

IN THE INCOME TAX APPELLATE TRIBUNAL  
Mumbai "A" Bench, Mumbai.

Before Shri B.R. Baskaran (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. No. 1921/Mum/2020 (A.Y. 2010-11)  
I.T.A. No. 1922/Mum/2020 (A.Y. 2011-12)  
I.T.A. No. 1923/Mum/2020 (A.Y. 2012-13)  
C.O. No. 128/Mum/2021 (A.Y. 2010-11)  
C.O. No. 131/Mum/2021 (A.Y. 2011-12)  
C.O. No. 130/Mum/2021 (A.Y. 2012-13)

M/s. Lupin Limited 7 <sup>th</sup> Floor, Kalpataru Inspire, Off Western Express Highway Santacruz East Mumbai-400 055. (Appellant)	Vs.	DCIT, Circle-3(4) 29 <sup>th</sup> Floor Center 1, World Trade Centre Cuffe Parade Mumbai-400 005. (Respondent)
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I.T.A. No. 394/Mum/2021 (A.Y. 2010-11)  
I.T.A. No. 456/Mum/2021 (A.Y. 2011-12)  
I.T.A. No. 20/Mum/2021 (A.Y. 2011-12)  
I.T.A. No. 455/Mum/2021 (A.Y. 2012-13)  
I.T.A. No. 21/Mum/2021 (A.Y. 2012-13)

DCIT/ACIT, Circle- 3(4), 29 <sup>th</sup> Floor Center 1, World Trade Centre Cuffe Parade Mumbai-400 005. (Appellant)	Vs.	M/s. Lupin Limited 159 CST Road Kalina Santacruz East Mumbai-400 098. (Respondent)
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PAN : AAACL1069K

Assessee by	Shri Rajan Vora
Department by	Shri Ashok Kumar Ambastha
Date of Hearing	03.11.2023
Date of Pronouncement	25.1.2024

ORDER

Per Bench: -

The cross appeals filed by the parties and the cross objections filed by the assessee are related to the A.Y. 2010-11, 2011-12 & 2012-13. All of them are directed against the orders passed by the learned CIT(A)-57, Mumbai. All these appeals were heard together and are being disposed of by this common order, for the sake of convenience. The appeals numbered as ITA No.20/Mum/2021 and ITA No.21/Mum/2021 are directed against the rectification orders passed by the Ld CIT(A) for AY 2011-12 and 2012-13 respectively and the other appeals/cross objections are directed against the orders passed by Ld CIT(A) against original assessment orders.

2. The assessee is engaged in the business of manufacture and sale of pharmaceutical products.

**ASSESSMENT YEAR: 2010-11:-**

3. We shall first take up the appeal relating to A.Y. 2010-11. However, the common issues, i.e., if both the parties are in appeal before us on very same issues, they are adjudicated together.

4. **We shall first take up the appeal of the assessee.** The first issue urged by the assessee relates to the disallowance of alleged bogus expenses amounting to Rs.18,15,788/-. According to the assessee, the above said disallowance consisted of general expenses of Rs.14,96,706/- and expenses that were capitalised by the assessee amounting to Rs. 3,19,082/-.

4.1 The facts relating to this issue are that the assessee was subjected to search on 15.3.2012. In the statement taken during the course of search, the assessee admitted that the commission expenses to the extent of Rs.9,05,34,000/- are bogus in nature. However, while filing the return of income the assessee disallowed a sum of Rs. 8,80,97,745/- only as relating

to bogus commission expenses. With regard to the balance amount of Rs.24,36,256/-, it was submitted that the same represented genuine miscellaneous expenses and it has been wrongly included in the commission expenditure at the time of search proceedings. Accordingly, the assessee contended that the above said expenditure is not required to be disallowed as bogus in nature. The assessee also submitted that the above said amount of Rs. 24,36,256/- included capital expenditure of Rs. 6,20,460/-, being stamp duty paid on purchase of land. Accordingly the assessee submitted that the disallowance of Rs. 24,36,256/- is not called for. During the course of assessment proceedings, the assessee also identified some more expenses to the tune of Rs.3,19,082/-, which had been capitalized. The assessee also furnished documentary evidences to substantiate its claim.

4.2 The Assessing Officer did not accept the explanations given by the assessee. However, he reduced the amounts capitalised by the assessee, viz., Rs.6,20,468/- (+) Rs.3,19,082/- from the shortfall amount of Rs. 24,36,256/- Accordingly he disallowed a sum of Rs. 14,96,706/-. With regard to the amount of Rs.3,19,082/-, that was capitalised by the assessee, the Assessing Officer held that the depreciation claimed thereon shall be disallowed. The learned CIT(A) confirmed the order passed by the Assessing Officer on this issue.

4.3 We heard the parties on this issue and perused the record. We noticed that the AO had made identical disallowance on identical reasoning in A.Y. 2009-10. The said issue has been examined by the Tribunal in assessee's own case in AY 2009-10 in ITA No. 1920/Mum/2020 dated 3.2.2023 and the Tribunal deleted the disallowance made by the AO. The relevant observations made by the Tribunal are extracted below :-

“6.4 In our view, we may leave aside the issue as to whether the said retraction is valid or not, since the assessee is supporting its stand for not disallowing these expenses on merits. In our view, the stand of the

assessee, in the facts and circumstances of the case, merits acceptance. First of all, there is no dispute that the amount of Rs.48,89,052/- is not in the nature of commission expenses, i.e., the assessee has admitted that it has booked bogus expenses by way of commission payments only. Secondly, it has furnished the details of materials purchased through these bills, delivery challans etc., to prove receipt of materials. The assessee has also explained the reason as to why these expenses were not added to the total income while computing total income. We notice that the tax authorities have ignored all these aspects on merits, but placed their reliance on the statement made u/s 132(4) of the Act. The provisions of sec.132(4) enables the assessing officer to presume that the admission made in the statement "may be" used in the assessment proceedings. It is well settled proposition of law that it is a rebuttable presumption, meaning thereby, the deponent could show that the admission made by him in the statement was wrong. In the instant case, in our view, the assessee has rebutted the admission by furnishing evidences in support of the expenses. The very same fact that a sum of Rs.9,86,470/- out of the above said expenditure amount of Rs.48,89,052/- represents Capital expenditure (which fact has also been accepted by the AO) would show that there is merit in the submission of the assessee. For booking bogus expenses, it is unlikely that anyone will account for bogus capital expenses. Accordingly, we are of the view that the explanation given by the assessee on this aspect merits acceptance. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the addition of Rs.39,02,582/-. Accordingly, we hold that the consequential disallowance of depreciation on the capital expenditure amount of Rs.9,86,470/- is also not warranted and we direct the AO accordingly."

Since the facts and circumstances of this addition are identical in this year also, following the decision rendered by the Tribunal in AY 2009-10, we set aside the order passed by the learned CIT(A) on this issue and direct the Assessing Officer to delete the disallowance of Rs.14,96,706/- and also disallowance of depreciation made on the capital expenditure.

5. Next issue urged by the assessee relates to disallowance of purchases of Rs.10,18,79,031/- holding the same as bogus in nature. We noticed that an identical disallowance was made in A.Y. 2009-10 and the Coordinate Bench, vide its order referred supra, has restored this matter to the file of the Assessing Officer for examining it afresh in the light of the discussions made by the Tribunal. Before us, the assessee has also filed certain additional

evidences to substantiate that the purchases made by it are genuine in nature. All of them also require examination at the end of the AO. In any case, an identical issue has been restored by the Tribunal in A.Y. 2009-10 to the file of AO. The relevant observations made by the Tribunal are extracted below: -

“7.3 We heard the parties on this issue and perused the record. We notice that the assessee has submitted that it has revised VAT returns under protest on 8<sup>th</sup> July, 2011, after Sales tax survey, since it would not get input VAT credit on the alleged bogus purchases. It is stated that on the basis of revised sales tax returns, it has agreed to surrender Rs.58.80 crores during the course of search towards bogus purchases in various years, which included Rs.10.00 crores pertaining to the year under consideration. However, it is stated that the assessee has noticed that the most of the vendors were not included in the final list of suspicious dealers published by MVAT authorities in its website. Hence, the assessee has re-revised its VAT returns after verification on 26<sup>th</sup> June, 2012, i.e., subsequent to the date of search. According to the assessee, the re-revised VAT returns has since been accepted by the VAT authorities. Accordingly, it was submitted that the surrender of income towards alleged bogus purchases was made on the basis of incomplete information and further on the reasons that the assessee was not able to prove the genuineness of purchases at that point of time.

7.4 With regard to the statement given by one of the vendors Shri Naresh Kantilal Shah, which was referred to by the AO, the assessee submitted that it has not made any purchases from the concerns belonging to the above said person during the year under consideration. On legal aspects, the assessee has contended that the addition could not be made merely on the basis of statement given on oath.

7.5 The Id D.R, on the contrary, supported the orders passed by tax authorities on this issue.

7.6 We notice that the assessing officer has entirely placed his reliance on the statement given by the employees and directors of the assessee u/s 132(4) of the Act. Besides the above, the AO has also placed reliance on the statement given by Shri Naresh Kantilal Shah, one of the accommodation entry providers and also the statement given by the Vice President (Taxation). However, we notice that the surrender made by him was not added by the AO. We notice that the assessing officer did not examine the explanations of the assessee as to why it was constrained to make surrender towards alleged bogus purchases. Though there was no specific retraction of the surrender so made, yet we have noticed earlier that the surrender made in the statement recorded u/s 132(4) of the Act

can be rebutted by producing evidences against the surrender. In the instant case, the additional evidences relied upon by the assessee to rebut the surrender are:-

- (a) Re-revised VAT returns.
- (b) VAT orders passed by the VAT authorities accepting the re-revised VAT returns,

The question of suspicious dealers came to fore only on the reason that these dealers did not deposit VAT tax after issuing accommodation bills. If the assessee could get VAT credit against these bills, then it may be possible to presume that the suppliers are genuine. Under these set of facts, it is claimed by the assessee that the surrender towards bogus purchases was made on the technical reason that the said suppliers have not paid VAT amount, which would disentitle the assessee to claim VAT credit and hence the assessee cannot effectively prove the genuineness of purchases. If the re-revised VAT returns have been accepted by the VAT authorities and the assessee got the credit of VAT amount, it is submitted that the entire foundation on which the surrender was made got demolished. It is also submitted that these suppliers are not included in the list of suspicious dealers by MVAT authorities.

7.7 Under these set of facts, we are of the view that the assessee may be provided with one more opportunity to prove the genuineness of purchases. Accordingly, this issue requires fresh examination at the end of the AO, since the AO has not examined these factual aspects. In order to prove the genuineness the assessee may also furnish documents/details, on sample basis, to show that the relevant goods have been received and used by it. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and restore the same to the file of AO for examining it afresh in the light of discussions made supra.

Following the above said decision, we set aside the order passed by Ld CIT(A) on this issue and restore the matter to the file of AO with similar directions.

6. Next issue urged by the assessee relates to the disallowance made under section 14A of the Act. The revenue is also contesting the decision rendered by Ld CIT(A) on this issue. **(Common issue)**. Hence this is a common issue in the appeals of both the parties. During the year under consideration the assessee earned exempt dividend income of Rs.1,04,410/- from equity shares and mutual funds. The assessee made suo moto disallowance of Rs.1,50,832/- under section 14A of the Act, which consisted

of interest disallowance of Rs.92,255/- and general expenditure disallowance of Rs.50,578/-. However, during the course of assessment proceedings the assessee claimed that it has not incurred any expense for earning exempt income. Accordingly it claimed no disallowance under section 14A of the Act is called for. In the alternative, it was submitted that the disallowance u/s 14A should not exceed exempt income. The Assessing Officer did not accept new claim so put forth by the assessee. He held that the assessee has made new claim without filing revised return of income. In this regard, he took support of the decision rendered by Hon'ble Supreme Court in the case of Goetz (India) Ltd. Vs. CIT (284 ITR 323).

6.1 The learned CIT(A) also did not accept the contentions of the assessee. However, he accepted alternative contentions of the assessee that the disallowance under section 14A of the Act should be restricted to the amount of exempt income and directed the AO accordingly.

6.2 We heard the parties on this issue and perused the record. The Ld A.R submitted that the own funds available with the assessee was more than the value of investments and hence no disallowance out of interest expenses is called for. The Ld A.R submitted that the own funds available with the assessee (after exclusion of certain reserves, share premium etc.) as at the beginning and end of the year was Rs. 1421.23 crores and Rs. 1901.10 crores respectively. The investments shown in the balance sheet as at the end of the beginning and end of the year was Rs. 473.87 crores and Rs. 724.07 crores. Since the own funds available with the assessee was more than the value of the investments, disallowance out of interest expenditure is not called for as held by Hon'ble Bombay High Court in the case of HDFC Bank Ltd. (2014) 366 ITR 505. Accordingly, it was contended that the suo moto disallowance made by the assessee out of interest expenditure, being contrary to the binding decision rendered by Hon'ble Bombay High Court, is

liable to be excluded. We agree with the above said contentions of the assessee. When the own funds available with the assessee is more than the value of investments, then the presumption is that the own funds have been used to make investments, as held by Hon'ble Bombay High Court in the case of HDFC Bank Ltd (supra). Accordingly, it was held by Hon'ble Bombay High Court that no disallowance out of interest expenditure is called for. Accordingly, we direct the AO to delete the interest disallowance made by the assessee/AO.

6.3 With regard to disallowance to be made out of general expenses, the learned AR submitted that the dividend income was directly received in the bank account and no specific expense has been earned for earning exempt income. Accordingly it claimed that no disallowance out of general expenses also should be made. However, we noticed that the Coordinate Bench in earlier assessment year, i.e., in AY 2009-10 has taken note of the fact that there is increase in the investments and also receipt of dividends, meaning thereby there was some activity in the investment portfolio of the assessee. Accordingly, the Tribunal held that disallowance under section 14A of the Act is called for. Accordingly, in the facts of that year, the Tribunal directed the Assessing Officer to disallow 15% of the exempt income to meet the requirements of section 14A of the Act. In the current year also, we notice that facts are identical, i.e., there is increase in the investments and further there was receipt of dividends. Accordingly, we also hold that disallowance under section 14A for general expense is called for. Accordingly, following the decision rendered in AY 2009-10, we direct the AO to restrict disallowance u/s 14A of the Act to 15% of the exempt income and the same, in our view, would meet the requirements of section 14A of the Act. Accordingly we set aside the order passed by the learned CIT(A) on this issue and direct the Assessing Officer to disallow 15% of the exempt income under section 14A of the Act.

7. Next issue urged by the assessee is related to the disallowance of depreciation on goodwill, which arose on account of amalgamation of three companies. It is pertinent to note that the assessee did not claim this depreciation in the return of income. However, it appended a note to the return of income stating that it reserves the right to claim depreciation on goodwill. Accordingly, during the course of assessment proceedings, the assessee claimed depreciation on the good will amount of Rs.21.81 crores. The Assessing Officer rejected the said claim by observing that the assessee has made a new claim without filing revised return of income. In this regard the Assessing Officer took support of the decision of Hon'ble Supreme Court rendered in the case of Goetz (India) Ltd. (supra).

7.1 The learned CIT(A) took the view that the Sixth Proviso to section 32(1) of the Act is applicable to the facts of the present case and hence the succeeding company i.e. the assessee herein, will not be entitled to claim depreciation. Accordingly he disallowed the claim of the assessee. He also did not examine the factual aspects relating to goodwill amount.

7.2 The background in which the goodwill arose to the assessee is discussed in brief. The assessee was having three wholly owned subsidiary companies namely M/s. Lupin Pharma Care Ltd, M/s. Lupin Herbal Ltd. & M/s. Novodigm Limited. All the three companies were amalgamated with the assessee company with effect from 1.4.2009 as per the scheme of amalgamation. The said scheme was sanctioned by Hon'ble Bombay High Court on 8.1.2010 and by Hon'ble Gujarat High Court on 6.5.2010. Pursuant to the amalgamation of these three companies,

- (a) All assets and liabilities of those three companies were transferred to the assessee at respective book values.
- (b) All inter-company balances were cancelled.

- (c) The shares held by the assessee in the three companies were also cancelled, i.e., the assets and liabilities of the three companies were transferred to the assessee company in lieu of the shares held by it in those three companies.

7.3 We notice the share value, i.e., investment value held by the assessee in three companies was Rs.47.39 crores. The aggregate net asset value (assets minus liabilities) of all the three companies that were taken over by the assessee in lieu of the shares is mentioned as Rs. 24.82 crores. Thus the assessee received net asset value of Rs.24.82 crores only against the investment value of Rs.47.39 crores, which represented fall in the value of investment to the tune of Rs.22.57 crores (Rs.47.39 crores minus Rs. 24.82 crores). This shortage amount or fall in the value of investment is treated as “goodwill” as per the accounting principles. However, the assessee arrived at the value of above said “good will” at Rs.21.81 crores after making some adjustments.

7.4 As noticed earlier, the assessee claimed depreciation on the above said amount of Rs.21.81 crores during the course of assessment proceedings before the AO. However, the said claim was rejected by the AO for the reasons discussed earlier. The Ld CIT(A) also confirmed the disallowance, however, on a different reasoning, i.e., he took the view that the sixth proviso to sec.32(1) would bar such a claim.

7.5 The Learned AR placed his reliance on various case laws to reiterate his contentions that “goodwill” is an intangible asset and it falls in the category of ‘any other business or commercial right of similar nature’ as given in the Explanation to section 32(1) of the Act and therefore it is eligible for depreciation under section 32(1)(ii) of the Act. He also placed reliance on the decision rendered by Hon'ble Supreme Court in the case of Smifs Securities Pvt. Ltd. (2012) 24 taxman.com 222 in this regard.

7.6 We noticed earlier that the assessee had made investment of Rs. 47.39 crores in the subsidiary companies. However, on account of amalgamation of those subsidiary companies, the assessee has received net asset of Rs. 24.82 cores in lieu of above said investment value. Hence, in reality, there was a fall in the recovery of investments made by the assessee in these three companies. Under the accounting principles, in the case of amalgamations, the difference between the consideration paid for acquiring a company and the net asset value of assets/liabilities acquired shall be termed as “goodwill”, if the payment made exceeds the value of net assets. On the contrary, if the payment made is less than the net asset value, the gain is termed as “Capital Reserve”. In the instant case, the investment of Rs.47.39 crores made by the assessee is treated as “consideration” paid for acquiring three subsidiary companies. Since the consideration so paid was in excess of the net asset value, the difference amount was treated as “goodwill” as per accounting principles.

7.7 The question is whether the “good will” arising on amalgamation of subsidiary company, which is in the nature of fall in the value of investment, would be of the same nature of the good will arising on acquisition of unrelated concern? Let us take a hypothetical case. Let us assume that a company acquires an “unrelated concern” by way of amalgamation. Let us assume that the consideration paid was Rs.50 crores and the net asset value of assets of acquired was Rs.40 crores. Since there is excess payment of Rs.10 crores, the said excess payment shall be treated as payment towards “goodwill”. In this case,

- (a) there is cash payment by the company.
- (b) it is a case of fresh acquisition and not acquisition in lieu of investments already made.
- (c) the excess payment was made voluntarily.

- (d) such excess payment was a conscious decision, i.e., the buyer should be visualizing some business advantage and hence it was paying higher consideration than the value of net assets.
- (e) The business advantage so visualized by the assessee is considered as an intangible asset eligible for depreciation.

7.8 In the instant case, the assessee has acquired its subsidiary companies by taking over their assets and liabilities in lieu of investments made by it. The above said short fall shall be termed as "goodwill" as per accounting principles. The question is whether such kinds of goodwill would fall under the category of business or commercial rights as mentioned in section 32(1)(ii) of the Act, which was interpreted by Hon'ble Supreme Court in the case of Smiffs Securities Ltd (supra). Hence it is imperative for the assessee to show that the good will, being short fall in the value of investments, would also rank at par with the good will which was considered as business or commercial rights as mentioned in sec. 32(1)(ii) of the Act. However, the fact remains that both the tax authorities have not examined this aspect.

7.10 We noticed that the learned CIT(A) has taken support of the sixth proviso to section 32(1) of the Act to reject the claim of depreciation on the good will. However, on a careful perusal of the sixth proviso to sec. 32(1) of the Act, we noticed that the same is applicable only in a situation where the amalgamation takes place in the middle of the year i.e. the said proviso states that the aggregate amount of depreciation claimed by the amalgamating companies and amalgamated company for that year should not exceed eligible amount of depreciation of that year. In the instant case the amalgamation has taken place on 1.4.2009 and not in the middle of the year. Hence the sixth proviso to section 32(1) will not apply to the facts of the present case. Accordingly we set aside the reasoning given by the learned CIT(A) for confirming the disallowance of depreciation of goodwill.

7.11 We noticed earlier that both the tax authorities have not examined the factual aspects relating to the goodwill amount of Rs.21.81 crores and also the depreciation claimed thereon. Hence the assessee also did not get opportunity to put forth its contentions before them. Under these set of facts, we are of the view, that this claim of depreciation on good will requires examination at the end of the AO by duly considering all the relevant factual aspects. Accordingly, we set aside the order passed by the learned CIT(A) on this issue and restore the same to the file of the Assessing Officer for examining it afresh by considering the discussions made supra.

8. The next issue urged by the assessee relates to the rejection of claim of the assessee for deduction of "Provision for doubtful debts" from the Net profit for the purposes of computing book profit u/s 115JB of the Act. We notice that identical disallowance was made by the AO in AY 2009-10 and the Tribunal has directed the AO to allow the claim, vide its order referred supra. The discussions made by the Tribunal in AY 2009-10 are extracted below:-

10.2 It is the contention of the assessee that the "Provision for bad and doubtful debts" debited to the Profit and loss account has been reduced from "Sundry debtors" balance and the net amount of 'Sundry debtors balance' was only shown in the "assets side" of Balance Sheet. Relying upon following decisions rendered by Hon'ble High Courts, the ld A.R contended that the provision for bad and doubtful is not required to be added to net profit, if it is reduced from the amount of Sundry debtors, as it has been interpreted by Hon'ble High Courts that such kind of treatment would amount to write off and such kind of actual write off would not be hit by clause (i) of the explanation to sec. 115JB of the Act.

- (a) CIT vs. Vodafone Essar Gujarat Ltd (2017)(397 ITR 55)(Guj)
- (b) ACC Ltd (2019)(112 taxmann.com 402)(Bom)
- (c) Sun Pharmaceuticals Ltd (2017)(87 taxmann.com 215)(Guj)
- (d) Yokogawa Ltd (2012)(204 Taxman 305)(Kar)

10.3 The Ld DR, on the contrary, submitted that there is vast difference between "actual write off of debts" and "Provision created for bad and doubtful debts". The ld D.R submitted that Hon'ble Gujarat High

Court has taken the view that the reduction of "Provision for bad and doubtful debts" from 'Sundry Debtors' balance shown in the Assets side of Balance sheet resulted in obliterating such provision from its accounts. The Ld D.R submitted that the meaning of the term "obliterate" has been defined in Cambridge dictionary as "to remove all signs of something, either by destroying it or by covering it so that it cannot be seen". The Ld CIT-DR submitted that, in the instant case, the Provision for bad and doubtful debts does not obliterate the corresponding debt merely for the reason that the same is reduced from the Sundry debtors balance in the Balance Sheet, i.e., it was only a method of presenting the accounts. In the books of accounts, the Provision for bad and doubtful debts account have been maintained separately and no part of debts got obliterated in the books of accounts. Inviting our attention to the Schedule of Sundry debtors given in Schedule 8 of the Annual report, the Ld D.R submitted that the amount reduced towards "provision for doubtful debts" was shown as 30 million as on 31.3.2008 and it has increased to 53.50 million as on 31.3.2009, i.e., by the amount of Rs.23.50 million created towards "Provision for doubtful debts" during the current year. This fact amply clears that the assessee is keeping "Provision for bad and doubtful debts" separately and it did not obliterate the corresponding debt at all in its books of account. Accordingly, the Ld CIT-DR contended that the "Provision for bad and doubtful debts" squarely falls under the category of "Provision for diminution in the value of assets" and hence the same was rightly added by the assessee itself in its return of income and by the tax authorities also.

10.4 We heard rival contentions and perused the record. There should not be any dispute that the "total income" is computed in accordance with the provisions of Income tax Act and for computing "total income", the entries made in the books of accounts are not relevant. For computing "book profit" u/s 115JB of the Act, the annual accounts are required to be prepared as per the Companies Act, which require preparation of annual accounts as per established accounting policies, accounting standards. It is well settled that, under the accounting principles, the expression "Provision for bad and doubtful debts" and "write off of bad debts" connote two different meaning. The expression "write off of bad debts" represents actually writing of debts as bad in the books of account, meaning thereby, the debt itself is removed permanently from the accounts of the assessee. On the contrary, the expression "Provision for bad and doubtful debts" represents expected loss in realization of debts. Under the accounting concept of "Prudence", it is required to make provision for all known expenses and losses, even if has not been actually paid. Even if the actual amount is not known, it is necessary to make provision on estimated basis in order to make the accounts true and fair. All the companies make "Provision for bad and doubtful debts" under Prudence principle, since it is quite natural that some portion of debt could not be realized.

10.5 While preparing financial statements, two methods of presentation are followed while preparing Balance Sheet. First method is to show

“Provision for bad and doubtful debts” in the liability side of Balance Sheet as part of “Provisions and liabilities”. The other method is to reduce the “provision for bad and doubtful debts” from Sundry debtors balance in the Assets side of Balance Sheet.

10.6 Clause (i) of Explanation 1 to sec. 115JB states that “the amount or amounts set aside as provision for diminution in the value of any asset” should be added to the Net profit while computing book profit. The case of the revenue is that the “Provision for bad and doubtful debts” falls under this category, since it only represents a provision created for diminution in the value of “sundry debtors”. As per the accounting principles, the contentions of the revenue is correct, since “actual write off bad debts” and “provision for bad and doubtful debts” are different, having two different meanings under the Accounting Principles.

10.7 But the question that arises in the context of Income tax Act is whether the meaning or character of “Provision for bad and doubtful debts” would undergo a change, merely a different method of presentation of accounts is made while preparing Balance Sheet, i.e., if it was shown as reduction from the value of “sundry debtors balance” in the assets side of Balance Sheet instead of showing the same in the liability side of Balance Sheet as part of “Provision and liabilities”?. We should keep in mind that all the assessee usually maintain separate ledger account for “Provision for bad and doubtful debts account” in its books of account. In the instant case also, the Provision for bad and doubtful debts account was having opening balance of Rs.30 million and the new provision created during the year amounting to Rs.23.50 million was added to it and the closing balance was shown at Rs.53.50 million. Hence, in this case also, the assessee has kept separate ledger account for “Provision for bad and doubtful debts” and the same is carried forward year after year.

10.8 We notice that the Hon’ble Gujarat High Court in the case of CIT vs. Vodafone Essar Gujarat Ltd (supra) and the Hon’ble Karnataka High Court, in the case of Yokogawa Ltd (supra) has expressed the view that the “Provision for bad and doubtful debts”, if reduced from the amount of “Sundry debtors balance” in the assets side of Balance Sheet would amount to actual write off of bad debts and accordingly, it would not be hit by clause (i) of Explanation 1 to sec.115JB of the Act. Both the High Courts have followed the decision rendered by Hon’ble Supreme Court in the case of Vijaya Bank (323 ITR 166)(SC). The Hon’ble Apex Court was considering the provisions of sec.36(1)(vii) r.w.s 36(2) of the Act in the context of a banking company. Under the provisions of sec.36(1)(vii) of the Act, an assessee is eligible to claim deduction of “amount of any bad debt or part thereof which is **written off as irrecoverable** in the accounts of the assessee”. Explanation 1 to sec. 36(1)(vii) reads as under:-

“Explanation 1:- For the purposes of this clause, any bad debt or part thereof written off as irrecoverable in the accounts of the

assessee shall not include any provision for bad and doubtful debts made in the accounts of the assessee”.

The above said explanation recognized the distinction between “actual write off bad debts” and “Provision for bad and doubtful debts”. The Hon’ble Supreme Court, in the case of Vijaya Bank and after considering Explanation 1 to sec. 36(1)(vii), has held that the reduction of “Provision for bad and doubtful debts” from the “Loans and Advances” account would meet the requirements of sec. 36(1)(iii), viz., “written off as irrecoverable”.

10.9 We noticed earlier that the total income is computed in accordance with the provision of Income tax Act and “Book profit” is computed on the basis of financial statements prepared in accordance with the accounting principles and accounting standards. Even though the decision in the case of Vijaya Bank (supra) was rendered by Hon’ble Supreme Court in the context of sec. 36(1)(vii) of the Act relating to computation of income, the Hon’ble High Courts have chosen to extend the said principle laid down by Hon’ble Supreme Court to computation of ‘book profit” u/s 115JB of the Act, wherein the accounting principles and accounting standards acquire prime importance. Following the decision rendered by High courts (referred supra), we hold that the amount of “Provision for bad and doubtful debts”, if reduced from the amount of “Sundry debtors balance” in the assets side of Balance Sheet, the same would not be hit by clause (i) of Explanation 1 to sec.115JB of the Act. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO not to add the amount of Provision for bad and doubtful debts to net profit, while computing book profit u/s 115JB of the Act.

9. The assessee has raised three additional grounds relating to unverified purchases offered to tax, mark to market loss/gain on forex derivative contracts and deduction u/s 10B of the Act. The Ld A.R submitted that these are alternative grounds and they are not being pressed.

10. **We shall now take up the appeal filed by the revenue for Asst. Year 2010-11.** The first issue relates to the disallowance of Sales promotion expenditure of RS.17.05 crores claimed by the Assessee. The AO disallowed the same by invoking Explanation 1 to sec. 37(1) of the Act. The Ld CIT(A) deleted the disallowance. The Ld CIT(A) took the view that the MCI Regulations, 2002 would not apply to the pharmaceutical companies.

10.1 At the outset, the Ld A.R submitted that the expenses incurred on doctors by way of freebies has been held to be disallowable u/s 37(1) by Hon'ble Supreme Court in the case of Apex Laboratories (P) Ltd vs. DCIT (2022)( 135 taxmann.com 286)(SC). He submitted that the entire sales promotion expenses claimed by the assessee may not be related to the freebies given to the doctors. It would include expenses incurred on brand reminders and articles having nominal value for promoting the products of the assessee company. He submitted that such kind of advertisement materials meant for distribution to the public at large including the doctors should not be treated as freebies to the doctors. He further claimed that many other expenses included under this head may not be hit by the MCI regulations. Accordingly, he submitted that the assessee may be provided with one opportunity to present break-up details of various expenses before the AO and also advance its contentions.

10.2 We heard Ld D.R on this issue and perused the record. We find merit in the submissions made by the Ld A.R. We notice that the assessing officer has disallowed sales promotion expenses of Rs.17.05 crores. According to the assessee, most of these expenses may not be hit by MCI regulations. Accordingly, the assessee seeks an opportunity to furnish break-up details of the above expenses. We notice that the AO also disallowed entire expenses without examining the real nature of expenses claimed under this head. Accordingly, we are of the view that, in the interest of natural justice, this issue requires fresh examination at the end of AO. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and restore the same to the file of the AO for examining it afresh by duly considering the information and explanations that may be furnished by the assessee.

11. The next ground urged by the revenue relates to the disallowance made u/s 35(2AB) of the Act.

11.1 The assessee incurred a sum of Rs.41.13 crores on clinical trial, bioequivalence study etc. outside its 'approved in-house R&D facility'. The assessee did claim the above said amount u/s 35(2AB) of the Act while computing total income for filing return of income. However, during the course of assessment proceedings, the assessee made a claim for allowing weighted deduction under section 35(2AB) of the Act. Since the claim was made without filing the return of income, the Assessing Officer rejected the same by following the decision rendered by Hon'ble Supreme Court in the case of Goetz (India) ltd. (supra).

11.2 The learned CIT(A) noticed that the Ahmedabad Bench of the Tribunal in the case Cadila Pharmaceuticals Ltd. (25 taxmann.com 519) and Hon'ble Gujarat High Court in very same case reported in 31 taxmann.com 300, has held that the term "in house", which is used in section 35(2AB) must be viewed in the context in which it has been used by the legislature. It was held if the research is conducted within the organization through utilisation of external use of resources or staff, it can be stated to be a in house research. The learned CIT(A) also noticed that identical issue was decided by Hon'ble ITAT Hyderabad in the case of DCIT Vs. Aurobindo Pharma Ltd. (ITA No. 1604 & 1605/Hyd/2016) in favour of the assessee. He also noticed that many other benches of ITAT have expressed an identical view. Accordingly, he directed the Assessing Officer to allow weighted deduction under section 35(2AB) of the Act on the expenditure incurred outside its approved inhouse R & D facility.

11.3 We noticed that the AO had made identical disallowance in Asst. Year 2009-10. The Coordinate Bench has examined the same in the

assessee's own case in A.Y. 2009-10 and decided in favour of the assessee by following the decision rendered by Hon'ble Gujarat High Court in the case of Cadila Pharmaceuticals Ltd. (supra). The observations made by the co-ordinate bench in AY 2009-10 are extracted below:-

"14.4 With regard to the first question, conflicting views have been expressed by different benches of the Tribunal. However, Hon'ble Gujarat High Court has considered this issue as under in its decision reported in the case of Cadila Healthcare Ltd (2013)(31 taxmann.com 300)(Guj) as under:-

**"11.** Revenue has also suggested following question :

"D. Whether the Appellate Tribunal has substantially erred in holding that the expenses incurred outside the approved R&D facility would also get weighted deduction based on the word under "on in house" interpreting contradictorily to the finding of coordinate bench in *Concept Pharmaceuticals Ltd. v. ACIT (ITAT, Mum)* reported at [43 SOT 423?](#)"

**12.** We may record that question 'E' in the appeal memo is an additional question which has an element of above noted question. We have, therefore, not separately reproduced the same in this order. The issue is whether the assessee who has incurred expenditure for scientific research, which was not in the in-house facility, could be covered for deduction under section 35(2AB) of the Income Tax Act, 1961.

**13.** More or less, facts are not in dispute. The assessee carried out scientific research in its facility approved by the prescribed authority. It incurred various expenditure including on clinical trials for developing its pharmaceutical products. These clinical trials were conducted outside the approved laboratory facility. The Revenue holds a belief that such expenditure not having been incurred in the approved facility cannot form part of the deduction provided under section 35(2AB) of the Act. The Tribunal observed that the term 'in-house' used in section 35(2AB) of the Act must be viewed in the context of which it has been used. If by utilizing the staff or resources of an organization, research is conducted within the organization rather than through utilization of external use of resources or staff, it can be stated to be an in-house research. On such basis, the Tribunal rejected the Revenue's contention that merely because an expenditure which was not incurred in the in-house facility cannot be discarded for the weighted deduction under section 35(2AB) of the Act. Learned counsel for the Revenue, however, strongly relied on the certificate issued by the Prescribed

Authority, which segregated the expenditure in two parts, that incurred in in-house facility and that incurred outside.

**14.** In our opinion, the Tribunal committed no error. Section 35(2AB) of the Act provides for deduction to a company engaged in business of bio-technology or the business of manufacture or production of any article or thing notified by the Board towards expenditure of scientific research development facility approved by the prescribed authority. Such deduction at the relevant time was one-and-a-half times expenditure which has now been increased to twice the eligible expenditure. We may notice that explanation to section 35(2AB)(1) which was introduced by the Finance Act 2001 with effect from 1.4.2002 reads as under:

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

**15.** Such explanation thus provides that for the purpose of said clause, i.e. clause (1) of section 35(2AB), expenditure on scientific research in relation to drugs and pharmaceuticals shall include expenditure incurred on clinical drug trial, obtaining approval from any regulatory authority under the Central, State or Provincial Act and filing an application for a patent under the Patents Act, 1970.

**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.

**17.** In the case *Dy. CIT v. Mastek Ltd.* [\[2012\] 210 Taxman 432/25 taxmann.com 133 \(Guj.\)](#) and connected matters, a Division Bench of this Court had touched on the aspect of what can be termed as scientific research. In the context, certain observations made by the Bench may be of some relevance.

"25. It can thus be seen that the term scientific research in the context of the deduction allowable under section 35(1) of the Act would include wide variety of activities. It can also be appreciated that every scientific research need not necessarily result into the ultimate goal with which it may have been undertaken. Often times in the field of research and invention, the efforts undertaken may or may not yield fruitful results. What is to be ascertained is whether any scientific research was undertaken and not whether such scientific research resulted into the ultimate aim for which such research was undertaken. It can be easily envisaged that the scientific research undertaken often times would completely fail to achieve desired results. That by itself does not mean that no scientific research was undertaken. What the Legislature desired to encourage by granting deduction under section 35(1) of the Act was a scientific research and not necessarily only the successful scientific research undertaken by an assessee."

**18.** We are, therefore, of the opinion that the Tribunal committed no error. Merely because the prescribed authority segregated the expenditure into two parts, namely, those incurred within the in-house facility and those can were incurred outside, in our opinion, by itself would not be sufficient to deny the benefit to the assessee under section 35(2AB) of the Act. It is not as if that the said authority was addressing the issue for deduction under section 35(2AB) of the Act in relation to the question on hand. The certificate issued was only for the purpose of listing the total expenditure under the Rules. Therefore, no question of law arises."

It can be noticed that the Hon'ble Gujarat High Court, after making extensive discussion on the issue and after holding that the Tribunal has committed no error, refused to admit the issue by observing no question of law arises. The revenue has challenged before Hon'ble Supreme Court the decision of Hon'ble Gujarat High Court in holding that no question of law arises. The Hon'ble Apex Court, vide its order dated 14<sup>th</sup> October, 2015

passed in SLP (c) No.770/2015 has directed the Hon'ble Gujarat High Court to admit the question of law and hear the revenue. However, no other order, if any, passed by Hon'ble Gujarat High Court was brought to our notice on the issue under our consideration in pursuance of the directions given by Hon'ble Supreme Court. In this connection, we may gainfully refer to the decision rendered by co-ordinate bench of Hyderabad in the case of DCIT vs. Aurobindo Pharma Limited (supra), wherein the effect of direction given by Hon'ble Supreme Court was examined and it was observed as under:-

“..... As seen from the order of the Supreme Court in Special Leave to Appeal (C) No.770/2015, dated 13.10.2015, the grievance of Revenue with reference to non-framing of three questions were considered by the Hon'ble Supreme Court as those three questions are considered to be 'substantial question of law' and referred to the Hon'ble High Court to hear the aforesaid three questions of law. However, the judgement already passed by the Gujarat High Court has not been set-aside....”

The Hyderabad bench of Tribunal also distinguished the decision rendered by the Mumbai bench of Tribunal in the case of Concept Pharmaceuticals Ltd (supra) by observing as under:-

“We have considered rival contentions and perused the case law placed on record. In the decision of Concept Pharmaceuticals Ltd (supra) the Coordinate bench did not allow the expenditure spent outside the R & D unit but the Bench has not considered the explanation introduced with reference to 'Clinical Trials'. By very nature, the Clinical Trials cannot alone be done within research facility as they require cooperation from the Medical Doctors, Hospitals, Volunteers and patients, therefore such expenditure has to be necessarily spent outside the facility, but for the purpose of 'in-house' research. This issue was examined by the Coordinate Bench which was subject matter of appeal before the Gujarat High Court and Gujarat High Court has approved the same.....”

Accordingly, following the decision of Hon'ble Gujarat High Court, we hold that the amount spent by the assessee on clinical trials outside the approved in-house facility is eligible for weighted deduction u/s 35(2AB) of the Act.”

Since the facts are identical in this year also and since the decision rendered by Ld CIT(A) on this issue is in accordance with the decision rendered by the co-ordinate bench in AY 2009-10, we uphold his order passed on this issue.

11.4 In the grounds of appeal, the Revenue has taken contention that the expenditure approved by DSIR in the certificate given in Form No. 3CL alone is eligible for weighted deduction. It has also taken support of Hon'ble Karnataka High Court in the case of Tejas Networks Ltd. Vs. DCIT (W.P. No. 7004/2014) in order to contend that the DSIR alone is competent to take the decision with regard to the correctness of the expenditure under section 35(2AB) read with rule 6(7A) of the Rules. We notice that identical contentions were raised in AY 2009-10 before the Tribunal and they were addressed in the following manner by the Tribunal:-

“14.5 The next question is Whether the weighted deduction u/s 35(2AB) could be allowed during the year under consideration, even if the expenditure has not been certified by DSIR in Form no.3CL?. The ld D.R placed her reliance on the decision rendered by Hon'ble Karnataka High Court in the case of Tejas Network Ltd (2015)(60 taxmann.com 309)(Kar), wherein it was held that the AO cannot sit in judgment over the report submitted by prescribed authority. Accordingly, the Ld D.R submitted that the AO has to necessarily follow the report given by the prescribed authority. The Ld D.R submitted that, in the instant case, the DSIR (Prescribed authority) has not certified the expenses incurred outside the in-house facility and the AO could not sit in judgment over the said report. Accordingly, the Ld D.R submitted that the unapproved expenses cannot be allowed deduction u/s 35(2AB) of the Act.

14.6 The next question is whether expenditure incurred prior to the date of approval could be allowed as deduction? Both these questions are answered together.

14.7 The legal sanctity of Form no.3CL was examined by the Pune bench of ITAT in the case of Cummins Ltd vs. DCIT (ITA No.309/Pun/2014 dated 15.5.2018 relating to AY 2009-10). It was held as under:-

"45. The issue which is raised in the present appeal is that whether where the facility has been recognized and necessary certification is issued by the prescribed authority, the assessee can avail the deduction in respect of expenditure incurred on in-house R&D facility, for which the adjudicating authority is the Assessing Officer and whether the prescribed authority is to approve expenditure in form No. 3CL from year to year. Looking into the provisions of rules, it stipulates

the filing of audit report before the prescribed authority by the persons availing the deduction under section 35(2AB) of the Act but the provisions of the Act do not prescribe any methodology of approval to be granted by the prescribed authority *vis-à-vis* expenditure from year to year. **The amendment brought in by the IT (Tenth Amendment) Rules w.e.f. 1-7-2016, wherein separate part has been inserted for certifying the amount of expenditure from year to year and the amended form No. 3CL thus, lays down the procedure to be followed by the prescribed authority. Prior to the aforesaid amendment in 2016, no such procedure/methodology was prescribed. In the absence of the same, there is no merit in the order of Assessing Officer in curtailing the expenditure and consequent weighted deduction claim under section 35(2AB) of the Act on the surmise that prescribed authority has only approved part of expenditure in form No. 3CL. We find no merit in the said order of authorities below.**

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

14.8 The question of allowing deduction u/s.35(2AB) of the Act was considered by the Hon'ble Delhi High Court in the case of *CIT v. Sadan Vikas (India) Ltd.* [\[2011\] 335 ITR 117 \(Del\)](#) where AO refused to accord the benefit of the weighted deduction to the assessee under s. 35(2AB) on the ground that recognition and approval was given by the DSIR in February/September, 2006, *i.e.*, in the next assessment year and, therefore, the weighted deduction cannot be allowed. In this case, the CIT(A) confirmed the order of the AO. The Tribunal held that the assessee would be entitled to weighted deductions of the aforesaid expenditure incurred by the assessee in terms of the s. 35(2AB) of the Act and in coming to this conclusion, the Tribunal relied upon the judgment of Gujarat High Court in *CIT v. Claris Lifesciences Ltd.* [326 ITR 251 \(Guj\)](#). In its decision the Hon'ble Gujarat High Court had held that the cut-off date mentioned in the certificate issued by the DSIR would be of no relevance. What is to be seen is that the assessee was indulging in R&D activity and had incurred the expenditure thereupon. Once a certificate by DSIR is issued, that would be sufficient to hold that the assessee fulfils the conditions laid down in the aforesaid provisions. The Hon'ble Delhi High Court followed the decision of the Hon'ble Gujarat High Court and upheld

the decision of the Tribunal. The Hon'ble Delhi High Court quoted the following observations of the Hon'ble Gujarat High Court and agreed with the said view:

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

8. The Tribunal has considered the submissions made on behalf of the assessee and took the view that section speaks of : (i) development of facility; (ii) incurring of expenditure by the assessee for development of such facility; (iii) approval of the facility by the prescribed authority, which is DSIR; and (iv) allowance of weighted deduction on the expenditure so incurred by the assessee.

9. The provisions nowhere suggest or imply that research and development facility is to be approved from a particular date and, in other words, it is nowhere suggested that date of approval only will be cut-off date for eligibility of weighted deduction on the expenses incurred from that date onwards. A plain reading clearly manifests that the assessee has to develop facility, which presupposes incurring expenditure in this behalf, application to prescribed authority, who after following proper procedure will approve the facility or otherwise and the assessee will be entitled to weighted deduction of any and all expenditure so incurred. The Tribunal has, therefore, come to the conclusion that on plain reading of s. itself, the assessee is entitled to weighted deduction on expenditure so incurred by the assessee for development of facility. The Tribunal has also considered r. 6(5A) and Form No. 3CM and come to the conclusion that a plain and harmonious reading of rule and Form clearly suggests that once facility is approved, the entire expenditure so incurred on development of R&D facility has to be allowed for weighted deduction as provided by s. 35(2AB). The Tribunal has also considered the legislative intention behind above enactment and observed that to boost up research and development facility in India, the legislature has provided this provision to encourage the development of the facility by providing deduction of weighted expenditure. Since what is stated to be promoted was development of facility, intention of the legislature by making above amendment is very clear that the entire expenditure incurred by the assessee on development of facility, if approved, has to be allowed for the purpose of weighted deduction."

From the above discussion it is clear that prior to 1-7-2016 Form 3CL had no legal sanctity and it is only w.e.f 1-7-2016 with the amendment to Rule 6(7A)(b) of the Rules, that the quantification of the weighted deduction u/s.35(2AB) of the Act has significance.

Further, the date of approval shall not be cut off date for allowing scientific research expenditure u/s. 35(2AB) of the Act.”

Following the above said decision, we reject both the contentions of the revenue.

11.5 We noticed that the Tribunal has restored the issue to the file of the Assessing Officer for examining the breakup details of the scientific research expenses incurred in each of the R & D facility centre, since it was not furnished to the Assessing Officer during the course of the assessment proceedings relating to AY 2009-10. Further, in that year, Learned DR also had contended that the approval given to some of the research facilities were not available in the record. Hence the matter was restored to the file of the Assessing Officer for the limited purposes discussed above.

11.6 The Learned AR submitted that the assessee has furnished the break up the details of expenses incurred in each of the R & D facility before the AO in the current year. Accordingly, he submitted that there is no requirement of remitting the issue back to the file of the Assessing Officer. However, we noticed that the Assessing Officer did not examine the claim of the assessee at all with regard to this expenditure. Hence there was no occasion for the AO to examine the issue. We have already discussed about the legal position relating to the claim made u/s 35(2AB) of the Act. In our view, the basic facts relating to the claim need to be verified at the end of the AO. Accordingly for verification of the basic details, we restore this issue to the file of the Assessing Officer with the direction to examine this issue and decide upon the claim of the assessee in accordance with the legal position discussed supra.

12. Next issue urged by the Revenue relates to the disallowance of expenses claimed under Employees stock option (ESOP) expenses claimed by

the assessee. The assessee claimed a sum of Rs. 21.75 crores as ESOP expenditure before the Assessing Officer during the course of assessment proceedings. The assessee did not claim this expenditure in the return of income, but claimed it before the AO during the course of assessment proceedings. Even though the assessee made detailed submissions with regard to the allowability of this expenditure, yet the Assessing Officer did not admit the claim on the reasoning that the assessee has not made the claim by filing a revised return of income as held in the case of Goetz (India) Ltd. (supra). The learned CIT(A) allowed the claim of the assessee by following the decision rendered by Special Bench of the Tribunal in the case of Biocon Ltd. (2014) 144 ITD 21. Hence, the Revenue is aggrieved.

12.1 We noticed that an identical claim made by the assessee was disallowed in A.Y. 2009-10 by the AO. This issue was examined in detail by the Tribunal in ITA No. 395/Mum/2021 read with order passed in M.A. No. 193/Mum/2023 arising out of ITA No. 395/Mum/2021 relating to A.Y. 2009-10. The final decision rendered by the Tribunal is extracted below by culling out relevant observations from the main order and the order passed in the Miscellaneous Application filed by the assessee:-

**From Main Order:-**

“15.1 The Ld CIT(A) allowed the claim of the assessee following the decision rendered by Special bench of Bangalore ITAT in the case of Biocon Ltd vs. DCIT (144 ITD 21). It is pertinent to mention that the decision rendered by the Special bench has since been upheld by the Hon’ble Karnataka High Court in 430 ITR 151.

15.2 The Ld D.R submitted that the Circular no. 9 of 2007 issued by CBDT has not been considered by the Special bench or by the Hon’ble High Court of Karnataka.

15.3 We heard Ld A.R and perused the record. It is well settled proposition that the Circular issued by CBDT is binding only on tax authorities and it will not bind on the Courts. The Hon’ble Karnataka High Court has dealt with this issue as under in the case of Biocon Ltd (supra) as under:-

“9. In the instant case, the ESOPs vest in an employee over a period of four years *i.e.*, at the rate of 25%, which means at the end of first year, the employee has a definite right to 25% of the shares and the assessee is bound to allow the vesting of 25% of the options. It is well settled in law that if a business liability has arisen in the accounting year, the same is permissible as deduction, even though, liability may have to quantify and discharged at a future date. On exercise of option by an employee, the actual amount of benefit has to be determined is only a quantification of liability, which takes place at a future date. The tribunal has therefore, rightly placed reliance on decisions of the Supreme Court in *Bharat Movers supra* and *Rotork Controls India P. Ltd., supra* and has recorded a finding that discount on issue of ESOPs is not a contingent liability but is an ascertained liability.

10. From perusal of section 37(1), which has been referred to *supra*, it is evident that an assessee is entitled to claim deduction under the aforesaid provision if the expenditure has been incurred. The expression 'expenditure' will also include a loss and therefore, issuance of shares at a discount where the assessee absorbs the difference between the price at which it is issued and the market value of the shares would also be expenditure incurred for the purposes of section 37(1) of the Act. The primary object of the aforesaid exercise is not to waste capital but to earn profits by securing consistent services of the employees and therefore, the same cannot be construed as short receipt of capital. The tribunal therefore, in paragraphs 9.2.7 and 9.2.8 has rightly held that incurring of the expenditure by the assessee entitles him for deduction under section 37(1) of the Act subject to fulfillment of the condition.

**11. The deduction of discount on ESOP over the vesting period is in accordance with the accounting in the books of account, which has been prepared in accordance with Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999.”**

**Continued in MA order:-**

“15.4 We notice that the Special bench has recognised that the discount on ESOP arises on two occasions, viz.,

(a) First type of discount arises at the time of granting and/or vesting of ESOP options and it represents the difference between fair market value on the date of granting/vesting date and the price at which shares are offered to the employees. This discount is usually amortised over the vesting period. The employee need not exercise option at the time of vesting itself.

(b) The second type of discount arises at the time of "actual exercise of option" by the employees and it represents the difference between the fair market value of the equity shares on the date of vesting of option and the date of exercise of option.

In the instant case, the amount of Rs.5,74,85,066/- claimed by the assessee represents the second type of discount mentioned in (b) above, i.e., the additional discount arising at the time when the employees actually exercise option. It is the submission of the assessee that the first type of discount did not arise in the instant case, since there was no difference between market price of equity shares and the price at which the shares were offered to the assessee. As per the decision rendered by the Special bench of Bangalore ITAT in the case of Biocon Ltd (supra), the second type of discount arising at the time of actual exercise of option by the employees is also allowable as deduction. This is clear from the discussions made by the Special bench in paragraph 11.1.6 of its order, more particularly, the discussion made in respect of "Situation II" explained by way of illustration by the Tribunal. Accordingly, the above said claim of the assessee is allowable as deduction.

15.5 We noticed that the assessee has claimed this amount as deduction before the AO during the course of assessment proceedings and it is the case of the AO that the assessee has not accounted for the same in the books of account. It is the submission of the assessee that the first type of discount is required to be accounted in the books of account and the second type of discount is not required to be accounted. We notice that the requirement of accounting second type of discount has been examined by the Special bench in paragraphs 11.2.8 and 11.2.9 of its order. We notice that the Special bench has stated that the SEBI guidelines did not discuss about the accounting of second type of discount. Accordingly, the Special bench held that the deduction of additional discount has to be allowed as per taxation principles. For the sake of convenience, we extract below paragraphs 11.2.8, 11.2.9 and 11.3 of the order passed by the Special bench:-

"11.2.8. The plea now raised before us by the Id. AR, relying on the case of Challapalli Sugars Ltd.'s case, was also taken up before the Hon'ble Supreme Court in the case of Tuticorin Alkalis (supra). Dealing with the same, the Hon'ble Supreme Court held that : "The question in Challapalli Sugars Ltd.'s case [1975] 98 ITR 167 (SC) was about computation of depreciation and development rebate under the [Indian Income-tax Act, 1922](#). In order to calculate depreciation and development rebate it was necessary to find out "the actual cost" of the plant and machinery purchased by the company. This court held that "cost" is a word of wider connotation than "price". There was a difference between the price of a machinery and its cost. This court thereafter pointed out that the expression "actual cost" had not been defined in the Act. It was, therefore, necessary to find out the commercial sense of the phrase.

.....The judgment in Challapalli's case [1975] 98 ITR 167 (SC), goes to show that the court was not in any way departing from legal principles because of any opinion expressed by the Institute of Chartered Accountants." From the above observations there is not even an iota of doubt in our minds that there can be no question of following the accounting principle or Guidance notes etc. in the matter of determination of total income.

11.2.9. The trump card of the Id. AR to bolster his submission for assigning the status of binding force to the SEBI Guidelines is the order in the case of SSI Limited (supra) which came to be affirmed by the Hon'ble Madras High Court in PVP Ventures (supra). We have noticed above that the said case dealt a situation falling within one of the three years of the vesting period, in which it was held that one third of the total amount of discount computed on the basis of the market price of the shares at the time of grant of option, is deductible. It is evident from the SEBI Guidelines that these deal with the deductibility of discount in the hands of company during the years of vesting period. **These Guidelines are silent on the position emanating from variation in the market price of the shares at the time of exercise of option by the employees vis-à-vis the market price at the time of grant of option. In other words, the SEBI Guidelines prescribe accounting treatment only in respect of the period of vesting of the options and the situation arising out of unvested options or vested options lapsing.** The very reference by the Chennai Bench of the Tribunal in SSI Limited (supra) to the SEBI Guidelines is indicative of the fact that it dealt with a year during which the options were vesting with the employees and the company claimed discount during the vesting period. The Hon'ble Madras High Court in the case of PVP Ventures (supra) has upheld the view taken by the Chennai Bench in the case of SSI Limited (supra). The granting of the binding force to the SEBI Guidelines by the Hon'ble Madras High Court should be viewed in the context of the issue before it, which was about the deductibility of discount during one of the vesting years. In the earlier part of this order, we have held that the deductibility of discount during the vesting period, as prescribed under the SEBI Guidelines, matches with the treatment under the mercantile system of accounting. **To that extent, we also hold that the SEBI guidelines are applicable in the matter of deduction of discount. Neither there was any issue before the Hon'ble Madras High Court nor it dealt with a situation in which the market price of the shares at the time of exercise of option is more or less than the market price at the time of grant of option. It is a situation which has also not been dealt with by the Guidelines.** Accordingly, the afore noted taxation principle of granting deduction for the additional discount and reversing deduction for the short amount of discount at the time of exercise of option, needs to be scrupulously followed.

11.3. We, therefore, sum up the position that the discount under ESOP is in the nature of employees cost and is hence deductible during the vesting period w.r.t. the market price of shares at the time of grant of options to the employees. The amount of discount claimed as deduction during the vesting period is required to be reversed in relation to the unvesting/lapsing options at the appropriate time. **However, an adjustment to the income is called for at the time of exercise of option by the amount of difference in the amount of discount calculated with reference the market price at the time of grant of option and the market price at the time of exercise of option. No accounting principle can be determinative in the matter of computation of total income under the Act.** The question before the special bench is thus answered in affirmative by holding that discount on issue of Employee Stock Options is allowable as deduction in computing the income under the head 'Profits and gains of business or profession'."

We notice that the assessee has also paid "fringe benefit tax" on the second type of discount (referred supra). It is well settled principle of taxation that the entries made or otherwise in the books of account are not relevant for computing total income, i.e., the total income has to be computed as per the provisions of Income tax Act. If the deduction is otherwise allowable as deduction in computing total income, the same is allowable irrespective of the fact whether the same is accounted in the books of account or not. We notice that this principle has been applied by the Special bench with regard to second type of discount. Accordingly, we are of the view that the Ld CIT(A) was justified in allowing the deduction of Rs.5,74,85,065/- claimed by the assessee. Accordingly, we uphold the order passed by Ld CIT(A) on this issue."

12.2 Since the facts are identical in this year also, following the above said order passed by the Tribunal, we hold that the learned CIT(A) was justified in allowing the ESOP expenditure claimed by the assessee. Accordingly we uphold the order passed by the learned CIT(A) on this issue.

13. Next issue urged by the revenue relates to the disallowance made u/s 14A of the Act. We have adjudicated this issue along with the ground raised by the assessee on the very same issue. Hence this ground of the revenue does not require separate adjudication.

14. The next issue urged by the revenue relates to the disallowance of Rs.27.85 crores relating to Pre-commencement revenue expenses incurred at Pithampur SEZ Plant-I.

14.1 The assessee did not claim this expenditure in the return of income, but claimed the same before the AO during the course of assessment proceedings. The AO rejected the same on the reasoning that the assessee has made new claim without filing revised return of income. The Id CIT(A), however, allowed the claim of the assessee holding that the assessee has already set up the business. He also held that the revenue expenses incurred after setting up of business is allowable as deduction, even if the business is not commenced. The revenue is aggrieved.

14.2 We heard the parties and perused the record. The Ld A.R submitted that the assessee has already set up the plant in SEZ, Pithampur and has already commenced production of Samples (Exhibit batch) for getting approval from United States Food and Drugs Administration (USFDA). Only commercial production is yet to commence. Accordingly, he submitted that the revenue expenses incurred after setting up of business is allowable as deduction, even though the commercial production has not yet started. In support of this proposition, the Ld A.R placed his reliance on host of case laws.

14.3 We notice that the Ld CIT(A) has accepted the fact that the business has been set up and hence revenue expenses incurred in that plant are allowable as deduction. He also accepted the alternative contention of the assessee that the Pithampur SEZ plant is extension of existing business and accordingly directed the AO to allow the exhibit batch expenditure as revenue expenditure. However, he rejected the claim of depreciation. The revenue is aggrieved.

14.4 The uncontroverted fact is that the business of the assessee in Pithampur SEZ has been set up and further it is an extension of existing business. We notice that the Ld CIT(A) has allowed the claim following the legal principles pronounced by the Courts. Hence, we do not find any infirmity in the decision rendered by Ld CIT(A) on this issue.

15. **The assessee has also filed cross objection for AY 2010-11.** The ld A.R submitted that the same is in support of the order passed by Ld CIT(A) on certain issues. Accordingly, the cross objection does not require adjudication.

#### **ASSESSMENT YEAR 2011-12**

16. **We shall first take up appeal filed by the assessee for AY 2011-12.**

17 The first issue contested by the assessee relates to the disallowance of bogus expenses to the tune of Rs.1,97,10,224/-, which consisted of general expenses of Rs.1,94,95,648/- and depreciation disallowance of Rs.2,14,576/- on the capitalized portion of bogus expenses.

17.1 The facts relating to the above said disallowance are identical with the identical disallowances made in AY 2009-10 and 2010-11. In paragraphs 4 (supra), we have dealt with identical disallowance made in the assessment year 2010-11 and following the decision rendered in AY 2009-10, this issue was restored to the file of AO for examining it afresh. Consistent with the view taken in AY 2009-10 and 2010-11, we set aside the order passed by Ld CIT(A) on this issue and restore the same to the file of AO with similar directions.

18. The next issue contested by the assessee relates to the disallowance of bogus purchases. The facts relating to this disallowance are identical with the identical disallowances made in AY 2009-10 and 2010-11. In paragraphs 5 (supra), we have dealt with identical disallowance made in the assessment year 2010-11 and following the decision rendered in AY 2009-10, this issue was restored to the file of AO for examining it afresh. Consistent with the view taken in AY 2009-10 and 2010-11, we set aside the order passed by Ld CIT(A) on this issue and restore the same to the file of AO with similar directions.

19. The next issue urged by the assessee relates to the disallowance made u/s 14A of the Act. The facts relating to the above said disallowance are identical with the identical disallowances made in AY 2009-10 and 2010-11. In paragraphs 6 (supra), we have dealt with identical disallowance made in the assessment year 2010-11. With regard to interest disallowance made u/r 8D(2)(ii) of I T Rules, the AO was directed to delete the voluntary disallowance made by the assessee by following the decision rendered by Hon'ble Bombay High Court in the case of HDFC Bank Ltd (supra), since the own funds available with the assessee was more than the value of investments. With regard to the disallowance of general expenses, the AO was directed to restrict the disallowance to 15% of exempt income. In view of the above, following the above said decision, we set aside the order passed by Ld CIT(A) on this issue and restore the same to the file of the AO with the direction to examine the issue of funds position and delete the disallowance if the own funds available with the assessee is more than the value of investments. In respect of disallowance to be made under Rule 8D(2)(iii), we direct the AO to restrict the same to 15% of the exempt income.

20. The next issue urged by the assessee relates to the disallowance of depreciation on good will arising on amalgamation of subsidiary companies.

The facts relating to the above said disallowance are identical with the identical disallowance made in AY 2010-11. In paragraphs 7 (supra), we have dealt with identical disallowance made in the assessment year 2010-11 and this issue was restored to the file of AO for examining it afresh by considering factual aspects surrounding the issue. Consistent with the view taken in AY 2010-11, we set aside the order passed by Ld CIT(A) on this issue and restore the same to the file of AO with similar directions.

**22. We shall now take up the appeal filed by the revenue for Asst. Year 2011-12.** The first issue relates to the disallowance of sales promotion expenses. The facts relating to the above said disallowance are identical with the identical disallowances made in AY 2010-11. In paragraphs 10 (supra), we have dealt with identical disallowance made in the assessment year 2010-11 and it was restored to the file of AO for examining it afresh. Consistent with the view taken in AY 2010-11, we set aside the order passed by Ld CIT(A) on this issue and restore the same to the file of AO with similar directions.

23. The next issue urged by the revenue relates to disallowance of R & D expenses not approved by DSIR and also disallowance of expenditure incurred outside the approved in-house research facility. On the very same issue, the Ld CIT(A) passed a rectification order u/s 154 of the Act directing the AO to allow the deduction u/s 35(2AB) of the Act in respect of expenses not approved by DSIR. Hence the revenue has filed another appeal numbered as ITA No.20/Mum/2021 challenging the rectification order passed by Ld CIT(A) u/s 154 of the Act.

23.1 The facts relating to the above said disallowance are identical with the identical disallowances made in AY 2010-11. In paragraphs 11 (supra), we have dealt with identical disallowance made in the assessment year 2010-11

and discussed about the legal principles laid down by High Courts. Since the issue required verification of certain factual aspects, the issue was restored to the file of the AO for the limited purpose of verification of factual aspects and the AO was directed to the issue following the legal principles discussed in the order. Consistent with the view taken in AY 2010-11, we set aside the order passed by Ld CIT(A) on this issue and restore the same to the file of AO with similar directions.

24. The next issue urged by the revenue relates to the disallowance of ESOP expenses. The facts relating to the above said disallowance are identical with the identical disallowances made in AY 2009-10 and 2010-11. In paragraphs 12 (supra), we have dealt with identical disallowance made in the assessment year 2010-11 and following the decision rendered in AY 2009-10, we have upheld the decision rendered by Ld CIT(A) on this issue. Consistent with the view taken in AY 2009-10 and 2010-11, we uphold the order passed by Ld CIT(A) on this issue.

25. The next issue urged by the revenue relates to the disallowance made u/s 14A of the Act. We have dealt with the issue in the assessee's appeal and hence this ground of the revenue does not require adjudication.

26. The next issue urged by the revenue relates to the disallowance of Pre-commencement expenses incurred in Pithampur SEZ Plant-I. In AY 2010-11, we have dealt with this issue in Paragraph 14 of the order and we have upheld the relief granted by Ld CIT(A). Since the facts are identical, following the decision rendered by us in AY 2010-11, we uphold the decision rendered by Ld CIT(A) on this issue.

27. **The assessee has filed cross objection for AY 2011-12** in order to support the decision rendered by Ld CIT(A) on the issues relating to ESOP

expenses and Pre-commencement expenses incurred in Pithampur SEZ Plant-I. Hence the cross objection filed by the assessee does not require adjudication.

### **ASSESSMENT YEAR : 2012-13**

#### **28. We shall first take up appeal filed by the assessee for AY 2012-13.**

29. The first issue contested by the assessee relates to the disallowance of bogus expenses to the tune of Rs.99,20,153/-, which consisted of general expenses of Rs.99,00,685/- and depreciation disallowance of Rs.19,468/- on the capitalized portion of bogus expenses.

29.1 The facts relating to the above said disallowance are identical with the identical disallowances made in AY 2009-10 and 2010-11. In paragraphs 4 (supra), we have dealt with identical disallowance made in the assessment year 2010-11 and following the decision rendered in AY 2009-10, this issue was restored to the file of AO for examining it afresh. Consistent with the view taken in AY 2009-10 and 2010-11, we set aside the order passed by Ld CIT(A) on this issue and restore the same to the file of AO with similar directions.

30. The next issue contested by the assessee relates to the disallowance of bogus purchases. The facts relating to this disallowance are identical with the identical disallowances made in AY 2009-10 and 2010-11. In paragraphs 5 (supra), we have dealt with identical disallowance made in the assessment year 2010-11 and following the decision rendered in AY 2009-10, this issue was restored to the file of AO for examining it afresh. Consistent with the view taken in AY 2009-10 and 2010-11, we set aside the order passed by Ld

CIT(A) on this issue and restore the same to the file of AO with similar directions.

31. The next issue urged by the assessee relates to the disallowance made u/s 14A of the Act. The facts relating to the above said disallowance are identical with the identical disallowances made in AY 2009-10 and 2010-11. In paragraphs 6 (supra), we have dealt with identical disallowance made in the assessment year 2010-11. With regard to interest disallowance made u/r 8D(2)(ii) of I T Rules, the AO was directed to delete the voluntary disallowance made by the assessee by following the decision rendered by Hon'ble Bombay High Court in the case of HDFC Bank Ltd (supra), since the own funds available with the assessee was more than the value of investments. With regard to the disallowance of general expenses, the AO was directed to restrict the disallowance to 15% of exempt income. In view of the above, following the above said decision, we set aside the order passed by Ld CIT(A) on this issue and restore the same to the file of the AO with the direction to examine the issue of funds position and delete the disallowance if the own funds available with the assessee is more than the value of investments. In respect of disallowance to be made under Rule 8D(2)(iii), we direct the AO to restrict the same to 15% of the exempt income.

32. The next issue urged by the assessee relates to the disallowance of depreciation on good will arising on amalgamation of subsidiary companies. The facts relating to the above said disallowance are identical with the identical disallowance made in AY 2010-11. In paragraphs 7 (supra), we have dealt with identical disallowance made in the assessment year 2010-11 and this issue was restored to the file of AO for examining it afresh by considering factual aspects surrounding the issue. Consistent with the view taken in AY 2010-11, we set aside the order passed by Ld CIT(A) on this issue and restore the same to the file of AO with similar directions.

33. The next issue relates to the interest levied u/s 234C of the Act. The advance tax remitted by the assessee got delayed by one day beyond the due date and hence interest u/s 234C of the Act to the tune of Rs.57,20,000/- was levied. It is the case of the assessee that the delay in payment of advance tax was beyond the control of the assessee and hence the interest u/s 234C should not be levied. We notice that the Ld CIT(A) has rejected the above said claim on the reasoning that he does not have power to condone the delay occurred in payment of advance tax. We also agree with the view so expressed by Ld CIT(A). We are also of the view that the condonation of delay in payment of advance tax will not fall under the scope of the powers of Tribunal also, i.e., it is a matter to be taken up with CBDT. Accordingly, we reject this ground of the assessee.

34. **We shall now take up the appeal filed by the revenue for Asst. Year 2012-13.** The first issue relates to the disallowance of sales promotion expenses. The facts relating to the above said disallowance are identical with the identical disallowances made in AY 2010-11. In paragraphs 10 (supra), we have dealt with identical disallowance made in the assessment year 2010-11 and it was restored to the file of AO for examining it afresh. Consistent with the view taken in AY 2010-11, we set aside the order passed by Ld CIT(A) on this issue and restore the same to the file of AO with similar directions.

35. The second issue relates to the disallowance of mark to market loss of Rs.46,87,968/- arising on account of revaluation of forward contracts due to exchange difference on the last date of balance sheet. The AO disallowed the same following the Instruction No.3/2010 issued by CBDT, wherein the CBDT has expressed the view that the such kind of revaluation loss is

notional one. The AO also expressed the view that the provisions of sec.43(5) bars such a claim.

35.1 We notice that an identical issue has been examined by the Tribunal in the assessee's own case in AY 2009-10. The relevant discussions made in that year are extracted below:-

13. We shall now take up the appeal filed by the revenue. The first issue contested by the revenue relates to the disallowance of mark to market loss of Rs.3,39,71,181/- made by the AO and deleted by Ld CIT(A). The assessee is supporting the decision rendered by Ld CIT(A) on this issue in the cross objections filed by it. The assessee had revalued the derivative contracts outstanding as at the yearend in respect of foreign exchange receivables. The same resulted in a loss of Rs.3.39 crores and it was claimed by the assessee has deduction. The AO disallowed the claim by placing reliance on CBDT Instruction no.3/2010 and holding it as notional loss. The Ld CIT(A) noticed that an identical disallowance made by the AO in AY 2008-09 has been deleted by the Tribunal in ITA No.7513 & 7274/Mum/2014 and the same has been affirmed by the Hon'ble Bombay High Court in ITA No.1532 of 2017 dated 2<sup>nd</sup> April, 2019. Accordingly, the Ld CIT(A) deleted this disallowance. The revenue is aggrieved.

13.1 We heard the parties on this issue and perused the record. It is the submission of the assessee that the forward contracts have been entered to cover future export receivables. The break-up details of above said loss are given as under by the assessee:-

M to M Loss in relation to effective portion of Forward Contract outstanding on 31.3.09	-	42,53,527
M to M Loss in relation to ineffective portion of Option contract outstanding on 31.3.09	-	39,97,341
M to M Loss in relation to derivative asset w/off relating to Option Contract	-	2,66,20,000
		-----
		3,48,70,868
Less:- Reversal of M to M Loss in relation to Ineffective portion of Option contract		8,99,687
		-----

Net amount of claim	3,39,71,181
	=====

13.2 The Ld A.R submitted that an identical issue has been examined by the Tribunal in the assessee's own case in AY 2008-09 and it has been decided in favour of the assessee following the decision rendered by Hon'ble jurisdictional Bombay High Court in the case of CIT vs. M/s D Chetan & Co (ITA No.278 of 2014 dated 01-10-2016)( [2016] 75 taxmann.com 300 (Bombay)). We also notice that the decision rendered by the Tribunal in the assessee's own case has since been upheld by Hon'ble Bombay High Court, vide its order dated 2<sup>nd</sup> April, 2019 in ITA No.1532 of 2017. In the case of M/s D Chetan & Co. (supra), the Hon'ble Bombay High Court held as under:-

**“5.** Being aggrieved, the Revenue preferred an appeal to the Tribunal. The impugned order of the Tribunal upheld the finding of the CIT (Appeals) that the loss incurred by the Respondent Assessee was a revenue loss and not connected with any speculation activities. **The Tribunal found that the transaction of forward contract had been entered into for the purpose of hedging in the course of its normal business activities of import and export of diamonds.** Thus, the Revenue's appeal was dismissed by the impugned order of the Tribunal.

**6.** Mr. Malhotra, learned Counsel appearing for the Revenue submits that this appeal had to be admitted as the impugned order has ignored its order in the case of S. Vinodkumar Diamonds (P.) Ltd. v. Addl. CIT [\[2013\] 59 SOT 124/35 taxmann.com 337 \(Mum. - Trib.\)](#) rendered on 3 May 2013 which on similar facts is in favour of the Revenue. He further submits that the impugned order of the Tribunal is suspect because it accepts the Respondent assessee's claim without calling upon it to prove that the same was not speculative. Lastly, he sought to place reliance upon Accounting Standard-11 to claim that such a loss is not allowable thereunder.

**7.** The impugned order of the Tribunal has, while upholding the finding of the CIT (Appeals), independently come to the conclusion that the transaction entered into by the Respondent assessee is not in the nature of speculative activities. **Further the hedging transactions were entered into so as to cover variation in foreign exchange rate which would impact its business of import and export of diamonds.** These concurrent finding of facts are not shown to be perverse in any manner. In fact, the Assessing Officer also in the Assessment Order does not find that the transaction entered into by the Respondent assessee was speculative in nature. It further holds that at no point of time did Revenue challenge the assertion of the Respondent assessee that the activity of entering into forward contract was in the regular course of its business only to safeguard against the loss on account of foreign exchange variation. Even

before the Tribunal, we find that there was no submission recorded on behalf of the Revenue that the Respondent assessee should be called upon to explain the nature of its transactions. Thus, the submission now being made is without any foundation as the stand of the assessee on facts was never disputed. So far as the reliance on Accounting Standard-11 is concerned, it would not by itself determine whether the activity was a part of the Respondent-assessee's regular business transaction or it was a speculative transaction. On present facts, it was never the Revenue's contention that the transaction was speculative but only disallowed on the ground that it was notional. Lastly, the reliance placed on the decision in *S. Vinodkumar Diamonds (P.) Ltd.* (supra) in the Revenue's favour would not by itself govern the issues arising herein. This is so as every decision is rendered in the context of the facts which arise before the authority for adjudication. Mere conclusion in favour of the Revenue in another case by itself would not entitle a party to have an identical relief in this case. In fact, if the Revenue was of the view that the facts in *S. Vinodkumar* (supra) are identical/similar to the present facts, then reliance would have been placed by the Revenue upon it at the hearing before the Tribunal. The impugned order does not indicate any such reliance. It appears that in *S. Vinodkumar Diamonds (P.) Ltd.* (supra), the Tribunal held the forward contract on facts before it to be speculative in nature in view of Section 43(5) of the Act. However, it appears that the decision of this court in *CIT v. Badridas Gauridu (P.) Ltd.* [\[2003\] 261 ITR 256/\[2004\] 134 Taxman 376 \(Mum.\)](#) was not brought to the notice of the Tribunal when it rendered its decision in *S. Vinodkumar Diamonds (P.) Ltd.* (supra). **In the above case, this court has held that forward contract in foreign exchange when incidental to carrying on business of cotton exporter and done to cover up losses on account of differences in foreign exchange valuations, would not be speculative activity but a business activity.**

**8.** In the above view, the question of law, as formulated by the Revenue, does not give rise to any substantial of law. Thus, not entertained.”

The Ld CIT(A) has followed the decision rendered by Hon'ble jurisdictional High Court and has decided this issue in favour of the assessee.

13.3 We notice from the break-up details of the claim extracted above, the M to M loss on “forward contracts” was Rs.42.53 lakhs. The other two items relate to “ineffective Option Contracts” and “Derivative asset w/off relating to option contracts”. The nature of these items is not clear and we notice that no tax authority has examined these items. If these transactions have been entered in the course of carrying on of regular business activities and the underlying assets are trading items, the loss arising on their revaluation at the year end is allowable as deduction. It is to be seen that the underlying assets

having foreign currency exposure is also revalued as at the year end. Accordingly, for the limited purpose of verifying these factual aspects, we restore this issue to the file of the AO for examining this issue in the light of principles laid down by Hon'ble jurisdictional Bombay High Court in the case of D Chetan & Co (supra).”

35.2 Following the above said decision, we restore this issue to the file of AO with similar directions.

36. The next issue urged by the revenue relates to disallowance of R & D expenses not approved by DSIR and also disallowance of expenditure incurred outside the approved in-house research facility. On the very same issue, the Ld CIT(A) passed a rectification order u/s 154 of the Act directing the AO to allow the deduction u/s 35(2AB) of the Act in respect of expenses not approved by DSIR. Hence the revenue has filed another appeal numbered as ITA No.21/Mum/2021 challenging the rectification order passed by Ld CIT(A) u/s 154 of the Act.

36.1 The facts relating to the above said disallowance are identical with the identical disallowances made in AY 2010-11. In paragraphs 11 (supra), we have dealt with identical disallowance made in the assessment year 2010-11 and discussed about the legal principles laid down by High Courts. Since the issue required verification of certain factual aspects, the issue was restored to the file of the AO for the limited purpose of verification of factual aspects and the AO was directed to the issue following the legal principles discussed in the order. Consistent with the view taken in AY 2010-11, we set aside the order passed by Ld CIT(A) on this issue and restore the same to the file of AO with similar directions.

37. The next issue urged by the revenue relates to the disallowance of ESOP expenses. The facts relating to the above said disallowance are identical with the identical disallowances made in AY 2009-10 and 2010-11.

In paragraphs 12 (supra), we have dealt with identical disallowance made in the assessment year 2010-11 and following the decision rendered in AY 2009-10, we have upheld the decision rendered by Ld CIT(A) on this issue. Consistent with the view taken in AY 2009-10 and 2010-11, we uphold the order passed by Ld CIT(A) on this issue.

38. The next issue urged by the revenue relates to the disallowance of Pre-commencement expenses incurred in Pithampur SEZ Plant-I. In AY 2010-11, we have dealt with this issue in Paragraph 14 of the order and we have upheld the relief granted by Ld CIT(A). Since the facts are identical, following the decision rendered by us in AY 2010-11, we uphold the decision rendered by Ld CIT(A) on this issue.

39. **The cross objection filed by the assessee for AY 2012-13** is only to support the decision rendered by Ld CIT(A) and hence it does not require adjudication.

40. In the result, all the appeals of the assessee and revenue are treated as partly allowed. The cross objections filed by the assessee are dismissed.

Order pronounced on 25.1.2024.

Sd/-  
(Pavan Kumar Gadale)  
Judicial Member

Sd/-  
(B.R. Baskaran)  
Accountant Member

Mumbai.; Dated : 25/1/2024

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai.

6. Guard File.

//True Copy//

PS

BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai