 1963 but the sum and substance of the agreement is that the assessee company has a claim only on the 90% of the net sale proceeds and the balance 10% is the income of the distributor and not the income of the assessee at any point of time. Reliance was placed by the learned AR on the following two Judgments of the Hon'ble Jurisdictional High Court:-

a) CIT Vs. Sudarshan Chemicals Industries Ltd. & Ors., 245 ITR 769

b) CIT VS. Kantilal Chhotalal, 246 ITR 439

It was held in the Judgement of the Sudarshan Chemicals Industries Ltd. (supra) that "the turnover should be restricted to such receipts which have an element of profit in it It was held in the case of KantilalChhotalal (supra) that the "total turnover cannot include reassortment charges, labour charges, commission, interest, rent or receipts of similar nature. The learned AR contended that since there is no element of profit involved in the amount of 10% retained by the distributor, the same cannot be included in the turnover of the assessee. The learned AR also contended that even such items which are generally construed as part of turnover like freight and insurance attributable to the transport of the goods are specifically excluded from the definition of export turnover and total turnover as per Explanation (b) and (ba) to section 80HHC. Our attention was drawn to the profit and loss account of the assessee company as per which the sales is shown at Rs. 3,962.97 lakhs, breakup of which is given in Schedule-L and detail thereof is also furnished, which includes sale to Geoffrey Manners & Co. Ltd., at Rs. 2319.39 STAY OF LAB A copy of the certificate from Geoffrey Manners & Co. Ltd. is also submitted as per which, the sales affected by the Geoffrey Manners & Co. td. on account of the assessee as reported to the Commissioner of Sales Tax of Maharashtra, Mumbai is the same at Rs. 2,171.89 lakhs plus excise duty Rs. 1,474.50 lakhs totaling to Rs 2,319.39

lakhs. It was Coned that the total sale amount as per distributor on which sales was paid by them and reported to Commissioner of Sales Tax has been accounted for by the assessee. In the income assessment also, no addition has been made on account of lower sales accounted for by the assessee and therefore there is no justification in adding the amount of said commission of distributor in the total turnover of the assessee only for the purpose of calculating the deduction allowable u/s. 80HHC.

5. As against this, the learned DR of the revenue contended that as per normal accounting principal, turnover also includes commission to distributor and therefore the Assessing Officer has rightly included the amount of commission in total turnover. It was also contended that the method of accounting as agreed to by both the parties cannot change the character of the receipts. Our attention was drawn to article No. 11 on page No. 5 of the agreement as per which, it is said that "the company agrees to pay the distributor a commission equal to 10% on the net value of sales......" It was contended by the learned DR that the very language of this article shows that the assessee has the claim an entire sales value out of which, it agrees to pay the distributor a commission equal to 10% and therefore it has to be included in the total turnover of the assessee. Our attention was also drawn to para 6.5 to 6.7 of the order of the learned CIT(A) and reliance was placed by the learned DR on the order of the learned CIT(A) and the same was strongly supported.

6. In the rejoinder, the learned AR of the assessee submitted that the rights and obligation of the assessee are as per clause 8 & 9 of the agreement and not as per clause 11 of the agreement which is only defining various terms ie. commission and net value of sale etc. Reliance was placed on the Judgement of the Hon'ble Apex Court in the case of Godhra Electricity Co. Ltd. & Ors. Vs. State of Gujarat and Ors., reported in AIR 1975 (SC) 32.

7. We have considered the rival submissions, perused the materials on record and have gone through the various case laws cited before us. It is admitted position that the assessee is regularly accounting for net sales after deducting the commission as per the agreement dated 1.5.63. Both the

assessee and the distributor are accounting for the sales after deducting the commission there from on a regular basis, which evident from the certificate given by the distributor to the Commissioner of Sales Tax Maharashtra, Mumbai also. Apparently, the revenue has not disputed this in any earlier year. As admitted by the learned AR of the assessee, the language of the agreement leads to some confusion but the conduct of both the parties, during the long period prior to this assessment year and subsequent year also, clearly shows that as per this agreement, the assessee has a claim over only 90% of the net sale proceeds affected by the distributor and the balance 10% belongs to the distributor. In view of this, it is also not disputed that there is no profit element accruing to the assessee out of 10% of the sale proceeds retained by the distributor and hence, in view of the above said two Judgments of the Hon'ble Jurisdictional High Court, same cannot be included in the assessee's turnover for the purposes of calculating deduction u/s. 80HHC. In the facts and circumstances of the case, we are of the considered opinion that the commission paid by the assessee/ retained by the distributor cannot form part of the turnover of the assessee for computing deduction u/s. 80HHC and the assessee succeeds on this ground.

8. The last ground of this appeal relates to treating cost of steam supplied as part of turnover for computing deduction u/s. 80HHC. It was contended by the learned AR of the assessee that this issue was not decided by the learned CIT(A) and therefore it should be set aside to the file of learned CIT(A) for a decision thereon. The learned DR also agreed and accordingly, we set aside this issue and restore it to the file of learned CIT(A) with a direction to decide this issue on merit after providing reasonable opportunity of being heard to the assessee.

9. In the result, both the appeals of the assessee are partly allowed as above."

62. Respectfully following the above decisions and following the principle of consistency, the view taken by the Tribunal in A.Y. 1994-95

and 1995-96 is respectfully followed, ground raised by the assessee is accordingly allowed.

63. With regard to ground No. 4(c) which is in respect of Reducing the profits of the business by 90% of the amount received as Manufacturing charges and miscellaneous receipts. Ld. AR of the assessee submitted that the amount received as manufacturing charges and amount received as miscellaneous receipts form part of business income and hence, should form part of the profits of the business for calculating the deduction u/s 80HHC of the Act. However, the Assessing Officer reduced 90% of the amount received as manufacturing charges of ₹.1,68,79,626 and misc. receipts of INR 1,14,43,660 from the profits of the Assessee for calculating the deduction u/s 80HHC of the Act.

64. As per the provisions of clause (baa) of the Explanation to section 80HHC (4A) of the Act, 90% of sums referred to in clauses (a), (b) and (c) of section 28 of the Act or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of similar nature are required to be deducted to arrive at the "profits of the business for computing the deduction u/s 80HHC of the Act. In this regard, it is respectfully submitted that the above provisions do not apply to subject

amounts received as manufacturing charges and miscellaneous receipts as these are not in the nature of brokerage, commission, interest, rent or charges of similar nature. Hence 90% of the receipt cannot be deducted in computing the deduction under section 80HHC of the Act

65. Further, Ld. AR of the assessee submitted that the subject issue was decided in favour of one of the amalgamating companies (ie., John Wyeth (India) Limited) by the CIT(A) itself in AY 1995-96 wherein it has been held that the AO was not correct in reducing 90% of the service charges, manufacturing charges and miscellaneous receipts from the profits of the business for calculating the deduction u/s 80HHC of the Act (refer para 9 of the order enclosed at pages to of the case law compilation)

66. In support of the above contentions, Ld. AR of the assessee relied on the following case laws: -

> *"Case laws wherein it is held that reducing 90% of the service charges, manufacturing charges and miscellaneous receipts from the profits of the business for calculating the deduction u/s 80HHC of the Act is not correct as the said amounts do not fall underthe purview of clause (baa) of the Explanation to section 80HHC (4A) of the Act*
>
> *Order passed by the CIT(A) in case of one of the amalgamating companies i.e., John Wyeth (India) Limited for AY 1995-96 (refer para 9 of the order at pages 147 to 150 ofthe case law compilation.*

CIT vs Bangalore Clothing Co.: [2003] 260ITR 371 (Bom)

CIT vs United India Shoe Corporation (P.) Ltd.: (2008) 302 ITR 326 (Mad)

Aurobindo Pharma Ltd. vs CIT: [2015] 370 ITR 216 (AP).”

67. Further, assessee filed its written submissions with regard to Ground No. 4(c), for the sake of clarity it is reproduced below:-

"1.1 It is respectfully submitted that the amount received as manufacturing charges and amount received as miscellaneous receipts form part of business income and hence, should form part of the profits of the business for calculating the deduction under section 80HHC of the Act.

1.2 The Assessing Officer ("AO") reduced 90% of the amount received as manufacturing charges of INR 1,68,79,626 and miscellaneous receipts of INR 1,14,43,660 from the profits of the Appellant for calculating the deduction under section 80HHC of the Act.

1.3 At this juncture, it is pertinent to

Deduction in respect of profits retained for export business.

80HHC,. (1)……..

Explanation-For the purposes of this section,-

(baa) "profits of the business means the profits of the business as computed under the head "Profits and gains of business or profession" as reduced by-

(1) ninety per cent of any sum referred to in clauses (a), (b), (c), (d) and (e) of section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits; and

(2)……

1.4 In this regard, it is respectfully submitted that as per the provisions of clause (baa) of the Explanation to section 80HHC (4A) of the Act, 90% of sums referred to in clauses (a), (b) and (c) of section 28 of the Act or of any receipts by way of brokerage, commission, interest, rent, charges or any otherreceipt of similar nature are required to be deducted to arrive at the "profits of the business" forcomputing the deduction u/s 80HHC of the Act.

1.5 The relevant provisions of section 28 of the Act read as under

> *Profits and gains of business or profession*
>
> *28. The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession"-*
>
> *……*
>
> *(iiia) profits on sale of a licence granted under the Imports (Control) Order, 1955, made under the Imports and Exports (Control) Act, 1947 (18 of 1947)*
>
> *(iiib) cash assistance (by whatever name called) received or receivable by any person against exports under any scheme of the Government of India.*
>
> *(iiic) any duty of customs or excise re-paid or re-payable as drawback to any person againstexports under the Customs and Central Excise Duties Drawback Rules, 1971:*
>
> *(iiid) any profit on the transfer of the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme under the export and import policy formulated and announced under section 5 of the Foreign Trade (Development and Regulation) Act 1992 (22 of 1992)*
>
> *(iiie) any profit on the transfer of the Duty Free Replenishment Certificate, being the Duty Remission Scheme under the export and import policy formulated and announced under section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (22 of 1992)*

(emphasis supplied)

1.6 The Appellant, during the subject assessment year, is engaged in manufacturing, sale and trading of pharmaceuticals, animal health and nutritional products. The amount received as manufacturing charges and miscellaneous receipts, being directly related to the business operations carried out by the Appellant, form part of business income.

1.7 In this regard, it is respectfully submitted that the above provisions do not apply to subject amounts received as manufacturing charges and miscellaneous receipts as these are not in the nature of brokerage, commission, interest, rent or charges of similar nature. Hence, 90% of the receipt cannotbe deducted in computing the deduction under section 80HHC of the Act

1.8 Reliance in this regard is placed on the decision of the Hon'ble Bombay High Court in the case of CIT vs Bangalore Clothing Co.: [2003] 260 ITR 371 (Bom) laid down important principles for ascertaining when a particular receipt has to be

> *"14. ….*
>
> *Under that Explanation profits of the business, for the purposes of Section 80HHC, does not include receipts which do not have an element of turnover like rent, commission, interest, etc However, as some expenditure might be incurred in earning such incomes an ad hoc 10 percent deduction from such incomes is provided to account for those expenses. However, learned counsel for the Department cannot invoke Explanation (baa) in every matter involving receipts by way of brokerage, commission, interest, rent, labour charges, etc. These items of income have got to be seen in the context of the business activity of the assessee. To give an example, in the case of a manufacturing company which undertakes exports, receipt of interest or commission may not be operational income because they do not have the element of turnover and consequently Explanation (baa) will apply However, that will not be the case the assessee is carrying on the business of financing becaus in the case of financing, the interest income which accrues to the assessee will have the element*

of turnover and in such a case, receipts like interest, will not attract Explanation (bas). The point which we would like to make, therefore, is that in every matter the Assessing Officer will have to ascertain whether receipt of interest, commission, labour charges, etc., were a part of operational income.

(emphasis supplied)

1.9 It has been held similarly by Courts in the following cases:

i. CIT vs United India Shoe Corporation (P) Ltd. (2008) 302 ITR 326 (Mad)

ii. Aurobindo Pharma Ltd vs CIT (2015) 370 ITR 216 (AP)

1.10 It is pertinent to highlight that the identical issue came up for consideration in the case of one of the amalgamating companies (ie, John Wyeth (India) Limited) into the Appellant for assessment year 1995-96. The CIT(A) decided the subject issue in favour by holding that the AO was not correct in reducing 90% of manufacturing charges and miscellaneous receipts from the profits of the business for calculating the deduction u/s 80HHC of the Act (refer para 9 of the order)

1.11 It is further submitted that the appeals filed by the Appellant for assessment years 1997-98, 1999-00 to 2004-05 were settled by the Appellant under the VSV Act. In this regard, it is submitted that Explanation to section 5 of the VSV Act clarifies that making a declaration under the VSV Act shall not amount to conceding the tax position and it shall not be lawful for the income-tax authority or the declarant being a party in appeal to contend that the declarant has acquiesced in the decision on the disputed issue by settling the dispute

1.12 in view of the above submissions, it is submitted that manufacturing charges and miscellaneous receipts should not be reduced for the purposes of computing deduction under section BOHHC of the Act"

68. On the other hand, Ld. DR relied on the order of the lower authorities.

69. Considered the rival submissions and material placed on record, we observe that the Assessing Officer has treated the manufacturing charges and Misc. charges received as similar to the income mentioned u/s.80HHC(4A) clause (baa). As held in the case of Bangalore Clothing Co.(supra), the category of income mentioned in clause (baa) are in the nature of commission, interest, rent etc, which are different and are not similar to the income earned by the assessee, which is manufacturing charges and misc. charges. Respectfully, following the decision of Bangalore Clothing Co. (supra), we are inclined to allow the claim made by the assessee, accordingly, the ground raised by the assessee is allowed.

70. With regard to Ground No. 5 which is in respect of Non grant of exemption under section 10(33) of the Act as claimed in the return of income. Brief facts are that, in the return of income, the assessee had claimed a deduction of INR 57,34,771 under section 80M of the Act in respect of dividend received by the Assessee. In other words, the Assessee had claimed an exemption of dividend income of INR 57,34,771 u/s. 10(33) of the Act. The Assessing Officer has granted deduction at INR 56,20,076 by holding that deduction under section 80M is admissible on the net income earned from dividend after setting off expenditure

incurred there against and that 2% of the gross dividend be considered as expenditure attributable for earning dividend income thereby granted deduction under section 80M at INR 56,20,076 as against INR 57,34,771 claimed in the return. Aggrieved assessee preferred an appeal before the Ld.CIT(A) and Ld.CIT(A) decided the issue against the assessee.

71. Aggrieved assessee is in appeal before us. Ld. AR of the assessee submitted that Ld.CIT(A) has decided this issue in favour of the Assessee in immediately succeeding assessment year (refer pages 4 and 5 of the appeal set for AY 1999-2000). The Department also did not challenge this issue further before the Tribunal and accepted the finding of the CIT(A). It is submitted that the Assessing Officer is not justified in allocating expenditure towards earning of dividend as no expense is incurred for earning such income. In the absence of the nexus of any expenditure with the corresponding dividend income being established, no disallowance is warranted. In this regard, it is respectfully submitted that the AO in his order has disallowed 2% of the expenditure on an ad-hoc basis without providing any cogent basis or establishing any nexus of such expenditure with the corresponding dividend income earned.

72. Reliance in this regard is placed on the decision of the Hon'ble Bombay High Court in the case of CIT(LTU) vs Reliance Industries Ltd.: [2017] 86 taxmann.com 24 (Bombay) wherein it is held that only expenditure incurred for earning dividend income ought to be taken into consideration and there is no question of making an estimation or assumption while computing deduction u/s 80M of the Act.

73. In view of above, Ld. AR of the assessee submits that, the deduction claimed u/s 80M in the return of income amounting to INR 57,34,771 should be fully allowed.

74. Ld. AR of the assessee relied on the following case laws: -

Cases wherein it is held that only expenditure solely and exclusively incurred for earning dividend income has to be reduced for computation of deduction u/s 80M; there is no justification to reduce dividend income entitled to deduction u/s 80M by estimating expenditure

i. *CIT vs Reliance Industries Ltd: [2017] 86 taxmann.com 24 (Bom)*
ii. *CIT vs Modern Terry Towers Ltd [2013] 357 ITR 750 (Bom)*
iii. *United Phosphorus Ltd vs ACIT: [2015] 230 Taxman 596 (Guj)*

Cases wherein it has been held that disallowance of expenditure cannot be made on adhoc basis

i. *J.J. Enterprises vs CIT: [2002] ITR 216 (SC)*

ii. *Roger Enterprises Pvt. Ltd. vs IAC: [1995] 52 TTJ 198 (Del)*

iii. *CIT vs Aero Club: [2011] 336 ITR 400 (Del)*

iv. *Mahendra Oil Cake Industries Pvt. Ltd. Vs ACIT (1996) 55 TTJ 711 (Ahd)*

v. *Vijay C. Kamdar vs ITO: [2009] 118 ITD 577 (Mumbai Trib.)*

vi. *Ador Technologies Ltd. Vs DCIT (2007) 112 TTJ 24 (Pune)*

75. On the other hand, Ld.DR relied on the order of the lower authorities.

76. Considered the rival submissions and material placed on record, we observe that the AO has disallowed 2% of the dividend received by the assessee on the basis that it is attributable towards earning of the such income. As held in the case of Reliance Industries Ltd (supra), the Hon'ble Bombay High Court held that only actual expenditure should be disallowed not on the basis of estimation or adhoc disallowance while giving deduction u/s 80M of the Act. Therefore, the disallowance made by the AO is not proper and accordingly, we direct the AO to allow the claim of the assessee. Accordingly, the ground raised by the assessee is allowed.

77. In the result, appeal filed by the assessee is partly allowed.

ITA.No. 3508/Mum/2010 (A.Y. 2004-05) - (Revenue Appeal)

78. Revenue has raised following grounds in its appeal: -

> *1 On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in directing the A.O to include sales tax set off in business profit for the purpose of deduction u/s. 80HHC.*
>
> *2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in directing the A.O to include scrap sales in the business profit for the purpose of deduction u/s. 80HHC.*
>
> *3. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in directing the A.O to include scrap sales income to business profit for the purpose of deduction u/s. 80-IB.*
>
> *4. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in directing A.O to allow provision for payment to National Pharmaceuticals Pricing Authority.*
>
> *5. The appellant prays that the order of the Learned CIT(A) on the above grounds be set aside and that of the A.O. is restored.*
>
> *6 The appellant craves leave to amend or alter any ground or add a new ground which may be necessary*

79. We shall adjudicate the issue ground wise in this appeal.

80. With regard to Ground No. 1 which is in respect of Exclusion of sales tax set off in business profit for the purpose of deduction u/s.80HHC. Brief facts of the ground are, the Assessing Officer excluded a sum of INR 10,35,516/-, being the sale tax set-off from the "profits of the business eligible for deduction u/s 80HHC of the Act on the premise that these receipts are not derived from the business of exports of the

Assessee. In doing so, the Assessing Officer relied on the decision of the Hon'ble Supreme Court in the case of Sterling Foods Ltd (1999) 237 ITR 579. Being aggrieved assessee preferred an appeal before the Ld.CIT(A) and Ld.CIT(A) relying on the order of the CIT(A) passed in the assessee's own case for AY 2000- 01, directed the Assessing Officer to reduce 90% of the sales tax set off under clause (baa) of Explanation to section 80HHC. Thus, CIT(A) gave relief only to the extent of 10% by directing to reduce 90% (instead of 100% as done by the AO) of the sales tax set off as from the profits of the business for the purpose of calculating deduction u/s 80HHC of the Act.

81. Aggrieved with the above order, revenue is in appeal before us. Ld.DR relied on the order of the Assessing Officer.

82. On the other hand, Ld. AR of the assessee submitted that the CIT(A), relying on the order passed by the CIT(A) in assessee own case for AYs 2000-01, 2002-03 and 2003-04 did not give complete relief to the assessee and directed the Assessing Officer to reduce 90% of the sales tax set off under clause (baa) of Explanation to section 80HHC of the Act. Thus, CIT(A) gave relief only to the extent of 10% by directing to reduce 90% (instead of 100% as done by the AO) of the sales tax set off as

from the profits of the business for the purpose of calculating deduction u/s 80HHC of the Act. Accordingly, revenue is in appeal with respect to the relief granted to the extent of 10% of the amount of sales tax set off and not the entire amount of the same.

83. Ld. AR of the assessee submitted that the revenue itself has accepted the reduction to the extent of 90% of the amount of sales tax set off under clause (baa) of Explanation to section 80HHC in AYs.2000-01 and 2003-04 as department is not in appeal before the Tribunal on this ground. The same is evident from the grounds of appeal filed by the department before the Hon'ble Mumbai Tribunal in case of AYS 2000-01 and 2003-04 in ITA No. 4070/Mum/2005 and ITA No 2285/Mum/2007.

84. Without prejudice to our above contention, it is respectfully submitted Section 80HHC(3) of the Act clearly provides for the method of computing profits eligible for deduction u/s 80HHC(1) of the Act. The same is reproduced as under:

> *"For the purposes of sub-section (1) –*
>
> *(a) Where the export out of India of goods or merchandise manufactured or processed bears to the profits of the business, the*

same proportion as the export turnover by the assessee, the in respect of such by the assessee;

(b) ……..,.

(c) ……..,

The term "profits of the business" used in the above section is specifically defined in Explanation (baa) which is reproduced as under:-

"baa) "profits of the business" means the profits of the business as computed under the head "Profits and gains of business or profession" as reduced by--

(1) ninety per cent of any sum referred to in clauses (ilia), (b), (c), (iiid) and (iiie) of section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits and

(2) the profits of any branch, office, warehouse or any other establishment of the assessee situate outside India."

85. From the above, it can be concluded that the aforesaid amount of sales tax set-off does form part of the income under the head "profits and gains of business and profession". Since the same is not falling under the items that are specifically reduced under Explanation (baa) to Section 80HHC of the Act, the question of reducing the same from the "profits of the business does not arise.

86. Reliance in this regard is placed on the decision passed by the Hon'ble Madras High Court in the case of Madras Motors Ltd. (122 Taxmann 516) (Madras High Court) wherein it has been held that

MODVAT credit is directly derived from the eligible business and could not be said to have been received by the assessee, had the assessee not purchased the raw material for carrying on the business of the undertaking. It is only on account of the purchase of raw materials, the assessee was required to pay the excise duty, in respect of which, the assessee has earned MODVAT credits. Further, Ld. AR of the assessee submitted that the sales tax set off could be equated with the "MODVAT Credit" since both are recoupment of actual cost incurred i.e. sales tax and excise duty paid on purchases, respectively.

87. It is also respectfully submitted that the decision of Hon'ble Supreme Court in the case of Sterling Foods (supra) is distinguishable from the present case on the facts as it was distinguished in the case of Madras Motors Ltd. (supra).

88. In the case of Sterling Foods (supra), the assessee was engaged in processing prawns and other seafood, which it exported and on such exports it earned some import entitlements granted by the Central Government under an Export Promotion Scheme. The assessee was entitled to use the import entitlements or sell the same to others. The assessee claimed relief under section 80HH of the Act in respect of the

sale proceeds of the import entitlements. The Supreme Court held that the source of the import entitlements cannot be said to be the industrial undertaking of the assessee. Please note that the Supreme Court has taken the above stand on the reason that the source of the import entitlements can, in the circumstances, only be said to be the Export Promotion Scheme of the Central Government where the export entitlements become available. According to the Supreme Court, there must be, for the application of the words "derived from", a direct nexus between the profits and gains and the industrial undertaking.

89. It will be appreciated that the facts in the instant case are different. The issue involved in the questioned matter is relating to "sales tax setoff which is merely a re-coupment of cost actually incurred by the Assessee or to put it differently reduction of sales tax liability in view of actual payment made earlier by way of sales tax on purchases. In view of above, it is respectfully submitted that sales tax set off should not be excluded from the business profits under clause (baa) of Explanation to section 80HHC of the Act.

90. In support of the above contentions, Ld. AR of the assessee relied on the following case laws: -

> *"Cases wherein it is held that the MODVAT credit is directly derived from the eligible business:*
>
> - *Madras Motors Ltd. (122 Taxmann 516) (Madras High Court)*
>
> *Cases where in the case of sterling Foods was distinguished:*
>
> - *Madras Motors Ltd. (122 Taxmann 516) (Madras High Court)*
> - *ACIT vs Galium Equipment (P.) Ltd.: (2001) 79 ITD 41 (Delhi)*

91. Considered the rival submissions and material placed on record, we observe that the assessee has received certain sales tax adjustment against its purchases or towards other credits. In our view, this is tax credit available to the assessee and not any benefit of incentives declared by the government or sales tax department. This is similar to the modvat credit available to the assessee in case of payment of excise or customs duty. Therefore, this is integral part of the business of the assessee, which will fall within the other incomes mentioned in the section 80HHC of the Act. Therefore, we are inclined to accept the findings of Ld CIT(A) in this regard, accordingly, the ground raised by the revenue is dismissed.

92. With regard to Ground No. 2 which is relating to exclusion of scrap sales in business profit for the purpose of deduction u/s. 80HHC. We

observe that this ground is similar to ground No. 4(a) raised by the assessee in ITA.No. 1154/Mum/2002 for the A.Y. 1998-99, therefore, the decision rendered therein shall apply mutatis mutandis for this assessment year also.

93. With regard to Ground No. 3 which is in respect of Exclusion of scrap sales income in business profit for the purpose of deduction u/s 80-IB. Brief facts relating to the case are, the assessee was entitled to a deduction under section 80-IB (4) of the Act with respect to the eligible undertaking being the manufacturing unit at Goa. The auditor's report u/s.80-IB in Form 10CCB is provided at pages 104-107 of the paper book. Assessee included scrap sales amounting to INR 2,46,201/- in the business profits for the purpose of deduction u/s 80IB of the Act. The amount of scrap sales may be verified from page 116 of the paper book. During the assessment proceedings, the Assessing Officer reduced the deduction u/s 80IB by an amount of INR 4,08,940 (instead of correct amount being INR 2,46,201) holding that scrap sales is not a part of the main business activity of the undertaking.

94. Aggrieved assessee preferred an appeal before the Ld.CIT(A) and Ld.CIT(A) held that Generation of scrap sales is an integral part of any

manufacturing activity and cannot be incidental. It is a receipt of the first degree as it has intimate and inextricable connection with manufacture. Accordingly, the Assessing Officer was not right in excluding it while computing deduction u/s 80IB of the Act. The AO has incorrectly considered the figure of INR 4,08,940/- instead of INR 2,46,201 but since the main ground is allowed in favour of the Assessee, this without prejudice ground pertaining to incorrect figure raised by the Assessee becomes infructuous.

95. Aggrieved revenue is in appeal before us. Ld. DR relied on the order of the Assessing Officer.

96. On the other hand, Ld. AR of the assessee submitted that the generation of scrap which mainly comprise of waste aluminium foils is part of the manufacturing activity and accordingly, the source for sale of scrap is the products manufactured at industrial undertaking under consideration. The immediate and direct source of the scrap is the manufacturing activity itself, accordingly, the assessee is entitled to a deduction of the amounts received on sale of the scrap since profits are derived from the business of the undertaking.

97. He further submitted that issue pertaining to deduction under section 80IB eligible on receipt from scrap generated during manufacturing activity is now settled by various judicial precedents. Reliance in this regard is placed on the decision recently passed by the Hon'ble Calcutta High Court in the case of PCIT *v.* Berger Paints India Ltd.: [2022] 137 taxmann.com 312 wherein it is held that the issue concerning the claim for deduction under section 80IB on the sale of scrap is no longer res integra and there are several decisions which are in favour of the assessee and accordingly, the Assessee was granted relief.

98. In support of the above contentions, Ld. AR of the assessee relied on the following case laws: -

> *"Cases wherein it is held that sale of scraps is eligible for deduction under section 80IB of the Act:-*
>
> *a. PCIT vs Berger Paints India Limited : (2022) 137 taxmann.com 312 (Calcutta) dated 02.02.2022.*
>
> *b. CIT vs Sadhu Forging Limited : (2011) 336 ITR 444 (Del)*
>
> *c. CIT vs Micro Inks Limited : TA No. 15/2011 (Guj)*
>
> *d. PCIT vs Hamilton Houseware Private Limited: TA No. 733/2017 (Guj)*
>
> *e. CIT vs JikarASaiyed: (2014) 221 Taxman 451 (Guj)*

99. Considered the rival submissions and material placed on record, we observe that the assessee has generated certain scraps out of its

manufacturing activities and the AO has treated as an incidental income and excluded the same while giving deduction u/s 80IB of the Act. We are in agreement with the findings of Ld CIT(A) that the generation of scraps is integral part of manufacturing activities and cannot be excluded for giving deduction u/s 80IB of the Act, therefore we are inclined to inclined to dismiss the ground raised by the revenue.

100. With regard to Ground No. 4 which is in respect of Disallowance of provision for payment to National Pharmaceuticals Pricing Authority ("NPPA"). Brief facts relating to the ground are, NPPA was set up in the Department of Chemicals and Petrochemicals. Govt of India ("GOl"). It has been entrusted with the function to fix/revise the prices of bulk drugs and formulations and to enforce them under the Drug (Prices Control) Order, 1995 (refer relevant clauses 8, 9 and 13 of Drug (Prices Control) Order, 1995 at pages 140-142 of the paper book). It was also entrusted with the task of recovering amounts over charged by manufacturers for controlled drugs.

101. The assessee, for the year under consideration, was the only manufacturer in India of Wysolone tablets which is a Prednisolone based

formulations. The bulk drug viz Prednisolone used in the manufacture of Wysolone was either imported or manufactured indigenously.

102. The ceiling price of formulated Prednisolone was fixed by NPPA based on imported prices of Prednisolone bulk. The NPPA vide its order dated July 9, 2003 had approved the ratio of 80% indigenous and 20% imported composition of Prednisolone bulk in the manufacture of Wysolone. However, the assessee could not comply with the norm set for import of Prednisolone and the actual import exceeded 20%. As the cost of imported Prednisolone bulk is substantially less than the cost of the indigenous manufactured Prednisolone, the NPPA held that the assessee have made more profits on account of low cost of imported Prednisolone

103. In view thereof, NPPA had issued a letter dated July 20, 2004 to the assessee raising a demand in respect of sales made by the assessee for the period April 2003 to March 2004 amounting to INR 3,02,98,000 (refer pages 126-131 of the paper book)

104. Pending negotiations, the assessee deposited the amount as under:-

Period for which demand was raised	***Date of payment***	***Amount of payment (in INR)***	***Page reference no.***
April 2003 to June 2003	*July 23, 2004*	*2,50,00,000*	*Refer page no. 131 and 189 of the paper book*
July 2003 to March 2004	*August 19,2004*	*52,98,300*	
Total		*3,02,98,300*	

105. Reading of the relevant clauses 8, 9 and 10 of Drug (Prices Control) Order, 1995 (DPCO, 1995") (refer pages 140-142 of the paper book), it is very clear that liability to deposit the amount under NPPA under DPCO, 1995 is fastened on the assessee the moment the sales are made at a price exceeding the price fixed by NPPA. Accordingly, in respect of the sales made during the subject financial year ("FY") 2003-04, the assessee made a provision in the books of accounts for the payment to NPPA of INR 2,50,00,000 which was claimed as a deduction (refer page 184 of the paper book).

106. During the assessment proceedings, Assessing Officer observed that the letter from NPPA directing the company to make the payment is dated July 20, 2004. As per the letter, the total amount payable by the company is INR 3,02,98,300/-. The provision made by the assessee was therefore an adhoc provision without any basis.The liability to pay the amount had not crystallized during the subject AY 2004- 05. Since the matter was in dispute with NPPA, it was not certain whether the liability

would arise or not. Therefore, as the liability could not be ascertained as at the year end, any provision for the same is not allowable.

107. Further, Assessing Officer observed that Accounting Standard ('AS') (Contingencies and Events occurring after the balance sheet) is mandatory only for disclosure requirement. The said standard is not binding under the Income-tax Act. Since liability itself has crystalized after the balance sheet date, the same cannot be adjusted taking recourse to the Accounting Standard. Accordingly, the provision of ₹.2.50 crores is therefore disallowed.

108. Aggrieved assessee preferred an appeal before the Ld.CIT(A) and Ld.CIT(A) after considering the submissions of the assessee granted relief to the assessee observing that demand raised is in pursuance to the DPCO order, 1995 and therefore, it is a statutory liability. Further, the liability is raised by NPAA which is an arm of Government of India.The Ld.CIT(A) held the same to be a statutory liability, albeit a disputed one. Being a statutory liability, it is liable to be allowable as a deduction, in view of various judicial pronouncements.

109. Aggrieved revenue is in appeal before us. Ld.DR relied on the order of the Assessing Officer and prayed that the order of the Ld.CIT(A) be set-aside.

110. On the other hand, Ld. AR of the assessee submitted that the payment to NPPA, being an arm of the GOI is a statutory one to be a statutory liability since the same is pursuant to the DPCO Order, 1995 Further, the statutory liability, unlike a contractual liability, was deductible even if the same is disputed.

111. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court in the case of Bharat Earth Movers vs CIT: [2000] 245 ITR 428 (SC) wherein it is held that liability which has arisen is allowable even though it may have to be quantified and discharged at a future date.

112. Further, in this regard, the reliance is placed on the decision passed by the Hon'ble Mumbai Tribunal in the case of John Wyeth & Brothers Ltd.: ITA No. 8432/Bom/1991 for the AY 1983-84 wherein it is held as under:

That it is settled that the liability under the DPCO is a statutory liability.

That if the liability has accrued in the previous year, the Assessee would be entitled to deduction in the year of accrual, notwithstanding that the Assessee has not paid his demand or has disputed the demand.

113. Without prejudice to our above contention that the disallowance of INR 2,50,00,000 should be deleted, it is respectfully submitted that the aforesaid amount of INR 2,50,00,000 should be allowed as a deduction in the subsequent AY 2005-06 on payment basis.

114. Considered the rival submissions and material placed on record, we observe that the assessee has created provision towards the demand in respect of excess benefit earned by the assessee in composition of input drugs in respect of sales made by the assessee during April 2003 to March 2004. The assessee also made part payment of Rs. 2.50 crores under protest and before finalizing the accounts, the assessee was aware of the balance demand of Rs. 52,98, 300. Therefore, the liability was ascertained. Therefore, the provision created by the assessee for the impugned assessment year is ascertained and justified. Therefore, it cannot be treated as adhoc provision. Even otherwise, this is allowable expenditure for the business, this expenditure will be allowed in the subsequent assessment year on the basis of payments. Since the tax

rates are rationalized, it will have only revenue neutral effect. Therefore, we are inclined to accept the findings of Ld CIT(A) and accordingly, the ground raised by the revenue is dismissed.

115. In the result, appeal filed by the revenue is dismissed

116. In the nut-shell, appeal filed by the assessee is allowed and appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 09th June, 2023

Sd/-	Sd/-
(VIKAS AWASTHY)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai / Dated 09/06/2023
Giridhar, Sr.PS

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum