IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD

BEFORE SMT. ANNAPURNA GUPTA, ACCOUNTANT MEMBER&
SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER

I.T.A. No.1334/Ahd/2017
(Assessment Year: 2009-10)

Intas Pharmaceuticals Ltd., 203, Chinubhai Center, Off. Nehru Bridge, Ashram Road Ahmedabad-380009	Vs.	Assistant Commissioner of Income Tax, Circle-2(1)(1), Ahmedabad
[PAN No.AAACI5120L]		
(**Appellant**)	..	(**Respondent**)

I.T.A. No. 1644/Ahd/2017
(Assessment Year: 2009-10)

Assistant Commissioner of Income Tax, Circle-2(1)(1), Ahmedabad	Vs.	Intas Pharmaceuticals Pvt. Ltd. 203, Chinubhai Center, Opp. Nehru Bridge, Ashram Road, Ahmedabad-380009
[PAN No.AAACI5120L]		
(**Appellant**)	..	(**Respondent**)

I.T.A. No. 1335/Ahd/2017
(Assessment Year: 2010-11)

Intas Pharmaceuticals Ltd., 203, Chinubhai Center, Off. Nehru Bridge, Ashram Road Ahmedabad-380009	Vs.	Assistant Commissioner of Income Tax, Circle-2(1)(1), Ahmedabad
[PAN No. AAACI5120L]		
(**Appellant**)	..	(**Respondent**)

I.T.A. No. 1645/Ahd/2017
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Assistant Commissioner of Income Tax, Circle-2(1)(1), Ahmedabad	Vs.	Intas Pharmaceuticals Pvt. Ltd. 203, Chinubhai Center, Opp. Nehru Bridge, Ashram Road, Ahmedabad-380009
[PAN No.AAACI5120L]		
(**Appellant**)	..	(**Respondent**)

I.T.A. No. 1336/Ahd/2017
(Assessment Year: 2011-12)

Intas Pharmaceuticals Ltd., 203, Chinubhai Center, Off. Nehru Bridge, Ashram Road Ahmedabad-380009	Vs.	Assistant Commissioner of Income Tax, Circle-2(1)(1), Ahmedabad
[PAN No. AAACI5120L]		
(**Appellant**)	..	(**Respondent**)

I.T.A. No. 1646/Ahd/2017
(Assessment Year: 2011-12)

Assistant Commissioner of Income Tax, Circle-2(1)(1), Ahmedabad	Vs.	Intas Pharmaceuticals Pvt. Ltd. 203, Chinubhai Center, Opp. Nehru Bridge, Ashram Road, Ahmedabad-380009
[PAN No.AAACI5120L]		
(**Appellant**)	..	(**Respondent**)

Appellantby :	Shri S. N. Soparkar, Sr. Advocate
Respondentby:	Dr. Darsi Suman Ratnam, CIT D.R.

Date of Hearing	17.01.2024
Date of Pronouncement	31.01.2024

O R D E R

PER SIDDHARTHA NAUTIYAL, JM:

These bunch of appeals have been filed by the Assessee and the Revenue against the orders passed by the Ld. Commissioner of Income Tax (Appeals)-2(in short "Ld. CIT(A)"), Ahmedabad vide orders dated 07.04.2017, 10.04.2017& 11.04.2017passed for the Assessment Years 2009-10 to 2011-12. Since common issues are under consideration before us, all appeals are taken up together for disposal.

Assessment Year 2009-10:-

2. The assessee has raised the following grounds of appeal:-

"1. (a) In the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the upward adjustment to the extent of Rs.80,34,261/- made by AO/TPO in relation to advances given for registration of appellant's product in respective territories and related matter to Associated Enterprises (AEs) namely Accord Farmaceutical, Brazil, Accord Farma, SA, Accord Mexico, Accord Healthcare SAC, Peru and Accord Healthcare, USA.

(b) That in the facts and circumstances of the case, the learned CIT(A) has failed to appreciate that all the aforesaid AEs were incorporated as marketing and distribution company for marketing and distribution of appellant's products in respective territories.

(c) That in the facts and circumstances of case and in law, the learned CIT(A) has also failed to appreciate that as per local regulations prevalent in respective territories, every pharmaceutical product is required to be registered with local regulatory authorities before its sale in the territories. As the AEs of the appellant company are in start-up phase and also not engaged in independent business activities, the advances were given out of commercial expediency to ensure that the AEs can obtain necessary regulatory approval in time for marketing and distribution of appellant's products in respective territories.

(d) That on the facts and circumstances of the case and in law, the learned CIT(A) has further erred in not appreciating the amounts advanced to AEs are inextricably linked with the export sale of finished goods (Finished Drug Formulation) by appellant company.

(e) That in the facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating the fact that the activities performed by AEs have yielded numerous economic benefits to the appellant including increase in export turnover.

(f) That in the facts and circumstances of the case and in law, without prejudice to above, the learned CIT(A) ought to have appreciated that the comparable entities are accounting such expenses in its books of accounts in India on the ground that incurrence of such expenditure is the requirement of entities in India. Further the comparable companies are claiming deduction of such expenses in India and it has been allowed by the Revenue Authorities.

(g) Without prejudice to Ground No. 1(1) to (f), in the facts and circumstances of the case and in las, the learned CIT(A) while confirming the upward adjustment of Rs.80,34,261/-, has failed to appreciate that the arm's length rate of interest

determined by the TPO was worked out after increasing interest rate by adhoc additional 100 basis points towards foreign exchange risk.

2. (a) In the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming disallowance to the extent of Rs. 12,12,20,245/- by rejecting books of accounts and on the ground that the appellant company failed to fully controvert the justification for lower gross profit rate (GP rate) and net profit rate (NP rate) as compared to GP rate and NP rate of M/s Intas Pharmaceuticals (partnership firm).

(b) That in the facts and circumstances of case and in law, the learned CIT(A) has failed to appreciate that GP rate of partnership of 57.81% is higher than the GP rate of appellant company of 45.80% mainly due to tax incentive of around 13.8% available to the partnership firm under excise and VAT laws together with low cost of labour, power etc.

(c) That on facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating and understanding the FAR as well as business models of the appellant and partnership firm and the industry in which both operates and thereby further erred in observing that broadly the functions performed, the activities carried out, assets employed and risk deployed by the appellant company and firm in relation to manufacturing of various products are similar.

(d) That on facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the disallowance .to the extent of Rs.12,12,20,245/- even after recording following observations:

- *In the assessment order of the partnership firm or of the appellant company, the sale proceeds of the firm have not been doubted by the AO, therefore, there is no case of inflated profit on account of inflation of sale proceeds.*

- *The disallowance is based on the observation of the AO in respect of expenditures such as R & D expenditure, selling and distribution expenses, packing expenses and financial cost belonging to the appellant firm but debited as expenses in the P & L Account of appellant company which is not based on any specific details and evidences brought on record by AO.*

- *The AO has only guess worked the reasons of low NP rate of the appellant company vis-a-vis high NP rate of firm and supported the same with the theory of reducing the tax liability in the hands of appellant company.*

- *It is apparent that the firm has debited the various expenditures as noted above which were pertaining to it in its P&L Account and hence, the AOs observation that it has incurred only manufacturing cost expenses is factually incorrect.*

- *As per the Income Tax provisions, the appellant company is different from the firm and their taxability are separately decided as per their business activities. Merely the appellant company has purchased majority of the products of the appellant firm does not mean that each and every deficiencies found in the case of the firm would call for the adverse inference in the case of the appellant company.*

(e) That in the facts and circumstances of the case and in law, the learned CIT(A) has further erred in confirming disallowance of Rs.12,12,20,245/- even after observing that the appellant company made a gross profit of 53% on products purchases for trading from partnership as compared to gross profit of 44% on trading of products purchased from third party, which negates the allegation of the AO that some expense has been shifted from the hands of the firm to the hands of the appellant company.

(f) Without prejudice to Ground No. 3(a) to 3(e) above, in the facts and circumstances of the case and in law, the learned CIT(A) while comparing the NP rate of appellant company vis-a-vis partnership firm, has erred in granting benefits of tax incentives under excise and VAT laws at 10% in place of 13.8%.

(g) Without prejudice to Ground No. 3(a) to 3(e) above, in the facts and circumstances of the case and in law, the learned CIT(A) while comparing selling and distribution expenses has also erred in excluding freight and forwarding expenses on sales from the selling and distribution expenses of the appellant company.

2. In the facts and circumstances of the case, the learned CIT(A) has erred in disallowing claim of deduction amounting to Rs.1,04,50,000/- under section 35(2AB) of the I.T. Act as per following working towards weighted portion relating to expenditure on exhibit batches, building maintenance and patent filing fees.

3.

Particulars	*As per Return*	*As per Form 3CL*	*Difference*	*Allowed by CIT*	*Weighted portion of Relief*	*Not Allowed by CIT*	*Weighted portion - disallowance*
R&D capital expenditure	*192,71*	*192,52*	*0.19*			*0.19*	*0.09*
R&O revenue expenditure	*5409.10*	*370742*	*1101,3.8*	*1492,86*	*746.42*	*208.42*	*104.21*
Total	*5,601.81*	*3900.34*	*1701.47*		*746.43*	*208.61*	*104.305*

4. Without prejudice to Ground No. 3 above, in the facts and circumstances of the case, the learned C1T(A) further erred in stating amount of disallowance towards weighted portion of disallowance under section 35(2AB) of the Act at Rs.2,10,44,148 in para 6.15 of the order (page 124) without appreciating that out of total disallowance of Rs. 850.93 lacs (para 6.13, page 109), on considering relief of

clinical trial expenses granted by him at para 6.13 of the order (pager 123), the disallowance towards weighted portion works out at Rs. 104.35 lacs.

The above grounds are independent and without prejudice to each other.

The Appellant prays for leave to add, alter, amend and / or modify any of the grounds of appeal at or before the hearing of the appeal."

3. The Department has raised the following grounds of appeal:-

"1. The Ld.CIT(A) has erred in law in deleting the upward adjustment of Rs 4509699/-made in respect of interest on loans and advances to Accord Newzeland, Accord UK and Accord Canada in whose case loans and advances have been converted int equity and advances were of nature of business advances.

2. The Ld.CIT(A) has erred in law and on facts in restricting the disallowance of expenses incurred by the assessee on behalf of its subsidiary firm 'Intas Pharmaceuticals from Rs 39,62,30,463/- to Rs 12,12,20,435 /- without properly appreciating the facts of the case and the material brought on record.

3. The Ld.CIT(A) has erred in law and on facts in allowing the deduction U/s 35(2AB) on the basis of expense claim made by the assessee in the ROI instead of granting deduction on the amount approved by DSIR in Form 3CL

4. The Ld.CIT(A) has erred in law and on facts in deleting the addition of expense of Rs 39,62,30,463/- incurred by the assessee to earn exempt income u/s 10(2A) on behalf of Intas Pharma (IP) to the Book Profits u/s 115JB of the Act.

5. On the facts and in the circumstances of the case, the Ld. CIT(A) ought to have upheld the order of the Assessing Officer.

6. It is, therefore, prayed that the order of the Ld. CIT(A) may be set aside and that of the Assessing Officer may be restored to the above extent.

7. The appellant craves leave to amend or alter any ground or add a new ground, which may be necessary."

Ground No.1 of the Assessee's Appeal (in ITA No. 1334/Ahd/2017) and Ground Number 1 of Department's Appeal (in ITA No. 1644/Ahd/2017)(A.Y. 2009-10):-

4. The brief facts in relation to this ground of appeal are that during the course of assessment proceedings, the Assessing Officer observed that the assessee is having international transactions with its Associated Enterprises. As per the transfer pricing study, the assessee had advanced amounts for the purpose of using the same towards filing of registration and other activities in overseas jurisdictions. The assessee did not charge any interest on such advances given to its Associated Enterprises. The assessee was of the view that since obtaining registration for assessee's products was essential for selling it's products in the respective local overseas territories and thereby increasing sales, the aforesaid advances were of a commercial nature and for the benefit of the assessee. Further, the assessee was also of the view that such advances are in the nature of quasi capital i.e. these advances were to be converted into equity at the option of the assessee. Accordingly, no interest was chargeable by the assessee with respect to aforesaid advances given to it's subsidiaries. However, the Assessing Officer made an upward adjustment of Rs. 1,25,43,960/- and added the same to the total income of the assessee.

5. In appeal, before CIT(Appeals) the assessee took similar arguments which are primarily to the effect that the advances were given to the subsidiaries for getting requisite registrations in the respective territories and hence were of commercial nature, on which no interest was chargeable. Further, the assessee submitted that as a result of such advances and it's utilization thereof in getting registration in respective countries, there was substantial increase in sales of the assessee. Further,

it was submitted that the aforesaid advances were given out of own interest free funds and therefore, no interest may be imputed on such advances given to it's subsidiaries. Further, the assessee submitted that the advances were in the nature of quasi capital and in the case of some of the subsidiaries loans and advances have been converted into equity as well. In support of it's contention, the assessee relied on the case of **Micro Inks Ltd. vs. ACIT 36 taxmann.com 50 (Ahmedabad)** and **Lambda Therapeutic Research Ltd. (ITA No. 3492/Ahd/2015)**, besides other cases. The Ld. CIT(A) gave part relief to the assessee in respect of advances given to three of it's Associated Enterprises namely Accord Healthcare Inc. Canada, Accord Healthcare Ltd., UK and Accord Healthcare NZ Ltd., NZ, on the ground that the loans were converted into equity in the subsequent year and hence the upward adjustments of Rs. 45,09,699/- made in respect of these three entities was deleted. With respect to other foreign Associates Enterprises, Ld. CIT(A) observed that there was no conversion of loans and advances made into equity, and therefore, the upward adjustment to the tune of Rs. 80,34,261/- was confirmed. While passing the order Ld. CIT(A) made the following observations:-

> *"3.16. In view of the aforesaid discussion and following the decision of Honourable ITAT, the upward adjustments of **Rs. 45,09,699/-** made in respect of interest on the loans and advances to the aforesaid .three AEs in whose case loans and advances have been converted into equity and advances were in the nature of business advances as discussed above is uncalled for and the same **is deleted.***
>
> *3.17. With regard to the other foreign **AEs namely; Accord Farmaceutical, Brazil, Accord Farma, SA, Accord Mexico, Accord Healthcare SAC, Peru, and Accord Healthcare, USA etc.** there were no conversion of loans and advances made*

to them in the equity. Thus, it cannot be said that the loans and advances were granted to those AEs to have the management and control over the same. Although from some of these concerns, the appellant has realized the revenue by making exports to them but merely realisation of revenue in 4he form of sale proceeds is not the sole criteria for no upward adjustments. In view of the decision of Hon'ble ITAT,Ahmedabad in the case of Micro Inks Limited (supra), both the conditionsare to be satisfied i.e. the realisation of revenue by way of exports along with conversion of the loans and advances into the equity. Since, in the case of these foreign AEs, these basic conditions have not been fulfilled, therefore, the upward adjustment in respect of interest on loans and advances granted to them is found correct and justified and hence, the same is ***confirmed.*** *In this regard, the upward adjustment on account of interest on loans and advances to them made by the AO at* ***Rs.80,34,261/-*** *is found correct and justified, accordingly,* ***confirmed.***

The ground of appeal is ***partly allowed.****"*

6. Both the assessee and the Department are in appeal before us against the aforesaid order passed by the Ld. CIT(A), partly allowing the appeal of the assessee. The primary arguments of the Ld. Counsel for the assessee are that aforesaid subsidiaries were incorporated as marketing and distribution companies for marketing and distribution of assessee's products in respective territories. The Ld. CIT(A) failed to appreciate that as per the local regulations prevalent in respective territories, every pharmaceutical product is required to be registered with local regulatory authorities before it's sale in the local territories. As the Associated Enterprises of the assessee were in start-up phase and also not engaged in it's independent business activities, the advances were given out of commercial expediency to ensure that the Associated Enterprises can obtain necessary regulatory approval in time for marketing and distribution of assessee's products in respective territories. Further, the advances were given by the assessee to the Associated Enterprises were inextricably linked with the export sale of finished goods by the assessee

company. It was further argued that the advances were made out of own interest free funds available with the assessee and therefore, no interest can be imputed in the instant facts. Therefore, the aforesaid advances are purely commercial in nature and had been given during the course of business transactions.

7. In response, the Ld. D.R. placed reliance in the case of **Soma Textile & Industries Ltd. 59 taxmann.com 152 (Ahmedabad Tribunal)** has held that comparable uncontrolled price of quasi-capital loan, cannot be nil, unless it is only for a transitory period and de facto reward for said value of money is opportunity for capital investment or such other benefit.

8. We have heard the rival contentions and perused the material on record.

9. We shall take up both the appeal of the assessee and the Department on this issue since the issues are connected. We shall briefly discuss the arguments taken up by the parties and our views on the same in light of the facts of the assessee's case.

Advances being quasi capital in nature

10. The issue for consideration is whether since the amount which has been advanced to it's Associated Enterprises is quasi capital in nature, no transfer pricing adjustment is called for.

11. Looking into the instant facts, we are of the considered view that Ld. CIT(A) has erred in holding that the advances given by the assessee to three of it's Associated Enterprises is quasi capital on the ground that in the subsequent year the advance / loan has been converted into equity by the assessee. In our considered view, the test for determine whether the advanced / loan given by the assessee to it's Associated Enterprises is quasi capital in nature has to be seen "at the time of granting of loan" i.e. the nature of loan, whether it is quasi capital in nature or not has to be seen at the time of advancement of loan by the assessee to it's Associated Enterprises". In the case of **Bialkhia Holdings Pvt. Ltd. vs. Additional Commissioner of Income Tax 115 taxmann.com 230 (Surat Tribunal)**the ITAT, while analysing the concept of quasi capital, observed that in simple terms, the difference between a quasi capital and loan simplicitor is that in the case of quasi capital, the consideration for a sum of money is received in the option to convert the loan to equity, however, in the case of loan simplicitor , the consideration is received in terms of interest and return of principal amount after a pre-decided deferred period of time.

12. In the case of **Perot Systems TSI (India) Ltd. vs. DCIT 37 SOT 358 (Delhi ITAT)**, the ITAT made some useful observations in this regard, which are quoted for reference purposes only:-

> *"**11.** The first objection of the TPO is that no two persons in normal business situation would grant interest free loan to the other persons. This is a fairly settled position. The assessee's contention in this regard is that no one would have given the AEs loan at that point of time as they were in a start-up stage and that debt ratio was not*

comfortable. Now, even if one is to accept this argument, there is no case for not providing or charging any interest, if assessee is coming to the rescue of the AEs. ***We have not come across any feature in the agreement to accept the contention of the counsel that loan was quasi-capital. It is also not the case that there was any technical problem that loan could not have been contributed as capital originally if it was actually meant to be capital contribution. If the assessee's contention that whenever interest free loan is granted to associated enterprises, there should not be any adjustment is accepted, it will tantamount to taking out such transactions from the realm of section 92(1) and section 92B of the IT Act. Section 92(1) mandates that any income arising from an international transaction shall be computed having regard to the arm's length price****. Section 92B defines international transaction as under:-*

> *"92B(1) For the purposes of this section and sections 92, 92C, 92D and 92E, 'international transaction' means a transaction between two or more associated enterprises, either or both of whom are non-resident, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises.*
>
> *(2) A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub-section (1), be deemed to be a transaction entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transactions are determined in substance between such other person and the associated enterprise."*

12. *From the above, it is clear that lending or borrowing money between two associated enterprises comes within the ambit of international transaction and whether the same is at arm's length price has to be considered. The question of rate interest on the borrowing loan is an integral part of arm's length price of determination in this context. Thus, clearly the assessee contention seeks to add text to the clear legal position as embodied in statute. Such an interpolation is not permissible, that when an interest free loan is given to the AEs, income on account of interest cannot be attributed from the point of view of arm's length consideration. In this regard we also draw support from the Hon'ble Apex Court in the case of Smt. Tarulata Shyam v. CIT [1977] 108 ITR 345 wherein it was held that when the language of the Act is clear and unambiguous, there is no scope of interpolation."*

13. The Ld. Counsel for the assessee has relied on various judicial precedents including the ITAT Ahmedabad in the case of **Micro Inks Ltd. (Ahmedabad Tribunal) 36 taxmann.com 50** which are primary on

the proposition that where advances were made, pending capital contribution, in foreign subsidiary, which played significant commercial role in assessee's business, comparable uncontrolled price for interest was NIL. However, this case is distinguishable on facts from the assessee's set of facts, for the reason that the Tribunal, in the case of Micro Inks, observed that unlike the case of Perot Systems TSI (India) Ltd. ,there was indeed a technical problem in subscribing to the capital directly.The Tribunal further noted that immediately upon obtaining the permission of the Reserve Bank of India, which assessee did obtain at later stages, the advances were converted into shares. However, in the facts of the assessee's case, the assessee has not pointed out to any particular technical glitch/problem in subscribing to the share capital of the associated enterprises directly. Accordingly, in our considered view, the facts of the Micro inks ruling are not applicable to the assessee's set of facts. Further, the counsel for the assessee has also placed reliance on several decisions, which have been rendered on a different set of facts and hence would not be applicable to the assessee's case. Further, the aforesaid decision are also not applicable to the assessee's set of facts, since in the instant facts, we observe that the nature of loans given to associated enterprises are not cause quasi capital in nature.

14. It would be useful to refer to the case of **Soma Textile & Industries Ltd. 59 taxmann.com 152 (Ahmedabad Tribunal)** wherein the Tribunal made the following observations on the quasi capital nature of advances:

- *Usually loan transactions are benchmarked on the basis of interest rate applicable on said transactions simplictor which, under the transfer pricing regulations, cannot be compared with a transaction which is something materially different than a loan simplictor,* ***for example, a non-refundable loan which is to be converted into equity****. It is in this context that the loan, which is in the nature of quasi-capital, is treated differently than the normal loan transactions. [Para 8]*
- ***The expression 'quasi-capital' is relevant from the point of view of highlighting that a quasi-capital loan or advance is not a routine loan transaction simplictor.*** *The substantive reward for such a loan transaction is not interest but opportunity to own capital. As a corollary to this position, in the cases of quasi-capital loans or advances, the comparison of the quasi-capital loans is not with the commercial borrowings but with the loans or advances which are given in the same or similar situations. In all the decisions of the coordinate benches, wherein references have been made to the advances being in the nature of 'quasi-capital', these cases referred to the situations in which* ***(a) advances were made as capital could not be subscribed to due to regulatory issues and the advancing of loans was only for the period till the same could be converted into equity, and (b) advances were made for subscribing to the capital but the issuance of shares was delayed, even if not inordinately****.*

15. In our considered view, in the light of the assessee's facts, the Ld. CIT(A) has erred in facts and in law in coming to the conclusion that the nature of advances given by the assessee to it's subsidiaries / Associated Enterprises as quasi capital in nature. The nature of advances, whether it is quasi capital in nature or not, has to be seen at the time of granting of advance / loan to the subsidiary. In the instant facts there was nothing to suggest that at a time of advancement of such loan to the Associated Enterprises the nature of such advances was quasi capital in nature and

fact that in the subsequent year, such amounts have been converted into equity (at the option of the assessee) would not alter such advance as being in the nature of quasi capital.

Commercial Expediency/ availability of interest free funds:

16. With respect to the argument of the Counsel for the assessee that since the advances made were out of commercial expediency, Transfer Pricing provisions would not apply, we are unable to appreciate this argument for the simple reason that all international transactions between Associated Enterprises are primarily guided by the principles of commercial expediency. If the argument of commercial expediency were to be accepted as a guiding tool for non-applicability of transfer pricing adjustments to international transactions, then no transfer pricing adjustment can be made in respect of all / most of the international transactions between Associated Enterprises. The primary underlying principle governing transfer pricing adjustments is that what could be the price / remuneration that could be charged in case similar transactions were to be carried out between two independent / unrelated parties. Accordingly, we are unable to accept the above arguments of the Ld. Counsel for the assessee that in case of commercial transactions, the transfer pricing principles are not applicable.

17. Further, the fact that the amounts advanced by the assessee to it's AEs are inextricably linked with export sale of finished goods or such advances have yielded the economic benefits to the assessee including

increase in export turnover or that the advances were given out of interest free funds available with the assessee, in our view, are irrelevant consideration while deciding the issue of charging of interest by the assessee from it's AEs, since Transfer Pricing is a special provision for computing arm's length price in respect of international transactions between Associated Enterprises, with a view to ensure that there is no tax base erosion at the India level and shifting of profits to an overseas jurisdiction with a view to avoid taxes.

18. It would be useful to refer to the case of **Tata Autocomp Systems Ltd. 21 taxmann.com 6 (Mumbai)** wherein the ITAT has thrown light on this issue and observed that transaction of granting interest free loans by the assessee to it's non-resident Associated Enterprise comes within the ambit of international transaction and thus, such a transaction can be a subject matter of Arm's Length Price under Section 92 of the Act. Even in the aforesaid case, the issue for consideration before ITAT was that loan granted to the Associated Enterprise was in the nature of "quasi equity" and thus, whether notional interest could be computed. While passing the decision, the ITAT made the following observations:-

> *"15. On the issue whether the transaction in question viz., interest free loan by the Assessee to its sister concern can be subject matter of test of Arm's Length Price (ALP) u/s.92 of the Act, we are of the view that the order of the revenue authorities have to be upheld.* ***It was argued on behalf of the Assessee that under the normal provisions of the Act (Chapter IV), had the Assessee given interest free loan out of its interest free funds to a resident or to a non-resident who is not an associated enterprise, then the revenue could not have brought to tax notional interest income attributable to such interest free loan given by the Assessee. The position cannot be different when interest free funds are given to AE which is a non-resident. We are unable to agree with such argument. Chapter X of the Act dealing with Special Provisions relating to Avoidance***

of Tax was introduced w.e.f. AY 02-03 by the Finance Act, 2001. *Prior to such introduction Sec.92 of the Act was the only section dealing with Transfer pricing. Those provisions and Rules made thereunder did not give sufficient powers to the Revenue authorities to find out whether the foreign companies/non-residents operating in India or earning income in India were being taxed on their Indian income on an arm's length basis. The legislative intent behind the introduction of detailed transfer pricing provisions is brought out in para 55.6 of CBDT Circular No. 14/2001 on provisions relating to Finance Act, 2001, which interalia states:*

> *"**The basic intention underlying the new transfer pricing regulations is to prevent shifting out of profits by manipulating prices charged or paid in international transactions, thereby eroding the Country's tax base**."*

Sec.92 of the Act lays down that any income arising from an international transaction shall be computed having regard to the arm's length price. The charge to tax under the Act is on the total income computed in accordance with the provisions of the Act. Sec.28 of the Act lays down the categories of income that are assessed as income from business or profession. Sec.29 lays down the manner of computation of income from business or profession. These are general provisions for computation of income from business applicable to all class of assessees. Provisions of Sec.92 in particular and Chapter X in general are special provisions dealing with computation of income in an international transaction. Those provisions will prevail over the general provisions. GeneraliaSpecialibus Non Derogant (general provisions must yield to the specific provisions). Generally speaking, the sections in the Act do not overlap one another and each section deals with the matter specified therein and goes no further. If a case appears to be governed by either of two provisions, it is clearly the right of the Assessee to claim that he should be assessed under the one, which leaves him with a lighter burden. ***When there is a conflict between a general provision and special provision, the latter shall prevail."***

16. Interest-free loan extended to the associated concerns as at arm's length lending or borrowing money between two associated enterprises comes within the ambit of international transaction and whether the same is at arms length price has to be considered. The question of rate of interest on the borrowing loan is an integral part of arms length price redetermination in this context. ***The fact that the loan has the RBI's approval does not put a seal of approval on the true character of the transaction from the perspective of transfer pricing regulation as the substance of the transaction has to be judged as to whether the transaction is at arms length or not****.*

19. As noted earlier, if the argument of commercial expediency were to be accepted as a guiding tool for non-applicability of transfer pricing adjustments to international transactions, then no transfer pricing adjustment can be made in respect to almost all international transactions

between Associated Enterprises, since mostly such transactions are based on the principles of commercial expediency. Further, transfer pricing provisions are special provisions have been introduced specifically to ensure that there is no tax base erosion at the India level and profits are not shifted outside of India by way of certain pre-arranged transactions between associated enterprises. Therefore, the arguments that the advances were given out of one interest-free funds or that the transactions between the associated enterprises were guided by commercial principles, in our considered view, are irrelevant considerations for the purpose of computing arms length Price between associated enterprises, since transfer pricing provisions are special provisions introduced with an aim of checking tax base erosion.

CIT(A) has not commented upon the correct amount of interest to be charged by the assessee from it's AEs

20. Another argument advanced by the assessee was that the Ld. CIT(A) has not commented upon the correct amount of interest to be charged by the assessee from it's AEs. We are in agreement with the contention of the Counsel for the assessee that the Ld. CIT(A) should have given a precise finding with respect to the correct amount of interest to be charged by the assessee from it's AEs.

21. We agree with the alternate contention taken by the counsel for the assessee and the matter is referred to the Ld. CIT(A) to give a specific finding on the correct amount of interest to be charged by the assessee

from it's AEs. The assessee is at liberty to furnish it's submissions / supporting documents to assist the Ld. CIT(A) in this regard.

22. Accordingly, in light of the aforesaid discussion, Ground No.1 of the Department's appeal is allowed and Ground No. 1 of the assessee's appeal is partly allowed for statistical purposes.

Ground No. 2 of the assessee's appeal and Ground No. 2 of the Department's appeal (disallowance of expenses incurred by the assessee on behalf of it's firm "Intas Pharmaceuticals")

23. The brief facts in relation to this ground of appeal are that the Assessing Officer made disallowance of certain expenses claimed by the assessee on the ground that same were pertaining to partnership firm namely M/s. Intas Pharmaceuticals in which assessee was a partner. Disallowance has been worked out by the Assessing Officer at Rs. 39,62,30,463/- being the difference of the net profit rate of 49.05% shown by the partnership firm namely M/s. Intas Pharmaceuticals and the estimated net profit rate taken by the Assessing Officer at 25%. The Assessing Officer was of the view that expenditures in the nature of Research and Development, packing expenses, financial expenses and selling and distribution expenses pertaining to the partnership firm have been expended by the assessee company and claimed in the Profit & Loss Account of the assessee company, which resulted in deduction of the net profit of the assessee company. The Assessing Officer observed that the

partnership firm in which the assessee is a partner has two units, one at Dehradun and another at Sikkim, which were claiming deduction under Section 80IE(i) and 80IC(3)(ii) of the Act, and therefore, their income was exempt from tax. The Assessing Officer observed that the partnership firm had shown net profit @ 49.05% of the sales while the assessee company had shown net profit of 11.04%. Thus, by claiming expenses of the partnership firm, the assessee company had reduced it's net profit and consequently taxes have been reduced. The Assessing Officer observed that the assessee company is engaged in the business of manufacturing and trading of pharmaceuticals products and almost entire production of the firm was sold to the assessee company only. The Assessing Officer observed that the partnership firm had supplied fully packaged products to the assessee company, but the partnership firm was not incurring any expenses on packaging. The partnership firm was simply manufacturing the pharmaceuticals products without incurring Research & Development, without incurring packaging cost and without incurring financial cost etc. Further, the Assessing Officer also observed that partnership firm was paying only 1.70 crores for Research & Development which is only 1.05% of the total turnover whereas the assessee company is incurring Research & Development expenses of 54 crores which are 4.68% of the total turnover. In view of the above, the Assessing Officer was of the view that many expenses which were otherwise of the partnership firm have been charged to the Profit & Loss Account of the assessee company and thereby leading to reduction of it's profit. Accordingly, the Assessing Officer was of the view that the

expenses have been diverted from the partnership firm to the assessee company and double tax deduction has been claimed, once in the hands of the partnership firm the income was claimed exempt and then again in the hands of the assessee company, the expenses have been claimed as an allowable expenses. Accordingly, the Assessing Officer held that there was leakage of revenue in the hands of the assessee company.

24. In appeal, the Ld. CIT(A) restricted the additions to Rs. 12,12,20,245/- by working out the revised net profit rate of the partnership firm @18.64% and the difference of the revised net profit rate of the partnership firm and the net profit rate of the assessee company (11.15%) was confirmed in the hands of the assessee.

25. Both the assessee and the Department are in appeal against the order passed by Ld. CIT(A).

We shall first take up the assessee's appeal.

26. Before us, the Counsel for the assessee at the outset submitted that this issue has been decided in favour of the assessee in assessee's own case for A.Ys. 2009-10 to 2011-12 in ITA Nos. 2377 to 2379/Ahd/2018 vide order dated 30.07.2021. Further, the Counsel for the assessee drew our attention to Page 78, Para 5.18 of the order passed by Ld. CIT(A) and submitted that the Department has not questioned the sale price at which the sales have been made by the partnership firm to the assessee company. Further, the Counsel for the assessee also drew our attention

to Page 82 of the Ld. CIT(A) order in which Ld. CIT(A) has observed that the partnership firm has produced generic medicine for which no innovations / formulations have to be researched, whereas the assessee company has manufactured various products, where innovation is required. Further, the Counsel for the assessee has submitted that simply because the partnership firm have earned a higher profit rate as compared to the assessee company, cannot itself be a ground for coming to the conclusion that expenses of the partnership firm have been diverted in the hands of the assessee company, without any concrete basis and only on the basis of conjecture and surmises.

27. In response, the Ld. D.R. submitted that even though the partnership firm and the assessee company are in the same line of business, the partnership firm earned four times more profit percentage as compared to the assessee company. Further, the Ld. D.R. submitted that in the instant facts the packaging expenses in the partnership firm have been incurred and debited to the Profit & Loss account of the assessee company.

28. We have heard the rival contentions and perused the material on record.

29. We observe that in A.Y. 2009-10 in ITA No. 2377 to 2379/Ahd/2018 vide order dated 30.07.2021 ITAT Ahmedabad has discussed this issue in assessee's own case for A.Y. 2009-10. It would be pertinent to produce the relevant extract of ruling for ready reference:-

"2. Briefly stated facts of the case are that the assessee, a partnership firm is eligible for deduction under section 80-IC of the Act. It filed its return of income declaring total income of Rs.10,89,250.00 only after deduction of Rs.80,08,37,425.00 under section 80-IC of the Act. The assessee is engaged the business of manufacturing and selling of pharmaceuticals product. The entire sale was made by the assessee to its holding company namely Intas pharmaceuticals Ltd.

3. The AO during the assessment proceedings found that the assessee was claiming only few expenses against the sale of its products. The assessee, though engaged in the manufacturing unit, has incurred small expense under the head research and development which is 0.73% of the total expenses. Likewise, the assessee has also not furnished the supporting documents for packaging expenses incurred by it.

4. As per the AO, the assessee was showing higher amount of gross as well as net profit being a unit eligible for deduction under section 80IC of the Act which is nothing but the inflated profit. As such the assessee has not claimed various expenses and diverted them to other group companies. Thus the AO rejected the books of accounts and determined the profit at Rs. 40,04,60,962.00 being 25% of the turnover. However, the AO was pleased to grant the deduction under section 80 IC of the Act for the amount of profit determined by him.

5. Aggrieved assessee preferred an appeal to the learned CIT (A) who has enhanced the income of the assessee at Rs.67,96,17,810 and simultaneously allowed the deduction under section 80-IC of the Act.

6. Being aggrieved by the order of the learned CIT (A), both the Revenue and the assessee are in appeal and the CO before us.
7. At the outset the learned AR before us submitted that appeals filed by the Revenue are not maintainable for the reason that whatever amount has been determined as income of the assessee, the same was allowed as deduction under section 80-IC of the Act, raising nil demand of tax. Accordingly the learned AR contended that the appeals filed by the Revenue should be dismissed in limine.

8. On the contrary, the learned DR agreed to the proposition projected by the learned AR for the assessee that the appeals filed by the Revenue are not maintainable.

9. The learned AR in his rejoinder submitted that if the appeals of the Revenue are not maintainable, then he doesn't want to press the issue raised by the assessee in the CO.

10. We have heard the rival contentions of both the parties and perused the materials available on record. Admittedly, there is no effect on the tax liability on the assessee on account of the reduction made in the deduction claimed under section 80 IC of the Act. In other words, whatever amount of deduction is reduced by allocating

the expenses which is resulting the deduction in the amount of profit that will get adjusted in the deduction available to the assessee under section 80 ICof the Act. Thus the entire exercise carried out by the Revenue is tax neutral. Accordingly, we hold that the appeals filed by the Revenue are not maintainable."

30. Further, we also observe that in the instant case, there is no concrete materials / evidence to come to the conclusion that there has been diversion of profits from the partnership firm to the assessee company. Admittedly, the Department has not challenged the sale price at which products have been sold by the partnership firm to the assessee company. Further, the Ld. CIT(A) has also made a specific observation that the products of the assessee company involved substantial innovation, whereas the products of the partnership firm are generic in nature and do not require substantial innovation. Further, there is no mistake in the books of accounts of the assessee much has been pointed out by the Assessing Officer. Accordingly, looking into the instant facts, we are of the considered view that the Ld. AO has erred in facts and in law in coming to the conclusion that there has been diversion of profits from the partnership firms, claiming exemption under Section 80IE(i) and 80IC(3)(ii) of the Act and thereby diverting expenses to the assessee company.

31. In view of the aforesaid discussion, Ground No. 2 of the assessee's appeal is allowed and the Ground No. 2 of the Department's appeal is dismissed.

Ground No. 3 of Department's appeal (Deduction under Section 35 (2AB) of the Act) (A.Y. 2009-10)

32. The brief facts in relation to this ground of appeal are that the Assessing Officer made disallowance of expenditure on non-clinical trials amounting to Rs. 1492.86 lakhs on the ground that the DSIR (Department of Scientific and Industrial Research) in the report in Form 3CL has granted approval for a lesser amount as against the claim made by the assessee. The Assessing Officer observed that the DSIR had granted a short approval in respect of clinical trials and accordingly, no weighted deduction thereupon @ 50% was liable to be granted. Accordingly, the Assessing Officer made a disallowance of Rs. 1492.86 lakhs in respect of clinical trials under Section 35(2AB) of the Act, during the impugned year under consideration.

33. The assessee filed appeal before Ld. CIT(A) on this issue and submitted that clinical trials are an essential activity for a pharmaceuticals company to market it's products and these trials are conducted by Clinical Research Organization (in short "CRO"). Hence, a pharma company has to do clinical trials outside the organization. The assessee also relied upon the decision in it's favour by ITAT in assessee's own case for A.Ys. 2002-03 to 2004-05 and 2008-09 in IT(SS)A No. 807 & 809/Ahd/2010 and 20/Ahd/2011 dated 14.08.2015 and contended that this issue is squarely covered in favour of the assessee by the observations made by ITAT in assessee's own case, on similar set of facts. Accordingly, in light of the submissions made by the assessee, the Ld. CIT(A) allowed the appeal of the assessee on this issue with the following observations:-

> *"6.13 Having considered the facts and the decision of CIT(A0 for the A.Y. 2007-08 & 2008-09, the clinical trials have been held to be an allowable expenditure u/s. 35(2AB) of the Act and subsequently, the Hon'ble ITAT has also approved the findings of the CIT(A) referred above. Respectfully following the decision of CIT(A) and Hon'ble ITAT,* ***the expenditure towards clinical trial at Rs.1492.86 lacs is held to be allowable expenditure for weighted deductions in view of the provisons of section 35(2AB) of the Act.****"*

34. The Department is in appeal before us against the aforesaid relief granted by the Ld. CIT(A) with respect to claim of deduction under Section 35(2AB) of the Act on clinical trials.

35. We observe that this issue is directly covered in favour of the assessee in assessee's own case for A.Ys. 2002-03 to 2004-05 and 2008-09. It would be useful to reproduce the relevant extracts of the judgment for ready reference:-

> *"10. We have heard both the Revenue and assessee. We come to Revenue's grievance first. It is an admitted fact that assessee has incurred the amount in question on specified purposes only. We find that the hon'ble jurisdictional high court in case of CIT vs. Cadila Healthcare Ltd. [2013] 31 taxmann.com 300 (Gujarat) takes into account explanation to Section 35(2AB)(1) introduced by the Finance Act, 2001 w.e.f. 01.04.2002 and holds that where an assessee company incurs expenses on clinical trials for developing its pharmaceutical products outside a lab facility approved by the prescribed authority (the DS1R), the impugned weighted deduction has to be granted as purpose of this beneficial provision is to encourage scientific research. The Revenue does not point out any distinction on facts and law. Nor"°does it highlight any factual infirmity in assessee's claim that the impugned: sum has not been incurred on clinical research. We reject the Revenue's corresponding ground accordingly in A.Y. 2007-08. Revenue's appeal IT(SS)A No. 38/Ahd/2011 is accordingly dismissed."*

36. Further, it would be useful to reproduce the relevant extracts of the ruling by Gujarat High Court in the case of **CIT vs. Cadila Healthcare Ltd. 31 taxmann.com 300 (Gujarat)**, wherein Gujarat held that Explanation to Section 35(2AB)(1) does not require that expenses

included in said Explanation are essentially to be incurred inside an approved in-house research facility. The relevant extract of the ruling are reproduced for ready reference:-

> *"**16.** The whole idea thus appears to be to give encouragement to scientific research. By the very nature of things, clinical trials may not always be possible to be conducted in closed laboratory or in similar in-house facility provided by the assessee and approved by the prescribed authority. Before a pharmaceutical drug could be put in the market, the regulatory authorities would insist on strict tests and research on all possible aspects, such as possible reactions, effect of the drug and so on. Extensive clinical trials, therefore, would be an intrinsic part of development of any such new pharmaceutical drug. It cannot be imagined that such clinical trial can be carried out only in the laboratory of the pharmaceutical company. If we give such restricted meaning to the term expenditure incurred on in-house research and development facility, we would on one hand be completely diluting the deduction envisaged under sub-section (2AB) of section 35 and on the other, making the explanation noted above quite meaningless. We have noticed that for the purpose of the said clause in relation to drug and pharmaceuticals, the expenditure on scientific research has to include the expenditure incurred on clinical trials in obtaining approvals from any regulatory authority or in filing an application for grant of patent. The activities of obtaining approval of the authority and filing of an application for patent necessarily shall have to be outside the in-house research facility. Thus the restricted meaning suggested by the Revenue would completely make the explanation quite meaningless. For the scientific research in relation to drugs and pharmaceuticals made for its own peculiar requirements, the Legislature appears to have added such an explanation."*

37. Accordingly, in view of the above discussion, the observations made by ITAT in assessee's own case for preceding assessment years and the observations made by the Jurisdictional High Court in the case of Cadila Healthcare Ltd. (supra), we are of the considered view that Ld. CIT(A) has not erred in facts and in law in making any disallowance with respect to the aforesaid issue.

38. In the result, Ground No. 3 of the Department's appeal is dismissed.

Ground Number 3 of the assessee's appeal (claim of deduction under Section 35 (2AB) of the Act Rs. 1,04,50,000/-):

39. Ground No. 3 of assessee's appeal is with regards to disallowance of claim of deduction amounting to Rs. 1,04,50,000/- under Section 35(2AB) of the Act towards weighted deduction relating to expenditure on accepted batches, building maintenance and patent filing fees.

40. In appeal, Ld. CIT(A) dismissed the appeal of the assessee on this issue by following the order passed by Ld. CIT(A) and ITAT in assessee's own case for A.Ys. 2007-08 and 2008-09, with the following observations:-

> *"6.14. However, with regard to the expenditure in the nature of exhibit batches and other expenses taken in plant area at Rs.207.55 lacs, certain building maintenance expenses at Rs. 0.87 lacs and foreign patent filing expenses under capital expenditure at Rs.0.19 lacs totalling to Rs.208.61 lacs which were not approved by the DSIR. It has been noticed that in the preceding years, there is no precedence for this issue in favour of the appellant or rather the CIT(A) and the ITAT has decided against the appellant in A. Y. 2007-08 & 2008-09. Since the DSIR has not approved these expenditures for grant of weighted deductions, and therefore, the denial of the AO of granting the weighted deduction @ 50% works out to Rs. 104.31 lacs in respect of these fouritems of expenditures is found correct and justified, and hence, the same is* ***confirmed.****"*

41. The assessee is in appeal before us against the aforesaid order passed by Ld. CIT(A) on this issue. Before us, the Counsel for the assessee drew our attention to the observations made by ITAT Ahmedabad in the case of **Sun Pharmaceuticals Industries Ltd. vs. ACIT 84 taxmann.com 217 (Ahmedabad – Tribunal)** on the issue of weighted deduction with respect to product registration expenses / patent

application (Pages 177 to 178 of the Paper Book). The Counsel for the assessee also relied upon certain other judicial precedents in support of claim of aforesaid expenditure, which in our considered view are distinguishable on facts. Accordingly, in light of observations made by Ld. CIT(A), the appeal of the assessee is partly allowed to the extent of weighted deduction with respect to foreign patent filing expenses under capital expenditure amounting to Rs. 0.19 lakhs. However, with respect to the balance amount, we find no infirmity in the order of Ld. CIT(A) so as to call for any interference.

42. In the result, Ground No. 3 of the assessee's appeal for A.Y. 2009-10 is partly allowed.

Ground No. 4 of the Department's appeal (deletion of expenses of Rs. 39.62 crores incurred by the assessee to earning exempt income under Section 10 (2A) on behalf of Intas Pharma, partnership firm to the book profit under Section 115JB of the Act:

43. Since we have, while dealing with Ground No. 2 of the assessee's as well as the Department's appeal, deleted the addition in the hands of the assessee company on this account, Ground No. 4 of the Department's appeal is dismissed.

Ground No. 4 of the assessee's appeal (Disallowance towards weighted deduction under Section 35(2AB) of the Act amounting to Rs. 2,10,44,148)

44. Before us, the Counsel for the assessee submitted that Ld. CIT(A) vide order dated 30.06.2017 has already afforded relief to the assessee on this issue and accordingly, the assessee shall not be pressing for this ground of appeal.

45. In the result, Ground No. 4 of the assessee's appeal is dismissed as not pressed.

Assessment Year 2010-11

46. The assessee has raised the following grounds of appeal:-

> *"1. (a) In the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the upward adjustment to the extent of Rs.2,03,71,479/- made by AO/TPO in relation to advances given for registration of appellant's product in respective territories and related matter to Associated Enterprises (AEs) namely Accord Farmaceutical, Brazil, Accord Farma, SA, Accord Mexico, Accord Healthcare SAC, Peru and Accord Healthcare, USA.*
>
> *(b) That in the facts and circumstances of the case, the learned CIT(A) has failed to appreciate that all the aforesaid AEs were incorporated as marketing and distribution company for marketing and distribution of appellant's products in respective territories.*
>
> *(c) That in the facts and circumstances of case and in law, the learned CIT(A) has also failed to appreciate that as per local regulations prevalent in respective territories, every pharmaceutical product is required to be registered with local regulatory authorities before its sale in the territories. As the AEs of the appellant company are in start-up phase and also not engaged in independent business activities, the advances were given out of commercial expediency to ensure that the AEs can obtain necessary regulatory approval in time for marketing and distribution of appellant's products in respective territories.*
>
> *(d) That on the facts and circumstances of the case and in law, the learned CIT(A) has further erred in not appreciating the amounts advanced to AEs are inextricably linked with the export sale of finished goods (Finished Drug Formulation) by appellant company.*
>
> *(e) That in the facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating the fact that the activities performed by AEs*

have yielded numerous economic benefits to the appellant including increase in export turnover.

(f) That in the facts and circumstances of the case and in law, without prejudice to above, the learned CIT(A) ought to have appreciated that the comparable entities are accounting such expenses in its books of accounts in India on the ground that incurrence of such expenditure is the requirement of entities in India. Further the comparable companies are claiming deduction of such expenses in India and it has been allowed by the Revenue Authorities.

(g) Without prejudice to Ground No. 1(1) to (f), in the facts and circumstances of the case and in las, the learned CIT(A) while confirming the upward adjustment of Rs.2,03,71,479/-, has failed to appreciate that the arm's length rate of interest determined by the TPO was worked out after increasing interest rate by adhoc additional 100 basis points towards foreign exchange risk ignoring the fact that during the year under consideration rupee appreciated against the US dollar.

2. (a) In the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming upward adjustment to the extent of Rs.2,27,520/- towards guarantee fees/commission.

(b) That in the facts and circumstances of the case and in law, the learned CIT(A) failed to appreciate that corporate guarantee does not fall in the ambit of international transaction as it has no bearing on profit, loss or assets of the appellant company and also it does not involve any cost for appellant company.

3. (a) In the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming disallowance to the extent of Rs.19,42,13,611/- by rejecting books of accounts and on the ground that the appellant company failed to fully controvert the justification for lower gross profit rate (GP rate) and net profit rate (NP rate) as compared to GP rate and NP rate of M/s Intas Pharmaceutical (partnership firm).

(b) That in the facts and circumstances of case and in law, the learned CIT(A) has failed to appreciate that GP rate of partnership of 66% is higher than the GP rate of appellant company of 46.42% mainly due to tax incentive of around 10% available to the partnership firm under excise and VAT laws together with low cost of labour, power etc.

(c) That on facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating and understanding the FAR as well as business models of the appellant and partnership firm and the industry in which both operates and thereby further erred in observing that broadly the functions performed, the activities carried out, assets employed and risk deployed by the appellant company and firm in relation to manufacturing of various products are similar.

(d) That on facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the disallowance to the extent of Rs. 19,42,12,611/- even after recording following observations'.

- *The comparison of net margins of six companies taken as base for working out the diversion of profits of the appellant company to the firm does not get substantiated. Companies selected by AO are more comparable to the appellant company.*

- *That excluding Glaxo Smithkline Pharmaceuticals Ltd, the weighted average rate of each of the company is ranging from 5.12% to 22.6%. The appellant's NP rate was at 13.23% which was more or less in the similar range.*

- *Thus the comparison made by the AO by taking the average of the six company is not correct and the same is rejected.*

- *In the assessment order of the partnership firm or of the appellant company, the sale proceeds of the firm have not been doubted by the AO, therefore, there is no case of inflated profit on account of inflation of sale proceeds.*

- *The disallowance is based on the observation of the AO in respect of expenditures such as R & D expenditure, selling and distribution expenses, packing expenses and financial cost belonging to the appellant firm but debited as expenses in the P & L Account of appellant company which is not based on any specific details and evidences brought on record by AO.*

- *The AO has only guess worked the reasons of low NP rate of the appellant company vis-a-vis high NP rate of firm and supported the same with the theory of reducing the tax liability in the hands of appellant company.*

- *It is apparent that the firm has debited the various expenditures as noted above which were pertaining to it in its P&L Account and hence, the AOs observation that it has incurred only manufacturing cost expenses is factually incorrect.*

- *As per the Income Tax provisions, the appellant company is different from the firm and their taxability are separately decided as per their business activities. Merely the appellant company has purchased majority of the products of the appellant firm does not mean that each and every deficiencies found in the case of the firm would call for the adverse inference in the case of the appellant company.*

(e) That in the facts and circumstances of the case and in law, the learned CIT(A) has further erred in confirming disallowance of Rs.19,42,13,611/- even after observing that the appellant company made a gross profit of 54% on products purchases for trading from partnership as compared to gross profit of 47%on

trading of products purchased from third party, which negates the allegation of the AO that some expense has been shifted from the hands of the firm to the hands of the appellant company.

(f) Without prejudice to Ground No. 3(a) to 3(e) above, in the facts and circumstances of the case and in law, the learned CIT(A) while comparing selling and distribution expenses has also erred in excluding freight and forwarding expenses on sales from the selling and distribution expenses of the appellant company.

4. In the facts and circumstances of the case, the learned CIT(A) has erred in disallowing claim of deduction amounting to Rs.1,59,65,500/- (50% of Rs.317.73 lacs + Rs.1.58 lacs) under section 35(2AB) of the IT. Act towards weighted portion relating to expenditure on exhibit batches and certain other expenses.

The above grounds are independent and without prejudice to each other.

The Appellant prays for leave to add, alter, amend and / or modify any of the grounds of appeal at or before the hearing of the appeal."

47. The Department has raised the following grounds of appeal:-

"1. The Ld.CIT(A) has erred in law in deleting the upward adjustment of Rs 23859025/-made in respect of interest on loans and advances to Accord Newzeland, Accord UK and Accord Canada in whose case loans and advances have been converted int equity and advances were of nature of business advances

2. The Ld.CIT(A) has erred in law and on facts in deleting the upward adjustment of Rs 341280/- made on account of charging of benchmark guarantee fees for the counter guarantee given on behalf of AEs.

3. The Ld.CIT(A) has erred in law and on facts in restricting the disallowance of expenses incurred by the assessee on behalf of its subsidiary firm 'Intas Pharmaceuticals from Rs 74,98,32,361/- to Rs 19,42,13,611 /- without properly appreciating the facts of the case and the material brought on record.

4. The Ld.CIT(A) has erred in law and on facts in allowing the deduction U/s 35(2AB) on the basis of expense claim made by the assessee in the P& L Account instead of granting deduction on the amount approved by DSIR in Form 3CL
5. The Ld.CIT(A) has erred in law and on facts in deleting the addition of expense of Rs 74,98,32.361/- incurred by the assessee to earn exempt income u/s 10(2A) on behalf of Intas Pharma (IP) to the the Book Profits u/s 115JB of the Act

6. The Ld.CIT(A) has erred in law and on facts in allowing the expense of Rs 13,20,119/-incurred by the assessee towards issue of debentures as revenue expense instead of the treating the expense as capital expense

7. On the facts and in the circumstances of the case, the Ld. CIT(A) ought to have upheld the order of the Assessing Officer.

8. It is, therefore, prayed that the order of the Ld. CIT(A) may be set aside and that of the Assessing Officer may be restored to the above extent.

9. The appellant craves leave to amend or alter any ground or add a new which may be necessary."

We observe that Ground Nos. 1, 3, 4 and 5 of the Department's appeal are similar to Assessment Year 2009-10 and our observations would apply for Assessment Year 2010-11 as well

We further observe that Ground Nos. 1, 3 and 4 of the assessee's appeals are similar to Assessment Year 2009-10 and our observations would apply for Assessment Year 2010-11 as well

Ground No. 2 of the Department's appeal and Ground No. 2 of the assessee's appeal (Upward adjustment towards guarantee fees / commission)

48. The brief facts in relation to this ground of appeal are that the assessee had given corporate guarantee in favour of Citi Bank in respect of certain transactions carried out by the Associated Enterprises of the assessee. The assessee had given corporate guarantee to Citi Bank, India, to enable Citi Bank, Mexico to give guarantee to Accord, Mexico to purchase shares of Pharma Farmaiot Mexico. The Assessing Officer made an upward adjustment of Rs. 5,68,800/- pertaining to guarantee under taken by the assessee to be at arm's length.

49. The assessee filed appeal before Ld. CIT(A) who restricted the corporate guarantee fees @ 0.8% on the basis of submissions made by the assessee before the TPO/AO, with the following observations:-

> *"4.11 Since the appellant himself has accepted to charge the guarantee fee @ 0.8% before the AO in the assessment proceedings which has been elaborately reproduced by the AO at Page 20 of the assessment order, therefore, the adjustment on account of guarantee commission made @ 0.8% on the US $ Rs. 6 lacs which comes to Rs. 2,27,520/- is confirmed. Thus, the guarantee commission adjustment of Rs. 2,27,520/- is confirmed and relief is granted for the balance amount of Rs.3,41,280/-"*

50. Both the Department and Assessee are in appeal before us against the order passed by Ld. CIT(A), partly allowing the appeal of the assessee.

51. In our considered view, it is well settled law that the transaction of furnishing corporate guarantee to overseas Associated Enterprises constitutes an international transaction and would be subject to Transfer Pricing regulations. Further, we observe that the assessee during the course of assessment proceedings has himself accepted to charge guarantee fee @ 0.8% as observed by Ld. CIT(A) in the appellate order. Accordingly, in view of the judicial precedents on the subject and the assessee's own acceptance placed on record before the AO / TPO, we find no infirmity in the order of Ld. CIT(A) so as to call for any interference. Further, we are also of the considered view that charging of corporate guarantee fee @ 0.8% is justified by the assessee in view of various judicial precedents on this issue and accordingly no further upward adjustment is called for as prayed by the Department.

Accordingly, we find no infirmity in the order of Ld. CIT(A) so as to call for any interference.

52. In the result, Ground No. 2 of the Department's appeal and Ground No. 2 of the Assessee's appeal are dismissed.

Ground No. 6 of the Department's appeal (Expenses of Rs. 13,20,119/- towards issue of debentures)

53. The brief issue for consideration before us is whether Ld. CIT(A) erred in disallowing expenses of Rs. 13,20,119/- towards issue of debenture as revenue expenses instead of treating the expenses as capital expenditure.

54. The brief facts of the case are that the Assessing Officer made disallowance of debenture issue expenses for the reason that these expenses were incurred before the issue of debentures which are in the nature of legal expenses and services charges and hence cannot be incurred in normal course of business. These expenses were held to be capital expenses as the non-convertible debentures were issued to provide enduring benefits to the business of the assessee company. In appeal, Ld. CIT(A) allowed the appeal of the assessee with the following observations:-

> *"8.4. Having considered the facts and submission, it has been noticed that these expenditures were incurred for issuing the debentures to the financial institutions and these funds were deployed in the business of the appellant which has not been doubted by the AO. Even undisputedly those funds have not been deployed in any*

new projects and therefore, the capitalisation of the issue expenditures of the NCDs cannot be said to be capital expenditures. In fact debentures are in the nature of loans only (not the equity) which have been raised to fulfill the working capital requirements of the company and the-expenditures related to them are routine business expenditures which are allowable u/s. 37(1) of the I. T. Act. Those cannot be termed as capital expenditures. Thus, the disallowance made by the AO is uncalled for and hence the same is ***deleted.***

Reliance in this regard is placed on the following decisions:-

- ***Commissioner of Income-tax V. Udaipur Secure Meters Ltd.[2008] 175 TAXMAN 567 (RAJ.)***

In view of catena of decisions, the expenditure incurred in issuing any debentures and raising loan as debentures is admissible, obviously because the debenture is also a loan. As the debenture, when issued, is a loan, whether it is convertible, ornon-convertible,, it does not militate against the nature of the debenture, being loan. Therefore, the expenditure incurred would be admissible as revenue expenditure

- ***Commissioner of Income-tax V. Havells India Ltd. [2012] 21 taxmann.com 476 (Delhi)***

It is well-settled that expenditure incurred in connection with the issue of debentures or obtaining loan is revenue expenditure. The question under consideration, however, is whether it is a debenture issue or an issue of share capital involving the strengthening of the capital base of the company. Though it prima facie appears that there are sufficient facts to indicate that what was contemplated was an issue of shares to the Mauritius company under the Investor Agreement which would result in strengthening of the assessee's capital base, having regard to the judgments cited on behalf of the assessee, in which it has been held that despite indications to the effect that the debentures are to be converted in the near future into equity shares,the expenditure incurred should be allowed as revenue expenditure on the basis of the factual position obtaining at the time of the debenture issue, a different view cannot be taken.

- ***Commissioner of Income-tax V. ITC Hotels Ltd. [2010] 190 Taxman 430 (Karnataka)***

The honourable high court came to the conclusion that even if the debenture were to be converted into share at a later date, the expenditure incurred on such convertible debenture has to be . treated as a revenue expenditure.

The ground of appeal is ***allowed.****"*

55. The Department is in appeal before us against the aforesaid order passed by Ld. CIT(A) on this issue.

56. On going through the facts of the case and the judicial precedents on the subject, we observe that we find no infirmity in the order of Ld. CIT(A) so as to call for any interference. The Ld. CIT(A) has given a specific finding that the funds received on issue of debentures were used by the assessee company in the course of business, these funds have not been deployed in any new projects and that the debentures are purely in the nature of loans which have been raised to fulfill the working capital requirements of the company and accordingly, the aforesaid expenses are allowable under Section 37(1) of the Act.

57. In the result, Ground No. 6 of the Department's appeal is dismissed.

Assessment Year 2011-12

58. The assessee has raised the following grounds of appeal:-

> *"1. (a) In the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the upward adjustment to the extent of Rs.1,48,92,713/- made by AO/TPO in relation to advances given for registration of appellant's product in respective territories and related matter to Associated Enterprises (AEs) namely Accord Farmaceutical, Brazil, Accord Farma, SA, Accord Mexico, Accord Healthcare SAC, Peru and Accord Healthcare, USA.*
>
> *(b) That in the facts and circumstances of the case, the learned CIT(A) has failed to appreciate that all the aforesaid AEs were incorporated as marketing and distribution company for marketing and distribution of appellant's products in respective territories.*

(c) That in the facts and circumstances of case and in law, the learned CIT(A) has also failed to appreciate that as per local regulations prevalent in respective territories, every pharmaceutical product is required to be registered with local regulatory authorities before its sale in the territories. As the AEs of the appellant company are in start-up phase and also not engaged in independent business activities, the advances were given out of commercial expediency to ensure that the AEs can obtain necessary regulatory approval in time for marketing and distribution of appellant's products in respective territories.

(d) That on the facts and circumstances of the case and in law, the learned CIT(A) has further erred in not appreciating the amounts advanced to AEs are inextricably linked with the export sale of finished goods (Finished Drug Formulation) by appellant company.

(e) That in the facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating the fact that the activities performed by AEs have yielded numerous economic benefits to the appellant including increase in export turnover.

(f) That in the facts and circumstances of the case and in law, without prejudice to above, the learned CIT(A) ought to have appreciated that the comparable entities are accounting such expenses in its books of accounts in India on the ground that incurrence of such expenditure is the requirement of entities in India. Further the comparable companies are claiming deduction of such expenses in India and it has been allowed by the Revenue Authorities.

(g) Without prejudice to Ground No. 1(1) to (f), in the facts and circumstances of the case and in las, the learned CIT(A) while confirming the upward adjustment of Rs.1,48,92,713/-, has failed to appreciate that the arm's length rate of interest determined by the TPO was worked out after increasing interest rate by adhoc additional 100 basis points towards foreign exchange risk ignoring the fact that during the year under consideration rupee appreciated against the US dollar.

2. (a) In the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming upward adjustment to the extent of Rs.28,050/- towards guarantee fees/commission.

(b) That in the facts and circumstances of the case and in law, the learned CIT(A) failed to appreciate that corporate guarantee does not fall in the ambit of international transaction as it has no bearing on profit, loss or assets of the appellant company and also it does not involve any cost for appellant company.

3. (a) In the facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming disallowance to the extent of Rs.16,64,18,930/- by rejecting books of accounts and on the ground that the appellant company failed to fully controvert the justification for lower gross profit rate (GP rate) and net profit

rate (NP rate) as compared to GP rate and NP rate of M/s Intas Pharmaceutical (partnership firm).

(b) That in the facts and circumstances of case and in law, the learned CIT(A) has failed to appreciate that GP rate of partnership of 60.02% is higher than the GP rate of appellant company of 50.18% mainly due to tax incentive of around 10% available to the partnership firm under excise and VAT laws together with low cost of labour, power etc.

(c) That on facts and circumstances of the case and in law, the learned CIT(A) has erred in not appreciating and understanding the FAR as well as business models of the appellant and partnership firm and the industry in which both operates and thereby further erred in observing that broadly the functions performed, the activities carried out, assets employed and risk deployed by the appellant company and firm in relation to manufacturing of various products are similar.

(d) That on facts and circumstances of the case and in law, the learned CIT(A) has erred in confirming the disallowance to the extent of Rs. 16,64,18,930/- even after recording following observations'.

- *The comparison of net margins of six companies taken as base for working out the diversion of profits of the appellant company to the firm does not get substantiated. Companies selected by AO are more comparable to the appellant company.*

- *That excluding Glaxo Smithkline Pharmaceuticals Ltd, the weighted average rate of each of the company is ranging from 5.12% to 22.6%. The appellant's NP rate was at 13.23% which was more or less in the similar range.*

- *Thus the comparison made by the AO by taking the average of the six company is not correct and the same is rejected.*

- *In the assessment order of the partnership firm or of the appellant company, the sale proceeds of the firm have not been doubted by the AO, therefore, there is no case of inflated profit on account of inflation of sale proceeds.*

- *The disallowance is based on the observation of the AO in respect of expenditures such as R & D expenditure, selling and distribution expenses, packing expenses and financial cost belonging to the appellant firm but debited as expenses in the P & L Account of appellant company which is not based on any specific details and evidences brought on record by AO.*

- *The AO has only guess worked the reasons of low NP rate of the appellant company vis-a-vis high NP rate of firm and supported the same with the theory of reducing the tax liability in the hands of appellant company.*

- *It is apparent that the firm has debited the various expenditures as noted above which were pertaining to it in its P&L Account and hence, the AOs observation that it has incurred only manufacturing cost expenses is factually incorrect.*

- *As per the Income Tax provisions, the appellant company is different from the firm and their taxability are separately decided as per their business activities. Merely the appellant company has purchased majority of the products of the appellant firm does not mean that each and every deficiencies found in the case of the firm would call for the adverse inference in the case of the appellant company.*

(e) That in the facts and circumstances of the case and in law, the learned CIT(A) has further erred in confirming disallowance of Rs.16,64,18,930/- even after observing that the appellant company made a gross profit of 55% on products purchases for trading from partnership as compared to gross profit of 46%on trading of products purchased from third party, which negates the allegation of the AO that some expense has been shifted from the hands of the firm to the hands of the appellant company.

(f) Without prejudice to Ground No. 3(a) to 3(e) above, in the facts and circumstances of the case and in law, the learned CIT(A) while comparing selling and distribution expenses has also erred in excluding freight and forwarding expenses on sales from the selling and distribution expenses of the appellant company.

4. In the facts and circumstances of the case, the learned CIT(A) has erred in disallowing claim of deduction amounting to Rs.5,04,56,906/- (Rs.409.55 lacs + Rs. 95.01 lacs) under section 35(2AB) of the IT. Act towards weighted portion relating to expenditure on exhibit batches and certain other expenses.

5. (a) In the facts and circumstances of the case and in law, the learned CIT(A) erred in rejecting the claim of Rs.12,86,51,799/- under section 35(1)(iv) of the Act (relating to expenditure incurred during the year on intangibles and accounted under capital work in progress on which no depreciation has been claimed later on) made by appellant company.

(b) That in the facts and circumstances of the case and in law, the learned CIT(A) failed to appreciate that Article 265 of the Constitution of India lays down that no tax shall be levied except by authority of law. Hence only legitimate tax can be recovered and even a concession by a tax-payer does not give authority to the tax collector to recover more than what is due from him under the law.

(c) That in the facts and circumstances of the case and in law, the learned CIT(A) ought to have appreciated that vide Circular No: 14 (XL-35) dated April 11, 1955, the CBDT has directed its officers that "Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to

assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the Officers should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him".

6. In the facts and circumstances of the case and in law, the learned CIT(A) erred in not admitting the additional ground raised by the appellant company relating to disallowance under section 40(a)((ia) of the Act towards commission paid outside India to non-resident agents operating outside India.

The above grounds are independent and without prejudice to each other.

The Appellant prays for leave to add, alter, amend and / or modify any of the grounds of appeal at or before the hearing of the appeal."

59. The Department has raised the following grounds of appeal:-

"1. The Ld.CIT(A) has erred in law in deleting the upward adjustment of Rs 21563844/-made in respect of interest on loans and advances to Accord Newzeland, Accord UK and Accord Canada in whose case loans and advances have been converted int equity and advances were of nature of business advances.

2. The Ld.CIT(A) has erred in law and on facts in deleting the upward adjustment of Rs 42076/- made on account of charging of benchmark guarantee fees for the counter guarantee given on behalf of AEs.

3. The Ld.CIT(A) has erred in law and on facts in restricting the disallowance of expenses incurred by the assessee on behalf of its subsidiary firm 'Intas Pharmaceuticals from Rs 66,04,46,017 to Rs 16,64,18,930/- without properly appreciating the facts of the case and the material brought on record.

4. The Ld.CIT(A) has erred in law and on facts in allowing the deduction U/s 35(2AB) on the basis of expense claim made by the assessee in the P& L Account instead of granting deduction on the amount approved by DSIR in Form 3CL

5. The Ld.CIT(A) has erred in law and on facts in deleting the disallowance u/s 14A of Rs 5,53,94,595/- without properly appreciating the facts of the case and the material brought on record.

6. The Ld.CIT(A) has erred in law and on facts in deleting the disallowance of Rs 35,50,000/- in respect of increase in authorized share capital without properly appreciating the facts of the case and , the material brought on record.

7. The Ld.CIT(A) has erred in law and on facts in deleting the disallowance u/s 36(1)(iii) of Rs 37700339/- without properly appreciating the facts of the case and the material brought on record.

8. The Ld.CIT(A) has erred in law and on facts in deleting the ^disallowance u/s 40A(2)(b) of Rs 1,79,46,654/- without properly appreciating the facts of the case and the material brought on record.

9. On the facts and in the circumstances of the case, the Ld. CIT(A) ought to have upheld the order of the Assessing Officer.

10. It is, therefore, prayed that the order of the Ld. CIT(A) may be set aside and that of the Assessing Officer may be restored to the above extent.

11. The appellant craves leave to amend or alter any ground or add a new ground, which may be necessary."

We shall first take up Department's appeal for A.Y. 2011-12

Ground No. 1 (Upward adjustment of Rs. 2,15,63,844/- in respect of interest on loans and advances)

60. We observe that this issue has already been allowed in Department's appeal for A.Y. 2009-10 in ITA No. 1644/Ahd/2017. Accordingly, this ground is allowed as per directions given in Ground No. 1 of the Department's appeal for A.Y. 2009-10.

Ground No. 2 (Deleting upward adjustment of Rs. 42,076/- on account of charging of benchmark guarantee fees)

61. We observe that this issue has already been dismissed in Department's appeal for A.Y. 2010-11 in ITA No. 1645/Ahd/2017. Accordingly, this ground is dismissed as per directions given in Ground No. 2 of the Department's appeal for A.Y. 2010-11.

Ground No. 3 (Restricting disallowance of expense incurred by assessee on behalf of its subsidiary firm "Intas Pharmaceuticals")

62. We observe that this issue has already been dismissed in Department's appeal for A.Y. 2009-10 in ITA No. 1644/Ahd/2017. Accordingly, this ground is dismissed as per directions given in Ground No. 2 of the Department's appeal for A.Y. 2009-10.

Ground No. 4 (Disallowance under Section 35(2AB) on the basis of expense claim made by assessee in P&L Account)

63. We observe that this issue has already been dismissed in Department's appeal for A.Y. 2009-10 in ITA No. 1644/Ahd/2017. Accordingly, this ground is dismissed as per directions given in Ground No. 3 of the Department's appeal for A.Y. 2009-10.

Ground No. 5 (Ld. CIT(A) erred in deleting disallowance under Section 14A amounting to Rs. 5,53,94,595/-)

64. The brief facts in relation to this ground of appeal are that the Assessing Officer worked out a disallowance under Section 14A of the Act amounting to Rs. 6,07,22,166/- which includes the interest disallowance under Rule 8D(ii) at Rs. 4,89,00,633/- and administrative expenses under Rule 8D(2)(iii) at Rs. 1,18,21,533/-. Since, the assessee himself made disallowance of an amount of Rs. 23,27,571/- in the return of income, the balance disallowance of Rs. 5,53,94,595/- was made by

the Assessing Officer in the assessment order. The Assessing Officer observed that the assessee has failed to prove that no interest bearing funds have been utilized in making investments in shares on which the income is exempt. As per the Assessing Officer, the assessee was required to prove that at the time of making investments, the assessee had interest free funds and that there was no diversion of interest bearing funds for non-business purposes.

65. In appeal, CIT(A) deleted the additions made by the Assessing Officer on the ground that the assessee had made investments in subsidiary companies namely Intas Biopharmaceuticals Ltd., Intas Pharma SEZ Ltd. and Astron Research Ltd. and the assessee did not derive any dividend income from these companies. Therefore, in absence of any exempt income, no disallowance was warranted in the hands of the assessee under Section 14A of the Act. Secondly, with respect to capital employed in partnership firm namely Intas Pharmaceuticals from which the assessee had derived share of profit, which was exempt under law, the CIT(A) observed that the investments made in the partnership amounting to Rs. 31.20 crores as on 31.03.2011 was much less than the average reserves and surplus funds of Rs. 710.84 crores. Accordingly, Ld. CIT(A) held that capital employed in the partnership firm has been made out of interest free funds of the assessee. The Assessing Officer has not brought on record any material to demonstrate that any interest bearing funds have been utilized for the purpose of capital employment in the partnership firm. Accordingly, the

Ld. CIT(A) deleted the additions made by the Assessing Officer. While passing the order, Ld. CIT(A) made the following observations:-

> *"9.6 Having considered the facts and submission, it has been noticed that the appellant had the share investments in the subsidiary companies namely; Intas Biopharmaceuticals Ltd., Intas Pharma SEZ Ltd. and Astron Research Ltd. and these investment were strategic investment in the group companies which are in line of the business of the appellant company. This fact is more evident from the amalgamation of these companies having undertaken on 01/04/2012. Therefore, the purpose was not to earn any dividend income on investment in share of these companies, but for the strategic purposes. Since the appellant did not derive any dividend income from these companies, therefore, in absence of any exempt income, no disallowance in this regard is warranted as has been held by the* ***Hon'ble Gujarat High Court in the case of Corrtech Energy Pvt. Ltd., Hon'ble Punjab & Haryana High Court in the case of CIT vs. Winsom Textile Ltd.*** *and many more other decision / judgments discussed below.*
>
> *….*
>
> *9.15 In view of the aforesaid discussion, the disallowance made by the AO invoking the provisions of section 14A of the Act is not correct and justified on the investment made in the shares on which no dividend income has been derived by the appellant. Hence, same is* ***deleted*** *except to the following discussion.*
> *….*
>
> *9.17 Further, it has been noticed that the appellant had the capital employed in the partnership firm namely; Intas Pharmaceuticals in which it has derived the share of profit which was exempt as per the provisions of law. Since the investment in the said partnership firm was at Rs.31,20,00,000/- as on 31/03/2011 as against Rs.31,01,26,458/- as on 31/03/2010 which was much less than the average reserves and surplus funds of Rs.710.84 crores, therefore, it is held that the capital employment in the partnership firm has been made out of the interest free funds of the appellant. The AO has not brought on record that any interest bearing funds have been utilized for the purpose of capital employment in the partnership firm."*

66. The Department is in appeal before us against the aforesaid order passed by Ld. CIT(A).

67. On going through the facts of the instant case, we observe that Ld. CIT(A) has given a categorical finding that firstly, with respect to investment in partnership firm, the assessee's own interest free funds

were far in excess of the investments made in the partnership, yielding exempt income and accordingly, no disallowance is called for. Further, in respect of the other three companies, the Ld. CIT(A) observed that since no exempt income was earned by the assessee during the impugned year under consideration, there is no question of disallowance under Section 14A of the Act. Accordingly, in view of the instant facts and the judicial precedents on the subject and the observations made by the Ld. CIT(A), we find no infirmity in the order of Ld. CIT(A), so as to call for any interference.

68. In the result, Ground No. 5 of the Department's appeal is dismissed.

Ground No.6 (Ld. CIT(A) erred in deleting disallowance of Rs. 35,50,000/- in respect of increase in authorized share capital

69. The brief facts in relation to this ground of appeal are that the Assessing Officer made disallowance of expenses of Rs. 35,50,000/- towards ROC fees paid for increasing the authorized share capital. The Assessing Officer made disallowance for the reason that these expenses were capital in nature in view of the judgment of Hon'ble Supreme Court in the case of **Brooke Bond India Ltd. vs. CIT 225 ITR 798 (SC)**.

70. The assessee filed appeal before Ld. CIT(A) and submitted that the assessee had increased it's authorize share capital and also issued company's shares during the impugned year under consideration.

Further, the assessee contended that the appellant has increased it's authorized share capital and also issued the bonus shares during the year under consideration. It was submitted by the assessee from the audited books of accounts that the authorized share capital as on 31.03.2011 was at Rs. 12500 lakhs as against the authorized share capital of Rs. 6000 lakhs on 31.03.2010. Thus there was increase in the authorised share capital to the tune of Rs.6500 lakhs in the year under consideration. Consequently, there was increase in the issued capital also because of the issuance of bonus shares of Rs.5173.84 lakhs. Therefore, the issued capital increased from Rs.5173.83 lakhs as on 31.03.2010 to Rs.10347.67 lakhs as on 31.03.2011. This increase in share capital was on account of capitalisation of the general reserve for issuance of the fully paid bonus shares. The appellant claimed that these expenditures were directly linked to the increase in authorised capital for issue of bonus shares. The assessee company did not receive any enduring benefit by issue of bonus shares. No fresh capital was increased nor there was any inflow of new money in form of share capital in to the company. Thus, all the expenses incurred are allowable u/s. 37 of the Act. In support of its claim of expenditure, the appellant relied upon the judgment of Hon'ble Apex Court in the case of **CIT Vs. M/s. General Insurance Corporation [286 ITR 23]**.

71. In light of the submissions made by the assessee, the Ld. CIT(A) allowed the appeal of the assessee with the following observations:-

"10.5 Considering the facts and submissions and also the contention, it is noticed that the appellant has increased and issued the bonus shares to the share holders in the year under consideration i.e. on 31/03/2011 and the same has been given effect in the final audited accounts by increasing the authorised share capital, consequently the issued capital through the corresponding transfer from the general reserve for the same. Thus, the expenditure incurred in the nature of stamp duty and fees etc. paid to ROC were ascertained liabilities which have been paid by the appellant in the year under consideration, thus the same is allowable deduction u/s. 37(1) of the I. T. Act. Since there was no inflow of funds, rather transfer of the reserve funds from the accumulated profits to the share capital in the form of bonus shares, and hence, the AOs reliance upon the judgment of Brooke Bond India Ltd. is misplaced. In fact the judgment of Hon'ble Court in the case of Brooke Bond India Ltd. was in respect of the expenses incurred on the issue of fresh share capital with inflow of funds, however, in the instant case, the facts are not similar as there was no inflow of funds in respect of issue of bonus shares, but it was the transfer of the accumulated profits into the share capital by issue of bonus shares. Thus, the direct judgment of ***Hon'ble Supreme Court in the case of General Insurance Corporation (Supra)*** *is applicable and accordingly the claim of expenditure is allowed as revenue. Thus the AO's action for making the disallowance is not approved and the same is deleted.*

The ground of appeal is accordingly ***allowed****."*

72. The Department is in appeal before us against the aforesaid relief granted by Ld. CIT(A) on this issue. Before us, the Ld. D.R. placed reliance in the case of **CIT vs. Fascel Ltd. 221 CTR 305 (Delhi High Court)**, wherein the Delhi High Court held that expenditure by way of payment made to Registrar of Companies for increase in share capital, is capital in nature.

73. In response, the Counsel for the assessee placed reliance in the case of **CIT vs. General Insurance Corporation 286 ITR 232 (SC)**, wherein it was held that expenditure incurred in connection with issues of bonus shares is revenue expenditure. Further, the Counsel for the assessee placed reliance in the case of **CIT vs. Tata Chemicals Ltd. 75 taxmann.com 228 (Bombay)**, which has again held that expenses

incurred for issue of bonus shares are to be allowed as revenue expenditure.

74. We have heard the rival contentions and perused the material on record. In our considered view, after going through the facts of the instant case, Ld. CIT(A) has duly considered and distinguished the facts of the instant case from the case of Brooke Bond India Ltd. (supra) and has taken a view that this is not a case of increase in share capital simplicitor and hence the facts and issues for consideration in the instant case are different from the facts before the Hon'ble Supreme Court in the case of Brooke Bond India Ltd. (supra). Accordingly, in light of the facts of the case, the observations made by Ld. CIT(A) we find no infirmity in the order Ld. CIT(A) so as to call for any interference.

75. In the result, Ground No. 6 of the Department's appeal is dismissed.

Ground No. 7 of the Department's appeal (Disallowance of Rs.3,77,00,339/- under Section 36(1)(iii) of the Act)

76. The brief facts in relation to this ground of appeal are that the Assessing Officer made disallowance of interest of Rs. 3,77,00,339/- on proportionate basis on the Capital Work-In-Progress on the average CWIP. The Assessing Officer was of the view that the assessee failed to establish any nexus to prove that the assessee had liquid funds available with it as on the date when the capital advances were made for the

purpose of Plant & Machinery, Electric Installation and for other fixed assets. The Assessing Officer held that in absence of any evidences it was established that the assessee utilized borrowed funds for giving capital advances for the purpose of Capital WIP. Accordingly, the Assessing Officer held that interest on borrowed funds to the extent of advances utilized for the purpose of CWIP was to be capitalized and hence is disallowable under Section 36(1)(iii) of the Act.

77. In appeal before CIT(A), the assessee contended that CWIP advances were made for the purpose of business. The assessee submitted that it had sufficient interest free funds available in the form of share capital and reserves and surplus for purpose of giving CWIP advances to various parties. Ld. CIT(A) after going through the facts of the case and the judicial precedents cited by the assessee deleted the additions with the following observations:-

> *"12.5. It is apparent that the appellant had granted the CWIP advances of Rs.86,53,04,054/- while it had the interest free own funds of Rs. 599,67,89,9277- as on 31/03/2011 and Rs. 822,02,05,153/- as on 31/03/2010. Thus, the interest free funds owned by the appellant were much more than the interest free advances towards CWIP. Thus, no interest bearing funds have been utilised for the purpose of CWIP advances. Even otherwise also the advances given towards CWIP were for the business purposes not for any other purposes. Even otherwise also, during the year under consideration the appellant company had earned the profit after tax at Rs.281 crores during the year under consideration which was even more than the total CWIP as on 31 /03/2011. Moreover, the onus on the AO to prove that interest bearing loans have been utilised for the purpose of CWIP has not been discharged, therefore, the allegation of the AO remained unproved.*
>
> *12.6. Considering the facts and submissions, the disallowance made by the AO towards the interest, treating the same as capital expenditure u/s. 36(l)(iii) is not correct, and therefore, the same is deleted. Reliance is placed on the following decisions / judgments:-*

(i) ***CIT Vs. Torrent Leasing & Finance Pvt. Ltd. in Tax Appeal No. 620 to 625 of 2006 dated 17/12/2014,*** *whereby the Hon'ble Gujarat High Court has held that when the interest free funds were available with the appellant then disallowance of interest u/s. 36(1) (iii) of the Act was unwarranted.*

(ii) ***CIT Vs. Raghuveer Synthetics Ltd. [(2013) 354 ITR 222]. The Hon'ble Gujarat High Court has held as under:-***

> *"As can be noted from the order of the Tribunal, the Assessing Officer disallowed the interest solely on the ground that the assessee had given interest-free loans to the associate concerns, viz., R. R. Family Trust and Sagar Textile Mills and this disallowance, in appeal the Commissioner of Income-tax (Appeals) deleted by holding that the amount advanced to both R. R. Family Trust and Sagar Textiles Mils were not given during the year under consideration, but the same was given in the earlier years. The Commissioner of Income-tax (Appeals) had also taken note of the fact that there was sufficient funds available with the assessee-respondent on which there was no interest liability that had been incurred. In such circumstances, relying on the case of Torrent Financiers (supra), it found that the disallowance was not justifiable.*
>
> *The Tribunal on noting these details, in terms held that there was nothing contrary that could be brought on record by the Department. The assessee's equity share capital Rs. 3.85 cores and reserve and surplus of Rs. 5.52 crores also were noted by the Tribunal. It found that the interest-free funds available with the assessee was far greater than the loan advanced to the sister concerns and as a corollary to that, it concluded that the borrowed money was not utilized for the purpose of advance to the sister concerns, as had been noted by the Assessing Officer. What had weighed with the Tribunal is the fact that the entire interest-free funds included owner's own capital and accumulated profits and other interest-free credits and loans and if the total interest-free advances including the debit balance of the partners did not exceed the total interest-free funds available with the assessee, interest was not disallowable merely on account of the utilization of the funds for non-business purposes.*
>
> *Thus, as can be seen the Tribunal actually relied on the findings given in case of Torrent Financiers (supra) and furthermore there was nothing contrary that could be brought on record by the Department for it to hold otherwise. Factually, it found huge funds were available without any interest liability with the assessee and that there was no evidence to hold that the borrowed money was utilized for the purpose of advance to the sister concerns. All these aspects cumulatively led the Tribunal to hold that the disallowance made only on the ground that advances were given out of the borrowed funds, holding the assessee ineligible for allowance of interest by the Assessing Officer of the sum of Rs. 18.66 lakhs was not sustainable.*

The Tribunal has correctly approached the issue which has been proposed in the present tax appeal. When there was no evidence brought on record by the Department for the Tribunal to hold otherwise than what has been concluded by way of any material, we hold that the issue is appropriately concluded in favour of the assessee and against the Revenue."

(iii) ***CIT – I Vs. Amod Stamping Pvt. Ltd. [2014 (45 Taxman. Com 427] has also endorsed the similar views.***

"3.2 Similar observations are made by the learned ITAT with respect to the assessment years 2005-06 and 2006-07. In the case of Reliance Utilities & Power Ltd. (supra), the Bombay High Court has held that if there are funds available both interest-free and overdraft and/or loans taken, then a presumption would arise that investments would be out of the interest-free funds generated or available with the company, if the interest-free funds were sufficient to meet the investments and therefore, interest was deductible. Similar view has been taken by the Division Bench of this Court in the case of CIT v. Gujarat *State Fertilizers & Chemicals Ltd. [2013] 358 ITR 323/36 taxmann.com 230/217 Taxman 229 (Guj.). Applying the ratio/law laid down by the Bombay High Court in the case of Reliance Utilities & Power Ltd. (supra) as well as Division Bench of this Court in the case of* Gujarat *State Fertilizers & Chemicals Ltd. (supra) to the facts of the case on hand and when it has been found that the assessee was having interest-free funds far in excess of investments and therefore, it can be said that the investments are made out of interest-free funds and therefore, the AO was not justified in making additions and/or making disallowance under section 36(1)(iii) of the IT Act. Under the circumstances, no error and/or illegality has been committed by the learned ITAT in deleting the disallowance made by the AO under section 36(1)(iii) of the IT Act. No question of law much less substantial question of law arise with respect to deletion of the disallowance made by the AO under section 36(1)(iii) of the IT Act."*

(iv) ***The Hon'ble Supreme Court in case of Munjal Sales Corporation 298 ITR 298*** *has also observed that when assessee has sufficient interest free funds to grant advances to sister concern, no disallowance of interest is justified.*

(v) ***The Hon'ble Ahmedabad I.T.A.T. in case of Paresh Lal Chand Shah in ITA no 3408/Ahm/2010 vide its order dated 29th April 2013*** *has decided the similar issue in favour of assessee after considering the decision of Raghuvir Synthetics Limited referred supra.*

(vi) ***S. A. Builders Ltd. Vs. CIT (Appeals) & ANR 288 ITR 1 (SC)*** *wherein it has been held as under:-*

"Interest on borrowed funds cannot be disallowed if the assessee has advanced interest free loan to a sister concern as a measure of commercial

expediency; what is to be seen is 'business purpose' and what the sister concern did with the money advanced."

(vii) ***CIT Vs. Reliance Utilities & Power Ltd., 313 ITR 340 (2009) (Bom.)*** *wherein it has been held as under:-*

"Tribunal having recorded a clear finding that the assessee possessed sufficient interest free funds of its own which were generated in the course of the relevant financial year, apart from substantial shareholders fund, presumption stands established that the investments in sister concerns were made by the assessee out of interest free funds and therefore no part of interest on borrowings can be disallowed on the basis that the investments were made out of interest bearing funds.

(viii) ***Shahibaug Entrepreneurs vs. ITO, 50 ITD 113 (Ahd)***

"In absence of nexus between interest-bearing loans taken and interest free loan given, interest paid on borrowed money cannot be disallowed.

There may be variety of reasons why an assessee doesn't charge or take interest from loanee parties; while at the same time, it pay interest on borrowings which are for business purposes. For the simple reason that the assessee has failed to charge interest on its receivables and dues there should not be proportionate disallowance in respect of interest paid by the assessee on its borrowings which are for the purpose of business. In the absence of any finding or evidence that borrowing was not for business, the disallowance of proportionate interest by the Assessing Officer cannot be upheld.

Thus where the assessee borrowed money for the purpose of the business and the interest paid thereon was disallowed proportionately by the Assessing Officer on the ground that the assessee did not charge interest on amounts receivable by it from its subsidiary company and others but the assessing officer had not shown any nexus or close relation between the loans obtained and the loans advanced free of interest, it was held that the disallowance was not justified"

ix) ***Gujarat Narmada Valley Fertilizers Co. Ltd. Vs. DCIT ITAT, Ahmedabad - A Bench [73 TTJ 787]***

"Business expenditure interest on borrowed capital diversion of interest bearing advances to associate concerns without interest sufficient funds available with assessee on which no interest was paid no evidence to link the interest bearing loan obtained by assessee with interest free advances made to associate concerns addition deleted.

Held

On going through the figure in the balance sheet of the assessee company as on 1st April, 1994 and 31st March, 1995 it found that the share capital and the reserves and surplus together with the accumulated depreciation would far exceed the loans and advances made to the three concerns. The percentage of loans and advances in relation to the own funds of the assessee company would be 0.012 percent as on 1st April 1994 and 0.0135 percent as on 31st march 1995, as per details furnished. In other words where sufficient funds available with the company on which no interest was paid and out of which the loans and advances to the above said concerns could be made. There is no clear evidence that the interest bearing loans taken by the assessee company for the purpose of its own business have been diverted for non business purpose, no direct nexus has been proved either by the AO or by the CIT(A) between the interest bearing loans taken and the interest free advances given. In this view of the matter, the AO is directly to delete the addition ShahibaugEnterprenuers v. ITO [1994] 49 TTJ (Ahd) 554; (1994) 50 ITD 113 (AMD) Durametalic India vs. I Ac (1991) 38 ITD 211 (Mad.) 209; (1993) 46 ITD 389 (Mad.) 138 ITR 45 (Guj) CIT vs. Hotel Severa (1998) 148 CTR (Mad.) 585 and Regal Theatre vs. CIT (1998) 100 Taxman 116 (Del.) relied on".

x) ITO Vs. Anjani Synthetics Ltd. [2012] 20 Taxmann. com 121 (Ahd. ITAT) dated 07/05/2010 *- whereby it has been held that when AO having not established that any borrowed funds were utilised by the assessee either for giving interest free loans or for non business purpose, no pat of interest paid on borrowed funds could be disallowed.*

xi) CIT Vs. Reliance Utilities & Power Limited [2009] 178 taxmann. 135 (Bombay)

12.7. Respectfully following the judgments of Hon'ble Gujarat High Court, jurisdictional I.T.A.T. and other authorities referred above and also judgments cited in the written submission, the disallowance of interest made by Assessing Officer of Rs.3,77,00,339/- is found uncalled for and hence the same is ***deleted.***

The ground of appeal is ***allowed.****"*

78. The Department is in appeal before us the aforesaid order passed by CIT(A) deleting the additions on this issue. On going through the facts of the instant case and the observations made by CIT(A) in the appellate order, we are of the considered view that the issue is directly covered in favour of the assessee by the decision of **CIT vs. Raghuvir Synthetics Ltd. 354 ITR 222 (Guj.)**, wherein the Courts have held that

where huge funds were available without any interest liability with assessee and there was no evidence to hold that borrowed money was utilized for purpose of advance to sister concerns, no disallowance of interest was warranted. We observe that Ld. CIT(A) has, after a detailed discussion on the facts of the case and judicial precedents as the subject decided this issue in favour of the assessee. Accordingly, we find no infirmity in the order of Ld. CIT(A), so as to call for any interference.

79. In the result, Ground No. 7 of the Department's appeal is dismissed.

Ground No. 8 (Disallowance under Section 40A(2)(b) of Rs. 1,79,46,654/-)

80. The brief facts in relation to this ground of appeal are that during the course of assessment, the A.O. made a disallowance of Rs. 1,79,46,654/- in respect of purchases made and payment of services to related parties. The A.O. was of the view that the assessee has failed to furnish comparative evidences in respect of similar items of purchases from the group companies and from outside parties, so that reasonableness of payment in terms of provisions of Section 40A(2)(b) of the Act could be verified. The A.O. was of the view that the onus of the assessee to prove the genuineness and reasonableness of payments to parties under Section 40A(2)(b) of the Act has not been established. The A.O. was of the view that the assessee did not furnish any comparative bills and in absence of production of specific evidences of purchase from

outside parties, the payment in respect of purchases made from related parties was excessive having regard to the Fair Market Value of the services in view of the provisions of Section 40A(2)(b) of the Act. Accordingly, a lumpsum disallowance @ 2.5% of the purchase / payments was disallowed by the A.O. and added to the income of the assessee.

81. In appeal before Ld. CIT(Appeals), the assessee submitted that it has made payments towards R&D clinical expenses of Rs. 49,89,38,734/- to Lambda Therapeutic Research Ltd. for clinical trials which was essential before launching any products in the market. The assessee submitted that due to various factors, comparison of payment towards clinical trials is not possible and further it was submitted that Lambda is also under the same tax bracket as the assessee, and therefore, there was no reason to make any excessive payments. Further, the assessee submitted that it made payment towards Research & Development amounting to Rs. 12,41,12,500/- to Astron Research Ltd. Further, Astron is also falling in the same tax bracket and therefore, there was no excess payment made towards the services. With regards to finished goods, the assessee submitted that it had made purchases from Intas Bio Pharmaceuticals Ltd. and the said company is falling in the same tax bracket and therefore, no excessive payments have been made. Ld. CIT(A) allowed the appeal of the assessee with the following observations:-

"14.8. Having considered the facts and submissions, it is noticed that the AO has made the disallowance of the purchases and payment towards services mainly for the reason that the appellant has not provided any comparative instances to show that no excessive payments have been made by the appellant. The appellant has provided the basic details available with it and submitted that each of the R & D clinical expenses paid for the clinical trials are not comparable with any other clinical trials. All these information are secret information based on specific formulations and the same cannot be similarly made for appellant and for outside parties. Therefore, no comparative instances are available on this account. Moreover, the AO has adopted the excessive payment on lumpsum basis @ 2.5% of the payments to them without any base. Even the AO has not given any basis showing that some excessive payments have been made by the appellant to the related parties. The onus wasupon the AO to prove the details and evidences that some excessive payments have been made and in the instant case, the appellant has tailed to provide such details. In this regard, reference is made to the judgments / decision of Hon'ble Courts briefly discussed as under:-

(i) ***CIT Vs. Aditya Medisales Ltd. (Tax Appeal No. 559 of 2009dated 04/05/2000)***

(ii) ***Vipul Mehta Vs. ACIT (ITA No.869/Ahd/2010 dated 09/07/2010) (ITAT, Ahmedabad)***

(iii) ***Laxmi Pulse Rice And Roller Flour... vs Assessee on 1 August, 2012 by the Hon'ble INCOME TAX APPELLATE TRIBUNAL 'C BENCH - AHMEDABAD - IT(SS)A No.50, 51 and 52/Ahd/2010 - A.Y.: 2001-02, 2002-03 and 2003-04***

The relevant extract of the decision is reproduced hereunder.-

"5. We have heard the rival submissions, carefully perused the orders of the revenue and gone through the paper book submitted by the learned AR along with the certificate of Financial Broker, Fakhari JabirbhaiJambughodawala of Dahod dated 14-09-2009 wherein prevailing market rate of interest on deposits during F. Y. 2000-01 to 2004-05 has been confirmed to be 12% to 18 and during F. Y. 2005- 06 and 2006-07 the same has been confirmed to be 127o to 15%. We also find that ITAT Ahmedabad "A" Bench in the case of M/s. Krishna Terene Pvt. Ltd. in ITA No.775/And/2010 dated 30-03-2012 wherein the similar issue was decided in favour of the assessee and against the revenue. The relevant portion of the findings of the Tribunal in the above case is reproduced herein below:

3. We have considered the rival submissions and perused the orders of the AO and the learned CIT(A) and also the orders of the AO and the learned CIT(A) in the immediately preceding Assessment Year 2004-05. We find that in similar facts the addition made u/s 40A(2)(b) of the Act on account of IT (SS) A No.50, 51 and 521 A/2010 (AY: 2001-02 to 2003-04) 6 Laxmi Pulse Rice & Roller Mills, Vs ACIT, CC-1, Baroda excessive interest in the immediately preceding assessment year 2004-05

was deleted by the learned CIT(A) in the case of the assessee vide his order dated 29-01-2008. It was stated by the assessee that no further appeal was preferred by the Revenue against the said order of the learned CIT(A). Even on merits, we find that the issue has to be decided in favour of the assessee since the disallowance was made only for the reason that the interest was paid to the depositors at the rate of 18% whereas it was paid to the bank at 13.5% per annum. The interest rate of 18% could not be said to be excessive inthe facts of the case. We find that the learned CIT(A) in his appellate order for the preceding assessment year 2004-05 has recorded that other persons who are not covered by section 40A(2)(b) of the Act were also paid interest at the rate of 18%. There are other factors also justifying higher rate of interest paid to the creditors as compared to the rate of interest paid to the bank, such as no need of offering security or pledging the movable or immovable asset, the period for which the loan was required and the purpose of the loan, etc. There is no material brought on record on behalf of the Revenue to suggest that the assessee has paid a lower rate of interest to outside parties as compared to the depositors covered u/s 40A(2)(b) of the Act. In these facts of the case, we hold that the addition / disallowance made u/s 40A (2)(b) on account of excessive interest is not justified and is deleted accordingly and the ground of appeal No.1 is allowed."

5.1 In view of the above discussions, keeping consistency with the decision taken in similar facts and circumstances by our Co-ordinate Bench, we hereby allow the appeal of the assessee in IT(SS)A No.50/Ahd/2010 for AY 2001-02.

5.2 Since, the facts and issue involved in case of the assessee for AY 2002-03 and 2003-04 are similar to that of AY 2001-02 and both the sides requested the Bench that the decision taken in the case of the assessee in AY 2001-02 may be followed in AY 2002-03 and IT (SS) A No.50, 51 and 52/A/2010 (AY: 2001-02 to 2003-04) 7 Laxmi Pulse Rice & Roller Mills, Vs ACIT, CC-1, Baroda 2003-04, we hereby allow both the appeals of the assessee in IT(SS)A No.51 and 52/Ahd/2010 for AY 2002-03 and 2003-04.

- ***Hon'ble ITAT "A" Bench, Ahmedabad** in the case of **ACIT Vs. M/sBudhalal& Co.** ITA No. 47/Ahd./2011 where in it is held that,*

  " there is nothing to suggest that the AO ever brought ant material on record on this aspect in respect of the fair market value of the facilities, for which the payment had been made, before concluding that expenditure was excessive or unreasonable. We are of the opinion that disallowance under s. 40A(2) is to be considered vis - a -vis the market value of the services or facilities or an fulfillment of any of the other ingredients mentioned hereinbefore and not the individual action of the assessee in charging or paying interest. In view therefore, we are not inclined to interfere with the conclusion drawn by the Ld. CIT (A). Therefore, ground nos. 1 & 2 in this appeal are dismissed."

- ***Hon'ble ITAT Ahmedabad** in the **case of DC/T Vs. M/s Cama Hotels Ltd.** ITA No. 1834/Ahd/2012, where in it is held that,*

"It has avoided a lot of formalities by taking loans from the associate concern. In our opinion, the payment of interest at a little higher rate to the persons even if covered u/s.40A(2)(b) cannot be termed as exorbitant when the fair market value of such interest cost is being considered. The assessee has paid interest commensurate with the interest rate prevailing in the open market. An order of the ITAT, Ahmedabad in ITA No.869/Ahd/2010 rendered in case of Vipul Y. Mehta vs. AC IT has been brought to our notice, wherein Tribunal has upheld the allowance of the interest rate @ 18% per annum to the relatives on unsecured loan. Considering all these aspects, we are of the view that Id. First Appellate Authority has appreciated the controversy in right perspective. Assessee has not extended any undue benefit to the persons covered u/s.40A(2)(b) of the Income Tax Act. This ground of Revenue's appeal is rejected."

- ***Hon'ble ITAT*** *in the case of* ***M/s Jyofi Enterprise Vs. DC/T*** *in ITA No.750/And/2012, where in it is held that,*

  " we find that the honable jurisdictional high court in (2014) 50 taxman.com 52 Gujarat CIT Vs. Sarjan Realities Ltd. holds that solely because an assessee had paid an interest to different parties would not itself be a ground to come to conclusion that payment of interest to related companies at rate other than that paid to other parties was excessive and unreasonable resulting in section 40A(2)(b) addition in question. We reiterate that neither of the lower authority gives an independent finding of such an excessive component over and above the prevailing market interest rate."

- *Hon'ble ITAT Ahmedabad "C" Bench in the case of* ***M/s Saffron Enterprise Vs. DCIT*** *ITA No. 1100/AHD/2008, where in it is held that,*

  " it is not in dispute that generally in the market rate of interest in respect of unsecured loan is a bit higher than the rate of interest prevalent in respect of secured loan. Thus, as rate of interest in respect of secured loan from the bank in the case of the assessee was 16.5%, rate of interest in respect of unsecured loan @ 18% cannot be held as excessive or unreasonably higher than the market rate. Further, simply because the assessee could make a better bargain with some parties and could secure unsecured loan at a lower rate of interest, it does not imply that the market rate of interest was lower. In the instant case market rate of interest in respect of secured loan is evident by the bank loan taken by the assessee on which interest @ 16.5% was charged in respect ofactual borrowing and therefore interest of 18% in respect of unsecured loan cannot be held as excessive or unreasonable than the market rate so as to warrant any disallowance by invoking provisions of Section 40A(2) of the Act. In view of the above, we delete the disallowance of interest of Rs. 3,67,271/- and allow this ground of appeal of the assessee."

  14.9. Even the AO has not given any reason or justification for adopting this rate of 2.5% and neither he has given any specific or comparable instance to show that payment made to these parties were not reasonable or not as per the prevalent fair market value. Thus, the disallowance was made on adhoc basis on pure estimate and hence not sustained. Thus, the disallowance is ***deleted.****"*

82. On going through the facts of the instant case we are of the considered view that Ld. CIT(A) has correctly observed that the A.O. was not justifying in adopting a lumpsum rate of 2.5% of such expenses as being excessive and there was no basis or rationale for arriving at such ad-hoc percentage for making disallowance under Section 40A(2)(b) of the Act. Further, we are also of the considered view that Ld. CIT(A) has correctly observed that the Assessing Officer has also not given any specific comparable instances to show that payment made to these parties was not reasonable or not as per prevalent Fair Market Value. Accordingly, we find no infirmity in the order of the Ld. CIT(A) so as to call for any interference.

83. In the result, Ground No. 8 of the Department's appeal is dismissed.

Now we shall take up assessee's appeal for A.Y. 2011-12

84. We observe that Ground Nos. 1, 2, 3 and 4 of Assessee's appeal are similar to Grounds raised in A.Y. 2009-10. Therefore, our observations in A.Y. 2009-10 would apply to these Grounds raised by the assessee for A.Y. 2011-12 as well. Accordingly, Ground Nos. 1, 2, 3 and 4 of assessee's appeal are disposed of accordingly.

Ground No. 5 (Disallowance of Rs. 12,86,51,799/- under Section 35(1)(vi) relating to expenditure incurred on intangibles)

85. The brief facts in relation to this ground of appeal are that during the course of assessment proceedings the assessee filed a letter dated 17.11.2014 before the Assessing Officer and claimed deduction @ 100% under Section 35(1)(i) in respect of Capital Work-In-Progress being intangible in nature at Rs. 1286.52 lakhs. In the said letter, the assessee also mentioned before the Assessing Officer that these expenditures were intangible CWIP and not incurred in-house and therefore, not eligible under Section 35(2AB) of the Act. However, the Assessing Officer did not give deduction of claim made by the assessee under Section 35(1)(i) of the Act of Rs. 12,86,51,799/- and further there was no discussion in the assessment order for rejection of claim made by the assessee on this issue during the course of assessment proceedings. In appeal, Ld. CIT(A) dismissed the appeal of the assessee with the following observations:-

> *"However, the appellant has not providing any explanation / details for eligibility of such claim not made in the return of income, but claimed through the letter in the assessment proceedings. Further, the appellant has claimed the deduction u/s. 35(12)(i) of the Act in the letter submitted to the AO, while in the grounds of appeal and submission, it has claimed the deduction u/s. 35(1)(iv) of the Act. Therefore, the justification of allowability of such expenditure has not been proved by the appellant either in the assessment proceedings or in the present appellate proceedings. Thus, the claim of the appellant cannot be said to be found eligible for deduction, and hence, no deduction is granted to the appellant. Thus, the ground of appeal is* ***dismissed.****"*

86. The assessee is in appeal before us against the aforesaid order passed by Ld. CIT(A) on this issue. Before us, the Counsel for the assessee relied on the decision of **CIT vs. Mitesh Impex 46 taxmann.com 30 (Gujarat)** and submitted that the Gujarat High Court

has held that the Tribunal is within its power to entertain a new claim for the first time even though the same has not been made before the A.O. In this case the Gujarat High Court has held that income tax proceedings are not strictly speaking adversarial in nature and the intention of Revenue would be to tax real income. The Counsel for the assessee submitted that the assessee is eligible for claim of deduction as under Section 35(1)(i) of the Act and in the interest of justice, the matter may be referred to the file of A.O. for consideration of the claim of the assessee on this issue.

87. On going through the instant facts and the decision cited by the assessee, we are of the considered view that in the interest of justice, the matter may be referred to the file of A.O. for consideration of the claim made by the assessee for deduction under Section 35(1)(i) of the Act.

88. In the result, Ground No. 5 of the assessee's appeal is allowed for statistical purposes.

Ground No. 6 (CIT(A) erred in not admitting additional ground raised by assessee relating to disallowance under Section 40(a)(ia) towards commission paid outside India to non-resident agents operating outside India.

89. The brief facts in relation to this ground of appeal are that the A.O. made disallowance of Rs. 39,15,000/- on account of foreign commission payments due to non-deduction of tax at source on such payments under Section 40(a)(ia) of the Act. However, Ld. CIT(A) did not consider the

additional ground of appeal raised by the assessee with respect to non-deduction of TDS on sales commission paid in overseas jurisdiction. The Ld. CIT(A) dismissed this additional ground raised by the assessee on this issue with the following observations:-

> *"I have carefully considered the facts of the case, assessment order and submission of the appellant. The appellant has raised this ground before this office first in the appellate proceedings, as the same was not raised in the original appeal filed in Form No. 35. Even no details and evidences in support of the claim of expenditures having been submitted in the assessment proceedings before the AO. Thus, the entire material was not on record while taking the additional ground by the appellant. The appellant has not substantiated the good and sufficient reasons for admitting this additional ground submitted in the appellate proceedings, therefore, the same is not admitted in view of the following judgments:-*
>
> - ***Appellant to satisfied about existence of good reasons for omission of such ground in original appeal memo - failure of assessee to give any reason, the additional ground could not be entertained - Held in the case of Batliboy& Co. Ltd. Vs. DCIT [ITAT, MUM] 67 ITD 397, S. Kumar's Tyre Manufacturing Co. Ltd. Vs. DCIT [ITAT, Indore] 61 ITD 326.***
>
> - ***Question of law can be raised afresh before ITAT if the relevant facts are on record - Appellant to satisfy that the ground raised was bonafide and the same could not have been raised earlier for good reasons. Held in the case of National Thermal Power Co. Ltd, Vs. CIT [SC] 229 ITR 383.***
>
> *19.4. In view of the aforesaid discussion, the additional ground raised by the appellant does not deserve to be admitted and hence, the same is rejected and the ground of appeal is* ***dismissed.****"*

90. Before us, the Counsel for the assessee submitted that the assessee has a good case on merits on the issue of non-deduction of TDS with respect to sales commission paid to non-resident commission agents and accordingly, in the interest of justice, the matter may be restored to the file of A.O. for de-novo consideration.

91. On going through the facts of the instant case, and the arguments put by the Ld. Counsel by the assessee, in the interest of justice, the issue is restored to the file of A.O. for de-novo consideration, after giving due opportunity of hearing to the assessee.

92. In the result, Ground No.6 of the assessee's appeal is allowed for statistical purposes.

93. In the combined result, the appeals filed by the assessee for A.Ys. 2009-10 to 2011-12 are partly allowed for statistical purposes and appeals filed by the Department are partly allowed.

This Order pronounced in Open Court on	**31/01/2024**

Sd/-	**Sd/-**
(ANNAPURNA GUPTA)	**(SIDDHARTHA NAUTIYAL)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad; Dated 31/01/2024
TANMAY, Sr. PS ***TRUE COPY***

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad