

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

BEFORE SHRI ABY T. VARKEY, JM AND SHRI AMARJIT SINGH, AM

आयकर अपील सं/ I.T. A. No. 880/Mum/2021
(निर्धारण वर्ष / Assessment Year: 2009-10)

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आयकर अपील सं/ I.T. A. No. 879/Mum/2021
(निर्धारण वर्ष / Assessment Year: 2010-11)

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आयकर अपील सं/ I.T. A. No. 882/Mum/2021
(निर्धारण वर्ष / Assessment Year: 2011-12)

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आयकर अपील सं/ I.T. A. No. 881/Mum/2021
(निर्धारण वर्ष / Assessment Year: 2012-13)

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आयकर अपील सं/ I.T. A. No. 883/Mum/2021
(निर्धारण वर्ष / Assessment Year: 2014-15)

IPCA Laboratories Ltd 48 Kandivli Industries Estate, Charkop Kandivli West, Mumbai-400067.	बनाम / Vs.	DCIT, Central Circle-5(2) 19 th Floor, Air India Building, Nariman Point, Mumbai-400021.
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आयकर अपील सं/ I.T. A. No. 2563/Mum/2021
(निर्धारण वर्ष / Assessment Year: 2009-10)

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आयकर अपील सं/ I.T. A. No. 2565/Mum/2021
(निर्धारण वर्ष / Assessment Year: 2010-11)

&

आयकर अपील सं/ I.T. A. No. 2567/Mum/2021
(निर्धारण वर्ष / Assessment Year: 2011-12)

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आयकर अपील सं/ I.T. A. No. 2569/Mum/2021
(निर्धारण वर्ष / Assessment Year: 2012-13)

&

आयकर अपील सं/ I.T. A. No. 2571/Mum/2021
(निर्धारण वर्ष / Assessment Year: 2014-15)



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DCIT-5(2) DCIT-CC-5(2), Central Circle-5, Room No. 1908, Air India Building, Nariman Point, Mumbai-400021.	बनाम / Vs.	IPCA Laboratories Ltd 48 Kandivli Industries Estate, Charkop Kandivli West, Mumbai-400067.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACI1220M		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Madhur Agrawal (Adv) Shri Mani Jain (CA)	
Revenue by:	Shri K. C Selvamani (DR) Mohd Arshad (ITO)	

सुनवाई की तारीख / Date of Hearing: 15/02/2024
घोषणा की तारीख /Date of Pronouncement: 08/04/2024

आदेश / ORDER

PER ABY T VARKEY, (JM):

These cross appeals by the Revenue and the Assessee arise out of the orders of the Learned Commissioner of Income Tax (Appeals) - 53, Mumbai [in short 'ld. CIT(A)'] all dated 31.03.2021 against the orders passed by the Dy. CIT, Central Circle-5(2), Mumbai [in short 'the AO'] for the Assessment Years [in short 'AYs'] 2009-10, 2010-11, 2011-12, 2012-13 & 2014-15. Since several issues involved are common, all the appeals for all the assessment years were heard together. Both the parties also argued them together raising similar arguments on these issues. Accordingly, for the sake of convenience and brevity, we dispose all the appeals by this consolidated order.



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2. Before we advert to the grounds taken in the cross appeals, it would first be relevant to cull out the basic facts of the case and effect of law in brief in respect of certain AYs. Search u/s 132 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) was conducted against the IPCA Laboratories Ltd. & Others Group, on 23-12-2014 thereby triggering Section 153A of the Act. Prior to the date of search, the income-tax assessment under section (hereinafter referred to as “u/s.”) 143(3) of the Act (scrutiny assessment) for AYs 2009-10 and 2010-11 stood completed on 09.05.2013 & 29.05.2014. Accordingly, the income-tax assessments for Assessment Years [AYs] 2009-10 & 2010-11 were not pending before Assessing Officer (AO) on the date of search, therefore, those years assessments didn’t abate consequent to the search on 23-12-2014. As far as assessments for AYs 2011-12, 2012-13 & 2014-15 are concerned, it was undisputed that these were abated assessments. The summary of the additions/disallowances in Rupees made by the AO which are in dispute in the cross- appeals for AYs 2009-10 to 2012-13 & 2014-15 are as follows:-



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(in Rs.)

Sl.	Issue	AY 2009-10	AY 2010-11	AY 2011-12	AY 2012-13	AY 2014-15
1.	Additions made in original assessment u/s 143(3) again added by the AO in assessment u/s 153A/143(3): - Transfer Pricing Adjustment - Denial of deduction u/s 80IC on sale of scrap - Disallowance of addl. depreciation - Disallowance of ESOP expenses	2,20,82,583 10,27,691 2,84,75,543 2,15,74,527	1,32,62,654 18,77,499 1,93,865 1,08,19,644	- - - -	- - - -	- - - -
2.	Disallowance of loss incurred by SEZ while computing book profit u/s 115JB	5,97,86,283	10,46,88,729	-	-	-
3.	Disallowance of weighted deduction u/s 35(2AB)	8,08,000	-	-	-	-
4.	Disallowance of tax paid on ESOP while computing book profit u/s 115JB	-	1,60,34,723	-	-	-
5.	Disallowance of purchases in relation to over-invoicing of raw materials	52,30,300	1,18,40,000	1,39,88,050	2,07,60,787	2,72,63,943
6.	Disallowance of bogus purchases	24,92,650	1,08,17,902	29,39,917	69,98,521	-
7.	Disallowance of professional fees paid	67,41,600	66,18,000	69,48,900	69,48,900	-
8.	Disallowance of sales promotion expenses	12,74,70,526	14,42,93,377	21,00,46,026	24,42,74,056	24,62,91,946
9.	Denial of deduction u/s 80IC in relation to sale of scrap	-	-	14,44,415	30,66,826	15,86,568
10.	Disallowance of ESOP expenses	-	-	31,05,222	10,12,686	-
11.	Exclusion of excise subsidy received under the Industrial Scheme by way of capital receipt	-	-	-	69,49,430	11,58,23,153
12.	Addition of foreign exchange fluctuation reserve to book profit u/s 115JB	-	-	-	-	8,59,80,061



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3. It is noted that the reasoning given by the AO for making the above additions/disallowances were verbatim same across all AYs. Hence, for the sake of convenience, and to avoid repetition of facts; we deem it fit to adjudicate each of the common issues across all AYs before us together.

4. Issue 1: Additions made in original assessment u/s 143(3) of the Act again added back in the assessment completed u/s 153A/143(3) of the Act

Ground Nos. 13-15 of the assessee's appeal and Ground No. 12 of the Revenue's appeal for AY 2009-10

Ground Nos. 11-13 of the assessee's appeal and Ground No. 12 of the Revenue's appeal for AY 2010-11

4.1 These grounds relate to the several additions which were made by the AO while completing the original assessment u/s 143(3) of the Act for AYs 2009-10 & 2010-11, which were again considered and added back by the AO while framing the income tax assessments u/s 153A/143(3) of the Act. The additions in question are noted to comprise of viz.,

- a) transfer pricing adjustments towards goods sold to AEs and interest recoverable from AEs made by the TPO u/s 92CA(3) of the Act, which was added by the AO in the original assessments for AYs 2009-10 and 2010-11;
- b) disallowance of deduction claimed u/s 80-IC of the Act to the extent of income derived from the sale of scrap added in original assessments u/s 143(3) for AYs 2009-10 & 2010-11;



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- c) disallowance of balance additional depreciation in relation to new assets acquired in earlier year, disallowed in assessments u/s 143(3) for AYs 2009-10 & 2010-11;
- d) disallowance of ESOP expenses in original assessments u/s 143(3) for AYs 2009-10 & 2010-11

4.2 On appeal, the Ld. CIT(A) is noted to have taken into account the appellate orders, available till then, passed in the matters of original assessments for AYs 2009-10 & 2010-11 and has accordingly partly allowed relief on merits in relation to the above issues. Aggrieved by the order of the Ld. CIT(A), both the parties are in appeal before us.

4.3 Assailing the action of the lower authorities, the Ld. AR of the assessee contended that the AYs 2009-10 & 2010-11 were unabated assessments and therefore the impugned additions/disallowances made by the AO, which were already added in the original assessment, were unsustainable in the assessment completed u/s 153A of the Act, since it was not based on any incriminating material seized during the course of search. For this, the Ld. AR relied on the decision of the Hon'ble Delhi High Court in the case of **CIT vs Kabul Chawla (380 ITR 573)** which has since been affirmed by the Hon'ble Supreme Court in the case of **PCIT vs Abhisar Buildwell (P) Ltd. (149 taxmann.com 399)**. On merits, the Ld. AR brought to our notice that issues (b), (c), (d) [supra] had been fully allowed and issue (a) had been partly allowed by this Tribunal in the regular appellate orders passed in



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relation to the original assessments framed u/s 143(3) of the Act. Per contra, the Ld. CIT, DR supported the order of the AO.

4.4 After hearing the rival contentions and perusing the material on record, it is an admitted fact that AYs 2009-10 & 2010-11 are unabated assessments. It is noted that the dispute as to whether completed/unabated assessments can be disturbed only when incriminating material is unearthed in the course of search has now been settled by the Hon'ble Supreme Court in the case of **Abhisar Buildwell Pvt Ltd (supra)**. The Hon'ble Supreme Court is noted to have approved the decision of Hon'ble Delhi High Court in the case of CIT Vs Kabul Chawla (supra). According to the Hon'ble Apex Court, in case of search under section 132, the AO assumes the jurisdiction for block assessment under section 153A of the Act, but in case no incriminating material is unearthed during the search, the AO cannot assess or reassess, by taking into consideration the other material, in respect of completed/unabated assessment. Hence, in case of unabated assessments, the AO can re-assess the income only to the extent and with reference to any incriminating material which the Revenue has unearthed in the course of search qua the assess qua the AY.

4.5 From the facts before us, it is noted that the AO's predecessor had already made additions on the four (4) issues mentioned above in the original assessment u/s 143(3) for AYs 2009-10 & 2010-11, which was completed much prior to the date of search. Hence, these assessments were unabated and the fate of the addition/s made in the



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original assessments, constituted separate & independent proceedings, which as rightly pointed by the Ld. AR was being separately pursued both by the assessee and the Revenue as well. We thus note that the fate of the addition/s made therein had no relation with the income-tax assessments completed u/s 153A/143(3) of the Act pursuant to the search. As noted above, since AYs 2009-10 & 2010-11 were unabated assessments, the AO could disturb these completed assessments only qua the issues in relation to which incriminating material was found. Clearly, these four (4) additions were not based on any incriminating material unearthed in the course of search. Rather, the AO is noted to have followed the assessment orders passed by his predecessors and again added the disallowance/s on identical line of reasoning given by them. The Ld. CIT, DR could not controvert this factual position. Hence, in our considered view, such action of the AO making these additions again in these unabated assessments cannot be countenanced. We accordingly hold that the addition/s made by the AO on the four (4) issues highlighted above in these unabated AYs 2009-10 & 2010-11 to be unsustainable. Hence, the grounds taken by the assessee in this regard stands allowed and the grounds of the Revenue in this regard stands dismissed.

5. Issue 2: Disallowance of loss incurred by SEZ added u/s 115JB of the Act

Ground Nos. 11-12 of the assessee's appeal for AY 2009-10

Additional Ground No. 1 of the assessee's appeal for AY 2010-11



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5.1 The facts relating to this issue are that, the AO had disallowed the loss of Rs.5,97,86,283/- incurred in the SEZ Unit of the assessee, while computing book profit u/s 115JB of the Act for AY 2009-10. Briefly stated, the AO is noted to have observed that one of the assessee's manufacturing units was situated in Special Economic Zone ('SEZ') at Pritampur, Madhya Pradesh. Upon verification of books of accounts, the AO noted that the said unit had incurred loss on account of various trial expenses. The AO was of the view that such loss incurred by the SEZ unit could not be allowed in view of provisions of Section 115JB (6) of the Act and therefore disallowed the same. Being aggrieved by this action of the AO, the assessee preferred appeal before the Ld. CIT(A) who confirmed the same. Now the assessee is in appeal before us.

5.2 Assailing the action of the lower authorities, the Ld. AR of the assessee contended that the relevant AY 2009-10 was an unabated assessment year and therefore the impugned disallowance was unsustainable since it was not based on any incriminating material seized during the course of search. For this, the Ld. AR reiterated his reliance on the decision of the Hon'ble Supreme Court in the case of **Pr.CIT vs Abhisar Buildwell Pvt Ltd (supra)**. According to Ld. AR, if this legal plea is not upheld, and it is held that such disallowance is permissible even in absence of incriminating material in an unabated assessment, then he has prayed for admission of the Additional Ground No. 1 raised in AY 2010-11. In this additional ground, the assessee has



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claimed deduction for the amount of loss incurred by the same SEZ Unit, prior to commencement of commercial production, while computing the book profit u/s 115JB of the Act for AY 2010-11.

5.3 On merits of the claim, the Ld. AR submitted that the provisions of Section 115JB (6) of the Act invoked by the AO had no application to the loss incurred by SEZ Unit prior to commencement of business activity/commercial production. He submitted that, the SEZ Unit at Pritampur, Madhya Pradesh had commenced commercial production only from 29.11.2011 i.e. AY 2012-13 and onwards and thus any expenses/losses incurred by the said SEZ unit prior to commencement of business was not amenable to Section 10AA of the Act and hence the provisions of Section 115JB(6) had no application. For this, the Ld AR first invited our attention to the language used in clause (6) to Section 115JB of the Act. It is noted that clause (6) of Section 115JB provided that; *the provisions of this section shall not apply to the income accrued or arising on or after the 1st day of April, 2005 from any business carried on, or services rendered, by an entrepreneur or a Developer, in a Unit or Special Economic Zone.* According to Ld. AR, the phrase '*any business carried on*' was of importance. He submitted that, unless there is a business being carried on at the SEZ Unit, the provisions of Section 115JB (6) would not apply. The Ld. AR showed us that, the commercial production at the SEZ only began from AY 2012-13 and onwards, and thus any loss incurred prior to commencement of business was not subject to disallowance u/s 115JB



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(6) of the Act. He shows us that, it was not in dispute that the SEZ Unit had only incurred trial expenses during the year which had resulted in the impugned loss and that, the business of the SEZ Unit at Pritampur, Madhya Pradesh had not commenced during the year. The Ld. AR placed before the letter dated 26.08.2013 which was filed by the assessee before the AO informing him that the unit had commenced business activity only from 23.03.2011 and thus it had not claimed any exemption u/s 10AA of the Act. In the said letter, the assessee accordingly stated that the depreciation claimed on the assets prior to the unit becoming eligible for exemption u/s 10AA of the Act has to be allowed u/s 32 of the Act. The Ld. AR thereafter took us through the provisions of Section 10AA of the Act to show that even the exemption provided therein begins only when the unit begins to manufacture or produce i.e. the commercial production commences and that no exemption is available qua any profits derived from trial production. According to Ld. AR, since the assessee did not commence the business activity at the SEZ Unit during the year, the provisions of Section 10AA did not kick in the relevant AY 2009-10. As a consequence, the loss incurred due to incurrance of trial run expenses was not hit by the rigors of Section 115JB(6) of the Act. The Ld. AR thus contended that, the loss was allowable while computing book profit u/s 115JB of the Act for AYs 2009-10 & 2010-11. Per contra, the Ld. DR vehemently supported the order of the lower authorities.



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5.4 After hearing the rival contentions and perusing the material on record, we find that admittedly both AYs 2009-10 & 2010-11 are unabated assessment years and during the course of search no incriminating material was found with respect to the loss on account of trial expenses incurred at the SEZ Unit at Pritampur, Madhya Pradesh. As noted by us above, following the decision of the Hon'ble Supreme Court in the case of **Abhisar Buildwell Pvt Ltd (supra)**, in case of unabated assessments, the AO can re-assess the income only to the extent and with reference to any incriminating material which the Revenue has unearthed in the course of search qua the assess qua the AY. On the given facts before us, we find that the AO has made disallowance to the computation of book profit on the basis of his interpretation of the provisions of Section 115JB (6) of the Act, without any reference to any seized material impounded in the course of search. Following the decision of Hon'ble Supreme Court (supra), we are in agreement with the Ld. AR that the impugned disallowance could not have been made in the unabated AY 2009-10, in absence of there being any incriminating material found in the course of search relating to this impugned issue. Accordingly, this legal plea of the assessee stands allowed and hence the disallowance of Rs.5,97,86,283/- made by the AO on account of loss incurred by the SEZ Unit while computing book profit u/s 115JB of the Act is hereby directed to be deleted. Hence, Ground nos. 11 & 12 of the assessee's appeal for AY 2009-10 is allowed.



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5.5 Having held so above, we are accordingly of the view that, likewise, the Additional Ground No. 1 of the assessee raising fresh claim for deduction of loss incurred at SEZ unit while computing book profit u/s 115JB of the Act in unabated AY 2010-11 cannot be entertained. For this, we gainfully refer to the decision of this Tribunal at Pune in the case of **Umesh D Shinde Vs DCIT (ITA Nos. 1363 to 1367/Pun/2014) dated 16.03.2018** wherein it was held as under :-

“9. We have heard the rival contentions and perused the record. The years under appeal are assessment years 2004-05 to 2008-09. The assessee in each of the years had filed the return of income within prescribed period and time for taking up for scrutiny had also lapsed before the date of search on the assessee. Survey proceedings had taken place on 23.09.2009. The assessee in response to notice issued under section 153A of the Act, made certain fresh claims in the returns of income filed. The Assessing Officer while completing proceedings under section 153A r.w.s. 143(3) of the Act made certain additions on account of agricultural income, deemed dividend under section 2(22)(e) of the Act, cash in hand and adhoc addition out of expenses and interest payment to Ravi Cooperative Bank. The new claim of assessee in the returns of income on account of depreciation on Motor Car in assessment years 2004-05 and 2005-06 and loss on trading of shares in assessment year 2006-07 was rejected by the Assessing Officer.

10. The issue which arises is in respect of respective additions made and the rejection of new claim of deduction in the returns of income filed under section 153A of the Act in respect of



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assessment years for which assessment proceedings have not abated.

11. We find that the issue of abated and non-abated assessment proceedings has been decided by Hon'ble Bombay High Court in CIT Vs. (1) Continental Warehousing Corporation (Nhava Sheva) Ltd. (2) All Cargo Global Logistics Ltd., ITA Nos.1363 to 1367/PUN/2014 Umesh D Shinde (2015) 374 ITR 645 (Bom). The said ratio has been applied by Pune Bench of Tribunal in Shri Gajendra D. Pawar Vs. DCIT in ITA Nos.1009 to 1012/PUN/2015, relating to assessment years 2005-06 to 2008-09, order dated 31.10.2017. The first issue which was decided by the Tribunal was in respect of claim of expenditure and in some cases on account of depreciation made for the first time in the returns of income filed under section 153A of the Act. The Tribunal vide para 11 held as under:-

"11. We have heard the rival contentions and perused the record. The first issue which arises in the present appeal is in respect of claim of expenditure on account of interest and in some cases on account of depreciation. Admittedly, the said expenditure was not claimed by the assessee in the return of income filed prior to search at the premises of assessee. However, consequent to search proceedings carried on the premises of assessee, notice under section 153A of the Act was served upon the assessee. In response thereto, in the return of income filed by the assessee, fresh claim of interest expenditure and depreciation on certain assets was made. The said claim was not allowed by the



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authorities below. The assessments for assessment years 2005-06 to 2008-09 i.e. appeals listed before us have not abated. In such cases, where the assessment has not abated, then the Hon'ble Bombay High Court (supra) has laid down that only undisclosed income and undisclosed assets detected during the course of search could be brought to tax. Applying the said ratio to the facts of the present case, we hold that the assessee is not entitled to claim any deduction on account of fresh claim i.e. on account of interest and depreciation in the respective years. Applying the ratio laid down by the Hon'ble Bombay High Court in CIT Vs. (1) Continental Warehousing Corporation (Nhava Sheva) Ltd. (2) All Cargo Global Logistics Ltd. (supra), we hold that in the years under appeal, where the assessment has not abated, then no deduction is to be allowed in respect of fresh claim made in the return of income filed in response to notice under section 153A of the Act. Consequently, the first issue raised by way of ground of appeal No.1 in assessment year 2005-06, grounds of appeal No.1 and 3 in assessment year 2006-07, ground of appeal No.1 in assessment years 2007-08 and 2008-09 are dismissed."

12. The issue arising before us is identical to the issue before the Tribunal in Shri Gajendra D. Pawar Vs. DCIT (supra) and following the same parity of reasoning, we hold that the assessee is not entitled to make any fresh claim of deduction on following counts."



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5.6 In view of the above, this Additional Ground raised in AY 2010-11 is dismissed.

6. Issue 3: Disallowance of deduction claimed u/s 35(2AB) of the Act

Ground No. 7 of the Revenue's appeal for AY 2009-10

6.1 This ground raised by the Revenue relates to the Ld. CIT(A)'s action of deleting the disallowance of amount of Rs.8,08,000/- spent by the assessee on registration of patent, claimed u/s 35(2AB) of the Act. The AO is noted to have held that the reimbursement of expenses for obtaining patent specification and renewal of patents was not eligible for deduction u/s 35(2AB) of the Act. On appeal, the Ld. CIT(A) is noted to have deleted the same. Aggrieved by the same, the Revenue is now in appeal before us.

6.2 Heard both the parties. After hearing the rival contentions and perusing the material on record, we find that admittedly, the instant assessment year is an unabated assessment year and the impugned disallowance was not based on any incriminating material found in relation thereto in the course of search. We note that the AO has made addition on re-appraisal of the claim made in the return of income, which had been accepted in the original assessment u/s 143(3) of the Act. In our opinion, in absence of any incriminating material to justify the impugned addition, and following the decision of Hon'ble Supreme Court in the case of **Pr.CIT vs Abhisar Buildwell Pvt Ltd**



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(**supra**), it is held that the impugned disallowance could not have been legally made in the unabated AY 2009-10. We thus uphold the order of Ld. CIT(A) by allowing this legal issue and dismiss this ground of the Revenue.

7. Issue 4: Expenditure by way of tax paid on ESOP added u/s 115JB of the Act

Ground No. 7 of the Revenue's appeal for AY 2010-11

7.1 This ground raised by the Revenue relates to the Ld. CIT(A)'s action of deleting the addition made on account of tax of Rs.1,60,34,723/- paid on the non-monetary perquisite granted to employee/s by way of ESOPs while computing book profit u/s 115JB of the Act. The AO is noted to have held that this tax paid for and on behalf of the employees, although a non-monetary perquisite, was in the nature of 'income-tax' and hence added the same under Explanation (1) to Section 115JB of the Act. On appeal, the Ld. CIT(A) is noted to have deleted the disallowance by following the decision rendered by this Tribunal on this issue in the case of **Rashtriya Chemicals & Fertilizers Ltd Vs CIT (91 taxmann.com 104)**. Aggrieved by the same, the Revenue is now in appeal before us.

7.2 We have heard both the sides and perused the findings in the assessment order and the material placed before us. We find merit in the preliminary plea of the Ld. AR for the assessee that the impugned disallowance was not based on any incriminating material found in the



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course of search and therefore the AO was legally unjustified in making this addition in the unabated AY 2010-11. It is noted that, this addition was also made on re-appraisal of the claim made by the assessee in the return of income, which had not been disputed in the original assessment u/s 143(3) of the Act. This addition was not made with reference to any impounded material seized in search. Hence, in absence of any incriminating material to justify this addition, and following the decision of Hon'ble Supreme Court in the case of **Pr.CIT vs Abhisar Buildwell Pvt Ltd (supra)**, we hold that the impugned disallowance was legally untenable in the unabated AY 2010-11. For the aforesaid reasons, we uphold the order of Ld. CIT(A) deleting the same but on legal issue and dismiss this ground of the Revenue.

8. Issue 5: Disallowance of purchases in relation to over-invoicing of raw materials

Ground Nos. 5-7 of the assessee's appeal and the Ground No. 4 of the Revenue's appeal for AY 2009-10

Ground Nos. 5-7 of the assessee's appeal and the Ground No. 4 of the Revenue's appeal for AY 2010-11

Ground Nos. 5-7 of the assessee's appeal and the Ground No. 4 of the Revenue's appeal for AY 2011-12

Ground Nos. 5-7 of the assessee's appeal and the Ground No. 7 of the Revenue's appeal for AY 2012-13

Ground Nos. 5-7 of the assessee's appeal and the Ground No. 6 of the Revenue's appeal for AY 2014-15



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8.1 These grounds relate to the addition made by the AO on account of over-invoicing of raw materials. Briefly noted, the facts of the case are that, the Investigating authorities, in the course of search conducted u/s 132 of the Act, had found Mr. Prashant Godha, Managing Director of the assessee, to be in possession of cash of Rs.1.17 crores at his residential premises. When enquired about the source of cash, he is noted to have explained in his statement u/s 132(4) of the Act that, this amount was generated from over-invoicing of raw material purchases in the IPCA Laboratories Ltd, which was received back by him in cash. Basis this statement, the Investigating authorities are noted to have examined three (3) employees viz., Mr. Manoj K. Jain, Mr. Manoj S Jayawant and Mr. Peter Fernandez, each of whom is noted to have stated that over-invoicing purchases are booked through M/s Reynolds Petro Chem Ltd. The relevant excerpts of their statements as noted by us are as follows :-

Relevant part of statement of Mr. Manoj Kumar Jain:-

“Q. 9 Are you aware of any bogus purchases booked or bogus commission payments made by M/s IPCA Laboratories Ltd.

Ans: Sir, I am not aware of any bogus commission made by M/s IPCA Laboratories ltd. but there is bogus purchase booked from M/s Reynolds Petro Chem Ltd.

Q. 11 Please furnish the details of the transactions made with M/s Reynolds Petro Chem Ltd, along with the modes operandi followed.



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Ans: Sir, in case of purchase of product MAPA (Methyl Amino Propyl Amine) which is made in M/s Makers Laboratories Ltd., the adjustments are made. M/s Makers Laboratories Ltd. makes purchase from M/s Reynolds Petro Chem Ltd, at the rate which is Rs. 73/- per kg. higher than the market rate. This excess payment made to the M/s Reynolds Petro Chem Lid. is returned back to M/s IPCA Laboratories Ltd. in cash with the Knowledge of the management. M/s Reynolds Petro Chem Ltd. charges 5% commission and after deducting the same the balance amount of cash is returned back. This over invoicing is done in certain products purchased through M/s. Reynolds Petro Chem Ltd. and the excess payment made is brought back in cash after deducting commission of M/s Reynolds Petro Chem Ltd.

Q.12 Please give details of all products which are purchased at a rate higher than market rate for the purpose of taking cash out of the system.

Ans. Sir, following are the products purchased at a higher rate:

Name of the Products	Market Rate	Inflated Rate	Difference per Kg taken out in cash
Paracetamol	235/-	245/-	10/-
Erythromycin Estolate	2400/-	2750/-	350/-
Meta chloro Aniline	290/-	320/-	30/-

The market price keeps on fluctuating with time. However, the difference per Kg. taken out in cash remains same.”

Relevant part of statement of Mr. Manoj Suresh Jayawant:-



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Q.10 Are you aware of any bogus purchases booked or bogus commission payments made by M/s IPCA Laboratories Ltd.

Ans: Sir, I am not aware of any bogus commission made by M/s IPCA Laboratories Ltd. but there is bogus purchase booked from M/s Reynolds Petro Chem Ltd.

Q. 12 Please furnish the details of the transactions made with M/s Reynolds Petro Chem Ltd, along with the modes operandi followed.

Ans: Sir, in case of purchase of product MAPA (Methyl Amino Propyl Amine) which is made in M/s Makers Laboratories Ltd., the adjustments are made. M/s Makers Laboratories Ltd. makes purchase from M/s Reynolds Petro Chem Ltd; at the rate which is Rs. 73/- per kg. higher than the market rate. This excess payment made to the M/s Reynolds Petro Chem Ltd. is returned back to M/s IPCA Laboratories Ltd. in cash with the Knowledge of the management. This over invoicing is done in certain products purchased through M/s. Reynolds Petro Chem Ltd. and the excess payment made is brought back in cash after deducting commission of M/s Reynolds Petro Chem Ltd.

Relevant part of statement of Mr. Peter Fernandes:-

“Q. 9 Are you aware of any bogus purchases booked or bogus commission payments made by M/s IPCA Laboratories Ltd.

Ans: Sir, purchases are booked from M/s Reynolds Petro Chem Ltd. The purchases are not bogus but over invoicing are done.



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Q.12 Please give details of all products which are purchased at a rate higher than market rate for the purpose of taking cash out of the system.

Ans. Sir, following are the products purchased at a higher rate:

Name of the Products	Market Rate	Inflated Rate	Difference per Kg taken out in cash
Paracetamol	235/-	245/-	10/-
Erythromycin Estolate	2500/-	2700/-	200/-

The market price keeps on fluctuating with time. However, the difference per Kg. taken out in cash remains same.”

8.2 The Ld. AR particularly pointed out to us that, each of these three (3) employees in their statements had only admitted that the over-invoicing of raw materials was done through one vendor, M/s Reynolds Petro Chem Ltd who would provide inflated bills. In fact, Mr. Manoj K. Jain & Mr. Manoj S Jayawant in their answers to Q No. 11 & Q No. 12 respectively, are noted to have specifically identified one of the sister concerns, M/s Maker Laboratories Ltd which had made purchases from M/s Reynolds Petro Chem Ltd. These employees are noted to have explained the *modus operandi* followed for inflating the purchases. The Ld. AR accordingly emphasized on the fact that none of these employees had named the assessee to be involved in over-invoicing but had only admitted that vendor, M/s Reynolds Petro Chem Ltd would provide inflated bills, which was to M/s Maker Laboratories Ltd. According to Ld. AR therefore, the statement of



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these three (3) employees had no bearing whatsoever in the income-tax assessment of the assessee.

8.3 It is further noted that the AO had issued show cause to the assessee dated 22.07.2016 wherein he had *inter alia* highlighted the modus operandi of over invoicing/inflated purchases detected to have been done through M/s Reynolds Petro Chem Ltd. He accordingly required the assessee to explain as to why disallowance should not be made in this regard. In response, the assessee is noted to have made multi-fold submissions viz., the assessee firstly pointed out that Mr. Godha had retracted his statement, which formed the genesis of this dispute. The assessee showed that Mr. Godha in his retraction affidavit had clarified that the sum of Rs.1.17 crores found from his possession did not represent any amount generated from over-invoicing done by the assessee company but represented his own unaccounted cash income. The assessee corroborated the retraction affidavit by showing that Mr. Godha had offered the same to tax as his own unaccounted income in the return of income filed by him for AY 2015-16. Secondly, the assessee explained that each of the three (3) employees had also retracted their original statements and therefore according to assessee, their original statements had lost its evidentiary value. The assessee had placed on record their retraction affidavits as well. The AO however is noted to have rejected the explanation put forth by the assessee. The AO observed that, in a subsequent survey action conducted on 16.04.2015, Shri Jagdish Somani, Director of M/s



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Reynolds Petro Chem Ltd, had also admitted to the modus operandi of providing inflated bills to its customers. The AO accordingly observed that M/s Reynolds Petro Chem Ltd was providing inflated purchases to M/s Maker Laboratories Ltd and the amount of over-invoicing was routed back in guise of '*commission*'.

8.4 Referring to the search findings, the AO is noted to have made independent enquiries u/s 133(6) of the Act from five (5) suppliers viz., M/s Sarna Chemicals Pvt Ltd, M/s Anuh Pharma Ltd, M/s Mehta API Pvt Ltd, M/s Calyx Chemicals & Pharmaceuticals Ltd and M/s Farmson Pharmaceuticals Pvt Ltd. According to AO, these vendors were over-invoicing the assessee. To this, the Ld. AR has rightly pointed before us out that M/s Reynolds Petro Chem Ltd does not feature therein and it is not in dispute that the assessee company i.e. M/s IPCA Laboratories Ltd had not made any purchases from M/s Reynolds Petro Chem Ltd in any of the AYs. It is further noted that, in the enquiries made u/s 133(6), the AO had called for the comparative details of sales made by these five (5) vendors to the assessee company and their other customers. Based on the data obtained from these vendors, the AO is noted to have undertaken a benchmarking analysis and compared the prices at which the aforementioned vendors had made sales to the assessee and to others and also the internal rates at which the assessee made purchases of same products from other parties, apart from these five (5) vendors. According to AO, the comparative data revealed that the prices at which goods were sold to



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the assessee by these five (5) vendors were either higher than the prices charged from other customers or that the prices paid by assessee to other suppliers were lower. The AO thus inferred that the purchases from these five (5) vendors had been inflated and accordingly held it to be a case of over-invoicing. Although the AO is noted to have undertaken this factual exercise, but the AO is found to have ultimately discarded the same. Instead, the AO is observed to have simply applied the following uniform rates, as admitted by the employees to be the over-invoicing component in the purchases.

Name of Raw Material	Over-Invoicing/kg
Meta-Chloro Aniline (MCA)	Rs.30/-
Paracetamol	Rs.20/-
Erythromycin Estolate	Rs.200/-

8.5 Aggrieved, the assessee carried the matter in appeal before the Ld. CIT(A). On appeal, the Ld. CIT(A) is noted to have examined the contemporaneous facts available on record and thereafter, he himself is observed to have undertaken detailed comparative exercise of the each of the above products procured by the assessee from the five (suppliers). The Ld. CIT(A) noted that, the average price paid by the assessee for purchase of MCA and Paracetamol from M/s Sarna Chemicals Pvt Ltd and M/s Farmson Pharmaceuticals Pvt Ltd respectively was commensurate with the average prices paid to other vendors. The Ld. CIT(A) is noted to have accordingly partly deleted the addition made in respect of these purchases. With regard to the purchase of Erythromycin Estolate made from M/s Anuh Pharma Ltd,



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M/s Mehta API Pvt Ltd, M/s Calyx Chemicals and Pharmaceuticals Ltd, the Ld. CIT(A) noted that, the assessee had not purchased this particular raw material from any other vendors. Hence in absence of any comparative details, the Ld. CIT(A) is noted to have confirmed the addition. Being aggrieved by this order of the Ld. CIT(A), both the assessee and the Revenue are in appeal before us.

8.6 We have heard both the parties and perused the relevant statements and retraction affidavits and also the other material placed on our record. The main thrust of the Revenue's argument was that the addition made by the AO on account of over invoicing was justified as it was made on the basis of statements given by the three employees in the course of search u/s 132(4) of the Act, which is an important piece of evidence in itself and that their subsequent retraction, being an afterthought, was of no relevance. In order to adjudicate this contention, it is first relevant to examine the extant provisions of Section 132(4) of the Act, which reads as follows:

“(4) The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act.



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Explanation.—For the removal of doubts, it is hereby declared that the examination of any person under this sub-section may be not merely in respect of any books of account, other documents or assets found as a result of the search, but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act.”

8.7 From a bare reading of the aforesaid provision, it is noted that Section 132(4) of the Act empowers the authorized officer to examine on oath any person who is found to be in possession or control of any books of account, documents, money etc. Such a statement made by that person may thereafter be used in *evidence* in any proceedings under the Act. *Evidence* is a mode or means to prove a *fact-in- issue*. Statement is an oral testimony of *relevant fact*; and an admission of a fact-in-issue is an important piece of evidence, provided it has been voluntarily given without any inducement, promise, threat or coercion. Once a statement recorded of a person who is in possession of any valuable thing or control of books found during search then it can be used as evidence in any proceedings under the Act and the presumption would be that it has been given by that person voluntarily. The burden to prove that the statement was incorrect based on mistake of fact or that it was not voluntarily obtained, but due to threat, coercion, promise etc., is upon the maker of statement. In this context, the Hon'ble Apex Court in the case of **Pullengole Rubber Produce Co. Ltd. v. State of Kerala (91 ITR 18)** has held that although an



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admission is an extremely important piece of evidence but it cannot be said that it is conclusive. It was held that, it is open to the assessee who made the admission to show that it is incorrect based on mistake of fact. An oral statement on a relevant fact is a piece of evidence, and the weight to be attached to it must depend on the factual circumstances in which it was made. It is open for the assessee to show the contents/facts stated therein to be erroneous or untrue, based on mistake of fact. Hence, the position which emerges is that a statement u/s 132(4) of the Act by itself cannot be reason enough to justify an addition, if the assessee is able to show that the facts admitted by him was purely based on wrong assumption of facts and able to adduce evidence/material to show that he was wrong on the facts he admitted. So, when an admission u/s 132(4) of the Act has been retracted on the aforesaid reasons, then the AO should cross-examine the person again to ascertain the correct facts. The AO ought to conduct proper investigation into the affairs of the assessee and gather corroborative material which would negate such retraction and prove that the facts admitted originally is correct and thus retraction can be discarded.

8.8 In view of the above position of law, we now proceed to examine the facts on the present case. It is noted that the impugned addition on account of over-invoicing emanated from the statement of Mr. Prashant Godha. He is noted to have admitted in his statement that the cash found in his possession was generated out of over-invoicing and that these proceeds belonged to the assessee-company. Based on



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his statement, the Investigating Authorities are noted to have enquired into the source/party from whom such over-invoicing was done. As noted from the statements of the three (3) employees extracted above, the Investigating Authorities had questioned them as to whether they were aware of any bogus purchases booked by the assessee company. To this, each of the employee is noted to have made the same averment that purchases were booked from M/s Reynolds Petro Chem Ltd but these purchases were not bogus and that only over invoicing was done. The Investigating Authorities are noted to have followed up this answer with another question to explain the details of transactions made with M/s Reynolds Petro Chem Ltd and these employees are noted to have explained the same. Having perused each of these statements given by these three employees, it is evident that they had only admitted to over-invoicing being done through M/s Reynolds Petro Chem Ltd. The Ld. AR has rightly pointed out that none of these employees have named the assessee, i.e. M/s IPCA Laboratories Ltd. in their answers. Instead, while explaining the modus operandi, these employees are noted to have named M/s Maker Laboratories Ltd, which we note to be sister concern of the assessee who had made purchases from M/s Reynolds Petro Chem Ltd. It is not the Revenue's case that the assessee had made any purchases from M/s Reynolds Petro Chem Ltd. The AO instead is noted to have used these statements to allege that purchases made from other vendors, namely, M/s Sarna Chemicals Pvt Ltd, M/s Anuh Pharma Ltd, M/s Mehta API Pvt Ltd, M/s Calyx Chemicals and Pharmaceuticals Ltd and M/s



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Farmson Pharmaceuticals Pvt Ltd were also subjected to over-invoicing. Upon query by this Bench on this aspect, the Ld. AR confirmed that there were no purchases made by the assessee from M/s M/s Reynolds Petro Chem Ltd and this admitted factual position was not controverted by the Revenue. The Ld. AR brought to our notice that only M/s Maker Laboratories Ltd had conducted transactions with M/s Reynolds Petro Chem Ltd, and that the AO had already drawn adverse inference on account of over-invoicing in the hands of M/s Maker Laboratories Ltd. The Ld. AR also brought to our notice that Shri Prashant Godha was also an erstwhile Director of M/s Maker Laboratories Ltd and that he had remitted his office only a few months prior to the date of search. The Ld. AR has therefore rightly suggested that even if the statement of Mr. Godha was to be taken at face value, i.e. the cash found on him was generated from over-invoicing, then he has mistakenly named the assessee instead of M/s Maker Laboratories Ltd in his statement. Having regard to these facts and evidences brought on record, we find force in the submissions of the Ld. AR that the statement given by Shri Prashant Godha that the cash found from his possession belonged to the assessee, which it had generated from over-invoicing, was based on mistaken understanding of fact and that his testimony was factually incorrect. This is also found to be corroborated by the fact that Shri Prashant Godha had backed his retraction affidavit by offering the cash found in his possession to tax as his own unaccounted income and the Revenue is also noted to have accepted the said offer and assessed it to tax in his hands. The



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contemporaneous facts showed that assessee-company had not made any purchases from M/s Reynolds Petro Chem Ltd, which was found to be engaged in giving inflated invoices. Moreover, the Revenue had already made additions on account of over-invoicing in hands of M/s Maker Laboratories Ltd in relation to the purchases from M/s Reynolds Petro Chem Ltd. Also, the cash found from the possession of Shri Prashant Godha had been ultimately assessed as his own undisclosed income. Considering the entire gamut of facts therefore, the original testimony of Shri Prashant Godha is found to be based on wrong assumption of facts, which makes it unsafe to rely on it and as discussed, the assessee has rebutted the same with evidence. Hence, we hold in aforesaid factual matrix, the AO erred to draw adverse inference in the hands of the assessee solely based on an incorrect admission made by the Director on wrong assumption of fact/mistake of fact.

8.9 As already noted above, the AO had erroneously referred to the statement of three (3) employees to justify the addition on account of over-invoicing from purchases made from vendors, M/s Sarna Chemicals Pvt Ltd, M/s Anuh Pharma Ltd, M/s Mehta API Pvt Ltd, M/s Calyx Chemicals and Pharmaceuticals Ltd and M/s Farmson Pharmaceuticals Pvt Ltd. The AO, instead, is noted to have drawn this inference on his own surmises and not any incriminating material found in the course of search. Overall, therefore, we find that the entire premise on which the AO alleged over-invoicing of purchases by the



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assessee was fundamentally flawed and not backed by any material or evidence. Accordingly, the additions made in this regard in the hands of the assessee is untenable.

8.10 Moreover, before us, the Ld. AR for the assessee has also demonstrated through the details of purchases that the purported statements obtained from the three (3) employees regarding over-invoicing was also not corroborated by the given facts of the case. He has thus shown us that the admission obtained by them was untrue and hence their retractions should not be discarded straightaway. The Ld. AR has accordingly pointed out apparent fallacies in the manner in which the AO inferred over-invoicing from the vendors in question. The Ld. AR showed us that the AO had cited instances and made comparison on selective data. For instance, it was shown to us, that the AO had cherry picked six (6) transactions of M/s Sarna Chemicals Pvt Ltd as opposed to the twenty (20) transactions undertaken during the entire year. Likewise, in the case of purchases from M/s Mehta API Private Limited, the AO has picked up only two (2) out of thirteen (13) transactions actually entered into by the assessee. The Ld. AR has shown us similar cherry-picking exercise in almost all cases. It was shown to us that, if the overall transactions were compared, the rates were commensurate and the differences were minimal. Hence, the purported values of over-invoicing obtained from these employees were not backed by the given facts of the case. We also find merit in the submissions of the Ld. AR that the price comparison undertaken by



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the lower authorities was inherently flawed as the lower authorities had failed to consider the functional, economic and risk differences amongst different vendors. The Ld. AR pointed out that, the terms of contract and terms of payment varied across vendors and hence an apple-to-apple comparison was not possible until functional adjustments were made. The Ld. AR also showed us that there were quantitative differences as well. He explained that it is well-known that bulk purchases carry discounted value in comparison to small/retail purchases. The Ld. AR also brought to our notice certain quality differences as well, which according to him, would have a bearing on the price. For instance, he took us through the different grades of paracetamol used in Indian market, European market and other countries. He accordingly explained that the rates of paracetamol varied across different grades. Having regard to the foregoing, we overall find merit in the assessee's plea that the benchmarking exercise conducted by the lower authorities suffered from several infirmities and was therefore unreliable.

8.11 The Ld. AR also pointed out that this benchmarking exercise undertaken by the lower authorities had no legal backing. He submitted that Chapter X of the Act contained provisions giving authority to the officers for undertaking the transfer pricing exercise in relation to international or specified domestic transactions with associated enterprises. Similarly, according to him, only if the purchases from related parties are found to be inflated then the excess



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portion was disallowable u/s 40A(2)(b) of the Act. The Ld. AR thus submitted that there was no provision in law, which empowered the AO to undertake comparison of different prices paid for purchases made from different unrelated independent parties. He thus contended that this entire exercise undertaken by the AO was irrelevant. The Ld. AR explained that the difference in rates amongst purchases from unrelated and independent vendors can be on account of varied reasons such as availability of quantity with them, urgency/need of the assessee, place of delivery and terms of credit, etc. He also showed us that the purchases of these raw materials were made from both MSME vendors as well as reputed manufacturers. He thus contended that it is common in any industry that the rates would vary based on the reputation of the manufacturers. Having considered the foregoing, we find force in these submissions put forth by the assessee. Unless, the AO is able to bring on record tangible material or evidence that the assessee had paid excess price and got back monies/cash from suppliers, according to us, merely because there were rates differential amongst purchases from different vendors cannot be sole reason to infer over-invoicing/inflation of purchases. We also note that the AO himself had ultimately not given any relevance to the enquiry and comparison made by him, which although was extensively discussed in the assessment order. It is noted that the AO had ultimately made the addition based on the value of over-invoicing as stated by the employees in their statements and not based on his comparison/independent enquiry from these vendors. As already held above, the



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statements of the employees had no bearing in the given facts of the assessee's case as the over-invoicing component admitted by them was in relation to purchases made from M/s Reynolds Petro Chem Ltd. Hence, for the various reasons as discussed in the foregoing, we hold that the impugned addition on account of alleged over-invoicing was unwarranted on the given facts as well.

8.12 In light of the above findings, we direct the AO to delete the addition made on account of over invoicing in purchases across all AYs. Hence, the grounds raised by the assessee are allowed and the grounds of Revenue are dismissed.

9. Issue 6: Disallowance of bogus purchases

Ground Nos. 8-10 of the assessee's appeal and the Ground No. 5-6 of the Revenue's appeal for AY 2009-10

Ground Nos. 8-10 of the assessee's appeal and the Ground No. 5-6 of the Revenue's appeal for AY 2010-11

Ground Nos. 8-10 of the assessee's appeal and the Ground No. 5-6 of the Revenue's appeal for AY 2011-12

Ground Nos. 8-10 of the assessee's appeal and the Ground No. 8-9 of the Revenue's appeal for AY 2012-13

9.1 These grounds are in relation to the disallowance of purchases made from seven (7) parties viz., M/s Arihant Enterprises, M/s Rushabh Sales Corporation, M/s Regal Sales Corporation, M/s Seva Enterprises, M/s Shree Ganesh Enterprises, M/s Mehul Traders and M/s Krish Enterprises. Briefly stated, the facts as noted are that, during the course of a survey action at one of the premises of the assessee,



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statement of one employee Mr. Bhupendra Joshi was recorded. In his statement, he is noted to have stated that, the purchases made from M/s Arihant Enterprises, M/s Rushabh Sales Corporation and M/s Regal Sales Corporation were not verifiable and thus he offered to disallow the same. Apart from the foregoing, the AO in the course of assessment came across another four (4) parties i.e. M/s Seva Enterprises, M/s Shree Ganesh Enterprises, M/s Mehul Traders and M/s Krish Enterprises, which according to AO, were flagged as hawala dealers by Maharashtra State VAT Department. The AO accordingly required the assessee to explain as to why the purchases made from these parties should not be treated as bogus. The assessee, in response, explained that, Mr. Bhupendra Joshi had retracted his statement and provided his affidavit as well. The assessee further submitted the relevant invoices, ledgers, bank statements etc. to substantiate the genuineness of purchases. The AO however did not agree with the explanation furnished by the assessee and rejected the retraction as after-thought. The AO noted that the notices issued upon these parties u/s 133(6) were either un-served or nor complied with. The AO further observed that these entities featured in the list notified by the Sales Tax Department of Maharashtra. According to AO therefore, these purchases were bogus and hence added the same to the total income. On appeal the Ld. CIT(A) is noted to have restricted the addition to the extent of profit element of 12.5% embedded in these purchases. Aggrieved by the order of Ld. CIT(A), both Revenue and assessee are in appeal before us.



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9.2 Assailing the action of Ld. CIT(A), the Ld. AR for the assessee submitted that the additions made in unabated AYs 2009-10 & 2010-11 was not tenable since they were not based on any incriminating material unearthed in course of search. Moreover, according to him, since the statement basis which the impugned addition was made, had been retracted by Mr. Bhupendra Joshi, the same was not tenable in law. On merits, the Ld. AR submitted that the assessee had already provided all relevant contemporaneous evidences, which it was required to maintain in ordinary course to substantiate the genuineness of purchases. The Ld. AR further took us through the published list of the Sales Tax Department of Maharashtra referred to by the AO, which was in relation to suspicious dealers and not hawala dealers, as wrongly inferred by the AO. He pointed out that, the list also came with a disclaimer wherein any supplier who had grievance could lodge their complaint with them. He showed us that, this list contained the details of those dealers who had collected VAT from the customers but did not deposit it with the State Government. According to Ld. AR therefore, this default by the supplier would not ipso facto mean that the purchases made by the assessee was not genuine. The Ld. AR accordingly submitted that the premise on which the AO suspected the purchases to be bogus was fundamentally flawed. The Ld. AR thus urged that these purchases ought to be held as genuine and thus the entire addition be deleted. Alternatively, the Ld. AR submitted that the profit element of 12.5% taxed by the Ld. CIT(A) was excessive. He



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showed us that, the assessee had already disclosed gross profit of 38% and thus according to him, further addition of 12.5% was unwarranted.

9.3 Per contra, the Ld. CIT, DR vehemently supported the order of the AO. He submitted that the retraction affidavit furnished by Mr. Bhupendra Joshi was an after-thought and therefore ought to be discarded. He further claimed that the assessee had failed to prove the genuineness of the purchases in the course of assessment, hence the AO had rightly disallowed the same. According to him, the Ld. CIT(A) had erred in restricting the disallowance to the extent of profit element in these purchases as opposed. He urged that the entire value of purchases ought to be disallowed.

9.4 We have heard both the parties. From the facts placed before us, it is noted that, the seven (7) suppliers in question, were flagged as suspicious entities by the Maharashtra Sales Tax Department. When enquired in the course of search, the employee of the assessee, Shri Bhupendra Joshi is noted to have also admitted that the purchases from these suppliers were not genuine, although he is noted to have retracted the same. We agree in principle with the submission of the Ld. AR that an admission/ statement alone is not sufficient to justify an addition but at the same time the onus is on the assessee to support their retraction with corroborative evidence. On the given facts, it is noted that the assessee has only been able to furnish the relevant tax invoices, ledgers and bank statements in support of purchases. The AO is noted to have attempted to make independent enquiries from these



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suppliers but the notices issued u/s 133(6) of the Act remained un-served / non-complied. Hence, in absence of independent verification and having regard to the published list of Maharashtra Sales Tax Department, the purchases made by the assessee from these seven (7) suppliers were indeed suspicious. Overall, therefore, we are in agreement with the lower authorities that the assessee was unable to fully discharge the genuineness of the purchases made from these suppliers.

9.5 The next issue for consideration is whether the entire value of payments made to the suppliers was to be disallowed or only the profit element embedded therein was to be taxed in hands of the assessee. From the material available on record, it is noted that the fact that assessee had purchased these materials is not in dispute. The Ld. AR has rightly pointed out that, the quantitative details reported in the tax audit report, consumption of raw materials, corresponding sales and the book results have not been rejected by the AO. It was also brought to our notice that certain purchases were capitalized to the cost of fixed assets and that the AO did not dispute the actual cost of assets and the depreciation claimed thereon. It is therefore a case where the purchases were indeed made, but the parties, who the assessee claims to have supplied these purchases, are not genuine. In this regard, we may gainfully refer to the decision of the Hon'ble Gujarat High Court in the case of **CIT Vs Bholanath Polyfab (P.) Ltd. (355 ITR 290)** wherein similar issue was involved. In that case also, it is noted that this



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Tribunal was of the opinion that the purchases might have been made from bogus parties but the purchases themselves were not bogus. Considering such a situation, this Tribunal was of the opinion that not the entire amount of purchases but the profit margin embedded in such amount would be subjected to tax. On appeal by the Revenue, the Hon'ble High Court is noted to have upheld this finding of the Tribunal.

9.6 We further note that there are a series of judgments of the Hon'ble jurisdictional Bombay High Court wherein it has been held that, only the profit element embedded in the purchases made from bogus parties has to be brought to tax and that the entire value of purchases cannot be disallowed. In the case of **PCIT vs Mohommad Haji Adam & Co (103 taxmann.com 459)**, the Hon'ble jurisdictional High Court has held as under:-

“8. In the present case, as noted above, the assessee was a trader of fabrics. The A.O. found three entities who were indulging in bogus billing activities. A.O. found that the purchases made by the assessee from these entities were bogus. This being a finding of fact, we have proceeded on such basis. Despite this, the question arises whether the Revenue is correct in contending that the entire purchase amount should be added by way of assessee's additional income or the assessee is correct in contending that such logic cannot be applied. The finding of the CIT(A) and the Tribunal would suggest that the department had not disputed the assessee's sales. There was no discrepancy between the purchases



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shown by the assessee and the sales declared. That being the position, the Tribunal was correct in coming to the conclusion that the purchases cannot be rejected without disturbing the sales in case of a trader. The Tribunal, therefore, correctly restricted the additions limited to the extent of bringing the G.P. rate on purchases at the same rate of other genuine purchases.”

9.7 Similar principle was followed by the Hon’ble jurisdictional High Court in the case of **PCIT Central-4 vs Paramshakti Distributors Pvt Ltd (ITA No. 413 of 2017)** wherein it was held as under:

"2. The first question pertains to restricting the addition of Rs.23.16 Lakhs to Rs.2,21,600/- by the Tribunal. The Assessing Officer had made the said addition on the ground that the assessee's purchases were found to be bogus. The entire purchase amount was therefore, added to the assessee's income. The Tribunal, however, restricted to the said sum of Rs.2,21,600/-. The Tribunal recorded that the Assessing Officer has not rejected either the purchases or the sales made out of the said purchases. The Tribunal therefore, was of the opinion that the addition should be restricted to 10% of the total purchases. The Revenue strongly disputes this proposition.

3. Without elaboration, what the Tribunal by the impugned Judgment held is that the Department had not rejected the instance of the purchases since the sales out of purchase of such raw material was accounted for and accepted. With above position, the Tribunal applied the principle of taxing the profit embedded in such purchases covered by the bogus bills, instead of disallowing



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the entire expenditure. We do not find any error in the view of the Tribunal. No question of law arises."

9.8 Following this principle, the Hon'ble jurisdictional High Court in the case of **PCIT vs. Pinaki D Panani (ITA No. 1543 of 2017)** has held as under :-

"Even if the purchases made by the assessee are to be treated as bogus, it does not mean that entire amount can be disallowed. As the AO did not dispute the consumption of the raw materials and completion of work, only a percentage of net profit on total turnover can be estimated."

9.9 The Hon'ble Bombay High Court in the case of **PCIT vs. Jakharia Fabric (P.) Ltd. [2020] (118 taxmann.com 406)** also held as under:

"11. In the assessment proceedings Assessing Officer had relied upon information obtained from the Investigation Wing of the Department at Mumbai which in turn had obtained the information from the Sales Tax Department, Government of Maharashtra. The information was to the effect that the eight parties from whom the purchases were allegedly made were alleged hawala dealers who had issued bogus bills totalling Rs. 1,14,92,970.00.

12. In the appellate proceedings before the first appellate authority, it was held as under :—



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"2.15 The facts in the present case shows that the appellant was not in a position to prove the existence of the suppliers. The suppliers were found to be engaged in providing bogus bills without actual delivery of goods. Moreover few of the suppliers are not regular parties and they were found to have supplied only during the year and there were no supply either in the earlier year or in the subsequent year from such parties. This circumstantial evidence also prove the bogus nature of the transaction. On careful analysis of the finding of Hon'ble High Court of Gujarat in the abovementioned cases, I am of the firm view that without purchase of materials it was not possible for the appellant to complete the job work of dying. As mentioned above the AO had never disputed or examined the aspect of job work receipts. Hence I am of the firm belief that the appellant had made cash purchases from other parties which were not recorded in the books. The appellant took only bills from these 8 parties as accommodation to explain the purchases. Therefore the entire purchase from these 8 parties cannot be added as bogus and what needs to be taxed is the profit element embedded in such transaction. The appellant carryout only the job work of dying the cloths on a contract basis. Estimation ranging from 12.5% to 25% has been upheld by the Hon'ble Gujarat High Court depending upon the nature of the business. As held in the case of *Simit P. Sheth (supra)* no uniform yardstick could be applied to estimate the rate of profit and it vary with the nature of business. Taking all the facts into consideration and the findings of the Hon'ble Courts on this issue, I am of the



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view that estimation of 17.5% of profit would meet the ends of justice. Therefore, I direct the AO to estimate profit of 17.5% on the total alleged bogus purchase which works out to Rs. 20,11,270(17.5% of Rs. 1,14,92,970/-). The appellant get the relief of the balance Rs. 94,81,700/-. The grounds raised are partly Allowed."

13. Thus as can be seen from the above, CIT (A) had relied upon the decision of the Gujarat High Court in *Simit P. Sheth (supra)* and took the view that entire purchases from the eight parties could not be added as bogus but what needed to be added to the total income of the assessee was the profit element embedded in such transaction. CIT(A) noted that assessee carried out only the job work of designing the clothes on contract basis; profit estimation ranged from 12.5% to 25%. In the circumstances of the case, CIT(A) took the view that taking of 17.5% as the profit would meet the ends of justice. Accordingly, Assessing Officer was directed to estimate profit of 17.5% on the total alleged bogus purchases and thereafter, to delete the balance amount of addition.

14. In further appeal Tribunal referred to the above finding of the CIT(A), whereafter it was held as under:—

"6. Thus, from the aforesaid analysis, conclusions and findings recorded by the Ld. CIT(A), it is evident that total purchases were wrongly disallowed by the Assessing Officer. The Ld.CIT (A) took a reasonable view whereby the disallowance was sustained to the extent of estimated inflation in the amount of purchases made by the assessee.



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The disallowance sustained by the Ld. CIT(A) @ 17.5% of the purchases have been accepted by the assessee with a view to bury the litigation. Nothing has been brought before us by the Ld. DR to contradict the findings recorded by the Ld.CIT(A). The assessee's counsel has also placed reliance upon the judgment of Hon'ble Bombay High Court in the case of *Nikunj Eximp Enterprises Pvt. Ltd. (supra)* wherein similar issue has been decided on identical lines by the Hon'ble Bombay High Court. In our view, no intervention is required in the findings of Ld. CIT(A) and, therefore, the same is confirmed. The grounds raised by the revenue are dismissed."

15. Thus, Tribunal concurred with the view taken by the CIT(A) that the Assessing Officer had erred in disallowing the entire total purchases and adding the same to the total income of the assessee. View taken by the CIT(A) that 17.5% of the purchases be added to the total income of the assessee as the profit element was a reasonable one. It was also noted that the said percentage was accepted by the assessee with a view to close the litigation. Nothing was brought on record by the Revenue to contradict the findings recorded by the CIT(A). Tribunal had also referred to the decision of this court in *CIT v. Nikunj Eximp Enterprises (P.) Ltd.* [2013] 35 taxmann.com 384/216 Taxman 171 (Mag.)/[2015]/384 ITR 619. Infact, this court has also held following the decision of *Nikunj Eximp Enterprises Pvt. Ltd.* that the revenue is required to furnish the information received from the Sales Tax Department or from the Investigation Wing of the Department to the assessee allowing the assessee to test the



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veracity of such information otherwise such information could not be relied upon. This court in the case of *Pr. CIT v. Vaman International (P.) Ltd.* [IT Appeal No. 1940 of 2017, decided on January 29, 2020] held as under:-

"17.1 Thus, from the above, it is seen that Tribunal had returned a finding of fact that the assessee had filed copies of purchase bills, copies of purchase/sale invoices, challan cum tax invoices in respect of the purchases, extracts of stock ledger showing entry/exit of the materials purchased, copies of bank statements to show that payment for such purchases were made through regular banking channels, etc., to establish the genuineness of the purchases. Thereafter, Tribunal held that Assessing Officer could not bring on record any material evidence to show that the purchases were bogus. Mere reliance by the Assessing Officer on information obtained from the Sales Tax Department or the statements of two persons made before the Sales Tax Department would not be sufficient to treat the purchases as bogus and thereafter to make addition under section 69C of the Act. Tribunal has also held that if the Assessing Officer had doubted the genuineness of the purchases, it was incumbent upon the Assessing Officer to have caused further enquiries in the matter to ascertain genuineness or otherwise of the transaction and to have given an opportunity to the assessee to examine/cross-examine those two parties *vis-a-vis* the statements made by them before the Sales Tax Department. Without causing such further enquiries in respect of the purchases, it was not



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open to the Assessing Officer to make the addition under section 69C of the Act.

18. We are in agreement with the view expressed by the Tribunal. In fact, Tribunal has only affirmed the finding of the first appellate authority. Thus, there is concurrent finding of fact by the two lower appellate authorities.

19. This Court in the case of *Commissioner of Income-tax - 1, Mumbai v. Nikunj Eximp Enterprises(P.) Ltd.* 372 ITR 619; wherein an identical fact situation arose did not interfere with the order passed by the Tribunal and held that no substantial question of law arose from such order. It was held that merely because the suppliers had not appeared before the Assessing Officer, no conclusion could be arrived at that the purchases were not made by the assessee."

16. Today while dealing with Income-tax Appeal No. 1330 of 2017 (*Pr. CIT v. Rishabhdev Technocable Ltd.*) [2020] 115 taxmann.com 333 (Bom.), we have held as under:

.....

16. On thorough consideration of the matter, we do not find any error or infirmity in the finding returned by the Tribunal. No substantial question of law arises from such finding returned by the Tribunal."

9.10 The ratio laid down in the above judgments is binding upon us. We accordingly hold that only the profit element embedded in these



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purchases ought to be assessed to tax and that on the given facts, the disallowance of entire value of purchases was unwarranted. Coming to the issue of estimation of the profits, on the given facts and having regard to the gross profit already declared by the assessee, according to us, in the fitness of matters and fair play, profit rate of 8% would be fair & reasonable. The AO is accordingly directed to restrict the addition on account of bogus purchases to 8% of the value of supplies across all AYs 2009-10, 2010-11, 2011-12 & 2012-13. With these directions, the grounds of the assessee are partly allowed and the grounds raised by the Revenue are dismissed.

10. Issue 7: Disallowance of professional fees paid

Ground Nos. 8-11 of the Revenue's appeal for AY 2009-10

Ground Nos. 8-11 of the Revenue's appeal for AY 2010-11

Ground Nos. 7-10 of the Revenue's appeal for AY 2011-12

Ground Nos. 10-13 of the Revenue's appeal for AY 2012-13

10.1 These grounds raised by the Revenue in AYs 2009-10 to 2012-13 are against the Ld. CIT(A)'s action of deleting the disallowance of professional fees paid to M/s Allied Computers International (Asia) Ltd [in short 'ACIAL']. The observations and findings given by the AO and Ld. CIT(A) are same across all AYs. We therefore take AY 2009-10 to be the lead case and the decision rendered therein would apply mutatis mutandis to all other AYs.

10.2 Briefly stated, the AO in the course of assessment had required the assessee to provide the details of the professional services availed



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from various persons / agencies. After perusing the details furnished, the AO vide order sheet noting dated 06.10.2016 had required the assessee to provide proof of performance of services rendered by ACIAL. The assessee is noted to have filed its reply vide letter dated 13.10.2016 in which it provided the details of services rendered by ACIAL, invoices raised by them, service tax charged, TDS deducted etc. The AO however observed that this company ACIAL was being operated by Shri Shirish Shah who was found to be providing accommodation entries like LTCG, share capital etc., which was revealed in the course of a search action conducted upon Mr. Shah. The AO thus held that ACIAL had provided accommodation entries to the assessee as well, in the guise of professional fees. The AO accordingly disallowed the professional fees paid by the assessee to ACIAL. Being aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who deleted the same. Aggrieved by this Ld. CIT(A)'s action, the Revenue is now in appeal before us.

10.3 We have heard both the parties and perused the material placed before us. It is noted that, the assessee had availed annual support services for maintenance of their computer systems and internal servers from ACIAL which was essential to their business. The Ld. CIT(A) at Para 11.3.2 of the order for AY 2009-10 is observed to have taken note of the annual maintenance services rendered by ACIAL, which are as follows :-



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“9.3.2. The facts of the case of the appellant are that professional services in the nature of Annual Support Services were taken by the appellant from M/s. Allied Computers International [Asia] Ltd. The appellant has incurred expenses amounting to Rs.67,41,600/- for these services. The nature of the services rendered by the service provider included i) Maintenance of e-Mails, includes upgrades server performance optimization, user management, ii) Maintenance of SPAM Servers and controlling of the same, (iii) Maintenance of Proxy Services for internet access which includes user management, reporting on usage, (iv) Maintenance of Gateway & Desktop, Anti-virus servers and monitoring for e-Mail and Desktops signature update, (v) Maintenance of Checkpoint firewall and RSA Security solutions for effective data protection, (vi) Maintenance of Windows & Linux Servers and managing the patches, (vii) Maintenance of Active Directory Services and configuring the users, defining policies for access control on consultation with various department heads, (viii) Maintenance of Oracle database, configuring of the same for efficient working and improved performance of the applications, defining backup policies and implementing the same, monitoring of daily back-up process and replication of the same and (ix) Maintenance of Desktop computers for reinstallation of Operating system, Standard packages like MS Office and other in house developed applications.

The AO has not doubted the services rendered by the service provider. The payment to the service provider has been made through banking channels and TDS has also been made. The



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copies of the invoices, payment details and TDS certificate were submitted before the A.O. Thus, the appellant, by submitting the above documents, has proved the business exigency and genuineness of the expense. The services are proved by the above invoices and nature of the work done. It is also pertinent to mention here that the appellant company is a big corporate with huge computer infrastructure. The maintenance of such computers and their internal systems is essential for the entire business and they cannot work in the absence of the same. In view of the above discussion, the disallowance made for AY 2009-10 is deleted.”

10.4 The invoices raised by ACIAL are noted to be subject to levy of service tax at the rate of 12.36%. The assessee is noted to have paid the professional fees inclusive of service tax after deducting tax at source through banking channel. These facts are not in dispute before us. We therefore note that the assessee has provided all relevant contemporaneous evidences, which it was required to maintain in the ordinary course of business, to substantiate the genuineness of the transactions.

10.5 The case of the Revenue is found to be hinge solely on the statement of one Mr. Shirish Shah who was purportedly found to have been involved in providing accommodation entries in the form of bogus long-term capital gains and share capital etc. According to the Revenue, ACIAL was being managed and controlled by Shri Shah and thus in light of his statement given in the course of his search, the



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professional fees paid to ACIAL was treated to be in nature of accommodation entry. The Ld. AR has shown us that, the copy of the statement of Mr. Shirish Shah was never provided to the assessee nor was any opportunity to cross-examine him afforded to the assessee. It also not the case that the Revenue was able to show that Mr. Shirish Shah in his statement had implicated the assessee of any wrong-doing or admitted to providing accommodation entry to the assessee. Even before us, the Revenue has not brought any such statement of Shri Shirish Shah on record. Hence, in absence of this statement, which was collected at the back of the assessee, we agree with the Ld. AR that the same cannot be relied upon to justify the impugned addition, particularly when the copy was never provided to the assessee and even the opportunity to cross-examine Mr. Shah was not afforded. For this, we may gainfully refer to the decision of the Hon'ble Supreme Court in the case of **Andaman Timber Industries Vs. CCE reported in (2015) 281 CTR 241 (SC)**. In this case, the Hon'ble Apex Court had held that, *"failure to give the assessee the opportunity to cross examine witness, whose statements are relied upon, results in breach of principles of Natural Justice. It is a serious flaw which renders the order a nullity."*

10.6 We also gainfully refer to the judgment of the Hon'ble Apex Court in the case of **CIT Vs. Odeon Builders Pvt. Ltd. (418 ITR 315)**. In the decided case also it was held that, the addition/disallowance made solely on third party information without subjecting it to further



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scrutiny and denying the opportunity of cross examination of the third party renders the addition/disallowance bad in law. The relevant findings of Hon'ble Apex Court are as follows :-

“3. However, on going through the judgments of the CIT, ITAT and the High Court, we find that on merits a disallowance of Rs. 19,39,60,866/- was based solely on third party information, which was not subjected to any further scrutiny. Thus, the CIT (Appeals) allowed the appeal of the assessee stating:

"Thus, the entire disallowance in this case is based on third party information gathered by the Investigation Wing of the Department, which have not been independently subjected to further verification by the AO who has not provided the copy of such statements to the appellant, thus denying opportunity of cross examination to the appellant, who has prima facie discharged the initial burden of substantiating the purchases through various documentation including purchase bills, transportation bills, confirmed copy of accounts and the fact of payment through cheques, & VAT Registration of the sellers & their Income Tax Return. In view of the above discussion in totality, the purchases made by the appellant from M/s Padmesh Realtors Pvt. Ltd. is found to be acceptable and the consequent disallowance resulting in addition to income made for Rs. 19,39,60,866/-, is directed to be deleted."

4. The ITAT by its judgment dated 16th May, 2014 relied on the self-same reasoning and dismissed the appeal of the revenue. Likewise, the High Court by the impugned judgment dated 5th



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July, 2017, affirmed the judgments of the CIT and ITAT as concurrent factual findings, which have not been shown to be perverse and, therefore, dismissed the appeal stating that no substantial question of law arises from the impugned order of the ITAT.”

10.7 In view of the facts as discussed above and following the ratio laid down in the decisions cited (supra), the order of the Ld. CIT(A) deleting the disallowance of professional fees made by the AO, does not warrant any interference. These grounds of the Revenue are therefore dismissed.

11. Issue 8: Disallowance of sales promotion expenses

Ground Nos. 1 to 4 of the assessee's appeal and the Ground Nos. 1-3 of the Revenue's appeal for AY 2009-10

Ground Nos. 1 to 4 of the assessee's appeal and the Ground Nos. 1-3 of the Revenue's appeal for AY 2010-11

Ground Nos. 1 to 4 of the assessee's appeal and the Ground Nos. 1-3 of the Revenue's appeal for AY 2011-12

Ground Nos. 1 to 4 of the assessee's appeal and the Ground Nos. 4-6 of the Revenue's appeal for AY 2012-13

Ground Nos. 1 to 4 of the assessee's appeal and the Ground Nos. 4-5 of the Revenue's appeal for AY 2014-15

11.1 These grounds relate to the disallowance of sales promotion expenses which according to the AO fell within the ambit of 'freebies' given to doctors, in violation of the guidelines issued by Medical Council of India in December 2009 and the CBDT Circular issued in



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August 2012. The AO is accordingly noted to have disallowed the same in terms of Explanation to Section 37(1) of the Act. The facts of the case are that, during the course of search conducted u/s 132 of the Act on 23.12.2014, it was found that the assessee had debited several expenses under the head 'selling & marketing expenses' which inter alia comprised of gifts, travelling expenses, hotel expenses and conference registration charges. Since the assessee was involved in the business of manufacture and marketing of pharmaceutical products, the Investigating Authorities sought to verify whether these expenses came within the ambit of 'freebies' given to doctors in violation of the guidelines issued by Medical Council of India in December 2009. The Investigating Authorities are noted to have confronted Mr. Shrawan Beli, General Manager Taxation on this aspect and the relevant question put to him and his answer is noted to be as follows:-

“Q.16 Please state as to whether M/s. IPCA Ltd had incurred sales promotion expenses submitted by you which has direct nexus to doctors which are under the category of freebees as detail in para 6.8.1 of Medical Council of India Notification on 'Professional Conduct, Etiquette and Ethics Regulation, 2002 No. MCI-211(1)/2009(Ethics), dt.10.12.2009 and Circular no. 5/2012 dt.01.08.2012 issued by Hon'ble CBDT.

Ans: Sir, from the combined statement, submitted in reply to Q15 above, you will find that various types of nature of expenses are incurred by the company and clubbed under the head of Sales and Marketing expenses.



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Sir, we are further submitting herewith the sales promotion expenses from FY 2010-11 to 2013-14 which have direct nexus to doctors which are as under:

Sr. No and Code	Account Head	Financial Year				(in Rs.)
		2013-14	2012-13	2011-12	2010-11	Total
1)547014	Patient Education / Detection Camp	91918890	23210338	15485059	11417698	142031985
2)547019	HTC expenses				5437948	5437948
3)547050	Other Sales promotion expenses	303491	7434329	4458844	9527184	21723848
4)548262	Sales promotion expenses	10222498	11760119	16155111	13913895	21723848
5)548283	Journal & periodicals	3185471	16160223	24083160	9805864	43447696
6)548284	Taxi Hire charges	12346237	11016369	4899879	11541126	86895392
7)548285	Field Printing expenses	47067729	41214476	22982639		
8)547017	Sponsorship expenses	19407	141271	237285	21964439	22362402
9)547025	CRM-I Expenses				2078002	2078002
10)547026	CRM-II Expenses				483201	483201
11)547027	CRM-III Expenses				254396	254396
12)547055	Trade Relation expenses	9579992				9579992
13)5457056	Gifts for sales promotion	566762				566762
	Total (I)	175210477	110937125	88301977	86423753	460873332
14)548282	Camp expenses (40% estimated)	24391280	18465076	21750082	21932463	86538901
15)547042	Brand Recall Local purchase (estimated)	15000000	15000000	15000000	15000000	60000000
16)547043	Brand Recall import purchase (estimated)	1302540	12197158	15738735		29238433
	Total	40693820	45662234	52488817	36932463	175777332

We are submitting that we will pay full tax on the above expenses mentioned at Sr. No.1 to 13 as they are not allowable expenses and so we will disallow these expenses. These expenses will be added back in the total income of M/s. Ipca Laboratories Ltd. These expenses have direct nexus with doctors as they are in



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contravention to CBDT Circular No.5/2012 dated 01.08.2012 issued by Hon'ble CBDT and guidelines issued by the Medical Council of India on professional ethics No. MCI-211(1)/2009(Ethics), dt. 10.12.2009.

As far as the sales promotion expenses mentioned at Sr.No. 14,15,16 which have direct nexus but exact quantum of disallowance cannot be ascertained right now. However, we will give estimate of these expenses as some of these expenses are also having direct nexus as per the MCI Guidelines and CBDT Circular No.5/2012, dated 01.08.2012. The exact amount of the three heads mentioned at Sr.No. 14,15,16 will be submitted in due course of time.

Sir, the above expenses mentioned in the table are for FYs.2010-11, 2011-12, 2012-13 & 2013-14. As the Circular was issued in December 2009, the expenses related to part period of FY2009-10 will be verified and the expenses which are not allowable will be submitted in due course of time".

11.2 The above statement is noted to have been shown to Mr. Premchand Godha, Managing Director of the assessee company, who is noted to have confirmed the same. The relevant question put to him and his answer is noted to be as follows: -

“Q.13 I am showing you the statement Mr.Shravan Beli, Head Taxation at M/s IPCA, recorded U/s 131 on 25.12.2014, wherein he has admitted that M/s IPCA Laboratories Limited has incurred expenses of Rs.63.66 crores under various subheads of sales and promotion. These expenses have nexus with the doctors. These



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expenses are in contrarian to the guidelines issued by MCI vide notification No. MCI-211(1)/2009 (Ethics)/ 55667 dt. 10/12/2009 and CBDT Circular No. 05/2012 issued in August 2012. Shri Shravan Beli has admitted that these expenses of Rs.63.66 Crores are not allowable expenses as per the provisions of 1.T.Act. 1961.

Ans. Sir, I confirm that I have gone through the statement of Mr. Shravan Beli recorded U/s 131 on 25.12.2014. I do agree with him and state that expenses of Rs.63.66 crores are not allowable expenses and M/s IPCA will disallow the same and pay the applicable taxes.”

11.3 In the post search enquiries, the assessee is however noted to have furnished explanation for selective impounded material relating to sales promotion expenses which has been extracted by way of a Table in Para 7.3 of the assessment order for AY 2009-10. The assessee is noted to have provided the complete details and supporting's in relation to the impounded materials and showed that these were incurred in the course and for the purposes of business. These selective impounded materials were not found to contain any details of freebies paid to doctors.

11.4 Thereafter, the case of the assessee was centralized with the AO. The assessee did not disallow the sales promotion expenses in the returns filed in response to notices issued by the AO u/s 153A of the Act for the relevant AYs in question. The AO accordingly show caused the assessee vide notice dated 01.08.2012 as to why the sales promotion expenses, which were offered to be disallowed in the course



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of search, should not be added back while assessing the total income. In response, the assessee is noted to have furnished the relevant details of the sales promotion expenses and submitted that these expenses were allowable in nature. The assessee further explained that, the statement given by Mr. Beli was based on a leading question put to him by the Investigating Authority to which he had answered without having any proper and correct knowledge of the position of law and the relevant facts. According to the assessee, the contemporaneous facts would show that majority of the sales promotion expenses were not incurred / paid to doctors but to their field staff and/or the sales person, and thus the statement of Mr. Beli was rebuttable. The assessee had further claimed that the regulations prescribed by IMC was neither applicable to it nor was it in the nature of 'law' in the AYs in question and therefore even if it is held that, some of the expenses were incurred towards freebies given to doctors, still it was allowable u/s 37(1) of the Act. The assessee had thus contended that, the CBDT Circular No.5/2012 dated 01.08.2012 could not be given retrospective effect.

11.5 The AO is noted to have tacitly agreed with the assessee to the extent that he did not rely on the statements of Mr. Beli and Mr. Godha to make the impugned additions. The AO however is noted to have rejected the explanation put forth by the assessee on merits. The AO at Paras 7.12 & 7.13 of his order firstly dealt with the legal contention raised by the assessee. The AO concluded that any expenses incurred



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by a pharmaceutical company towards ‘freebies’ given to doctors in violation of the IMC regulations, 2009 framed by MCI read with CBDT Circular No. 05/2012 dated 01.08.2012, was not an allowable expenditure as it fell under the ambit of Explanation to Section 37(1) of the Act. On facts, qua each of the sub-head of sales & promotion expenses, the AO is noted to have examined the same and made disallowance in the following manner, which is noted to be independent and different from the amounts admitted to be disallowable by Mr. Beli.

Nature of Expenses	Quantum Disallowed
- Expenses on Patient Detection / Education Camp - Camp Expenses	100%
Sponsorship Expenses	100%
Participation in Symposium	Separate Quantification by AO
Doctor Meeting/ Medical Awareness	Separate Quantification by AO
Corporate / Brand-recall Promotion Expenses	100%
HTC Expenses	100%
CRM Expenses	100%
Sales Promotion & Other Sales Promotion Expenses	100%
Journals & Periodicals	100%
Taxi Hire Charges	100%
Field Printing Expenses	100%
Trade Relation Expenses & Gifts for sales promotion	100%
Air Ticket Expenses	100%

11.6 Being aggrieved by the above action of the AO, the assessee had preferred an appeal before the Ld. CIT(A). The Ld. CIT(A) is also noted to have undertaken factual exercise into the nature and details of the above sales promotion expenses and re-quantified the expenses which were incurred for the benefit of the doctors across all AYs 2009-10, 2010-11, 2011-12, 2012-13 & 2014-15 and accordingly partially deleted the addition made by the AO, on facts. At the same time, the Ld. CIT(A) noted that the CBDT Circular No. 5/2012 dated



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01.08.2012 did not have retrospective application and thus on this score he is noted to have deleted the entire disallowance of sales promotion expenses in AYs 2009-10, 2010-11, 2011-12 & 2012-13. Aggrieved by the Ld. CIT(A)'s order, both the assessee and the Revenue are in appeal before us.

11.7 Assailing the action of the Ld. CIT(A), the Ld. CIT, DR submitted that the Hon'ble Apex Court in the case of **Apex Laboratories Pvt. Ltd. vs DCIT (135 taxmann.com 286)** has held that the expenditure incurred by pharmaceutical companies for supply of freebies to medical practitioners constitutes an illegal activity and is therefore required to be disallowed under Explanation 1 to Section 37(1) of the Act. He pointed out that the Hon'ble Apex Court had held the CBDT Circular No.5 of 2012 dated 01.08.2012 to be clarificatory in nature and thus contended that the same was retrospectively applicable. He accordingly urged that the action of the Ld. CIT(A) deleting the disallowances made in AYs 2009-10, 2010-11, 2011-12 & 2012-13, by holding the CBDT Circular (supra) to be applicable prospectively, be reversed. The Ld. CIT, DR further supported the order of the AO disallowing the sales promotion expenses and contended that the disallowance made by the AO be restored.

11.8 Per contra, the Ld. AR first submitted that AYs 2009-10 & 2010-11 were unabated assessments and therefore additions / disallowance could only be made based on any incriminating material found in the course of search. According to the Ld. AR, the



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disallowance of sales promotion expenses was not based on any incriminating material impounded in the course of search and therefore he prayed that, on this score alone, the additions made in AYs 2009-10 & 2010-11 be deleted. On the merits of the claim, the Ld. AR of the appellant submitted that although the Hon'ble Apex Court had held the CBDT Circular No.5 of 2012 dated 01.08.2012 to be clarificatory in nature but the same was effective only from the date of implementation of Regulation 6.8 of the MCI Regulations viz., 14.12.2009. He accordingly urged that the Ld. CIT(A)'s action of deleting the disallowance made in AYs 2009-10 & 2010-11 be upheld as the CBDT Circular did not apply to these assessment years. The Ld.AR further took us through the details of the expenses incurred towards sales promotions expenses to show us that none of these expenses were incurred for the benefit of the doctors. According to him therefore, even on facts the sales promotion expenses did not fall within the mischief of MCI Regulations, 2009 read with CBDT Circular (supra) and thus he prayed that the entire addition be deleted in full. The Ld. AR has also furnished a written note in support of the same.

11.9 In the rejoinder, the Ld. CIT, DR in his written submissions has submitted that, in the course of search, the statement of Mr. Beli and Mr. Godha were recorded which constituted incriminating material to justify the disallowances made in the unabated AYs 2009-10 & 2010-11. According to him, the AO had analyzed the details of expenses



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found on the server and unearthed that certain expenses which were in nature of 'freebies' had been guised as 'sales promotion expenses', and this, in his view was incriminating in nature. The Ld. CIT, DR has also filed written submissions obtained from the AO.

11.10 We have heard both the parties and perused the material as well as the written submissions placed before us. Before advertng to the facts of the case, let us first examine the prevailing legal position on this subject. It is noted that the Hon'ble Supreme Court in the case of **Apex Laboratories Pvt. Ltd. vs DCIT (442 ITR 1)** has held that incentives or freebies given to doctors was punishable as per the Circular issued by the Medical Council of India on 14.12.2019 under the MCI Regulations 2002. The Hon'ble Apex Court held that such freebies given by pharmaceutical companies to medical practitioners was held to be prohibited by law and therefore the expenditure incurred on distribution of such freebies was not allowable as deduction in terms of Explanation (1) to Section 37(1) of the Act. While holding so, the Hon'ble Apex Court held that the CBDT Circular No. 5/2012 dated 01.08.2012 clarifying that the freebies given by pharmaceutical companies to medical practitioners was inadmissible as deduction u/s 37(1) of the Act was clarificatory in nature. The said Circular was thus held to be effective from the date of implementation of Regulation 6.8 of the 2002 MCI Regulations i.e. from 14.12.2009.



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11.11 We also noted that the Hon'ble jurisdictional Bombay High Court in the case of **Abbott India Ltd Vs ACIT (WP No. 685 of 2016) dated 10.02.2023**, after considering the decision of Hon'ble Supreme Court in the case of Apex Laboratories (supra) explained that the ruling of the Hon'ble High Court laying down that the CBDT Circular No.5/2012 is indeed clarificatory in nature, but the same is only effective retrospectively from the date of implementation of Regulation 6.8 of 2002 Regulations, i.e. 14th December 2009. The Hon'ble High Court is noted to have thus held that, the expenditure incurred on freebies given to doctors, prior to 14th December 2009, was not hit by the rigors of CBDT Circular No.5/2012 read with MCI regulations dated 14th December 2009, and was thus allowable business expenditure. The relevant findings as noted by us are as under :-

“19 The other contention of Mr. Madhur Agarwal, learned Counsel for the Petitioner was that the Circular dated 1 August 2012 issued by the CBDT and the amendment incorporated in regulation 6.4 of the Regulations of 2002 in 2009 were not at all applicable to the assessment year 2008-09 and, therefore, it was urged that the assessing officer could not have any basis for his 'reason to believe' that the claim was prohibited in terms of Section 37 r/w the CBDT circular dated Circular No.5/2012 (F.No.225/142/2012-ITA.II), dated 01.08.2012 and the regulations of 2002.



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20 In this context it becomes necessary to briefly refer to the regulations of 2002 as also the CBDT circular dated 1 August 2012.

21 The Medical Council of India in exercise of powers conferred under the MCI Act 1956 framed the regulations called the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002. These regulations pertain to the professional conduct, etiquette and ethics for medical practitioners.

22 Chapter 6 of the regulations in particular deals with certain acts which would be construed as unethical like advertising his professional skill or practice soliciting patients directly or indirectly etc.

....

23 However, vide notification dated 10 December 2009 the aforementioned regulations were amended to include Clause 6.8. This was incorporated for the reason that the existing regulations prescribed conditions and regulations for medical practitioners only and did not cover their relationship with the pharmaceutical and allied health industry. The regulation prescribed as under :

....

24 It was in the aforementioned backdrop that the Board issued the Circular No.5/2012 dated 1 August 2012 for sensitizing its officers that receipt of gifts, cash, travel facilities and hospitality from the pharmaceutical or allied health sector being



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prohibited under the regulations of 2002 would be inadmissible under Section 37 being prohibited by law. The Circular reads as under :

.....

25. It is, thus, clear that the Circular No.5/2012 referred to the position of the regulations of 2002 after its amendment in the year 2009 and, therefore, neither the circular nor regulation 6.8 incorporated w.e.f. 10 December 2009 would be applicable to the instant case pertaining to assessment year 2008-09.

26 It is settled that law to be applied is the one that is in force in the relevant assessment year, unless otherwise provided expressly or by necessary implication - CIT Vs. Insthman Steamship Lines and Reliance Jute & Industries Ltd. Vs. Commissioner of Income- tax.

27 Learned Counsel for the Respondents, Mr. Suresh Kumar, placed reliance upon the case of Apex Laboratories (P) Ltd. Vs. Deputy Commissioner of Income-tax LTU4. This was a case where the assessee being a pharmaceutical company had incurred expenditure by giving freebies to the medical practitioners and accordingly, claimed exemption for the said expenditure under Section 37(1) of the Act for the assessment year 2010-11. The assessing officer partially allowed the exemption claimed by the assessee on the expenses so incurred by placing reliance upon Circular No.5/12. The CIT (Appeals), Tribunal, as also the jurisdictional High Court upheld the said Order and subsequently, also by the Apex Court.



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28 However, in the aforementioned case, two features needs to be highlighted, firstly, that the claim before the Apex Court pertained to the assessment yea 2010-11, to which amendment incorporated in the Regulations 2009 was squarely applicable. The second thing which needs to be highlighted is that in the aforementioned case, the revenue had permitted partial exemption for expenses incurred till 14 December 2009 and held the assessee eligible for the benefit under Section 37(1) but disallowed the expenses incurred thereafter in view of the amendment of 2009. The Apex Court in fact in the judgment Apex Laboratories (P.) Ltd. (supra), has also clearly held that “the CBDT Circular being clarifcatory in nature and was in effect from the date of implementation of Regulation 6.8 of 2002 Regulations, i.e. from 14 December 2009.”

29 In our opinion, since the CBDT Circular No.5/12 as also Regulation 6.8 of 2002, were not applicable to the case of the Petitioner for the relevant assessment year 2008-09, there would be no tangible material or basis for the assessing officer to have ‘reason to believe’ that income for the said assessment year 2008-09 had escaped assessment.”

11.12 Having regard to the above position of law, we thus hold that the CBDT Circular No. 5/2012 read with MCI Regulations, 2009 did not apply to the sales promotion expenses incurred by the assessee in FY 2008-09 relevant to AY 2009-10. It is accordingly held that the sales promotion expenses disallowed by the AO in this AY 2009-10 by invoking Explanation (1) to Section 37(1) of the Act was unjustified.



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Thus, the entire disallowance is held to be unsustainable and is directed to be deleted.

11.13 Now coming to AY 2010-11, as noted above, the CBDT Circular No. 5/2012 read with MCI Regulations, 2009 is effective only from 14.12.2009. Accordingly, any sales promotion expenses incurred prior to the said date, irrespective whether it included any freebies given to doctors or not, cannot be said to be prohibited by law and hence cannot be disallowed u/s 37(1) of the Act. Before us, the Ld. AR of the assessee has provided the break-up of the sales promotion expenses incurred from 01.04.2009 to 13.12.2009 and 14.12.2009 to 31.03.2010. For the aforesaid reasons, the AO is accordingly directed to delete the disallowance of sales promotion expenses to the extent pertaining to the period 01.04.2009 to 13.12.2009.

11.14 In view of the above, we are now required to adjudicate the merits of the disallowance made by the AO out of sales promotions expenses in AY 2010-11 (14.12.2009 to 31.03.2010), 2011-12, 2012-13 & 2014-15. As noted earlier, the Hon'ble Apex Court has held that any expenditure incurred by pharmaceutical companies for the benefit of doctors, which fall within the mischief of MCI Regulations, 2009, shall not be allowable as deduction u/s 37(1) of the Act.

11.15 Having perused the Regulation 6.8.1, it is noted that a medical practitioner is refrained from availing, (a) gifts, (b) travel facilities, (c) hospitality and (d) cash or monetary grants from



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pharmaceutical companies. The Ld. AR further brought to our notice that, the MCI vide Notification dated 01.02.2016 has clarified that, where any gift items or courtesies having value of less than Rs.1000/- is provided, then such would not fall within the mischief of MCI Regulations, 2009. The relevant extract of the Notification, found placed at Pages 138-153 of Paper Book reads as under:-

“6.4 Companies may occasionally provide modest, appropriate brand recall items/ brand reminders, which are customary business courtesies and are reasonable in value and frequency. However, the value of such brand recalls items/ brand reminders shall not exceed INR 1,000 (Rupees One Thousand). Companies shall maintain proper documentation with respect to expense incurred on such brand reminders.”

11.16 The Ld. AR also brought to our notice that this Tribunal at Bangalore in the case of **Himalaya Drug Company Vs CIT (124 taxmann.com 252)** has taken cognizance of the above MCI Notification. The Tribunal is noted to have deleted the estimated disallowance made by the AO out of sales promotion expenses by observing that gifts having value less than Rs.1000/- would not fall under the mischief of MCI regulations 2009.

11.17 The Ld. AR has also rightly pointed out that, being a pharmaceutical company, the assessee cannot advertise its products. However, the assessee is entitled to create awareness of its products by participating in exhibitions and organizing conferences and therefore



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the expenditure incurred for organizing the same would not fall within the ambit of CBDT Circular No.5/2012 read with MCI Regulations 2009. Likewise, any journals or periodicals printed and shared with customers, distributors or medical practitioners to make them aware about the research behind manufacture of any new medication or its uses or effects in any particular disease also cannot be termed as 'gifts' given to doctors. However, the expenses, if any, incurred on travel and hotel accommodation of the doctors to attend these exhibitions or conferences would however be hit by the rigors of MCI Regulations, 2009.

11.18 In light of the above understanding of the position of law and MCI Regulations, 2009, we now proceed to examine the head-wise nature of sales promotion expenses claimed by the assessee and ascertain as to the quantum of expenses, if any, which qualifies as 'freebies' given to doctors and thus disallowable under Section 37(1) of the Act.

11.19 We first take up sub-heads: *Expenses on Patient Detection / Education Camp & Camp expenses*. The AO is noted to have observed that the expenses debited under this sub-head majorly comprised of medicine and testing kits, certain instruments purchased as required in medical camps. According to the AO, these medical kits like lipid profile test, sugar testing kit, thermometer, urine kits, pregnancy sticks etc., which were purchased for the camps were gifted to the doctors who attended the camp and thus held that this



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expenditure fell under the mischief of IMC regulations and accordingly disallowed the same in its entirety. Apart from the foregoing, the AO also noted that the assessee had incurred camp expenses, which were noted to include venue charges, payment to field staff, taxi hire charges to staffs etc. The AO had disallowed 10% of these expenses.

11.19.1 The Ld. AR showed us that, the expenses on patient education included expenses at diabetic camps, ECG Camps, BPH/BMD camps etc. and the nature of expenses primarily included testing kits, ECG rolls, needles, blankets, pamphlets for patients etc. These expenses by its very nature are noted to be for the benefit of patients and not doctors. The Ld. AR further explained that, the expenses towards thermometers, basic BP machines etc. were meant for the patients and their disease detection. He pointed out to us that, the averment made by the AO that these equipment's would have been gifted to doctors later on, was on pure surmise and conjecture and not based on any material or evidence found in course of search. He showed us that, the cost of these medical equipment's were minimal, if considered item-wise, and the shelf life of these medical equipment's when used tirelessly in the camps was very low and accordingly these were usually either discarded on completion of camp or shifted out by the field staff to other camps. Hence, these medical equipment's were also meant for the benefit of patients and not the doctors as wrongly presumed by the AO. The Ld. AR also brought to our notice that, the



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medical practitioners attending the camps were engaged in professional basis and professional fees were separately paid to them for attending patients.

11.19.2 We note that, the Ld. CIT(A) had examined the details of these expenses and recorded a finding of fact that the expenses on Patient Detection were incurred for the benefit of patients and not the doctors and thus deleted the same. Likewise, camp expenses were examined by the Ld. CIT(A) and was noted to have been paid to various camps and included expenses incurred for travelling & refreshments of field staff or patients and thus was not related to doctors.

11.19.3 Before us, the Ld. DR was unable to point out any specific defect in the above submissions of the Ld. AR as well as the findings of Ld. CIT(A). We thus do not see any reason to interfere with the Ld. CIT(A)'s action of deleting the disallowance made by the AO out of *Expenses on Patient Detection / Education Camp & Camp expenses*.

11.20 We now come to *Sponsorship Expenses*. The AO is noted to have held that these expenses were for the benefit of doctors and thus disallowed the same in full. It is observed that, there were no specific reasons assigned by the AO for arriving at such conclusion. On appeal, the Ld. CIT(A) is noted to have examined the details of these expenses and he found that these payments were made to trade



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associations for sponsoring their events as a measure of brand-awareness by the assessee and not to any medical practitioners. Although the Ld. CIT(A) in principle held that these sponsorship expenses did not constitute 'freebies' to doctors, but out of abundant caution, he is noted to have subjectively assumed that certain portion of the expenses may have been towards doctors as well and thus restricted the disallowance to 10%.

11.20.1 Having heard the rival submissions, it is noted that the Revenue was unable to controvert the Ld. CIT(A)'s finding that the sponsorship expenses were paid to trade bodies/associations by the assessee to put up their banners and posters in their events as a measure of brand re-call. The Ld. AR also showed us the sample supporting, which was placed at Pages 214 to 215 of Paper Book. The Ld. AR has rightly pointed out to us that, the sponsorship payments made to trade bodies/associations has not been prohibited in the MCI Regulations, 2009. Hence, when these payments were not made for the benefit of any medical practitioners and were also not falling in the mischief of MCI regulations, we find force in the Ld. AR's plea that the disallowance out of such sales promotion expenses was unwarranted. Coming to the Ld. CIT(A)'s action of making disallowance at 10%, we do not countenance such action of making estimated & ad-hoc addition. It is not the case of the Ld. CIT(A) that the assessee had not provided the details of the expenses or that the books of accounts were found to be unreliable. Hence, without



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rejecting the books of accounts or pointing out any defect / omission in the details filed by the assessee, the Ld. CIT(A) was unjustified in making estimated disallowance of 10%. The Ld. AR has shown us that complete details of expenses were found & seized by the Investigating authorities, which were available on the server. It was not the case of any of the lower authorities that any specific item of expense debited under *Sponsorship Expenses* was found to have been paid to or for the benefit of doctors. Overall, therefore, we hold that the sponsorship expenses not having been incurred for the benefit of doctors but to create brand awareness about the assessee company was allowable as deduction u/s 37(1) of the Act. The AO is accordingly directed to delete the disallowance made on this count.

11.21 We now examine the expenses debited under the sub-head *Participation in Symposiums / Exhibitions*: The AO had noted that the expenses under this head majorly comprised of payments to organizers for hiring & erection of stalls at their symposiums, registration charges, hotel expenses & travelling expenses and disallowed the entire amount as 'freebies' to doctors. The Ld. CIT(A) however noted that these expenses were paid to institutions and not doctors and thus deleted the same. Having heard the rival submissions and upon examining the facts placed before us, it is noted that the payments made by the assessee can be categorized into three categories viz., (a) payments made to institutions/trade bodies for registration, hiring of stall, designing and erecting their stalls, (b) hotel expenses and (c)



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travelling expenses. According to us, there is no such bar under the MCI regulations preventing the assessee from registering themselves at different symposiums, hiring & erecting stalls etc. The Ld. AR showed us that these expenses were paid to institutions / trade bodies. We agree with the Ld. CIT(A) that these expenses did not result in any benefit to the medical practitioners and thus could not be disallowed u/s 37 of the Act. With regard to hotel & travelling expenses, we find that these expenses comprised of refreshments provided to doctors at hotels and their local conveyance to attend the symposiums. These expenses indeed benefitted the doctors and would tantamount to availing hospitality from a pharmaceutical company. According to us therefore, these expenses viz., (b) & (c), would fall under the mischief of MCI regulations and is required to be disallowed and added back u/s 37(1) of the Act.

11.22 Coming to the expenses debited under the sub-head *Doctor's Meeting / Medical Awareness*: The AO had noted that these expenses were in relation to attending conferences, hotel expenses & travelling expenses of doctors and thus disallowed the same in its entirety. On appeal the Ld. CIT(A) is noted to have restricted the disallowance to 10%. The Ld. AR first explained to us, the nature of these expenses. He pointed out that these expenses comprised of the costs incurred by the assessee for organizing conferences. Taking us through the details, the Ld. AR showed us that majority of the expenses debited was in relation to the cost incurred for hiring venue



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or booking a conference hall at a five-star hotel and making arrangements to organize these conferences. Apart from the foregoing, the assessee also incurs hotel & travelling expenses for the doctors who attend these conferences. According to Ld. AR, the hotel expenses comprised of food & refreshment, which the assessee was duty bound to provide as being organizer of the conference and thus he prayed that these expenses should not be viewed adversely. As far as the travelling expenses, the Ld. AR submitted that the doctors who were attending conferences were required to be provided with conveyance so that they would reach the venue timely and ensure smooth execution of the conferences. The Ld. AR thus urged that even these travelling expenses fell outside the ambit of MCI Regulations, 2009.

11.22.1 Upon examination of the facts placed before us, it is noted that the expenditure incurred for organizing the conference i.e. hiring of venue & making arrangements etc. cannot be said to be in nature of 'freebies' given to the doctors. Understandably, the assessee, being a pharmaceutical company is required to organize such conferences to educate the delegates about their products and also obtain their feedback. Hence, the registration / conference expenses paid for organizing such events for their brand awareness and dissemination of information and research, cannot be said to constitute 'freebies' to medical practitioners and thus is held allowable u/s 37(1) of the Act. As far as hotel & travelling expenses are concerned, we find that these



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expenses comprised of refreshments provided to doctors who were the delegates at the conferences and reimbursement of their travelling expenses. As noted earlier, these expenses indeed benefitted the doctors and would tantamount to availing hospitality from a pharmaceutical company. According to us therefore, only the hotel & travelling expenses fell within the ambit of MCI regulations and directed to be disallowed and added back u/s 37(1) of the Act.

11.23 We now take up the *Brand Recall Purchases, HTC Expenses, CRM Expenses and Sales Promotion & Other Sales Promotion Expenses* together. Briefly stated, the AO noted that the brand re-call purchases included procurement of customized items such as clock, cup, cookware etc. The assessee had explained that these sales promotion articles which had their name & logo were given to customers, retailers, stockiest and distributors as a part of their advertisement strategy. The AO however noted that certain items purchased included paper weight, utility pouch, calling bell, apron etc. which were generally used by doctors and hence he held that it cannot be denied with certainty that some of these items were also sent to doctors. The AO accordingly estimated disallowance of 10% of the total expenses under this head. With regard to HTC expenses, it was noted to comprise of flower & sweets valuing less than Rs.500/- each incurred by field staff which were presented to customers / retailers / doctors. According to the AO, these expenses were gifts given to doctors on their special occasions i.e. anniversary or birthdays etc. The



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AO thus held that this expenditure was incurred in violation of MCI regulations Likewise, the AO disallowed the sales promotion & CRM expenses which were noted to comprise of expenses of value less than Rs.500/- incurred by more than 4500 field staff of the assessee. According to the AO, these expenses were incurred by the field staff to maintain cordial relations with medical practitioners. He treated these expenses to be in nature of freebies and disallowed the same. On appeal, the Ld. CIT(A) is noted to have restricted the disallowance to 10% of these expenses.

11.23.1 Having heard both the parties, it is not disputed by the Revenue that the items of expenses incurred under these heads were of nominal value less than Rs.1000/- on flowers, sweets, cup, aprons etc. The sales promotion articles which had their name & logo were given to customers, retailers, stockiest and distributors as a part of their brand awareness strategy. Likewise, flowers and sweets of nominal value would also be given by field staff on special occasions to their customer / stockiest / distributors. Also, some of these items were used by field staff to be given to doctors in the course of their visits. As noted in Para 11.15 above, the MCI Notification dated 01.02.2016 has excluded nominal gifts valuing Rs.1000/- and less from the mischief of MCI Regulations, 2009. This was also clarified by a public notice issued by Government of India dated 16.03.2022. In light of the foregoing and following the decision of this Tribunal at Bangalore in the case of Himalaya Drug Company (supra), as discussed earlier, the



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disallowance made by the AO out of these sub-heads of sales promotion expenses is held to be unsustainable and is thus directed to be deleted.

11.24 With regard to sub-head '*Journals & Periodicals*', it is noted that these expenses were incurred for researching & printing literature or purchasing journals regarding the products and its related uses/effects. As noted earlier, these expenses do not result in any benefit or gifts given to the doctors. We thus agree with the following findings of Ld. CIT(A) recorded in AY 2011-12 deleting the disallowance made by the AO on account of expenses incurred under this sub-head.

“6.4.3 Further, with respect to expenses incurred under the head 'Journal and periodicals', I find that the same are not related to doctors and used for the branding of the products of the assessee. The said journals and periodicals contains the description and articles on the products of the assessee which are circulated by the assessee in order to advertise its brands. The main purpose behind these expenses is for providing knowledge and update about its products. Thus, the doctors have not get any benefit from such expenses paid to third party. Therefore, 100% disallowance of Rs. 98,05,864/- made by the AO is deleted.”

11.25 Now we examine the sub-head '*Taxi Hire Charges*'. It is noted that these expenses related to the reimbursements of local taxi / conveyance expenses incurred by the sales employees / staff on their outstation visits. The AO is observed to have disallowed and added the



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same on the ground that the details were not made available. The Ld. CIT(A) is noted to have restricted the same to 10% of the expenses. Before us, the Ld. AR argued that the pretext on which the AO made the disallowance was unjustified for the reason that the Investigating authorities had found & seized the books of accounts in the course of search and had also taken back-up of their server and thus it was incorrect to state that the details of these expenses were not made available. The Ld. AR further showed us that the assessee had 12 divisions and more than 4500 persons as field staff and therefore in light of the foregoing, the taxi hire charges incurred across the years was reasonable and not excessive. Further, to substantiate the nature of these expenses, the Ld. AR by way of an illustration has also placed the copy of email approving reimbursement of taxi conveyance of their marketing staff at Page 269 of Paper Book No. 3. Having regard to the nature of expenses and overall facts as discussed in the foregoing, we note that these expenses were incurred by sales personnel of the assessee and not paid to any doctors or medical practitioners. Accordingly, the disallowance of taxi hire charges is held to be unwarranted in the facts of this case, and we direct to delete the same in all AYs.

11.26 As far as the sub-head '*Field Printing Expenses*' is concerned, it is noted that these expenses included printing of files, folders for the field staff and pads for the doctors to make noting's or prescribe drugs when attending camps. The AO is noted to have



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disallowed these expenses holding it to have been incurred for the benefit of doctors, which was deleted by the Ld. CIT(A). Before us, the Ld. AR has placed sample copies of invoices at Pages 250-253, 267-268 of Paper Book No. 3 to evidence the nature of printing charges incurred by the assessee. Having perused the same, we note that these expenses related to printing of files, folders, pads and pens which were understandably to be used by the field staff and also the doctors who were attending camps. Going by the nature of these expenses, it cannot be termed as 'freebies' given to doctors and hence we uphold the order of Ld. CIT(A) deleting the same.

11.27 The next sub-head for our consideration is '*Trade Relation Expenses & Gifts for Sales Promotion*'. Briefly noted, these expenses are noted to cover the cost of articles / gifts purchased by field staff to be distributed to wholesalers / stockiest / business partners etc. The assessee is noted to have placed sample supporting's at Page Nos. 270 to 279 of Paper Book No. 3. It is observed that, the AO had disallowed these expenses under erroneous understanding that these were given to doctors. On appeal, the Ld. CIT(A) in AY 2014-15 is noted to have deleted the addition by observing as under :-

“Further, with respect to the expenditure incurred under the head Trade relation expense and gifts for sales promotion expenses, the same has majorly incurred on the distributors and stockists for the domestic marketing. Therefore, it is not incurred in relation to the doctors. Therefore, 100% of the disallowance of Rs.95,79,992/- in



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relation to Trade Relation expenses and Rs.5,66,672/- in relation to Gift for sales promotion expenses by the AO is deleted.”

11.27.1 The Ld. CIT, DR appearing for the Revenue was unable to dislodge the above findings of the Ld. CIT(A) in light of the details placed by the assessee in the paper book. We accordingly uphold the order of Ld. CIT(A) deleting the same.

11.28 The last sub-head is ‘*Air Ticket Expenses*’. In some of the AYs, the AO is also noted to have identified expenses incurred on air tickets of doctors attending conference, which was disallowed u/s 37(1) of the Act and the Ld. CIT(A) is observed to have restricted the disallowance to 10%. According to us, the air ticket expenses paid for doctors directly fell under the mischief of MCI Regulations 2009 and was thus not allowable as deduction under Explanation (1) to Section 37(1) of the Act. We thus reverse the order of Ld. CIT(A) in this regard and uphold the action of AO disallowing the same in full.

11.29 In light of the our above findings, the sums disallowable out of the sales promotion expenses u/s 37(1) of the Act in AY 2010-11 (14.12.2009 to 31.03.2010), 2011-12, 2012-13 & 2014-15 are quantified as follows: -



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Nature of Expenses	AY 2010-11 (14.12.09 – 31.03.10)	AY 2011-12	AY 2012-13	AY 2014-15
Participation in Symposium/Exhibitions				
- Hotel Expenses	Nil	Nil	3,08,686	45,80,264
- Travelling Expenses	Nil	49,636	6,41,230	39,14,699
Doctor Meeting/ Medical Awareness				
- Hotel Expenses	5,52,810	32,57,926	3,78,433	1,09,40,845
- Travelling Expenses	2,95,372	2,01,350	1,00,86,599	5,36,005
Air Ticket Expenses	N.A.	N.A.	N.A.	1,69,79,382
Total	8,48,182	35,08,912	1,10,36,515	3,69,51,195

11.30 The Ld. AR had further pleaded before us that, in case any portion of the sales promotion expenses is held to be disallowable, then according to him, the disallowance attributable to the eligible units u/s 80-IC of the Act, would correspondingly result in enhancement of the profits of eligible business and consequent enhancement of deduction u/s 80-IC of the Act to the extent of such disallowance. For this, he relied on the CBDT Circular No. 37/2016 dated 02.11.2016, whose relevant extracts are noted as under: -

“Chapter VI-A of the Income-tax Act, 1961 ("the Act"), provides for deductions in respect of certain incomes. In computing the profits and gains of a business activity, the Assessing Officer may make certain disallowances, such as disallowances pertaining to sections 32, 40(a)(ia), 40A(3), 43B etc., of the Act. At times disallowance out of specific expenditure claimed may also be made. The effect of such disallowances is an increase in the profits. Doubts have been raised as to whether such higher profits would also result in claim for a higher profit-linked deduction under Chapter VI-A.



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2. The issue of the claim of higher deduction on the enhanced profits has been a contentious one. However, the courts have generally held that if the expenditure disallowed is related to the business activity against which the Chapter VI-A deduction has been claimed, the deduction needs to be allowed on the enhanced profits....

3. In view of the above, the Board has accepted the settled position that the disallowances made under sections 32, 40(a)(ia), 40A(3), 43B, etc. of the Act and other specific disallowances, related to the business activity against which the Chapter VI-A deduction has been claimed, result in enhancement of the profits of the eligible business, and that deduction under Chapter VI-A is admissible on the profits so enhanced by the disallowance.”

11.31 It was brought to our notice that the AO had already, in principle, accepted the above plea of the assessee qua the amount disallowed in the assessment and accorded the benefit of the Circular (supra). The AO is noted to have attributed the disallowance relating to the eligible units and enhanced the eligible profits of the units available for deduction u/s 80-IC of the Act accordingly. In such a scenario therefore, this particular plea of the assessee is found to be acceptable. Hence, having regard to the disallowance quantified by us above, the AO is accordingly directed to appropriately attribute the disallowance of freebies to the eligible unit's u/s 80-IC of the Act and consequentially re-compute the enhanced eligible profits and allow the deduction u/s 80-IC of the Act. Needless to say, the AO shall allow an



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opportunity of hearing to the assessee to provide necessary computation, before undertaking this exercise.

11.32 Overall therefore, the grounds raised by the assessee in AY 2009-10 is allowed and the grounds of the Revenue is dismissed. And, the grounds raised by the assessee and Revenue in AYs 2010-11, 2011-12, 2012-13 & 2014-15 stands partly allowed.

12. Issue 9: Disallowance of ESOP expenses

Ground No. 11 of the Revenue's appeal for AY 2011-12

Ground No. 14 of the Revenue's appeal for AY 2012-13

12.1 These grounds of the Revenue are against the Ld. CIT(A)'s action of deleting the disallowance of ESOP compensation expenditure made by the AO. Briefly noted, the AO, following the order of his predecessors had disallowed the same holding it to be capital in nature. On first appeal, the Ld. CIT(A) following the order passed by this Tribunal in assessee's own case in ITA No.3691/Mum/2016 for AY 2009-10 dated 29.08.2022 has deleted the same. The Revenue is now in appeal before us.

12.2 At the onset the Ld. AR for the assessee pointed out that the issue is squarely covered by the decision rendered by this Tribunal in their own case for AYs 2008-09 & 2009-10. This Tribunal in their order dated 29.08.2022 is noted to have upheld the Ld. CIT(A)'s order deleting the disallowance of ESOP expenses by following the decision



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of the Special Bench of Tribunal in the case of **Biocon Ltd. vs. DCIT (35 taxmann.com 335)**. The Tribunal also took note of the fact that the Hon'ble Karnataka High Court in their judgment reported in **121 taxmann.com 351** has since affirmed the decision of the Special Bench. Thus, in light of aforesaid decisions, we have no hesitation in upholding the order of Ld. CIT(A) deleting this impugned addition. We thus dismiss these grounds of the Revenue.

13. Issue 10: Disallowance of deduction u/s 80IC in relation to sale of scrap

Ground No. 11 of the Assessee's appeal for AY 2011-12

Ground No. 11 of the Assessee's appeal for AY 2012-13

Ground No. 8 of the Assessee's appeal for AY 2014-15

13.1 These grounds of the Revenue are against the Ld. CIT(A)'s action of reversing the AO's action of not considering the profit derived from sale of scrap as eligible profit of industrial undertaking u/s 80IC of the Act. Briefly noted, the AO following the identical line of reasoning set out by his predecessors held that the sale of scrap does not constitute turnover and is not derived from the eligible undertaking. The AO accordingly held the profit from sale of scrap to be ineligible for deduction u/s 80-IC of the Act. Likewise, on appeal, the Ld. CIT(A) is noted to have deleted this disallowance by following the order passed by this Tribunal in assessee's own case in ITA



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No.3597/Mum/2016 for AY 2009-10 dated 29.08.2022. The Revenue is now in appeal before us.

13.2 Heard both the parties. It is noted that the impugned issue stands squarely covered in favour of the assessee by the decision rendered by this Tribunal in their common order passed in assessee's own case for AYs 2008-09 & 2009-10. The relevant findings of the Tribunal is noted to be as under :-

“We have carefully considered the rival contention and perused the orders of the lower authorities. Apparently, assessee earned receipt of sale of empty containers. Undisputedly, the unit at Silvassa and Dheradun are eligible undertakings income, which is eligible for deduction under Section 80IC and 80IB of the Act. Provision of Section 80IC of the Act allows deduction of profit and gains derived by undertaking from eligible business. It cannot be said that sale of empty containers is altogether different business of the assessee. We further held that this issue is squarely covered in favour of the assessee by the decision of honourable Delhi High Court in case of CIT versus Sadhu forging Ltd 336 ITR 444 as well as the decision of the honourable Gujarat High Court in Tax Appeal No. 368 of 2008 December 21, 2013 and Dy. CIT v. Harjivandas Juthabhai Zaveri [2002] 258 ITR 785/ [2003] 132 Taxman 923 (Guj.) In view of this, we find that lower authorities have erred in not allowing deduction under Section 80IB and 80IC of the Act on the above sum. Accordingly, ground no.2 and 3 of the appeal is allowed. “



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13.3 The Ld. CIT, DR was unable to point out any change of facts or position of law in the relevant AYs. Following the above decision (supra) rendered in assessee's own case, we have no hesitation in upholding the order of Ld. CIT(A) deleting this impugned addition. These grounds of the Revenue are therefore dismissed.

14. Issue 11: Exclusion of excise subsidy by way of capital receipt not liable to tax

Ground No. 1-3 of the Revenue's appeal for AY 2013-14

Ground No. 1-3 of the Revenue's appeal for AY 2014-15

14.1 These grounds raised by the Revenue are against the Ld. CIT(A)'s action of admitting and allowing the fresh claim raised by the assessee seeking exclusion of capital subsidy from computation of income under normal provisions as well as book profit u/s 115JB of the Act, which was not made in the return of income. From the facts placed before us, it is noted that, the assessee was in receipt of excise subsidy from the Central Government to the tune of Rs.69,49,430/- and Rs.11,58,23,153/- in AYs 2012-13 & 2014-15 respectively in respect of their new unit set-up in the State of Sikkim. The Ld. AR pointed out that the assessee had set-up a new manufacturing unit in the State of Assam. The Id. AR invited our attention to the Eligibility Certificate confirming that the unit set-up by the assessee is eligible for exemption from excise duty in terms of the said Notification as a new



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unit with effect from 01.07.2011 i.e. the date of commencement of commercial production. It is noted that the said exemption was given to the new units for development of Industries and generation of employment in the North Eastern States. In this regard relevant extracts of Notification dated 01.04.2007 is reproduced below: —

“Incentives will be available to all industrial units, new as well as existing units on their substantial expansion, located anywhere in the North Eastern Region. Consequently, the distinction made between ‘thrust’ and ‘non-thrust’ industries made in NEIP, 1997 will be discontinued from 01.04.2007.”

14.2 In view of the above, it was the plea of the assessee that the incentive in the form of excise duty subsidy, have been granted for setting up new unit in the State of Sikkim which lagged behind in industrial development, for development of industries and generation of employment opportunities. The object of the assistance was not to enable the assessee to run the business more profitably but encourage them to set up a new unit or expand the existing unit for overall economic development of the State. Relying on the decisions rendered by several judicial forums holding such subsidy received for setting-up new unit to be in nature of capital receipt not exigible to tax, the assessee had raised a fresh claim seeking exclusion of the same from the computation of income under normal provisions as well as book profit u/s 115JB of the Act. The AO however noted that this claim was not raised in the return of income filed by the assessee and accordingly rejected the same by following the decision of the Hon’ble Supreme



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Court in the case of **Goetze India Ltd Vs CIT (284 ITR 323)**. Aggrieved by this action of the AO, the assessee preferred an appeal before the Ld. CIT(A) who following the decision of Hon'ble Bombay High Court in the case of **CIT Vs Pruthvi Brokers & Shareholders (349 ITR 336)** admitted this fresh claim raised by the assessee in the course of assessment. The Ld. CIT(A) thereafter analyzed the nature of subsidy in light of the decisions rendered by the Hon'ble Supreme Court in the case of **CIT Vs Shree Balaji Alloys Ltd (80 taxmann.com 239)** and **CIT Vs Ponni Sugar & Chemicals Ltd (174 Taxman 87)**. The Ld. CIT(A) accordingly held the excise subsidy to be in nature of capital receipt not liable to tax and thus allowed the ground raised by the assessee. Aggrieved by the order of Ld. CIT(A), the Revenue is now in appeal before us.

14.3 Assailing the action of Ld. CIT(A), the Ld. CIT, DR primarily contended that the additional claim raised by the assessee could be allowed only if it was made in return of income. He argued that the assessee had raised this claim by filing revised computation of income, in the course of assessment, which according to him, could not be entertained. The Ld. CIT, DR further contended that the subsidy granted was revenue in nature and not capital as claimed by the assessee. Per contra, the Ld. AR supported the order of the Ld. CIT(A).



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14.4 We have considered the rival submissions of both the parties. From the facts as discussed in the foregoing, it can be safely inferred that the subsidy was granted to the assessee for setting up new unit in the State of Sikkim. The Hon'ble Supreme Court in the case of **Chaphalkar Brothers (400 ITR 279)** has held that the subsidies granted under Government Industrial Scheme to accelerate industrial development and generate employment is capital in nature. The relevant extracts of the judgment are as follows:

"21. What is important from the ratio of this judgment is the fact that Sahney Steel was followed and the test laid down was the "purpose test". It was specifically held that the point of time at which the subsidy is paid is not relevant; the source of the subsidy is immaterial; the form of subsidy is equally immaterial.

22. Applying the aforesaid test contained in both Sahney Steel as well as Ponni Sugar, we are of the view that the object, as stated in the statement of objects and reasons, of the amendment ordinance was that since the average occupancy in cinema theatres has fallen considerably and hardly any new theatres have been started in the recent past, the concept of a Complete Family Entertainment Centre, more popularly known as Multiplex Theatre Complex, has emerged. These complexes offer various entertainment facilities for the entire family as a whole. It was noticed that these complexes are highly capital intensive and their gestation period is quite long and therefore, they need Government support in the form of incentives qua entertainment duty. It was also added that government with a view to



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commemorate the birth centenary of late Shri V. Shantaram decided to grant concession in entertainment duty to Multiplex Theatre Complexes to promote construction of new cinema houses in the State. The aforesaid object is clear and unequivocal. The object of the grant of the subsidy was in order that persons come forward to construct Multiplex Theatre Complexes, the idea being that exemption from entertainment duty for a period of three years and partial remission for a period of two years should go towards helping the industry to set up such highly capital intensive entertainment centers. This being the case, it is difficult to accept Mr. Narasimha's argument that it is only the immediate object and not the larger object which must be kept in mind in that the subsidy scheme kicks in only post construction, that is when cinema tickets are actually sold. We hasten to add that the object of the scheme is only one -there is no larger or immediate object. That the object is carried out in a particular manner is irrelevant, as has been held in both Ponni Sugar and Sahney Steel.

23. Mr. Ganesh, learned Senior Counsel, also sought to rely upon a judgment of the Jammu and Kashmir High Court in ShreeBalaji Alloys v. CIT [2011] 9 taxmann.com 255/198 Taxman 122/333 ITR 335. While considering the scheme of refund of excise duty and interest subsidy in that case, it was held that the scheme was capital in nature, despite the fact that the incentives were not available unless and until commercial production has started, and that the incentives in the form of excise duty or interest subsidy were not given to the assessee expressly for the purpose of purchasing capital assets or for the purpose of purchasing machinery.



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24. After setting out both the Supreme Court judgments referred to hereinabove, the High Court found that the concessions were issued in order to achieve the twin objects of acceleration of industrial development in the State of Jammu and Kashmir and generation of employment in the said State. Thus considered, it was obvious that the incentives would have to be held capital and not revenue. Mr. Ganesh, learned Senior Counsel, pointed out that by an order dated 19-4-2016, this Court stated that the issue raised in those appeals was covered, inter alia, by the judgment in Ponna Sugars & Chemicals Ltd. case (supra) and the appeals were, therefore, dismissed.

25. We have no hesitation in holding that the finding of the Jammu and Kashmir High Court on the facts of the incentive subsidy contained in that case is absolutely correct. In that once the object of the subsidy was to industrialize the State and to generate employment in the State, the fact that the subsidy took a particular form and the fact that it was granted only after commencement of production would make no difference." (Emphasis Supplied)

14.5 The above decision of the Hon'ble Supreme Court has been followed by the jurisdictional Hon'ble Bombay High Court in the case of **Pr. CIT Vs Welspun Steel Ltd (264 Taxman 252)**. In the decided case also, the Hon'ble Court held that, where the incentive under the Industrial Scheme is given only to new units and units which have undergone an expansion, then the real purpose of such incentive has to be seen as a capital subsidy and therefore should be regarded as a



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capital receipt and not a revenue receipt. The relevant findings of the Hon'ble High Court are noted to be as follows :-

“6. Having heard the learned Counsel for the parties on this question, we notice that, the Government of Gujarat Sales Tax Incentive Scheme was envisaged to promote large scale investments in the Kutch District since on account of devastating earth-quake, development of the district had suffered. The Scheme envisaged that, the same was confined only with the Kutch District. Similar, being the purpose and philosophy of the Government of India, while granting excise duty exemption, we may not separately take note of the back-ground thereof. In view of these facts, the question arises is - whether the Tribunal was justified in holding that Sales Tax and Excise duty exemption enjoyed by the assessee under the said subsidy scheme, was not taxable as revenue receipt. Such and similar issue has come up before different High Courts and Supreme Court on the numerous occasions. Reference to all those judgments would be unnecessary. However, the principle that has evolved is that, not the nomenclature of the subsidy or the fact that, the computation of the subsidy benefit is in terms of tax payable, would not be conclusive. What is to be examined in each case is the purpose for granting such subsidy. We may refer to the decision of the Supreme Court in case of CIT v. Chaphalkar Bro. [2017] 88 taxmann.com 178/[2018] 252 Taxman 360/400 ITR27. It was a case arising out of judgment of this Court in which, the dispute between assessee and the Revenue was with respect to subsidy granted to the multiplex cinema operators in the form of entertainment tax waiver. The subsidy was granted in view of the fact that, industry was highly capital intensive. The Revenue



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argued that, the subsidy was revenue in nature. This Court after referring to several decisions of the Supreme Court including the case of CIT v. Ponni Sugars and Chemicals Ltd. [2008] 306 ITR 392/174 Taxman 87 and Sahney Steel and Press Works Ltd. v. CIT [1997] 94 Taxman 368/228 ITR 253 (SC) held that, subsidy had not been granted for construction but only after setting up of a new industry which was in the nature of assistance given for the purpose of carrying on business.

.....

8. In the present appeal also, as noted, the subsidy was granted under schemes framed by the State and the Central Government, to be given to the assesses who set up new industry in Kutch District. The scheme was envisaged to encourage investment which would in turn, provide fresh employment opportunity in the district which had suffered due to devastating earthquake. The computation of subsidy may be on the basis of sales tax or excise duty. Nevertheless, the purpose test would ensure that, the subsidy was capital in nature.”

14.6 Following the ratio laid down in the judgements (supra), we see no reason to interfere with the Ld. CIT(A)’s findings hold that the excise subsidy received by the assessee was in the nature of capital receipt not liable to tax, as the object of granting subsidy was to encourage setting up new industries for industrial growth of industrially non-developed area.



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14.7 We now come to the issue relating to treatment of these subsidies while computing book profit u/s 115JB. It is noted that, in the context of similar State Industrial Scheme, the Hon'ble Calcutta High Court in the case of **Ankit Metal and Power Ltd. (416 ITR 591)** has held that, the subsidies received for setting up new industry is not in the nature of income, and therefore cannot be deemed as income, for the purposes of computing book profit u/s 115JB of the Act. In the decided case, the assessee had received interest subsidy under the WB Incentive Scheme, 2000 and power subsidy under the Power Intensive Industries Scheme, 2005 for setting up Sponge Iron Plant in Bankura. Before this Tribunal, the assessee claimed that receipt of such subsidies in form of remission of interest and power/electricity duty payments etc. was capital receipt not liable to tax both under the normal computational provisions as well as book profit u/s 115JB of the Act. The Tribunal answered the issue in favour of the assessee. On appeal by the Revenue, the Hon'ble High Court upheld the order of this Tribunal by observing as under:

"26. Now the second issue which requires adjudication is as to whether the aforesaid incentive subsidies received by the assessee from the Government of West Bengal under the schemes in question are to be included for the purpose of computation of book profit under section 115JB of the Income-tax Act, 1961 as contended by the revenue by relying on the decision in the case of *Appollo Tyres Ltd. (supra)*.



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27. In this case since we have already held that in relevant assessment year 2010-11 the incentives 'Interest subsidy' and 'Power subsidy' is a 'capital receipt' and does not fall within the definition of 'Income' under section 2(24) of Income-tax Act, 1961 and when a receipt is not on in the character of income it cannot form part of the book profit under section 115JB of the Act, 1961. In the case of *Appollo Tyres Ltd. (supra)* the income in question was taxable but was exempt under a specific provision of the Act as such it was to be included as a part of the book profit. But where a receipt is not in the nature of income at all it cannot be included in book profit for the purpose of computation under section 115JB of the Income-tax Act, 1961. For the aforesaid reason, we hold that the interest and power subsidy under the schemes in question would have to be excluded while computing book profit under section 115 JB of the Income-tax Act, 1961."

14.8 We also rely on the decision of the coordinate bench of this Tribunal in the case of **Sicpa India (P.) Ltd. Vs DCIT (80 taxmann.com 87)** involving identical facts and circumstances as found in the present case before us. In the decided case, it has been held that the subsidy received by the assessee in form of excise duty exemption for setting up new industry in the North Eastern State *viz.*, Sikkim was in the capital field and therefore not liable to tax under the provisions of section 115JB of the Act. The relevant findings of this Tribunal are as follows:

"21. The main issue that arises for consideration on the basis of the grievance projected by the Revenue in the aforesaid ground No. 2 is as to whether the excise duty refund which were held by



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the CIT(A) to be capital receipts not chargeable to tax can still be considered as part of the book profits u/s.115JB of the Act, even though these sums have been credited in the profit and loss account and treated as income and even though the exclusion of these sums for the purpose of computing book profit u/s.115JB has not been specifically provided under explanation below sec.115JB (2) of the Act. In rejecting the claim of the Assessee in this regard, the AO held that these sums have been credited in the profit and loss account and treated as income and exclusion of these incomes (sums) for the purpose of computing book profit u/s.115JB has not been specifically provided under explanation below sec.115JB (2) of the Act.

22. We have heard the submission of the learned counsel for the Assessee. As far as the excluding the subsidies in question from computation of book profit u/s 115JB of the Act is concerned, the provisions of sec.115JB of the Act have to be looked at. Section 115JB of the Act provides that notwithstanding anything contained in any other provision of the Act, where in the case of an Assessee, being a company, the income- tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April,2001, is less than seven and one half percent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of seven and one half ten per cent. The Assessee being a company the provisions of sec.115JB of the Act were applicable. Every assessee, being a company, shall, for the purposes of section 115JB of the Act, prepare its profit and loss



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account for the relevant previous year in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 (1 of 1956). In so preparing its book of accounts including profit and loss account, the company shall adopt the same accounting policies, accounting stand and method and rates for calculating depreciation as is adopted while preparing its accounts that are laid before the company at its annual general meeting in accordance with provisions of Sec.210 of the Companies Act. *Explanation* below sec.115JB of the Act provides that for the purposes of section 115JB of the Act, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub- section (2), as increased by certain items debited in the profit and loss account in arriving at the net profit and as reduced by- certain items that are credited in the profit and loss account. In other words, all that one has to do, while computing book profits is to take the profit as per profit and loss account prepared in accordance with Companies Act, 1956 and make additions or subtraction as is given in the explanation to sec.115JB(2) of the Act.

23. We have already seen that the issue whether subsidies in question can be regarded as income at all is no longer *res integra* and has been concluded by the Hon'ble Jammu & Kashmir High Court in the case of *Balaji Alloys (supra)*. In the aforesaid decision the Hon'ble J & K High Court on identical facts held that excise duty subsidy and interest subsidy were capital receipts not chargeable to tax. In view of the aforesaid decision of the Hon'ble High Court rendered on identical facts as that of the Assessee's



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case, there can be no doubt that subsidies in question does not have any character of income.

24. When a receipt is not in the character of income, can it form part of the book profits for the purpose of sec.115JB of the Act, is the question that arises for consideration. The ITAT Kolkata Bench in the case of *Dy. CIT v. Binani Industries Ltd.* [2016] 178 TTTJ 658 : had to deal with a case where the question was as to whether receipts on account of forfeiture of share warrants amounting to Rs. 12,65,75,000/-, being a capital receipt, would be liable for taxation u/s 115JB. The tribunal after referring to several decisions on the issue viz., the Hon'ble Apex Court in case of *Indo Rama Synthetics (I) Ltd. v. CIT* [2011] 330 ITR 336/9 taxmann.com 25, *Apollo Tyres Ltd. v. CIT* [2002] 255 ITR 273/122 Taxman 562 (SC), Special Bench ITAT in the case of *Rain Commodities Ltd. v. Dy. CIT* [2010] 40 SOT 265 (Hyd.) (SB), ITAT Luknow Bench in the case of *ACIT v. L.H. Sugar Factory Ltd. and vice versa* [ITA Nos. 417 , 418 & 339/LKW/2013, dated 9-2-2016] and decision of Mumbai ITAT in the case of *Shivalik Venture (P.) Ltd. v. Dy. CIT* [2015] 70 SOT 92/60 taxmann.com 314, came to the conclusions

(i) the object of Minimum Alternate Tax (MAT) provisions incorporated in Sec.115JB of the Act was to bring out real profit of companies and the thrust was to find out real working results of company.

(ii) Inclusion of receipt which are not in the nature of income in computation of book profits for MAT would defeat two



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fundamental principles, it would levy tax on receipt which was not in nature of income at all and secondly it would not result in arriving at real working results of company. Real working result could be arrived at only after excluding this receipt which had been credited to P&L a/c and not otherwise.

(iii) There was a disclosure of the factum of forfeiture of share warrants amounting to Rs. 12,65,75,000/- by the Assessee in its notes on accounts vide Note No. 6 to Schedule 11 of Financial Statements for year ended 31-3-2009. Profit and loss account prepared in accordance with Part II and III of Schedule VI of Companies Act 1956, included notes on accounts thereon and accordingly in order to determine real profit of Assessee, adjustment need to be made to disclosures made in notes on accounts forming part of profit and loss account of Assessee. Profits arrived after such adjustment, should be considered for purpose of computation of book profits u/s 115JB of the Act and thereafter, AO had to make adjustments for additions/deletions contemplated in Explanation to section 115JB of the Act.

25. The Tribunal in the aforesaid decision made a reference to the decision of the Special Bench of the ITAT in the case of *Rain Commodities (supra)* which in turn was based on the ratio laid down in the decision of the Hon'ble Supreme Court in the case of *Apollo Tyres Ltd. (supra)* as a case in which the income in question was taxable but was exempt under a specific provision of the Act and but for the exemption, the income would be chargeable to tax and such items of income should also be included as part of the book profits. But where a receipt is not in



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the nature of income at all it cannot be included in book profits though it is credited in the profit and loss account. The Bench followed the decision of the Lucknow Bench in the case of *L.H. Sugar Factory Ltd. (supra)*, where receipts on account of carbon credits which were capital receipts not chargeable to tax and hence not in the nature of income were held not included in the book profits. The Bench also referred to the decision of the Mumbai Bench of the ITAT in the case of *Shivalik Venture (P.) Ltd. (supra)* which was a case where the question was whether profits arising on transfer of a capital asset by a company to its wholly owned subsidiary company which is not treated as "income" u/s 2(24) of the Act and since it does not form part of the total income u/s.10 of the Act and therefore does not enter into computation provision at all under the normal provisions of the Act, the same should be considered for the purpose of computing book profit u/s 115JB of the Act. The Mumbai Bench held as follows:

'26. We shall now examine the scheme of the provisions of sec. 115JB of the Act. It is pertinent to note that the provisions of sec. 10 lists out various types of income, which do not form part of Total income. All those items of receipts shall otherwise fall under the definition of the term "income" as defined in sec. 2(24) of the Act, but they are not included in total income in view of the provisions of sec. 10 of the Act. Since they are considered as "incomes not included in total income" for some policy reasons, the legislature, in its wisdom, has decided not to subject them to tax u/s 115JB of the Act also, except otherwise specifically provided for. Clause (ii) of *Explanation 1* to sec.115JB specifically provides that the



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amount of income to which any of the provisions of section 10 (other than the provisions contained in clause (38) thereof) is to be reduced from the Net profit, if they are credited to the Profit and Loss account. The logic of these provisions, in our view, is that an item of receipt which falls under the definition of "income", are excluded for the purpose of computing "Book Profit", since the said receipts are exempted u/s 10 of the Act while computing total income. Thus, it is seen that the legislature seeks to maintain parity between the computation of "total income" and "book profit", in respect of exempted category of income. If the said logic is extended further, an item of receipt which does not fall under the definition of "income" at all and hence falls outside the purview of the computation provisions of Income-tax Act, cannot also be included in "book profit" u/s 115JB of the Act. Hence, we find merit in the submissions made by the assessee on this legal point.'

26. The admitted factual and legal position in the present case is that subsidies in question is not in the nature of income. Therefore they cannot be regarded as income even for the purpose of book profits u/s.115JB of the Act though credited in the profit and loss account and have to be excluded for arriving at the book profits u/s.115JB of the Act. We hold accordingly and confirm the order of the CIT(A) in this regard. In light of the aforesaid discussion, we are of the view that the subsidies in question should be excluded for the purpose of determination of book profits u/s.115JB of the Act. We hold accordingly and dismiss Gr.No.2 raised by the Revenue.



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14.9 For the reasons set out above and respectfully following the decisions (supra), we uphold the order of Ld. CIT(A) excluding the subsidy received by the assessee for setting up new industry, by way of refund of excise duty from the computation of book profit u/s 115JB of the Act.

14.10 As far as the ld. CIT, DR's contention regarding admission of fresh claim is concerned, we note that the assessee had raised the claim in the abated AYs 2012-13 & 2014-15. It is noted that the Hon'ble Bombay High Court in the decisions rendered in the cases of **Pr. CIT v. JSW Steel Limited (270 Taxman 201)** and **CIT v. B. G. Shirke Construction Technology (P.) Ltd.(395 ITR 371)** has held that, it is open for an assessee to lodge a new claim in a proceeding under section 153A which was not claimed in his regular return of income, provided the assessment stood abated as a consequence of the search. Also, the Hon'ble Bombay High Court in the case of **CIT Vs Pruthvi Brokers & Shareholders (supra)** after considering the decisions of the Hon'ble Supreme Court in the cases of **Addl. CIT v. Gurjargravures (P.) Ltd., (111 ITR 1)**, **Jute Corpn. of India Ltd. v. CIT (187 ITR 688)**, **National Thermal Power Co. Ltd. v. CIT (229 ITR 383)** and **Goetze (India) Ltd. v. CIT (supra)** has upheld the powers of the appellate authorities including Ld. CIT(A) to entertain and adjudicate additional claims which was not made by an assessee in the return of income.



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14.11 We further note that, on similar set of facts & circumstances, identical contention was also raised by the Revenue before the Hon'ble Calcutta High Court in the case of **Ankit Metal and Power Ltd. (supra)**. In the decided case also, the assessee had raised this plea for the first time before the Tribunal *viz.*, the subsidy received under the State Industrial Scheme is capital in nature and therefore should be excluded from the book profit u/s 115JB of the Act. The Tribunal admitted this legal issue raised by the assessee and answered it in their favour. Before the Hon'ble High Court, the Revenue raised the following question for their consideration.

"(ii) Whether on the facts and in the circumstances of the case the learned Tribunal erred in law in accepting the claim of deduction by the assessee towards 'Interest subsidy' and 'Power subsidy' under the aforesaid schemes by filing revised computation instead of revised return before the assessing officer for exclusion of the aforesaid receipts from the book profit under section 115 JB on the ground that the said subsidies do not constitute income under section 2(24) of the Income-tax Act, 1961?."

14.12 The Hon'ble High Court answered the question in negative and in favour of the assessee by observing as under:

"28. The third issue involve in the instant appeal which requires adjudication is whether the action of Tribunal entertaining/allowing the claim which was made by the assessee before the Assessing Officer by filing a revised computation instead of filing a revised return since the time to file the revised return was lapsed, for claiming to treat the incentive subsidies in



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question as capital receipts instead of revenue receipts as claimed in original return. The Assessing Officer had denied this claim. Revenue has attacked the order of the tribunal by relying on the decision in the case of *Goetze (India) Ltd. (supra)*.

29. This case does not help the revenue/appellant. In this case Supreme Court has made it clear that its decision was restricted to the power of the Assessing authority to entertain a claim for deduction otherwise than by a revised return, and did not impinge on the power of the Appellate Tribunal under section 254 of the Income-tax Act, 1961. The Hon'ble Supreme Court in the said decision held as follows:

".....In the circumstances of the case, we dismiss the Civil Appeal. However, we make it clear that the issue in this case is limited to the power of the Assessing Authority and does not impinge on the power of the Income-tax Appellate Tribunal under section 254 of the Income-tax Act, 1961."

29.1 This judgment was followed by our Court in the case of *Britannia Industries Ltd. (supra)* holding that Tribunal has the power to entertain the claim of deduction not claimed before the Assessing Officer by filing revised return. Respectfully following the aforesaid decision as well as the view already taken by us in this case that the aforesaid subsidies are capital receipt and not an 'income' and not liable to Tax Tribunal in exercise of its power under section 254 of the Income-tax Act justified this claim though no revised return under section 139 (5) of the Act was



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filed before the Assessing Officer. We answer both the question Nos. 1 and 2 in negative and in favour of assessee."

14.13 For the reasons set out above therefore, we do not find any merit in the legal plea raised by the Ld. CIT, DR contesting validity of admission of additional claim by the Ld. CIT(A). Overall thus, we see no reason to interfere with the order of Ld. CIT(A) on this issue and uphold his action of directing the AO to delete / reduce the excise duty subsidy both while computing income under normal provisions as well as book profit u/s 115JB of the Act. These grounds of the Revenue are therefore dismissed.

15. Issue 12: Additional Claim for deduction of foreign fluctuation translation reserve while computing book profit u/s 115JB of the Act

Additional Ground No. 1 of the Assessee's appeal for AY 2014-15

15.1 This ground is regarding non-inclusion of foreign fluctuation translation reserve of Rs.8,59,80,061/- while computing book profit u/s 115JB of the Act. The facts as noted by us are that, the assessee had advanced loan in foreign currency to its subsidiary in AY 2012-13. In compliance with the Accounting Standards viz., AS-11 notified by the Institute of Chartered Accountants of India, the assessee is noted to have re-stated the loans at their fair value at the year-end and the gain/loss arising on such re-statement had been credited/debited



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directly by way of foreign fluctuation translation reserve in the Balance Sheet. The Ld. AR pointed out that, such notional gain, which was directly credited to reserves, was not included or added while computing book profit u/s 115JB of the Act in AYs 2012-13 & 2013-14. Reason being, there was no specific adjustment prescribed in Explanation (1) to Section 115JB of the Act warranting such addition. It was pointed out that, the computation of book profit as declared by the assessee was accepted by the same AO in the income-tax assessments completed u/s 153A/143(3) of the Act for the unabated AYs 2012-13 & 2013-14 and no adjustment was made to book profit u/s 115JB of the Act on this aspect.

15.2 The Ld. AR thereafter showed us that, the assessee however had mistakenly added the restatement gain credited to foreign fluctuation translation reserve in AY 2014-15 while computing book profit u/s 115JB of the Act for the relevant year, even though the same was not credited in P&L A/c. The assessee had accordingly raised fresh claim in this regard before the AO along with exclusion of excise subsidy (*as discussed at Para 14 above*), and filed a revised computation of income in the course of assessment. The AO is noted to have rejected both these claims since it was not made in the return of income. On appeal, the Ld. CIT(A) is noted to have held in principle that, additional claims not raised in return of income but made in the course of assessment is admissible and accordingly admitted the revised computation of income. The Ld. CIT(A) however is noted to have only



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adjudicated and allowed the claim relating to exclusion of excise subsidy on merits but no specific finding is noted to have been rendered on this particular claim. The Ld. AR further brought to our notice that, the AO while giving effect to the appellate order u/s 250/143(3) of the Act had accepted the revised computation of income in its entirety. The AO had accordingly reduced the gain credited to foreign fluctuation translation reserve along with the excise duty subsidy, while re-computing the book profit u/s 115JB of the Act. Hence, prima facie there was no grievance of the assessee. The Ld. AR however submitted that, since the Ld. CIT(A) had not rendered any specific finding in his appellate order directing the AO to do so, the assessee was advised to raise this issue by way of additional ground before this Tribunal.

15.3 We have heard both the parties. It is noted that, the assessee had credited notional gains to foreign fluctuation translation reserve in the Schedule to Balance Sheet, which is found available at Page 302 of the Paper Book. This restatement of foreign currency loans and directly crediting of the gains to the foreign fluctuation translation reserve, without routing the same through P&L A/c, was stated to be in compliance with AS-11 notified by the ICAI. It is also not in dispute that the shareholders at the annual general meeting approved the audited financial statements for AY 2014-15. Therefore, in light of the decision of Hon'ble Apex Court in the case of **CIT Vs Apollo Tyres Ltd (255 ITR 273)** only the specific additions and reductions as



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provided for in Explanation to Section 115JB, can be made to the net profit as declared in the audited financial statements for the relevant AY 2014-15. As rightly pointed out by the Ld. AR, there is no specific adjustment prescribed in this regard in Explanation (1) to Section 115JB of the Act. We further observe that, similar gains were credited to foreign fluctuation translation reserve on restatement of foreign currency loans in earlier AYs 2012-13 & 2013-14 and the same was not added to computation of book profit u/s 115JB of the Act by the assessee. The earlier AYs 2012-13 & 2013-14 are noted to be abated assessments. We note that, in the income-tax assessments u/s 153A/143(3) for these AYs 2012-13 & 2013-14 was completed by the same AO. The AO is noted to have accepted the computation of book profit made by the assessee in AYs 2012-13 & 2013-14 and the gains directly credited to foreign fluctuation translation reserve were not added while assessing book profit u/s 115JB of the Act. Hence, when on same set of facts and circumstances, the Revenue, in the earlier AYs 2012-13 & 2013-14, did draw any adverse inference on this issue, then in absence of any change in position of law, we uphold the claim of the assessee, seeking reduction of foreign fluctuation translation reserve, inadvertently added while computing book profit u/s 115JB of the Act in the return of income. Useful reference in this regard may be made to the following observations made by the Hon'ble Supreme Court in the case of **Radhasoami Satsang v. CIT (193 ITR 321)**.



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"where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and the parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."

15.4 For the above reasons, this additional ground raised by the assessee in AY 2014-15 stands allowed.

16. In the result, both the appeals of the assessee as well as the revenue for AYs 2009-10, 2010-11, 2011-12, 2012-13 & 2014-15 are partly allowed.

Order pronounced in the open court on this 08/04/2024.

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-
(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 08/04/2024.
Vijay Pal Singh, (Sr. PS)



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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**