IN THE INCOME TAX APPELLATE TRIBUNAL, 'A' BENCH MUMBAI

BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SMT RENU JAUHRI, ACCOUNTANT MEMBER

ITA No.2700/Mum/2023
(**Assessment Year :2016-17**)

ITA No.2697/Mum/2023
(**Assessment Year :2017-18**)
&
ITA No.2696/Mum/2023
(**Assessment Year :2018-19**)

M/s. Asian Paints Limited Asian Paints House 6A, Shanti Nagar Vakola Pipeline Lane Santacruz (East) S.O. Mumbai-400 055 Maharashtra	Vs.	Dy. Commissioner of Income Tax, LTU Circle 2, World Trade Centre 1 Cuffee Parade Mumbai-400 005
PAN/GIR No.AAACA3622K		
(Appellant)	..	**(Respondent)**

ITA No.2936/Mum/2023
(**Assessment Year :2016-17**)

ITA No.3063/Mum/2023
(**Assessment Year :2017-18**)
&
ITA No.3083/Mum/2023
(**Assessment Year :2018-19**)

Dy. Commissioner of Income Tax, LTU Circle 2, World Trade Centre 1 Cuffee Parade Mumbai-400 005Maharashtra	Vs.	M/s. Asian Paints Limited Asian Paints House 6A, Shanti Nagar Vakola Pipeline Lane Santacruz (East) S.O. Mumbai-400 055 Maharashtra
PAN/GIR No.AAACA3622K		
(Appellant)	..	**(Respondent)**

Assessee by	Shri Madhur Agrawal & Shri Ronak Doshi
Revenue by	Shri Ajay Chandra
Date of Hearing	**21/05/2024**
Date of Pronouncement	**26/07/2024**

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid cross appeals have been filed by the assessee as well as by the Revenue against separate impugned orders dated 26/06/2023 for the A.Y.2016-17; and order dated 13/07/2023 for the A.Ys. 2017-18 and 2018-19 passed by NFAC, Delhi for the quantum of assessment passed u/s.143(3).

2. In all the years various grounds have been raised and most of the grounds are common arising out of identical set of facts, therefore, the same were heard together and are being disposed of by way of consolidated order. For the sake of ready reference, the brief summary of various grounds raised by the assessee as well as Revenue in all the three years are as under:-

		2700/Mum/ 2023	**2697/Mum/ 2023**	**2696/Mum/ 2023**
Sr. No.	Assessee Grounds of appeal	AY 2016-1 7	AY 2017-1 8	AY 2018-19
1	Violation of Judicial Discipline	Ground. I	Ground No. II	Ground No. II
2	Order passed merely on conjecture and surmises	Ground No. II	Ground No. Ill	Ground No. Ill

3	Breach of principles of natural justice	-	Ground No. I	Ground No. I
4	Enhancement made by CIT (A) is bad in law	Ground No. XIII	Ground No. XVI	Ground No. XIII
5	Reduction of claim made u/s. 35(2AB) of the Act	Ground No. Ill	Ground No. IV	Ground No. IV
6	Disallowance being 25% of exp on distribution of gift articles	Ground No. IV	Ground No. V	Ground No. V
7	Disallowance u/s 14A r.w.r 8D of the Act & also under book profits	Ground No. V & VI	Ground No. VI & VII	Ground No. VI & VII
8	Disallowance of exp related to evaluation of business opportunities	Ground No. VII	Ground No. IX	
9	Disallowance of Prior Period Exp	Ground No. VIII	Ground No. X	
10	Disallowance of provision for doubtful debts under the Act & also under book profits	Ground No. IX &X (	Ground No. XI & XII	Ground No. VIII & IX
11	Disallowance of Trip Scheme Expenses	Ground No. XI	Ground No. XIV	Ground No. XI
12	Disallowance of Colour Idea Stores expenses	Ground No. XII	Ground No. XV	Ground No. XII
13	Disallowance of discount and incentives which are target based to increase sales given to dealers	Ground No. XIV	Ground No. XVII	Ground No, XIV

14	Non-Acceptance of additional claim of applicability of beneficial rate as per DTAA to the DOT	Ground No. XV	Ground No. XVIII	Ground No. XV
15	Earlier year depreciation on Colour Idea store	Ground No. XVI	Ground No. XX	Ground No. XVII
16	Disallowance of Sundry balance written off	Allowed by CIT(A)	Ground No. VIII	
17	Denial of set off short term capital gains u/s 50 of the Act against long term capital loss		Ground No. XIII	
18	Non-Acceptance of additional claim of Foreign Tax Credit (FTC)		Ground No. XIX	Ground No. XVI
19	Disallowance of foreign tax credit claim u/s 90 and 91 of the Act		Allowed by CIT(A)	Ground No. X

Department Appeal

		2936/Mum/2023	**3063/Mum/2023**	**3083/Mum/2023**
Sr. No.	Department Grounds of appeal	AY 201 6-17	AY 201 7-1 8	AY 2018-19
20	Sundry balances written off	Ground No. I		

21	Colour Idea Stores expenditure providing enduring benefit thereby capital in nature	Ground No. II	Ground No. I	Ground No. I
22	Disallowance of foreign tax credit claim u/s 90 and 91 of the Act			Ground No. 11
23	Expression 'tax[1] used in section 40(a)(ii) is wider and not restricted to the expression of tax defined u/s.2(43) of the Act			Ground III
24	Disallowance of deduction claimed u/s 80G of the Act			Ground No. IV

3. We will take up the cross appeal for A.Y.2016-17 and our finding given in most of the issues will apply *mutatis mutandis* in other two years except where issues are different, the same shall be discussed separately.

4. The assessee is engaged in the business of manufacturing, selling and distribution of paints, coatings, products related to home décor bath fittings and providing of related services. For the A.Y.2016-17, assessee has filed its return of income on 26/11/2016 declaring total income of Rs.2130,56,12,790/- under the normal provisions and book profit of Rs. 2381,62,17,214/- u/s.115JB. Later on, the case was selected for scrutiny and finally, the assessee has been completed for income of Rs.2312,15,42,600/- under the normal provisions of the Act and Rs.2387,63,25,151/- u/s.115JB.

5. The ground Nos. I & II have not been pressed. Therefore, the same are dismissed as infructous.

6. In ground No.III, assessee has raised the issue of deduction claim made u/s.35 (2AB) of the Act. The assessee company has claimed weighted deduction u/s. 35(2AB) showing that it has incurred expenditure of scientific research and development to the tune of Rs. 75.16 crores. Out of which, the assessee had claimed Rs. 129.94 crores as 200% weighted deduction. Before the ld. AO assessee produced certificate issued by DSIR in Form 3CL and reconciliation of the same. The ld. AO asked the assessee as to why like in the earlier years similar addition should not be made in this year. The assessee submitted that it has a Research & Development unit at Turbhe, Navi Mumbai which is carrying out scientific research and development fot oits product and has been granted approval from DSIR which includes copy of determination of R & D Unit, copy of approval

u/s.35 (2AB) in Form No.3CM and copy of certificate of expenditure in Form No.3CL. The assessee had incurred revenue expenditure amounting to Rs.68.04 Crores and Rs.7.12 Crores on capital expenditure. The details of which has been at page 64 of the paper book which in note No.35 of the financial statements. The ld. AO noted that in Form 3CL DSIR had reduced the assessee's eligible scientific expenditure u/s.35 (2AB) qua, the revenue expenditure to Rs. 47.21 Crores and thereby denying the weighted deduction of Rs.12.41 Crores. The ld. AO disallowed the claim of revenue expenditure incurred on R & D to the amount which has been disapproved by the DSIR, i.e., Rs.12.41 Crores.

7. The ld. CIT (A) has also confirmed the said disallowance holding that the amount which has been allowed by the prescribed authority, i.e., DSIR only can be allowed which has been given in Form 3CL and which has been disallowed cannot be allowed by the ld. AO because ld. AO does not have the authority to tinker with the amount u/s.35 (2AB) which has been allowed or disallowed by DSIR.

8. Ld. Counsel submitted that this issue stands covered by the decision of the Tribunal in assessee's own case in the A.Y.2007-08 and then from A.Y.2009-10 to 2015-16. The relevant observation of the Tribunal in A.Y.2007-08 reads as under:-

"14. The Id. Counsel for the assessee has also relied on the decision of the Ahmedabad bench of ITAT in the case of ACIT vs Torrent Pharmaceuticals Ltd. in ITA No.3569/Ahd/2004 dated 13.11.2009 in support of the assessee's case on the issue under consideration. In the said case, weighted deduction claimed by the

assessee u/s 35(2AB) on account of R & D expenditure was partly disallowed by the AO relying on the figure contained in the certificate issued by DSIR and the same was held to be unsustainable by the Tribunal holding that There was no Justification in harping upon the figure contained in the certificate issued by DSIR as was done by the Assessing Officer. It was held by the Tribunal that the relevant provisions of the Act did not contain any specific condition that the deduction u/s. 35(2AB) and accordingly the claim of the assessee for deduction u/s 35(2AB) will be restricted to the amount of R & D expenditure as contained in the certificate. The Tribunal found on verification of the relevant details that even the expenditure is not included in the said certificate was eligible for deduction u/s 35(2AB) in respect of the said expenditure was allowed by the Tribunal. In our opinion, the issue involved in the case of Torrent Pharmaceuticals Ltd. thus is similar to the one involved in the present case and this position is not disputed even by the Id. DR at the time of the hearing before us. He, however, has contended that the claim of the assessee of having incurred the expenditure in question on R & D which is eligible u/s 35(2AB) has not been examined either by the AO or by the Id. CIT(A). He has urged that the matter may therefore be restored to the file of AO for giving him an opportunity to verify the same. We find merit in this contention of the Id. DR and since the Id. Counsel for the assessee has also not raised any objection in this regard we restore this issue to the file of the AO with a direction to decide the same afresh after verifying whether the expenditure in question has been incurred by the assessee on research and development which is eligible for deduction u/s 35(2AB). The appeal of the assessee is accordingly treated as allowed for statistical purpose"

9. He submitted that the issue was set aside on the ground that the amount of expenditure incurred on R & D which is eligible u/s. 35(2AB) has not been examined either by the ld. AO or by ld. CIT(A). Thus, he submitted that the matter should be restored back to the file of the ld. AO to examine the nature of expenditure which has been claimed by the Revenue because the

entire expenditure claimed directly pertaining to research and development.

10. Before us the ld. CIT DR submitted that once the DSIR which is a competent authority has certified the expenditure and has made the disallowance then, there is no power to the ld. AO to examine the issue. He further submitted that there has been amendment in Rule 6(7A) of the Income Tax rules which has been brought in the statute w.e.f. 01/07/2016 effective from 2017-18 which categorically states that the DSIR is a prescribed authority, who shall quantify the expenditure incurred on in-house research and development facility by the company during the previous year and qualified amount alone is eligible for weighted deduction u/s.35(2AB) in part D of Form 3CL. This amendment has been brought in Rule 6(7A)((b). He submitted that, however, even prior to this amendment there are judgments of the Hon'ble Karnataka High Court and Gujarat High Court including Hyderabad ITAT that once the DSIR has quantified the expenditure then, the ld. AO has to allow such expenditure and expenditure which has not been allowed, the same cannot be tinkered with. In his written submission he has given the following summary and relevant extract of these judgments.

(i) Tejas Networks Ltd. vs. DCIT - Writ Petition No.7004/2014 dated 24.4.2015 of the Karnataka High Court.

In this case the AO did not accept the quantum of expenditure certified by the DSIR. In this case, the Hon'ble Karnataka High Court held that the AO in light of express provisions of section 35(3) should have referred the matter to the Board who in turn would refer such question to the

prescribed authority and its decision would be final. In this context, the assessee has stated that the AO has not made any reference to section 35(3). It is to be stated that in this case the AO has not made any reference to section 35(3) because he has accepted the quantum of expenditure incurred on scientific research approved by the DSIR, in the assessment order. In such a situation, no question arose for the AO to refer the question to the prescribed authority as he has allowed the quantum of expenditure approved by DSIR, in Form No. 3CL. It is to be further highlighted that the assessee has not made any application to DSIR either directly or through the AO submitting its objection to the quantum of scientific expenditure approved by DSIR in Form 3CL. Therefore, no question arose within the meaning of sec. 35(3)(b) before the AO.

In this context, the following extract from the judgment of the Karnataka High Court in the above Writ Petition corroborates the stand taken by the Revenue.

"27 .In other words, the assessing officer is precluded from examining the correctness or otherwise of the certificate issued by the prescribed authority on the ground that it is either being contrary to facts or contrary to the express provisions of the Act. It would not be out of context to state that when assessee files the report issued by the prescribed authority, as indicated under Section 35(2AB), before the jurisdictional assessing officer and seeks for allowability of such expenditure, the Assessing Of would be exceeding in his jurisdiction, if he were to undertake the exercise of examining as to whether the certificate issued by the prescribed authority is within the parameters of statutory provisions of the Act or otherwise. Keeping in mind that such contingency may arise, Parliament has incorporated sub-section (3) to Section 35 of the Act which would be a complete answer to such situations. Thus, if any question arises as to what extent, any activity constitutes or constituted or an asset is or was being used for scientific research, then the Assessing Officer would be required to refer such question to the Board for being referred to the prescribed authority. The decision of the

prescribed authority in this regard would be final, in as much as, the certification of such expenditure is being examined by an expert body and undisputedly, such exercise has been outsourced by the Revenue under the Act itself, since the prescribed authority being possessed of requisite expertise, it would be in a better position to certify as to whether such expenditure claimed by the assessee under Section 35(2AB) would fall within the said provision or outside. This exercise of examining the correctness of the Certificate issued by the prescribed authority is not available to the Assessing Officer as could be seen from scheme of Section 35 of the Act.

28. It is in this background, sub-section (4) of Section 43 will have to be considered, which defines as to what activities would constitute "scientific research" as indicated under the said Section namely, Section 43(4). As to whether any expenditure incurred in the acquisition of rights in or arising out of scientific research as indicated in clause(ii) of sub-section 4) of Section 43 is an issue which requires to be examined by the prescribed authority itself and it would not be in the domain of the assessing authority to undertake such an exercise. When Section 35(2AB), Section 35(3) and Section 34) of the Act are read harmoniously, the irresistible conclusion that has to be drawn would be that assessing officer cannot sit in judgment over the report submitted by the prescribed authority in Form No. 3CL. This view is also supported by the judgment of the High Court of Gujarat in Mastek Ltd.'s case (supra). "(Emphasis supplied)

ii. Biological E Ltd. Vs. DCIT -ITA No. 1590/Hyd/2018 dated 22.7.2022 passed by ITAT, Hyderabad Bench 'B'.

With respect to this judgment of ITAT Hyderabad, the assessee has submitted that the Tribunal has misinterpreted Rule 6(7A) as it existed prior to 1.7.2016. In this context it is to be stated that the Hon'ble Tribunal has harmoniously read and interpreted provisions of section 35(2AB) read with Rule 6, more particularly Rule 6(5A) and Rule 6(7A) as under:

'16. Further the approval of the in-house R&D facility ends with issuance of Form 3CM under sub Rule 5A of Rule 6. If

really the intention of the legislature, even prior to 01/07/2016, was to confine to the requirement of approval of the in-house facility, then there is no further need to refer to the approval of expenditure incurred on in-house R&D facility under section 35(2AB) of the Act by way of Rule 6 (7A) of the Rules. By virtue of Rule 6(7A) of the Rules the prescribed authority is put under an obligation to verify whether certain conditions are satisfied before approving the expenditure. Rule 6 speaks of the expenditure and its approval and E'orm 3CL is only a Form of communication. Section 35('2AB) of the Act deals with the quantum of deduction that is allowable in respect of expenditure on scientific research and in respect of the business of biotechnology.

17. The essence of section 35(2AB) o[the Act read with Rule 6 (5A) of the Rules is approval of the in-house R&D facility, whereas 35(2AB) of the Act read with Rule 6(7A) of the Rules is in relation to approval of the expenditure incurred on in-house R&D facility by a compqy$_1$forweighted deduction. If the approval of the prescribed authority has nothing to do with the expenditure, but its role is confined only in respect of the in-house R&D facility, then the exercise of the prescribed authority under Rule 6(7A) of the Rules would be a redundant exercise because, if we go by the contention of the assessee, when once the in-house R&D facilities approved, all the expenditure, irrespective of the fact whether or not it is reflected in Form 3CL, would be qualified for weighted deduction. Rule 6(5A) cannot be read to otiose Rule 6(7A) of the Rules. Both operate in their own fields and to say that the approval required under section 352AB) of the Act is only in respect of the in-house R&D facility but not in respect of the expenditure is violence to Rule 6(7A) qf the Rules. Who else, other than the prescribed authority, can verify the propriety and benefit of incurring such expenses on the in-house R&D facility? It is only the approval of the prescribed authority that can give authenticity to the desirability of incurring the expenditure and deriving benefit out of such expenditure and that is the reason why Rule 6 prescribes the procedure for approval of the in-house R&D facility and the related expenditure thereon. Lest, as stated supra there is no need of Rule 6(7A) of the Rules at all or Form 3CL, for that

matter. Accepting the argument of the Ld. AR, we are afraid, will attribute redundancy to the wisdom of legislature in prescribing Rule 6(7A) of the Rules and Form 3CL. Such an interpretation cannot be accepted because it militates against the purpose of prescribing Rule 6(7A) of the Rules and Form 3CL.

18.The argument of the assessee that the moment the approval is granted by the DSIR to the R&D facility and Form 3CM is issued, the role of DSIR comes to an end, does not come out of the provisions. At the cost of repetition, we would like to emphasise that the technical competency about the need to incur the expenditure or the corresponding benefit derivable by the company rested with the prescribed authority only, and that the reason why Rule 6 and more particularly sub Rule 7A thereof prescribes the authority for approval of expenditure incurred on the in house R&D facility and keeps the prescribed authority under an obligation to verify certain factors like the activities of the in-house R&D facility, maintenance of separate accounts, the approval of the expenditure that is eligible for weighted deduction under section 35('2AB) of the Act and to make it apart from the expenditure that is allowable under other provisions of the Act, it is necessary that such an expenditure must be incurred on scientific research on in-house R&D facility by the company engaged in the business of biotechnology, and the authority to determine such expenditure is provided by Rule 6(7A) of the Rules.

19. Even in respect of Form 3CL, even prior to the amendment thereof by the IT (10th amendment) Rules, 2016 w.e.f 0110712016, vide item No. 9, the report to be submitted by the prescribed authority to the Director General (Income tax exemptions) under section 35(2AB) of the Act, shall contain the total cost of in-house research facility. By way of amendment for the purpose of electronic submission, the Form is made in a detailed manner for incorporation of the total cost of in-house research facility. There are no path breaking changes either in Rule 6(7A) of the Rules or in Form 3L by way of the IT (1 0th Amendment) Rules 2010, so as to impact the powers and duties of the prescribed authority or the right, liability or disability of the

companies incurring expenditure on scientific research on in-house R&D facility.

20. When the entire exercise of section 35(2AB) of the Act read with Rule 6 particularly sub sections 5A and 7A thereof is in respect of the expenditure on scientific research which is allowable with weighted deduction, and the purpose of the prescribed authority is to have the technical competence to approve the in-house R&D facility and approval of the expenditure incurred in such in-house R&D facility, while looking at sub Rule 5A and 7A of Rule 6, it would be difficult to accept the contention of the assessee that the legislative intent behind section 35(2AB) of the Act read with Rule 6 (5A) and (7A) is that when once the facilities approved, it is the end of the matter and whatever the expenditure that is incurred by the assessee shall be allowed without any question with weighted deduction, thereby attributing redundancy to the exercise under Rule 7A. The expression "so incurred" occurring in section 35(2AB) of the Act denotes that the expenditure has nexus with the in-house R&D facility, and the technical competence to decide whether such nexus exist between the expenditure and the in-house research facility rests with the prescribed authority to be approved under Rule 6(7A) to be communicated in Form 3CL. On a comprehensive reading of the provisions, we understand that the enquiry of the learned Assessing Officer as to any expenses said to have been incurred on the in-house R&D facility for the purpose of weighted deduction does not extend beyond the technically approved expenditure by the prescribed authority under Rule 6(7A) of the Rules and communicated by way of Form 3cL, and it is only in respect of such expenditure which is not to be found in Form 3CL, where the other provisions of the Act are applicable, the learned Assessing Officer's discretion steps in.

21. At this juncture, we deem it just and necessary to refer to the observations of the Co-ordinate Bench of this Tribunal in Electronics Corpn. of India (supra), which clinches the issue in our opinion.

> "17 ..... As per the provisions of sec 35(2AB) of Act as applicable to the relevant Assessment year, the expenditure

incurred by the assessee in any approved in-house research facility, to the extent of approved by the prescribed authority, is entitled to weighted deduction of 150% of such approved expenditure. Therefore, the expenditure as approved by the DSIR in the certificate given by them in Form 3CL alone is to be granted weighted deduction. The DSIR in their certificate has certified expenditure eligible for weighted deduction as Rs. 3,126.02 lakhs. Therefore, it is not for either the assessing authority or the appellate authority to decide on the expenditure which will be entitled to weighted deduction u/s.35('2AB). In fact, U/s.35(2AB)(3) if any question arises u/s.35 as to whether and if so, what extent any activities constitutes or constituted or any asset was used for scientific research, the matter should be referred to the appropriate authority whose decision will be final. In this case the appropriate Authority is the DSIR. Therefore once the DSIR has certified the quantum of eligible R&D expenditure for the purposes of weighted deduction u/s 35(2AB) the figure cannot be tampered with by ITAT. Even if the assessee is right in that the there is a mistake in the certificate issued by the DSIR, which we don't know, the same can only be rectified by DSIR and not the ITAT in appellate proceedings. We, therefore, uphold the decision of lower authorities in restricting the weighted deduction u/s. 35(2AB) to Rs. 46,89,03 lakhs and disallowing sum of Rs. 1, 69,73,98 7 out of the claim made by the assessee. We, however, direct that in case DSIR corrects the amount of R&D expenditure on which the assessee is entitled weighted deduction for the assessment year under appeal, corresponding weighted deduction u/s.35(2AB) shall be granted on receipt of the clarification from DSIR. Consequentially if the assessee is able to prove that any amount of expenditure in their in-house R&D facilities was omitted to be considered by the DSIR for weighted deduction the same may be allowed as a deduction u/s.35/ 37 of the Act. With this observation we dismiss the appeal of the assessee on this issue."
(Emphasis supplied)

iii. DCIT vs. Mastek Ltd. [(2012) 25 Taxmann.com 133(Guj)]

The assessee has stated that the Hon'ble High Court has referred to section 35(3) and not to section 35(2AB)(3) while delivering the above judgment. In this context it is to be stated that expenditure on scientific research for weighted deduction has not only to satisfy the conditions given in section 35(2AB) but also to the provisions of section 35(3)(b) of the Income Tax Act Therefore, the ratio of the decisions of the Gujarat High Court rendered in the context of allowability of expenditure u/s. 35(1) with reference to provisions of section 35(3) is relevant to the case of our assessee in view of the ratio pertaining to the provisions of section 35(3) (paras 28 and 29 of the judgment of the Hon'ble High Court.)

4. The assessee has stated that amendment made to Rule 6 w.e.f. 1.7.2016 is ultra vires of the Income-tax, is not correct. Provisions of section 35(2AB) r.w.s. 35(3) mandated that expenditure on scientific research on in-house R & D facility be approved by the prescribed authority both before and after the amendment to the Income Tax Rules. This will be evident from the three case laws, listed in Para 2 of this submission.

5. In view of the above discussion, Ld. DR prayed that ground No.3 of the assessee's appeal may be dismissed.

11. We have heard both the parties, perused the relevant provisions of the Act and the Rules and also the relevant finding given in the impugned orders. From the arguments made by both the parties, the main issue which has been raised is, whether the quantification of expenditure by the prescribed authority, DSIR alone should be allowed for deduction and if something has been disallowed or has not been qualified, then, can ld. AO have the power to tinker with such quantification? And vice versa, if DSIR has allowed such an expenditure ld. AO cannot examine the

same and whatever has been quantified by the DSIR, that becomes final.

11.1 In order to appreciate the understanding of the said section 35(2AB) r.w.r. 6 as it stood in the relevant assessment year under consideration i.e. A.Y.2016-17 reads as under:-

Section 35(2AB) -

"(1) Where a company engaged in the business of bio-technology or in any business of manufacture or production of any article or thing, not being an article or thing specified in the list of the Eleventh Schedule incurs any expenditure on scientific research (not being expenditure in the nature of cost of any land or building) on in-house research and development facility as approved by the prescribed authority, then, there shall be allowed a deduction of a sum equal to one and one-half times of the expenditure so incurred:

Provided----------

(2) No deduction shall be allowed in respect of the expenditure mentioned in clause (1) under any other provision of this Act.

(3) No company shall be entitled for deduction under clause (1) unless it enters into an agreement with the prescribed authority for co-operation in such research and development facility and for audit of accounts maintained for that facility. [and ['fulfils such conditions with regard to maintenance of accounts and audit thereof and furnishing of reports in such manner as may be prescribed'

(4) The prescribed authority shall submit its report in relation to the approval of the said facility to the Principal Chief Commissioner or Chief Commissioner or Principal Director General, before Director General in such form and within such time as may be prescribed.

Section 35(3) -

"If any question arises under this section as to whether, and if so, to what extent, any activity constitutes or constituted, or any asset is or was being used for, scientific research, the Board shall refer the question to—

(a) the Central Government, when such question relates to any activity under clauses (ii) and (iii) of sub-section (1), and its decision shall be final;

(b) the prescribed authority, when such question relates to any activity other than the activity specified in clause (a), whose decision shall be final."

11.2 Relevant sub – rule (7) of Rule 6 related to section 35(2AB) of the Act reads as under -

"(1B) For the purposes of sub-section (2AB) of section 35, the prescribed authority shall be the Secretary, Department of Scientific and Industrial Research".

"(4) The application required to be furnished by a company under sub-section (2AB) of section 35 shall be in Form No. 3CK."

"(5A) The prescribed authority shall, if he is satisfied that the conditions provided in this rule and in sub-section (2AB) of section 35 of the Act are fulfilled, pass an order in writing in Form No. 3CM:

Provided that a reasonable opportunity of being heard shall be granted to the company before rejecting an application."

"(7A) *Approval of expenditure incurred on in-house research and development facility by a company under sub-section (2AB) of section 35 shall be subject to the following conditions, namely:—*

(a) The facility should not relate purely to market research, sales promotion, quality control, testing, commercial production, style changes, routine data collection or activities of a like nature;

(b) The prescribed, authority shall submit its report in relation to the approval of in-house Research and Development facility in Form No. 3CL to the Director General (Income Tax Exemptions) within sixty days of its granting approval;

(c) The company shall maintain a separate account for each approved facility; which shall be audited annually and a copy thereof shall be furnished to the Secretary, Department of Scientific and Industrial Research by 31st day of October of each succeeding year;

Explanation:-For the purposes of this sub-rule the expression "audited" means the audit of accounts by an accountant, as defined in the Explanation below subsection (2) of section 288 of the Income-tax Act, 1961

(d) Assets acquired in respect of development of scientific research and development facility shall not be disposed off without the approval of the Secretary, Department of Scientific and Industrial Research",

12. Post amendment from A.Y.2017-18, the **Clause 'b'** now reads as under:-

(b) The prescribed authority shall furnish electronically its report,-

(i) in relation to the approval of in-house research and development facility in Part A of Form No. 3CL;

(ii) quantifying the expenditure incurred on in-house research and development facility by the company during the previous year and eligible for weighted deduction under sub-section (2AB) 35 of the Act in Part B of Form No. 3CL;

(ba) The report in Form No. 3CL referred to in clause (b) shall be furnished electronically by the prescribed authority to the Principal Chief Com- missioner of Income-tax or Chief Commissioner of Income-tax or Principal Director General of Income-tax or Director

General of In- come-tax having jurisdiction over such company within one hundred and twenty days-

(i) of the grant of the approval, in a case referred to in sub-clause (i) of clause (b);

(ii) of the submission of the audit report, in a case referred to in sub- clause (ii) of clause (b);]

(c) The company shall maintain a separate account for each approved facility, which shall be audited annually and "[a report of audit in Form No. 3CLA shall be furnished electronically to the Secretary, Department of Scientific and Industrial Research on or before the due date specified in Explanation 2 to sub-section (1) of section 139 of the Act for furnishing the return of income, for each succeeding year].

Explanation: For the purposes of this sub-rule the expression "audited" means the audit of accounts by an accountant, as defined in the Explanation below sub-section (2) of section 288 of the Income-tax Act, 1961;

13. It is not in dispute that assessee had submitted Form 3CL with DSIR which is an agreement as envisaged u/s. 35(2AB)(3) of the Act and said facility was duly approved by DSIR in Form 3CL. Assessee has also complied with the requirement under the Act and applicable Rule like maintenance of separate accounts for its R & D unit and getting the same audited. The assessee's contention has been that all the expenditure incurred at its R & D unit pertains to scientific research and no expenditure has been incurred for the company or any diversion of expenditure to the corporate office or for the other company activities. This has been certified and substantiated in the audited financial statements of the assessee.

14. Form 3CL is a report which the DSIR requires to submit to the Income Tax authorities as mentioned in the Act within 60 days wherein assessee has no role to play in the same. The unamended Form 3CL does not require the DSIR to quantify scientific expenditure eligible for deduction u/s. 35(2AB). **However, w.e.f. 01/07/2016, i.e., from A.Y.2017-18, now rule provide that the prescribed authority shall furnish electronically its report quantifying the expenditure incurred and in-house research and development which is eligible for weighted deduction.** The case of the ld. Counsel before us is that once the entire R & D facility has been approved by the DSIR under clause-(1) of sub-section (2AB) of Section 35, then, any expenditure on scientific research which is not in the nature of cost of land or building and has been incurred on in-house research and development facility, it should be allowable deduction as prescribed under the Act. What the main Section provides that expenditure should be incurred for in-house research and development which has been duly approved by the DSIR. Further, clause (3) provides that no company shall be entitled for deduction under Clause-(1) unless it enters into an agreement with the prescribed authority and fulfills such conditions with regard to maintenance of accounts and audit thereof and furnishing of reports in such a manner which has been prescribed. Once all these conditions have been fulfilled, there is no provision in the section or in the Act that part of the expenditure should be disallowed.

14.1 Section 35(3) of the Act provides that if any question arises under this section as to whether, and if so, to what extent, **any activity** constitutes or constituted, or any asset is or was being used for, scientific research, the Board shall refer the question to prescribed authority, whose decision shall be final. In the present case, there is no doubt about the nature of activities carried by the assessee whether it is for scientific purpose or not; neither is there any doubt whether any asset was used for scientific research or not, the same has been duly verified and approved in Form 3CM issued by the DSIR. Here there is no question of whether and to what extent any activity constitutes or any asset is or was being used for, scientific research or not. Hence any reference to section 35(3) of the Act in our opinion is not warranted. Here the issue is of restriction of revenue expenses by the DSIR.

15. From the plain reading of Section 35(2AB)(1), it indicates that any expenditure on scientific research" on R&D facility approved by DSIR. Thus, what is relevant is that Assessee should incur expenditure on scientific research and such expenditure should be in respect of facility approved by DSIR. The Section *per se* nowhere infers that expenditure should be approved and qualified by DSIR. It only provides that the said facility should be approved by the DSIR. Clause (3) mandates that the company is only entitled for deduction if it enters into agreement with the prescribed authority for co-operation and R & D facility and furnishes the report to the prescribed authority. This condition has been satisfied by

the assessee in the present case. Rule 6 r.w.sub-Rule 7A which was applicable prior to 01/07/2016 the condition for approval of expenditure incurred on in-house R & D facility by a company was not there. There were twin conditions for approval of expenditure; one was that, prescribed authority shall submit its report in relation to the approval of the in-house research and development facility in Form No.3CL to the Director General (Income Tax Exemption) within sixty days of granting approval. The second condition was that **the facility should not be related to market research, sales promotion, quality control, testing, commercial production, style changes, routine data collection or activities of a like nature. Thus, any condition relating to such activity shall not be allowed**. The other condition which has been prescribed for allowability that the company shall maintain a separate account for each of the facility which shall be audited annually and copy thereof shall be furnished to the Secretary, DSIR by 31st October. **Now, w.e.f. 01/06/2017 another condition has been brought that prescribed authority shall also quantify the expenditure incurred on in-house R & D.**

16. We had enquired from the assessee during the course of hearing as to what is the process of DSIR quantifying the expenditure which is allowable and which is not, except for expenditure which has been prohibited or limited by the Income Tax Act under the relevant Rules. He submitted that no opportunity is given by the DSIR to submit the details of expenses or explanation. Assessee has to submit its audited

accounts maintained separately for the facility; entire nature of expenditure highlighting what is revenue and what is pertaining to land and building and even qualifying whether any such expenditure which is prohibited under Rule 6(7A)(a), like the facility should not be related to market research, sales promotion, quality control, testing, commercial production, style changes, routine data collection or activities of a like nature. It is only when in Form 3CL, DSIR qualifies certain expenditure, assessee comes to know that only those expenditure are allowable and other revenue expenditure even if it is directly related to scientific research and development is not even confronted to the assessee or even examined, For instance, here in this case professional fees has been paid to the consultant and scientists for consulting and getting the report which is directly related to R & D has not been allowed and there is no reason or basis given by the DSIR.

17. By way of rebuttal, ld. CIT DR submitted that sub-Section 3 of Section 35 provides that if there is any question under the Section as to whether at what extent, any activity constitutes or constituted, or any asset is or was being used for, scientific research, the Board shall refer the question to the prescribed authority and such question relates to any activity than the activities specified by him in clause (a), whose decision shall be final. This specimen clearly provides that if there is any dispute with regard to any activity excluding any such expenditure, the matter can be referred to the DSIR by the Board.

18. From the perusal of Section 35(3) as quoted supra, it envisages that if there is any question arising as to whether and if so at what extent any activity constitutes or constituted or any asset was being used for scientific research or not shall refer the question to the Central Government or to the prescribed authority, that is, question which can be referred is whether any activity other than activity relates to any activity of scientific research and development or not. It does not mention that if there is a dispute with regard to nature of expenditure, same shall also be referred under sub-section 3. Thus, Section 35(2AB) r.w.s.35(3) does not provide any mechanism for quantifying the expenditure of an approved unit and emphasis has been on the nature of activity whether it is related to scientific research and development or not. As noted above, the relevant Rule 6 (7A) prior to 01/06/2016, there was no such rule for quantifying the expenditure. However, now the rules provide that quantification of expenditure incurred on in-house R & D facility is to be done by the prescribed authority. This *interalia* means that even if assessee has booked certain revenue expenditure which is directly related to scientific research and development which has not been quantified and allowed by the DSIR, ld. AO does not have the power to examine the nature of such expenditure. In vice versa situation, if something has been allowed by DSIR, then even if there are certain expenditure which are not related to scientific research and development and ld. AO also finds that expenditure is not relatable to such activity, he cannot examine the same as he has no power. Here is the situation where DSIR

while quantifying the expenditure does not even call for the details or explanation from the assessee whether such activity actually pertained to scientific research or R & D for which it has been granted approval. In the present case it has been pointed out that assessee has produced invoices and supporting documents for each and every expenditure directly pertaining to R & D which includes consultancy charges and other certain expenditure and such charges have been stated to be directly related to research and development taken from Scientists and Engineers.

18.1 **Now, whether such expenditure pertains to scientific research and development has neither been examined by DSIR nor by the ld. AO. In so far as A.Y.2016-17 is concerned, we are of the opinion that, since there were no rules for quantifying the expenditure by the DSIR, the matter should be restored back to the file of the ld. AO to examine the nature of expenditure and if he deems fit even he can seek a report from DSIR on such expenditure by sending all the details and explanation of the assessee as to how such an expenditure is directly relatable to scientific research and R & D.**

18.2 However, from A.Y.2017-18 onwards, there is a specific amendment in the rules where it provides that only DSIR can quantify the expenditure. First of all, there are no such substantive provisions in Section 35(2AB) that DSIR can only quantify the expenditure except that DSIR has to approve the

facility and seek for audited accounts and report from the assessee and submit its report to the DGIT. Be that as may be, we are not going into the rationale of the amendment in Rules that DSIR can alone quantify the expenditure. But if DSIR alone can quantify the expenditure then the principal of natural justice provides that explanation has to be sought from the assessee company to justify the expenses. Before us nothing has been brought on record as to what is the mechanism in the manner in which DSIR examines the nature of expenditure and whether such expenditure relates to scientific research and development or not or whether any details are called for from assessee company. There has to be some basis or procedure how certain expenditure are qualified for approval and what are the nature of expenses which do not fall in such category beyond what has been provided in Rule 6(7A)(a) of the Income Tax Rules. We understand that any such expenditure relating to activity provided in Sub-clause (a) of the Rule 6(7A) then such expenditure cannot be allowed. But if there are expenditure which does not fall in this category i.e., does not fall in Sub-clause (a), then what are the other parameters for which expenditure is qualified. **Accordingly, we are of the opinion that even for A.Y.2017-18 and 2018-19, this matter should be restored back to the file of the ld. AO and ld. AO may call for report from the DSIR and DSIR should given opportunity to the assessee to substantiate before it whether such an expenditure relates to scientific research and development or not? Otherwise it would be gross violation of natural**

justice where the quantifying of expenditure is opaque and there is no reasoning given as to why the expenditure other than which are excluded under the Rules are to be allowed or disallowed. We are leaving this matter to the concerned ld. AO to seek clarification or seek reference or guidance from the DSIR or ask the DSIR to quantify the expenditure only after giving due opportunity to the assessee.

19. In so far as both the parties have referred to the decisions in their favour. Ld. Counsel for the assessee relied upon the decision of ITAT Mumbai Bench in the case of Marksans Pharma Ltd. vs. DCIT reported in (2023) 203 ITD 269.

9. Firstly, the basis on which the disallowance of Rs. 212.85 lakh under section 35(2AB) of the Act was made by the AO and upheld by the learned CIT(A) was that the said expenditure was not approved by the DSIR for weighted deduction under section 35(2AB) of the Act. It is pertinent to note that there was an amendment with effect from 01/07/2016 to Rule 6(7A)(b) of the Rules, whereby it has been laid down that the prescribed authority, i.e., DSIR shall quantify the expenditure incurred on in-house research and development facility by the company during the previous year and eligible for weighted deduction under section 35(2AB) of the Act in Part-B of Form No. 3CL. Prior to the aforesaid amendment, the provisions of Rule 6(7A)(b) of the Rules merely provided that the prescribed authority shall submit its report in relation to the approval of the in-house R & D facility in Form No.3CL to the DGIT (Exemption) within 60 days of its granting approval. Therefore, prior to 01/07/2016, there was no legal sanctity for Form No.3CL in the context of quantifying the expenditure eligible for weighted deduction under section 35(2AB) of the Act. We find that the coordinate bench of the Tribunal in Cummins India Ltd v/s DCIT, [2018] 96 taxmann.com 576 (Pune-Trib.) held that there is no merit in the order of the Assessing Officer in curtailing the expenditure and consequent weighted deduction claimed under section 35(2AB) of the Act on

the surmise that the prescribed authority has not approved part of the expenditure in Form No. 3CL, prior to the amendment in 2016. The relevant findings of the coordinate bench, in the aforesaid decision, are reproduced as under:-.....

10. The coordinate bench, in the aforesaid decision, further held that for deduction under section 35(2AB) of the Act, the first step was the recognition of the facility by the prescribed authority and entering an agreement between the facility and the prescribed authority. It was also held that once such an agreement has been executed, under which recognition has been given to the facility, then thereafter the role of the Assessing Officer is to look into and allow the expenditure incurred on in-house R&D facility as weighted deduction under section 35(2AB) of the Act. As noted above, in the present case, the prescribed authority has already passed an order granting the approval in Form No. 3CM. We find that in various other decisions relied upon by the learned AR, the coordinate benches of the Tribunal rendered similar findings that prior to the aforesaid amendment from 01/07/2016 once the facility is approved by DSIR, the assessee is entitled to weighted deduction under section 35(2AB) of the Act and there is no requirement that expenses also need to be approved by the DSIR in Form No. 3CL. Therefore, since the aforesaid amendment is not applicable to the assessment year under consideration, we are of the view that the AO erred in restricting the weighted deduction under section 35(2AB) of the Act to the expenditure mentioned in Form No. 3CL.

11. Further, as regards the decision of the Hon'ble Karnataka High Court, in Tejas Networks Ltd (supra), relied upon by the learned CIT(A) in the impugned order, we find that in that case the DRP held that certain provisions of the Act exclude certain expenditure from the purview of section 35 of the Act, and the report of the prescribed authority cannot be considered as far as such excluded expenditure is concerned. In this factual background, the Hon'ble Karnataka High Court analysed the provisions of section 35(2AB) as well as section 43(4) of the Act and held that if any question arises as to what extent, any activity constitutes or constituted or an asset is or was being used for scientific research, then the AO would be required to refer such question to the Board under section 35(3) of the Act for being referred to the prescribed

authority and the decision of the prescribed authority would be final. The relevant findings of the Hon'ble Karnataka High Court, in the aforesaid decision, are as under:-……..

12. Therefore, we are of the considered view that the factual basis of the findings of the Hon'ble Karnataka High Court, which is relied upon by the learned CIT(A) in the present case, is completely different from the factual basis of the present appeal under consideration before us. Thus, the reliance upon the aforesaid decision by the learned CIT(A) is completely misplaced. In this regard, the following observations of the Hon'ble Supreme Court in CIT v/s Sun Engineering Private Limited, [1992] 198 ITR 297 (SC), become relevant:……..

16. Therefore, in view of the aforesaid findings, the impugned order passed by the learned CIT(A) is set aside and the AO is directed to grant weighted deduction on the revenue expenditure of Rs. 212.85 lakh under section 35(2AB) of the Act. Accordingly, grounds raised by the assessee are allowed.

20. Further, reliance was also placed on the decision of Hon'ble Ahmedabad Tribunal in the case of Pharmanz Herbal (P) Ltd. vs. DCIT (2023) 203 ITD 159 wherein it was held that-

"7.We have heard both the parties, carefully gone through the orders of the authority below and also decisions cited before us. The issue in dispute before us is vis a vis claim of weighted deduction at the rate of 200% of the expenditure incurred on in-house research and development activity, as allowed by section 35(2AB) of the Act. The Revenue restricting the assessee's claim to the extent approved by the prescribed authority in Form No. 3CL, while the assessee claiming weighted deduction on the entire amount of research and development expenditure debited to its P&L account

8. We have gone through the relevant provision of law and the relevant Rules & forms prescribed thereto for executing the provision of law in this regard, and we agree with the Ld. Counsel for the assessee that for the impugned years before

us, Le A.Y. 14-15 & 15-16, the prescribed authority, DSIR,- was not required to certify in Form 3CL, the quantum of expenditure incurred by assesses on inhouse research and development eligible for weighted deduction/ s35(2AB) of the Act. That therefore the certification by the DSIR of the quantum of expenditure on inhouse research and development in the present case in Form 3CL would not impinge on assesses claim of expenditure incurred as per Profit and Loss account. The detailed reasons are set out below.

.....

13. A conjoint reading of all the above reveals that as per the applicable provisions of law there was no requirement for the prescribed authority to certify the quantum of expenditure incurred by assessees on inhouse research and development activity. That the only reporting requirement in Form 3CL by the prescribed authority was with regard to the approval granted by it recognizing the inhouse research and development facility. For the quantum of expenditure eligible for weighted deduction as per section 35(2AB) of the Act, the only requirement prescribed by law was of entering into agreement with the prescribed authority for cooperation in audit of accounts of the facility, the Rules requiring separate accounts to be maintained of the facility which also were required to be audited by an accountant and report submitted in this regard to the prescribed authority every year

17 It is amply evident from the above, that we.f 1-4-2016, the requirement of law underwent a change to the effect that on entering into agreement with DSIR in Form no. 3CK, the assessee was required to submit information of its expenditure incurred in-house research and development facility on land, building, capital and revenue expenditure, every year to the prescribed authority in Annexure-2 of Form no. 3CK and prescribed authority was required to quantify the expenditure eligible for weighted deduction in Part-B of the Form No. 3CL

18. What derives from the above, therefore, is that consequent to amendment to section35(2AB) by the Finance Act, 2015 we.f. 1-4-2016, requirement of law was that the prescribed authority had to quantify the quantum of eligible expenditure incurred on in-house research and development facility by the

assessee. But prior to that there was no such requirement in law and the prescribed authority was the only required to grant approval to the in-house research & development activity.

19. The impugned assessment year before are Asst. Year 2014-15 & 2015-16. Since these assessments are prior to 1-4-2016, the amendment to section 35(2AB)) are not applicable to the same and in terms of un-amended provisions of section 35(2AB) of the Act, since we have held above that the prescribed authority was not required in law to quantify the amount of expenditure incurred on in-house research and development facility, such quantification, if any done by the prescribed authority in Form No. 3CL was not required to be taken cognizance of by the Revenue authorities and the assessee is entitled to claim weighted deduction on all expenditure incurred by it, on in-house research & development facility. Therefore, we agree with the contentions of the Id. counsel for the assessee, before us that in the impugned year involved before us, the Revenue has erred in restricting the claim of weighted deduction under section 35(2AB) of the Act to the extent approved by the prescribed authority ie. DSIR.

21. The aforesaid decision of the Tribunal is in line with our view taken above, however, we have remanded this matter back to the ld. AO with our observation. Now in so far as decision relied upon by the ld. DR also, it might be slightly distinguishable on facts, but the ratio and principle are same that once the DSIR has quantified the expenditure, the ld. AO cannot disallow such expenditure. In short, analyses of these judgments are as under:-

DCIT v. Mastek Ltd [2013] 263 CTR 671 (Guj) - In this case the question for consideration was whether the activities carried out by the assessee constituted research activity in

terms of section 43(4) of the Act and for permitting deduction u/s 35 The Hon'ble High Court referred to relevant sections and in light of section 35(3) and not section 35(2AB) (3), held that if there is any doubt on whether an activities constitute scientific research the AO can refer the question to the Board who in turn will refer to prescribed authority and whose decision shall be binding. (Refer Para 20, 27,28 of the decisions)

Tejas Networks v DCIT (WP No 7004 of 2014) dated April 24, 2015 by **Hon'ble Karnataka HC**-In this case as noted from Para 23 of the said decision, the AO had denied deduction u/s 35(2AB) on the grounds that expenditure is in respect of incomplete, certain expenditure was on know-how and certain expenditure was CWIP and hence do not qualify for deduction. Therefore, therefore there was no dispute of approval and certificate by DSIR. The AO wanted to deny deduction of the ground that certain expenditures are excluded from definition of scientific research u/s.43(4) The Hon'ble HC held that if the question arose before the AO u/s 35 as to whether the amounts certified by the DSIR is eligible to be allowed as expenditure and to what extent the activity constitutes or constituted, or any asset is or was used for scientific research, the AO in the light of express provision of section 35(3) should refer matter to the Board, who in turn would refer such question to the prescribed authority and its decision would be final. In present case, there is no dispute that Assessee has incurred expenditure on scientific research

and AO has not made any reference to section 35(3). The Writ filed by Tejas was allowed

Thus, in both cases, Revenue appeal in Mastek was dismissed and Assessee's Writ in Tejas Networks was allowed thereby upholding specific prayer of Assessee.

Biological E Ltd v. DCIT (ITA No. 1590/Hyd/2018) dated July 7, 2022: In this case, the Assessee had claimed deduction u/s 35(2AB), however, the DSIR in its Form 3CL, specifically disallowed "rent, electricity and maintenance". The Assessee relied on plethora of decisions in its favour to contend that once facility is approved and other conditions are complied with, DSIR cannot quantify expenditure and specifically considering that the amendment to Rule 6(7A)(b) was w.e.f.1.7.2016. The Hon'ble Tribunal took note of pre amended Rule 6(7A) and concluded that all conditions under said sub-rule indicated quantification and further held that amendment is retrospective.

22. Since we have remanded this issue back to the ld. AO after independently analyzing the provisions and the Rules and therefore, referring and relying upon these judgments are purely academic.

23. In ground No.IV relates to disallowance of 25% of expenditure incurred on account of distribution of gift articles.

24. The brief facts are that during the year under consideration, the assessee had incurred expenses of Rs 0.33 crore on account of gifts given to business associates on various occasions like Diwali, New Year, etc (Vendor wise break up given at page No.428 of PB). The said expenditure was disallowed by the ld.AO on the ground that the assessee has not furnished name and address of the persons to whom such gifts have been distributed. The ld. CIT (A) upheld the disallowance by the ld.AO, however, he restricted disallowance to 25%.

24.1 Before us ld. Counsel submitted that this issue stands covered by the decision of the Tribunal in all the earlier years from A.Y. 2003-04, wherein this disallowance has been restricted to 10% by the Tribunal and the same has been followed consistently by the Tribunal as well as by the ld. CIT (A) and in A.Y.2009-10 to 2015-16. Even ld. CIT(A) has restricted to disallowance to the extent of 10% in the earlier and neither of the parties are in appeal. Thus, consistent with the view taken in earlier years, we hold that expenditure incurred on account of distribution of gift articles is restricted to disallowance of expenditure of 10%. Accordingly, this ground is partly allowed.

25. Ground No. V & VI relates to disallowance u/s.14A r.w.r. 8D of the Act.

26. The brief facts in a very succinct manner are that during the year under consideration, the assessee has received a sum

of Rs.70.69 crores as income from dividend and interest on tax free bonds which have been claimed as exempt under section 10 of the Act. The assessee *suo moto* made a disallowance of Rs.0.31 crore under section 14A rwr 8D of the Act based on the report obtained from an Independent Chartered Accountants, M/s Bansi Mehta & Co., wherein the Chartered Accountants, post verifying assessee's books of accounts and relevant records and material quantified Rs.0.31 crore as expenses incurred in relation to exempt income. However, the ld. AO without recording any objective satisfaction as to why and how the amount suo motto disallowed is wrong, simply proceeded to disallow Rs.2.67 crores (after considering Rs.0.31 crore offered in return) as per rule 8D read with section 14A of the Act. On appeal, the ld. CIT(A) upheld the disallowance made by ld.AO.

27. Before us ld. Counsel submitted that similar addition was made by ld.AO as per Rule 8D in its own case for AY 2008-09 wherein the Tribunal had set aside the findings of the ld.CIT(A) and directed the AO to delete the additions as per Rule 8D Department had filed an appeal against the said order of ITAT before Hon'ble Bombay High Court which was decided against the Department by the Court by dismissing Department appeal. We find that similar reason given for of disallowance by the ld. AO, the Tribunal has deleted the disallowance in assessee's own case for A.Y.2009-10. This Tribunal vide order dated 23/02/2021 had observed and held as under:-

"12. We have considered rival submissions in the light of decisions relied upon and perused material on record. Undisputedly, the assessee in its computation of income has computed disallowance under section 14A of the Act at Rs. 23,98,769 by applying certain principles of apportionment. Therefore, it is not a case of any disallowance being made by the assessee. In fact, a perusal of impugned assessment order clearly reveals that though a detailed submission was filed by the assessee justifying the suo motu disallowance, however, the Assessing Officer without recording a proper satisfaction to the effect that the computation made by the assessee is incorrect having regard to the books of account maintained, has proceeded to compute the disallowance simply on the reasoning that disallowance under section 14A of the Act has to be made by applying the methodology of Rule 8D. In our view, the aforesaid reasoning of the Assessing Officer is contrary to the mandate of section 14A(2) of the Act, therefore. unsustainable. Further, while deciding similar disallowance made by the Assessing Officer without recording proper satisfaction, the Tribunal, in assessee's own case (supra) has deleted the disallowance. The aforesaid decision of the Tribunal was also upheld by the Hon'ble jurisdictional High Court (supra). In view of the above, we find no reason to uphold the disallowance made. Hence, we delete the same. This ground is allowed. "(Emphasis Supplied)

28. Similarly, for AYs 2010-11 to AY 2015-16, the Tribunal deleted the disallowance made under section 14A r.w.r 8D of the Act on the grounds of no proper satisfaction being recorded by the ld. AO. Accordingly, following the earlier year's precedents, we hold that no disallowance is called for over and above what has been suomoto disallowed by the assessee because assessee has given detailed justification for suomoto disallowance and ld. AO without recording its satisfaction or incurred any expenditure which can be said to

be attributable to earning of exempt income as mechanically applied, accordingly, the disallowance made by the ld. AO is deleted.

29. In ground No. VII, assessee has challenged the disallowance of expenditure related evaluation of business opportunities.

30. The facts in brief are that during the year under consideration, the assessee has incurred expenditure on account of professional and consultancy fees amounting to Rs.1.57 crores paid to various legal/consulting firms to carry out due diligence/ market survey /legal fees for drafting of agreements and to provide consultancy services for identifying business opportunities in the area of home decor/ improvements etc. The AO disallowed the said expenses by holding it as capital expenditure.

31. Before us, ld. Counsel that in the earlier year Home Decor/Home Improvement were at setting up stage, however, for the captioned year under consideration along with Paint business, these Home Décor / Home Improvement are primary business and also recorded as business segment. Therefore, since the Home Decor /Home Improvement is already into existence any expenditure related thereto has to be revenue expenditure. The other expenditure is in the nature of design/brand identity for the said business or for evaluating other business opportunities etc. It has been pointed out that this issue stands covered by the decision of

the Tribunal in assessee's own case for A.Y.2015-16 wherein the Tribunal held as under:-

"16. In the year under consideration, the assessee has filed the summary of `expenditure incurred on exploring various business opportunities. From the perusal of the aforesaid summary, we find that the entire expenditure was incurred on home improvement projects, furniture and furnishings business, bathroom space business, modular kitchen, market research in Saudi Arabia project, etc. Unlike the assessment year 2014-15, the assessee has not furnished the copy of engagement letters/scope of work in respect of the exploration of various business opportunities by the consultants. However, since in the preceding year, the coordinate bench has examined each business evaluation separately, which appears to have also been undertaken during the year under consideration, we deem it appropriate to restore this issue to the file of the AO for de novo adjudication in light of the decision of the coordinate bench of the Tribunal in assessee's own case in the assessment year 2014-15 cited supra. The AO is directed to decide on the allowability of each expenditure after duly examining the engagement letter with the consultants and the scope of work, in light of the aforesaid decision of the coordinate bench cited supra. Before concluding, from the perusal of the aforesaid summary of expenditure, we note that the assessee has reversed the provision made in the preceding year Since in the preceding year: the other expenditure, which is in relation to the expenditures found to be capital in nature, has been directed to be disallowed, therefore we direct the AO that the provision disallowed in the previous year be not again disallowed in the year under consideration as it would result in taxing the same amount twice. With the above directions, the impugned order on this issue is set aside and ground no.2 raised in assessee's appeal is allowed for statistical Purposes".

32. Before us the ASSESSEE has submitted the break-up of this expenditure which was filed before the lower authorities and therefore, in line with the earlier years, we restore this

matter to the file of the ld. AO for verification of bills / vouchers / invoices / documents and allow said expenses in accordance with law. Accordingly, ground No.VII is allowed for statistical purposes.

33. In ground No.VIII relates to disallowance of prior period expenditure.

34. The brief facts are that during the year under consideration, the assessee has shown an amount of Rs.0.76 crore 'as prior period expenditure given at page 435 of PB break up of expense. The ld.AO disallowed the same by inter-alia observing that those expenses which crystallized during the current year because of the events beyond the control of the assessee company can be allowed as deduction and if assessee did not make adequate efforts to reconcile the accounts cannot be the reason to allow such expenditure in the current year and such claims cannot be considered to have been crystallized during the year. On appeal, the ld.CIT(A) concurred with the view of ld.AO and upheld the disallowance.

35. Before us, ld. Counsel for the assessee submitted that -

(i) These expenses in comparison to total expenses (i.e. Rs. 3,636.75 crores) are minuscule, which comes to around only 0.02% of our total expenditure.

(ii) That expenses attributable to the earlier years but crystallize in the year under consideration on receipt of

invoice/bills ought to be allowed. Even if the bills were dated earlier year but due to certain issues/disputes, approved in the current year, the same crystallize in the current year. Sample copies of invoices has also been tendered during the course of the hearing before us.

(iii) Further, if a consistent method of accounting is followed and there is no revenue loss (i.e. tax neutral exercise considering common corporate tax rates), the department should not question the year of allowability of expense.

36. In support ld. Counsel has placed reliance on the judgment of the Hon'ble Bombay High Court in the case of CIT vs. Nagri Mills Co. Ltd. reported in (1957) 33 ITR 681 and judgment of Hon'ble Supreme Court in the case of CIT vs. Excel Industries Ltd. reported in (2013) 358 ITR 295. Further, this issue has been restored back by the Tribunal in A.Y.2015-16 after observing as under:-

"19. Undisputedly, the assessee is following the mercantile system of accounting. and therefore only such expenses which are crystallized during the year can be allowed as a deduction while computing the income. Since the issue pertains to the reconciliation of expenses vis-à-vis the year of crystallization, therefore in the interest of justice we deem it appropriate to restore this issue to the file of the AO for de novo adjudication. The assessee is directed to furnish all the details in support of its claim that the expenses claimed as prior period expenses were crystallized during the year under consideration. With the above directions, the impugned order on this issue is set aside and ground no.3 raised in assessee's appeal is allowed for statistical purposes."

37. Thus, consistent with the view of the earlier years, this issue is restored back to the file of the ld. AO to decide in line of the aforesaid directions.

38. In ground Nos. IX & X, assessee has challenged the disallowance of provision for doubtful debts under normal computation and adjustment to book profits u/s.115JB of the Act.

39. The brief facts are that during the year consideration, the assessee had made an incremental provision for doubtful debts of Rs. 3.34 Crores. The said provision was created by debiting the profit and loss account and correspondingly credit has been reflected the under the sundry debtors account in balance sheet. These provisions for doubtful debts is made at an individual debtor level and not at a consolidated level based on percentage of total value of debtors. Further, the said treatment of reduction from Sundry Debtors is an effective write off as observed by Hon'ble SC in the case of **Vijaya Bank Ltd. vs. CIT (2010) 322 ITR 166** and accordingly the assessee has claimed provision for doubtful debts.

40. However, the ld. AO disallowed such provision observing that judgement of Vijaya Bank only applies to banking companies, further, also made an observation that the provision was created on an estimated basis considering the percentage of the total value of receivables and the individual debtor's account have also not been adjusted with provision

amount and also that the assessee had shown its debtors in the balance sheet at full value and the provision amount was shown on the liability side of balance sheet. Further, the ld. CIT(A) upheld the disallowance made by the ld. AO by holding that it was not actual write off as irrecoverable bad debts and hence not allowable.

40.1 Ld. Counsel submitted that this issue is decided by the Tribunal in assessee's own case for A.Y.2015-16 and observed that if the assessee claims deduction of provision for doubtful debts, without any write-off of irrecoverable debt and it is contrary to section 36(1)(vii) of the Act. Further, Vijaya Bank (supra) is not applicable in the case of the Assessee, as the said decision was rendered in case of banking company. Accordingly, the provision for doubtful debts was disallowed holding that bad debts written off are allowable in the year in which it is actually written off. Thus this issue was decided against. However, Ld. Counsel for the assessee relied upon by the decision of the **Hon'ble Jurisdictional High Court in the case of C1T v. Tainwala Chemicals & Plastics India Ltd. [2013] 215 Taxman 153** wherein assessee-company made provision for doubtful debt given to its group concern and had debited same to profit and loss account and correspondingly reduced assets by reducing amount of unsecured loans, doubtful debt qualified for deduction under section 36(1)(vii) following Vijaya Bank (supra). This judgment was not considered in the earlier AY 2015-16 ITAT order.

41. Further, the Hon'ble Supreme Court in Vijaya Bank (supra) itself observed at Pg. 383 and Para 8 of LPB that *'it is not in dispute that section 36(1)(vii) of the Act applies both to the Banking and Non- Banking business'*. Accordingly, it appears that the Tribunal in earlier year in assessee's own case inadvertently did not consider this observation. Further, decision of Tainwala (supra) rendered by Jurisdictional High Court was not cited and therefore not considered.

42. Further, decision of Vijaya Bank (supra) is in the context of section 11 5JB qua provision for doubtful debts also followed by Karnataka High Court in CIT v. Kirloskar Systems Ltd 220 Taxman I and Hon'ble Gujarat High Court in the case of CIT v. Vodafone Essar Gujarat Ltd [2017] 397 ITR 55 for doubtful debt while computing book profit u/s.II5JB).

43. He also submitted that similar issue has arisen in the Joint venture company M/s Asian Paints PPG Pvt Ltd. The ld. CIT (A) had ruled the issue in favour of company. The department had challenged the order of the ld.CIT (A) before the Mumbai Tribunal which was dismissed by the Tribunal.

44. Ld. DR strongly relied upon the order of the ld. AO and ld. CIT(A) and also the decision of the Tribunal in assessee's own case for A.Y.2015-16.

45. We have heard both the parties and also perused the relevant finding given in the impugned orders. Assessee has made incremental provision for Rs. 3.34 Crores. The said

provision was created by debiting the profit and loss account and correspondingly credit has been reflected the under the sundry debtors account in balance sheet. One very important fact is that the provision for doubtful debts is made at an individual data level and on consolidated level based on percentage of total value of debtors. Though this issue has been decided by this Tribunal in A.Y.2015-16, however, we find that Hon'ble Bombay High Court in the case of CIT vs. Tainwala Chemicals & Plastics India Ltd. (supra), following the principle laid down by the Hon'ble Supreme Court in the case of Vijaya Bank Ltd. held that where assessee company made provision for doubtful debts given to its group concern and debited the same to the profit and loss account and correspondingly reduced the assets by reducing the amount of unsecured loans, doubtful debts is qualified for deduction u/s.36(1)(vii). We find that the Tribunal had not considered the judgment of the Hon'ble Jurisdictional High Court and held that judgment of Vijaya Bank is not applicable in the case of assessee as it is applicable on the banking business. Further, we find that the Hon'ble Supreme Court in para 8 of its judgment have held that u/s.36(1)(vii) applies both for banking and non-banking business. Another important fact is that principle of Vijaya Bank in the context of u/s.115JB for the provision of doubtful debts had also been followed by the Karnataka High Court in the case of CIT vs. Kirloskar Systems Ltd(supra), the Hon'ble Gujarat High Court in the case of Vodafone Essar Gujarat Ltd. (supra) wherein the

Hon'ble High Courts have allowed the provision for doubtful debts while computing the book profit u/s.115JB. Apart from that in sister concern, this Tribunal has decided this issue in favour of the assessee.

46. The ld. AO has added provision for doubtful debts to the book profit u/s.115JB. However, under earlier provisions of u/s.115JB any amount set aside for meeting liabilities, other than ascertained liabilities were to be added back. The Department used to add back provision of doubtful debt in said category. However, the Supreme Court in CIT v. HCL Comnet Systems & Services [2008] 174 Taxman 118 decided matter in favour of Assessee. Thereafter, the Act was amended and a provision for diminution in the value of the asset was categorically inserted vide Finance Act 2009 (i.e. under clause (i) However, even after such amendment, Jurisdictional HC in Tainwala Chemicals above observed that - **8.** ***"Whether, on the facts and circumstances of the case, the Tribunal was justified in upholding the decision of the CIT (A), in deleting the addition on account of provision for doubtful debts to the book profit under Section I15JB of the Act without appreciating that the disallowance / addition on account of diminution in the value of assets is mandatory in view of Explanation (I) to Section115JB of the Act ? In so far as question (k) is concerned, the grievance of the Revenue is that for the purpose of computing profits under Section 115JB, the provision of doubtful debts has to be added. In view of our decision***

to question (u) above, issue of adding back the provisions for the purpose of computing book profits does not survive. This is particularly so in view of the fact that the Tribunal has recorded a finding of fact that the provision has been written off. Accordingly, we see no reason to entertain question (k)'.

47. This principle of Hon'ble Bombay High Court has been followed by the Hon'ble Karnataka High Court and Hon'ble Gujarat High Court wherein post amendment to Section 115JB also even for the book profit provision for doubtful debts has been allowed as deduction. Therefore, in view of the principles laid down by the Hon'ble Jurisdictional High Court and other High Courts as noted above, we hold that the provision for doubtful debts is deductible not only under normal provisions of law but also u/s.115JB. Accordingly, ground No. IX and X are allowed.

48. Ground no. XI: disallowance of trip scheme expenses; Ground no. XII: disallowance of colour idea stores expenses; Ground no. XIV: disallowance of discount and incentives which are target based to increase sales (i.e. by way of credit notes) given to dealers (by way of enhancement by ld. CIT(A);

Without prejudice to above:
Ground no. XVI: earlier year depreciation on colour idea stores expenses;

We find that Department in its appeal has also raised this issue in ground no 2:Whether, on the facts and in the circumstances of the case, ld. CIT (A) erred in treating the expenditure incurred for colour idea stores as commission paid to the dealers disregarding the fact that as per the agreement and in substance the 'designated area' with its furniture, fixtures, decors etc is fully under the control of the assessee giving it an enduring benefits and therefore the expenditure incurred on the same is capital in nature?

49. In so far as Ground No. XI & XII are concerned, at the outset, the assessee submits that the issue is favourably covered in the assessee's own case in AY 2009-10 wherein the Tribunal held that relationship between the assessee and its Dealers is Principal to Principal and not Principal to Agent, accordingly, section 194H of the Act does not apply and consequently no disallowance u/s. section 40(a)(ia) of the Act be made. This has been consistently followed by Tribunal in AY 201011 to AY 2015-16.

50. Before us, ld. Counsel submitted that this principle should be followed for deciding the ground No. XIV as the ld. CIT(A) has disallowed certain discounts / incentives paid to dealers only on the ground that in relation to the assessee and dealers is that of principal to agent which is contrary to the Tribunal. During the course of hearing we had asked ld. Counsel to explain the business model, the same has been submitted which is summarized in the following manner:-

a. *The Appellant is a listed company engaged in the business of manufacturing and sale of paints.*

b. *As a business chain, it has various dealers (dealers 1 7iskl7x.. more than 50000) spread across the country. These dealers are normal hardware stores dealing in many other products other than paints. The Appellant sells its paints to various dealers, who in turn further sells to painters/end customers;*

c. *There is no agreement between the Appellant and its dealers for the sale of goods;*

d. *These dealers provide their basic details to the Appellant, post verification/due diligence of such, dealers are approved. Their customer code is created in the books of accounts. Thereafter, on receipt of request for goods, the goods are sold to the dealers by the Appellant;*

e. *Title in goods and the risk-reward of goods passes to the dealers on sale of paints;*

f. *The dealers are invoiced based on the Dealer Price List ('DPL") of paints and such invoice is issued post levying appropriate taxes such as VAT, Sales Tax, GST etc;*

g. *The dealers are responsible for taking their own registration and ensuring compliances.*

h. *The dealers have freedom of pricing to sell the paints up to the MRP;*

i. *Payment for paints is made by the dealer upfront, prior to the realisation by the dealer of the proceeds of the sale made by them, irrespective of whether the goods are sold or not by them;*

j. *Once the goods are sold to the dealers, the Appellant is not responsible for any loss incurred by the dealers;*

k. *The Appellant has no exclusivity over these dealers i.e. they can sell competitor's goods as well any other products;*

I. The dealers do not have any right to create obligations or incur any liability on behalf of the Appellant. Further, none of the acts of the dealer are binding on the Appellant and cannot hold responsible for any of their actions;

m. *The dealers carry all the business risk (viz Inventory risk, risk of non-recoverability of monies from its debtors, etc).*

n. *In order to promote Company's sales, the Appellant operates various schemes wherein various types such of trips, discounts viz, credit notes, gifts etc are given to the dealers on achievement of targets with respect to purchase of goods from the Company.*

Brief facts on these are mentioned below:

Trip Scheme: Eligibility for trip scheme is decided on the basis of achievement of targets for purchase of goods from the Company for a given scheme launched by the Company. Schemes are circulated in advance to the dealers. On achievement of targets, a dealer is eligible for business convention. In these conventions, dealers are informed on latest developments in paints business and knowledge is shared on various types of various paints, markets and various types of products. Dealers also share their success stories. Dealers gets opportunity to interact with top management and able to give the feedback which helps the company. Expense incurred for organising the trips have been claimed as revenue expenditure by the Appellant. There is no dispute that where Assessee is paying to the travel or tour operator, appropriate TDS has been deducted.

Discounts: Trade discount & Cash discounts - In order to promote the sales, the Appellant provide discounts to dealers. Majority of the discounts are given in the bill itself either as trade discounts or as per the general trade practice as cash

discounts for immediate payment of sale invoice. It needs to be noted that these trade discounts and cash discounts are given as reduction in purchase price in the invoice and GST as applicable, is levied on the net price. These are not commission. Target Incentives - The Appellant is operating several other schemes wherein various types of discounts/incentives which are given by way of credit notes since invoices are already issued earlier.

51. Before us ld. Counsel drew our attention to the following provisions of sale of Goods Act, 1930, which for the sake of ready reference is reproduced hereunder:-

"19. Property passes when intended to pass - (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to he transferred.
(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.
(3) Unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer
20. Specific goods in a deliverable state.— Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed."

52. He further submitted that title/property in the goods is transferred to the dealers, for a price, on raising the sales invoice and delivery of such goods. The sales are recorded as

and when the goods are sold to the dealers and not when the dealer ultimately sells the same. In case of agency, the principal would record sale as and when agent ultimately sells the goods. Thus, once the Department has not disputed the sales made by the assessee to dealers and accepted the same, question of agency does not arise. In fact, the dealers in response to inquiries made by the CIT (A) has accepted the transaction with the assessee as purchase of goods and submitted the relevant ledger of purchase. This clearly indicates the transaction between the assessee and the dealers is of sale-purchase and not of an agency. The assessee humbly submits that the relationship cannot be based on or cannot change qua the transactions between the parties.

53. Reliance was placed on the decision of Hon'ble Delhi High Court in the case of **CIT v. Mother Diary India Ltd [2013] 358 ITR 218** wherein it was held *"It is a well-settled proposition that if the property in the goods is transferred and gets vested in the concessionaire at the time of the delivery, then he is thereafter liable for the same and would be dealing with them in his own right as a principal and not as an agent of the Dairy... The concessionaire purchases the milk from the Dairy. The Dairy raises a bill on the concessionaire and the amount is paid.That question must be decided, on the basis of the fact as to when and at what point of time the property in the goods passed to the concessionaire. In the instant cases, the concessionaire became the owner of the milk and the*

products on taking delivery of the same from the Dairy. He, thus, purchased the milk and the products from the Dairy and sold them at the MRP.... The Dairy may have fixed the MRP and the price at which they sell the products to the concessionaire but the products are sold and ownership vests and is transferred to the concessionaires. This by itself does not show and establish principal and agent relationship."

54. Similar view has been taken in the decision of **CIT v. Jai Drinks [2011] 336 ITR 383 (Del.)** wherein it was held that *"From the agreement, it was evident that the distributor was to purchase products at pre-determined price from the assessee for selling the same within specified area.... That being the arrangement between the assessee and the distributor, it could not be said that the relation between them was that of principal and an agent. On the other hand, it was clearly stipulated to be an arrangement between them on principal-to-principal basis."*

55. Accordingly, ld. Counsel submitted that the transaction between the assessee and the dealer for sale of goods and relationship is principal to principal and not that of principal to agent. He submitted that ld. CIT(A) has ignored the order of the Tribunal for A.Y.2009-10 to 2015-16 and concluded that the relationship between the assessee and the dealers are of principal to agent and all the three expenditures mainly trip expenses, colour idea store expenses and post invoice incentives / discounts which issue has been raised by

way of enhancement are in nature of commissions subject to TDS u/s.194H of the Act and in absence of TDS, such expenses ought to be disallowed u/s.40(a)(ia) of the Act.

56. Ld. DR relied on the orders of the ld. CIT(A) and certain observations made by the ld. CIT(A) which are summarized in the following manner:-

a. No specific dealer agreement or dealer appointment agreement of the Appellant with their dealers - Pg 19 of CIT(A) Order;

b. Reliance was placed on extracts of Colour Idea Store Agreement and apply it to transaction of sale of goods to dealers - Pg 20 to 23 of CIT(A) Order;

"For the aforementioned purpose Asian paints intends to enter into an arrangement with its dealers, whereby the dealer shall provide Asian Paints a space in the dealers shop to be exclusively used by Asian Paints for installing its decor, designs, creative and concepts ("Designated Shop Area') on the terms and conditions as more fully described in the recitals and clauses hereunder..

The dealer shall provide a minimum of 25 square meter area in his shop as the Designated Shop Area to Asian Paints, as identified by Asian Paints to install its decor, displays, designs, visuals in the Dealers Shop which is intended to give the end consumer a complete experience, a look and feel of the paints world in an innovative way..... Apart from the above counters, the dealer shall also provide Asian Paints a separate contractor transaction area called as the "Decorator

express Area" measuring a minimum of 10 sq meter.....

The dealer shall get his shop premises and the designated shop area constructed, designed and decorated in accordance with and in the manner suggested by Asian Paints and its consultants/contractors...

The dealer shall use the decor elements as per the training manual provided to the dealer by Asian Paints.....

The dealer shall provide an unrestricted and unlimited excess to any of the Asian Paints employees, agents and representatives and the records thereto to all reasonable times.....

The dealer shall not charge excess of the MRP declared by Asian paints upon its products for the facilities provided to the customers in the Designated Shop area. The dealer shall make known the products and services of Asian paints in every way reasonable practicable to the general public.....

The dealer shall all the times maintain appropriate quantity of stocks of the Asian paints products in such quantities as may be advised by Asian Paints from time to time to ensure the availability of the products.....

The dealer shall defend, indemnity and hold Asian Paints harmless from and against any and all loss, claims, demands, suits, proceedings, damages, costs, expenses, liabilities (including, without limitation, reasonable legal fees) or causes of actions (collectively liabilities)..."

c. Inquiries conducted with dealers u/s. 133(6) of the Act and extract of Dealer Price List provided by them Pg 25 & 27 of the

CIT(A) Order -

"a. That, if any imposition or addition or any adverse change in the Customs Duty or any other taxes/ duty and/or any adverse change to the company on concessions on Customs Duties or any other taxes / duty on the finished paint, or on raw or packing materials used in goods offered, may be charged to the dealers/purchasers account,

b. As per legal metrology act 2009 and the rules framed there under for "tinted shades' the dealer/seller can change the cost of Colorants over and above the MRP of the tinted base. The total price charged to the Consumer shall not be more than the MRP of that particular SKU, as per the Tinted Shades Maximum Retail Price List, separately provided to the Dealer/Seller.

c. Company can change the price without any prior notice and same shall be charged.

d. Company at its discretion may compensate leakage/breakage that occurs in transit.

e. Reopening in the hands of the dealers.

"It is understood from these orders passed u/s. 148A(d) of the Act that, the said two dealers were also beneficiaries (from out of 3519 dealers beneficiaries) and that, the said gifts (trips) were not taxed as income in the hands of these beneficiary dealers and re-opening proceedings were dropped u/s. 148A(d) of the Act by the AO concerned for the reason that "expenditure incurred by the Asian Paints Ltd. on holding trips

for the dealers has already been taxed in the hands of the said company and taxing the same once again in the hands of its dealer. (i.e. assessee in the present case) would lead to double taxation, which is against the principle of taxation, unless mandated in certain circumstances. Further, it is also the fact that the said free trips to dealers in question were organized by principal company and the same were not as per choice and desire of the dealers (the assessee)"

Basis the above, the DR concurred with the CIT(A) findings which are summarised below:

i. The Appellant has entered into such terms and conditions with their dealers (colour idea stores) and/or which work as a dealer appointment agreement . which means there is no strict Principal to Principal relationship, rather its Principal to Agent.

ii.There is no basic difference between the dealers and the dealers with colour idea stores and that the terms and conditions were the same for both of them when it came to offering them discounts, incentives etc;

iii.As per the colour idea agreement - The dealers are required to construct, design and decorate the shop as suggested by the Appellant, maintenance of stock levels, keep designated shop area and it cannot be used for any other purpose, business promotions, unlimited/unrestricted access for assessee company's employees at dealer's premises, dictating price and cannot charge over particular price,

dealers to corporate in getting its records and accounts inspected;

iv. The Appellant has control or is dictating various terms of business to their dealers like MRP of the products, MRP in case dealer is doing additional activities like in tinted shades, undertaking to compensate for any adverse changes in any taxation, custom duty or any other cost even after sale of goods along with other conditions of agreement;

v. The Appellant provides dealers with Dealer Price List and asks them to follow terms and conditions mentioned therein;

vi. In spite of no signing any detailed dealership appointment agreement with the dealers, the Appellant has put binding conditions on their dealers through Dealer Agreements (colour idea stores) and Dealers Price List, hence, its crystal clear relationship is Principal to Agent;

vii. Discounts & Incentives are given to dealers to promote sales only, therefore, they are commission given on sale just by changing name. While Trade and Cash Discount can be accepted as not commission, however, other discount/incentives by way of credit notes are commission.

e. Decision relied on to conclude Principal to Agent relation - VST Tillers Tractors Limited v. DCIT (ITANo650/Bang/2017), Gaya Sugar Mills Limited v. Nand Kishor Bajoria &Anr. dated November 22.1954, Singapore Airlines and in decision in case of CIT v. Idea Cellular Ltd [2010] 325 ITR 148 (Del HC), Bharti Cellular Limited v. CIT [2011] 244 CTR 185 (Cal. HC) and Vodafone Essar Cellular Ltd v. ACIT [2010] 235 CTR 393 (Ker)

f. He further stated that in case of some dealers, such incentives/trips were not offered to tax, however, in their cases, where reopening was initiated, same was dropped on the basis that in case of Appellant, such expenses would be disallowed.

57. In rejoinder ld. Counsel has filed written submissions and various points raised by the ld. CIT(A) and DR. In sum and substance, same are reproduced hereunder:-

a. Custom Duty - In this regard, the Appellant submits that recovery of such custom duty deals with the element of costs with respect to indirect taxation included in the product pricing which might subsequently be imposed or amended. The Appellant is thus reserving its right to recover any additional cost that it may incur in the future due to any subsequent change. This is a commercial understanding between two independent parties. In fact, in case of agency, any such custom duty would always be borne by Principal. Thus, this clause supports that the dealer is not an agent but acts on Principal to Principal basis.

b.MRP tinted shades - In this regard, the Appellant submits that we deliver the base paint to our dealers and thereafter the dealer add colorant to the base paint in order to arrive at the colour shade desired by the end customer. This declaration is mentioned with respect to the provisions package commodity rules [erstwhile Legal Metrology (packaged commodities) rules], wherein we are required to state that the MRP mentioned of the base paint is only of base material. The final MRP of the tinted shade shall be post inclusion of colourant cost and in no point, dealers shall charge price higher than the MRP of the respective tinted shade. Therefore, the dealer can charge the cost of colorant over and above the MRP of the base paint and they are at the liberty to fix the price of the final colour shade subject to the Tinted Shades MRP list separately provided to the dealers i.e. the same cannot exceed the MRP fixed for that particular

c.Change in price - the Appellant, being the manufacturer of the product, has complete right over the pricing of the product and thus is well within its rights to change the product price in line with the current market and other factors. Further, a seller is not under any obligation to give prior intimation to its buyers with respect to change in the product's price.

d. Compensate leakage/ breakage that occur in transit - As per the terms and conditions mentioned in the DPL, the price at which dealers are supplied is ex-depot. Any local taxes/ levies till the time of delivery will have to be borne by the dealer/ purchaser. Further, the Appellant, at its discretion, may compensate for the leakages/ breakages that occurs in transit, after proper evaluation of the claims made. Thus, this cannot be inferred to create an agency. In case of agency, loss of agent is loss of principal and there cannot be any discretion.

58. We have heard both the parties and also perused the relevant materials referred to before us and the findings given in the impugned orders. We will first take up the issue of disallowance of trip scheme expenses and disallowance of colour idea store expenses as raised in ground No.11 & 12 respectively. As mentioned above assessee has various dealers all across the country who are normally hardware stores dealing in many other products other than paints and assessee company sell such paints to various dealers who will further sell to painters and other customers. There is no agreement as such between the assessee and its dealers for sale of goods. The assessee provided the basic details and after verification and due diligence had approved the dealers and then the customer code is created in the books of accounts of the assessee. Thereafter, on receipt of request for goods, the goods are sold to the dealers by the assessee. In so

far as assessee is concerned, the title in the goods, research and risk on the goods passed on to the dealers completely, the moment assessee sells the paint to the dealers. The dealers are invoiced based on the Dealer Price List ('DPL") of paints and such invoice is issued post levying appropriate taxes such as VAT, Sales Tax, GST etc. The dealers are responsible for taking their own registration and ensuring compliances.

59. Another important fact is that dealers have freedom of pricing to sell the paints up to the MRP and it is up to them that at what discount they offer to the customers. When the dealer purchased the paint from the assessee company, the dealer makes upfront payment prior to the realization by the dealer of the proceeds of the sale made by them, irrespective of whether the goods are sold or not by them. Once the goods are sold to the dealers, the assessee company nowhere responsible for any loss incurred by the dealers and assessee has no exclusivity over these dealers i.e. they can sell competitor's goods as well any other products of other company. Apart from that dealers do not have any right to create obligations or incur any liability on behalf of the assessee and none of the goods of the dealer are binding on the assessee company. The dealers carry all the business risk (viz., Inventory risk, risk of non-recoverability of monies from its debtors and other risks). Thus, there is no principal to agent relationship between assessee and dealer. This fact has also been approved by the Tribunal in assessee’s own case for A.Y.2009-10. When the Tribunal held

that the relationship between assessee and its dealer is principal to principal and not principal to agent.

60. In so far as other schemes, assessee company to promote the sales, it launches various schemes wherein it sponsors various trips to dealers in India and abroad and on achieving of certain targets give discounts in the form of credit notes, gifts etc., In so far as trip scheme is concerned, the eligibility is decided on the basis of achievement of targets for purchase of goods from the Company for a given scheme launched by the Company. These schemes are circulated in advance to the dealers and once dealers achieved the targets, he is eligible for business convention under which dealers are informed on latest developments in paints business and knowledge is shared on various types of various paints, markets and various types of products. Dealers also share their success stories and interact with top management to give the feedback. These conventions are often done on the trips sponsored for the dealers who had achieved the target as per the scheme floated by the assessee company. **Thus, expenses incurred for organizing such trips is allowable as 'revenue expenditure'.** It has also been brought on record that where assessee was paying to the travel or tour operator, appropriate TDS has been deducted.

61. In so far as trade discount & cash discounts, in order to promote the sales, the assessee provided discounts to dealers which are given in the bill itself either as trade discounts or

as per the general trade practice as cash discounts for immediate payment of sale invoice. These trade discounts / cash discounts are given as reduction in purchase price in the invoice and GST as applicable is levied on the net price. **Such discount nowhere can be treated as commission and accordingly, discounts given by the assessee company to the dealers is allowable as 'revenue expenditure'.** The whole case of the ld. AO and ld. CIT (A) is that there is an agency relationship between the assessee company and the dealers. As already held above, the title / property in the goods is transferred to the dealers for a price once the sales invoice is raised and delivery of such goods are made. In case of agency, the principal record the sale as and when agent ultimately sell the goods, but here in this case, sales are recorded as and when the goods are sold to the dealers and not when dealer ultimately sales to the end users. Once this aspect of the business model and the sales has not been disputed then the issue of agency concept cannot be accepted. It has been brought on record that ld. CIT(A) has made an enquiry with the dealers who have confirmed the transaction with the assessee with details of purchase of the goods and also submitted the relevant ledger of purchase, which clearly indicates the transaction between the assessee and the dealers is of sale-purchase and not of an agency. Thus, this finding of ld. CI T(A) is reversed. Moreover, this issue is also covered by the decision of the Hon'ble Delhi High Court in the

case of CIT vs. Mother Diary India Ltd [2013] 358 lTR218 as noted above.

62. Further the Tribunal in assessee's own case right from A.Y.2009-10 to 2015-16 have categorically been holding that relationship between the assessee and the dealers are principal to principal and all the three expenditures namely trip expenses, colour idea store expenses and post invoice incentives / discounts cannot be treated as in the nature of commission allowable for deduction of TDS u/s.194H. Before us, ld. Counsel had already given detailed write-up on the dealer price list. And has also given a detailed write up as to how the entire transaction including the terms and conditions and the other factors lead to inference that there was no such kind of agency relationship between the assessee and the dealers albeit, it was principal to principal transaction, which we fully agree.

63. In so far as the issue relating to colour idea store expenditure and the agreement between the assessee company and the dealers wherein dealers have to carve out a designated Shop Area and further maintain minimum stock levels. As stated and brought on record the assessee enters into an agreement with dealers wherein the dealers have the designated area for their colour showroom wherein the dealers will display latest colours and the effect of the colours on the wall and assessee spent part of the money in developing the colour showroom as part of joint sales promotion. This is not in

agreement on sale of goods albeit, it is more in the nature of promotion of sales of goods. In so far as maintaining the minimum stock as per the terms of agreement, commercially it was only to ensure that there is a joint promotion of goods and when ultimate consumer visit such discounted studio is able to get various choices and experiences of certain basic products. All these lead to only inference of business promotion and the inference drawn by the ld. CIT(A) by picking up few phrases from the agreement and to conclude that there is a relationship of principal to agent to disallow the expenses as is not correct. It is only a way of business and sales promotion for the assessee because the entire exercise is a joint sale promotion activity of the assessee and the dealer.

63.1 As brought on record and explained before us, that the concept of Colour Idea Store is that in order to increase the sales, over the years the assessee has been using various innovative marketing techniques with respect to advertisement and sales promotion. In order to promote its brands and products through a network of retail outlets wherein end consumers can have a complete experience of the assessee's paints and can understand various products, their attributes, educate themselves through colour consultants and other literature on paints, the assessee had entered into agreement with certain dealers, whereby the dealers shall provide designated space in the dealers shop to be exclusively used by assessee for installing its decor, designs, creative and concepts (referred to as 'Colour Idea Stores"). Also, the

dealers have approached the assessee requesting for creating such a designated space at their shops. The said arrangement provides an opportunity to the assessee to show case luxury products and their exclusive range, finished books, brochures, literatures, advertisements, counters called as 'Try and Decide', 'Be inspired area', and 'Chose your finish bar'. It also provides the dealers in giving a new look to their stores so as to drive the retailing concept. It also helps in increasing customer footfall and walk in thereby ultimately generating business for both the assessee as well as the dealers. Under the agreement, both the assessee and the dealer agree to share costs incurred for setting up of the designated area. The cost incurred broadly comprises of civil work, furniture and fittings, electrical fittings, signboards, designs, creative works, advertisement materials. etc. Further even though the assessee incurs expenditure on setting up of the stores, the stores always belong to the dealers. On termination of the agreement, the dealer is not under an obligation to return to the assessee any part of the erection/assembled items, furniture, fittings, etc except books, brochures, literatures and other intellectual property which contains business and product information of the assessee. This arrangement is joint sales promotion activity by the assessee and the dealer, wherein both the parties could benefit from the brand promotion and resultant increase in sale of goods. In fact, generally, the paints are at a dealer which also keeps other hardware stores and ultimate customers may not be inclined

to enter and choose the paint. To make it attractive for customer to enter and experience the products of the assessee and visualise how it would look in their home, such corner or designated area is made

63.2 Thus, the expenditure incurred under this head, we hold that it is purely Revenue expenditure as it is in the nature of sales promotion. All other aspects which has been raised by the ld. DR and the ld. CIT(A) has been clarified and reported by the assessee before us which has been incorporated in detailed in the foregoing paragraphs to which we fully endorse for the reasons that there is no concept of agency qua the dealing between the assessee and the dealers. It is purely on principal to principal basis and all the expenses incurred for sales promotion, business promotion, trip expenses, colour Idea store expenses are purely for the purpose of business and allowable as revenue expenditure. Accordingly, ground No. XI and XII are allowed.

64. Now coming to the Revenue's appeal, Ground No .I raised by the Revenue reads as under:-

"Whether on the facts and in the circumstances of the case and in law, the ld.cit(a) was right in allowing on account of various sundry balance written off during the year without appreciating the fact that such claim/deduction of expenses is not allowed under any provision of the income-tax act?"

65. The brief facts are that during the year under consideration, the assessee has written off certain old and sundry balances, lying in the books of accounts amounting to Rs. 2.54 crores and debited the same to the Profit and Loss Account. These are normal business expenses comprising CENVAT on transit, security deposits, old balances/open advances in vendor account and Service Tax paid on traded goods and hence allowable as deductible expenditure. The AO disallowed the said expenditure on the grounds that the assessee could not prove that alleged advances were made in the ordinary course of the business. Further advances written off could not be treated at par with bad debts written off. The CIT(A) while differing from the order of the AO, held that the said expenditure was allowable.

66. Before us ld. Counsel has relied upon the Delhi ITAT in the case of Fab India Overseas P Ltd v. ACIT [TS-5886-ITAT-2013(DeIhi)-O] where it has been held that expenditure written off on account of security deposit, double payment to supplier, small outstanding balance from customers, rounding of difference etc are allowable expenditure.

67. Here it is a case of writing certain old and sundry balances lying in the books of accounts and debited to the profit and loss account which had incurred during the course of normal business expenses like CENVAT on transit, security deposits, old balances/open advances in vendor account and Service Tax paid on traded goods etc., which are otherwise

allowable expenditure. Once the nature of expenses and transactions has not been doubted, then it cannot be disallowed and these advances written off cannot be treated at par with bad debts. Accordingly, the order of the ld. CIT(A) is confirmed.

68. Now**, the appeal for 2017-18.**

69. Ground No.IV relates to disallowance of claim made u/s.35(2AB) of the Act. This issue we have already discussed in detaile while dealing with the appeal for the A.Y.2016-17 and also the amendment brought in Rules w.e.f. A.Y.2017-18. Since we have set aside this issue to the file of the ld. AO with certain directions, accordingly, this ground is treated as allowed for statistical purposes.

70. Ground No.VIII relates to disallowance of sundry balances written off which is similar to the ground raised in A.Y.2016-17 and therefore, respectfully following the same, this issue is decided in favour of the assessee.

71. Ground No. XIII relates to denial of set off of short term capital gains u/s. 50 of the Act against long term capital loss.

72. The brief facts are that during the year under consideration, the assessee has sold a depreciable asset (i.e. Flat - Kaveri CHS in Vashi, Navi Mumbai), which is grouped under Building block @5%, for a consideration of Rs.1 .63 crores. The said asset was acquired on March 31, 1997. The

Opening WDV of the said flat is Rs 0.53 crore. In this regard, the assessee has calculated Rs.1.09 crore as deemed short term capital gains in light of section 50 of the Act. Further, the assessee set off this deemed short term capital gains, pertaining to long term capital asset (i.e. holding any immovable properties for more than 2 years, refer section 2(29AA) and 2(42A)) against brought forward long-term capital loss. The AO relying on section 70(3) of the Act denied the abovementioned set-off**.** And CIT(A) simply upheld that action of the AO by observing there are no merits in the assessee's case.

73. We have heard both the parties and also perused the relevant finding given in the impugned orders. The ld. AO has denied the set off relating to Section 70 of sub-Section 3 which for the sake of ready reference is reproduced hereunder:-

"Set off of loss from one source against income from another source under the same head of income.

70(3) Where the result of the computation made for any assessment year under sections 48 to 55 in respect of any capital asset (other than a short-term capital asset) is a loss, the assessee shall be entitled to have the amount of such loss set off against the income, if any, as arrived at under a similar computation made for the assessment year in respect of any other capital asset not being a short-term capital asset."

74. First of all assessee has not incurred any long term capital loss in A.Y.2017-18 and therefore, at the threshold the provision of Section 70 sub-Section 3 will not apply. Assessee has derived the income from sale of flat which is a long term capital asset as it was held from 1997-2017, however, by virtue of dealing

provision of Section 70, the same was treated as short term capital gain. The provision to Section 70 makes exactly clear for deeming fiction restricted only to the mode of computation of capital gains contained u/s.48 and 49 of the Act and cannot be extended beyond that. Further, as per section 74(1)(b) any loss related to long term capital asset, it shall be setoff against income under the head of 'Capital Gains' assessable for that assessment year in respect of any other capital asset not being short term capital asset (i.e. long term capital asset), accordingly, the assessee has set-off capital gain from long term capital asset (i.e. Flat) against brought forward long term capital loss.

75. It is as settled position in law that deeming fiction needs to be strictly constructed and cannot be extended to any other provision of law. Section 50 does not change the character of capital gain from being long term capital gain to short term capital gain for the purpose other than section 50 of the Act.

76. This issue is now covered by the decision of the Hon'ble Bombay High Court in the case of **CIT vs. Manali Investment (2013) 219 Taxman 113** and the Hon'ble High Court observed as under:-

"2. The respondent - assessee had during the subject assessment year sold its meters and transformers on which it had claimed depreciation. On sale, the respondent - assessee claimed long term capital gains and sought to set-off the same against Its carried forward long term capital loss in terms of Section 74 of the Income Tax Act, 1961 ('Act' for

short). The assessing officer disallowed the claim and held that in view of Section 50 of the Act, the gain is in the nature of short-term capital gain. The Commissioner of Income Tax (A) upheld the order of the assessing officer.

3. On further appeal, the Tribunal by the impugned order has allowed the claim of the respondent - assessee to set-off its long term losses in terms of Section 74 of the Act against the long term capital gains on sale of transformers and meters. This was by following the decision of this Court in the matter of CIT v. Ace Builders (P) Ltd [2006] 281 ITR 2 10/[2005] 144 Taxman 855 (Born). In the case of Ace Builders (P) Ltd (supra), this Court held that by virtue of Section 50 of the Act only the capital gains is to be computed in terms thereof and be deemed to be short-term capital gains. However, this deeming fiction is restricted only for the purposes of Section 50 of the Act and the benefit under Section 54E of the Act which is available only to long term capital gains was extended. In this case, the Tribunal held that the position is similar and the benefit of set-off against long term capital loss under Section 74 of the Act is to be allowed. Further, an identical issue with regard to set off against long term capital loss arose in an appeal filed by the Revenue in the matter of CIT v. Hathway Investments (P.) Ltd, being Income Tax Appeal (L) No. 405 of 2012. This Court by its order dated 31 January 2013 refused to entertain the appeal filed by the Revenue. The Revenue has not been able to point out any distinguishing features in the present case warranting a departure from the principles laid down by this Court in the matter of Ace Builders (P) Ltd. (supra) and in our order dated 3l January, 2013 in Income Tax Appeal (L) No. 405 of 2012.
3. In view of the above, we see no reason to entertain the proposed re-framed question of law. Accordingly, the appeal is dismissed with no order as to costs

77. Further Hon'ble Jurisdictional High Court in the case of **Hon'ble Jurisdictional High Court in the case of Commissioner of Income-tax v. Parrys (Eastern) (P.) Ltd [2016] 384 ITR 264** held as under:-

"6. We find that the issue stands concluded by the decision of this Court in ACE Builders (P) Ltd. 's case (supra) in favour of the Respondent-Assessee. Moreover, the impugned order relies upon the order of the Tribunal in Komac Investments & Finance (P) Ltd. 's case (supra) to dismiss the Revenue's appeal before it. The deeming fiction under Section 50 is restricted only to the mode of computation of capital gains contained in Sections 48 and 49 of the Act. It does not change the character of the capital gain from that of being a long term capital gain into a short term capital gain for purpose other than Section 50 of the Act. Thus, the respondent-assessee was entitled to claim set off as the amount of Rs. 7.12 Crores arising out of sale of depreciable assets which are admittedly on sale of assets held for a period to which long term capital gain apply. Thus for purposes of Section 74 of the Act, the deemed short term capital gain continues to be long term capital gain. Moreover, it appears that the Revenue has accepted the decision the Tribunal in Komac Investments and Finance (P) Ltd. 's case (supra), as our attention has not been drawn to any appeal being filed from that order."

78. Thus, following the aforesaid law laid down by the Hon'ble High Court we allow the set off of long term capital loss against deemed short term capital gain u/s.50.

79. Another ground raised by the Revenue is with regard to additional claim of foreign tax credit claim. It is seen that in the A.Y.2018-19, this issue is arising in assessee's appeal in ground No.X.

80. The brief facts are that assessee has various direct & indirect overseas subsidiaries. From those subsidiaries It is receiving royalty, dividend and recoveries for providing various services to those units. The said amounts are credited to the profit and loss account and offered for tax.

81. The above receipts are subject to withholding at the range of 10% to 20% at overseas units, whereas in India it is offered to tax at 34.608%. Accordingly, the assessee has claimed credit of taxes paid in foreign. Assessee has placed at 414 of PB (copies of foreign withholding certificates and Pg. 412 or 504 of PB for breakup of FTC claimed. Also, at Pg.458 of PB for copy of Form 67 filed pursuant to Rule 128 of the Rules to section 90/91 of the Act).

82. Further, the assessee submits that it is not claiming any FTC for reimbursement as there is no income component involved in. Also, in case of recoveries from subsidiaries, FTC is claimed only on the mark up component and not on the gross receipts.

83. The assessee has computed approximate expenditure incurred against these foreign incomes (i.e. Net Income) and tax thereon at Tax on net income comes to around 25.47% whereas none of the overseas units are withholding more than 20%. Further, with respect foreign dividend income, the assessee submits that we have made strategic investment in overseas subsidiaries. The investments in those subsidiaries were made out of the internal accruals and hence no expenses have been incurred in earning dividend income from the overseas subsidiaries. However, still such dividend income is offered to tax in India at 17.304% as against withholding of 5%.

84. In earlier years i.e. for AY 2012-13 to AY 2017-18, ld. CIT(A) has accepted the position of the assessee and directed the AG to verify the expenditure incurred against such foreign income and grant FTC as per section 90/91 of the Act.

85. The ld. AO disallowed the entire FTC claim by observing that the assessee did not provide any detail of expense in relation such foreign income, no separate books are maintained to such expense and there is no proper computation of FTC. Ld. CIT (A) restricted the FTC claim to 50%.

86. Thus, the contention of the assessee is that entire FTC claim by the assessee is to be allowed. Further, assessee submitted that certain incomes which are already considered for tax for A.Y.2018-19, however, tax was deducted by foreign tax credit. Subsequently, on making actual payment, accordingly, the assessee receives FTC certificates post filing of ROI, or post the due date of Revised ROl etc. Therefore, the assessee's only recourse is to file an additional claim for FTC before the AO. The assessee has also submitted the break-up of additional FTC claim at page 505 of PB. In 2017-18 ld. CIT(A) has allowed the claim in A.Y.2018-19 and upheld the action of the ld. AO that any additional claims of deduction which are neither claim in the original return of income nor by way of revised return cannot be granted by the AO. As noted above, from A.Y.2012-13 to 2017-18, ld. CIT(A) has accepted the position and directed the ld. AO to verify the expenditure

incurred against such foreign income and grant FTC as per Section 1990-91. Accordingly, ld. AO is directed to verify the details of expenses in relation to such foreign income and examine the claim of foreign tax credit and allow accordingly.

87. Even for the A.Y.2018-19, additional claim of FTC, even if assessee has filed subsequently on account of actual payment and assessee has received FTC certificates post filing of return of income, the same should also be allowed if it is permissible and allowable under the law and after examining the same, grant the FTC accordingly.

88. In the result, ground No. XIX of Revenues appeal for A.Y.2017-18 is dismissed and ground No. X for A.Y.2018-19 is allowed for statistical purposes.

89. In so far as Revenue's appeal for A.Y.2017-18, the only issue raised is with regard to colour idea stores expenses which issue we have already decided in favour of the assessee holding it to be Revenue in nature. Accordingly, ground raised by the Revenue is dismissed.

90. Now coming to the appeal grounds relating to A.Y.2018-19, all these issues have been discussed in details while deciding the appeal for A.Y.2016-17 and accordingly, our finding given therein will apply *mutatis mutandis.*

In Brief the result of various grounds for AY 2018-19 are as under:-

91. Ground No.I: In so far as issue of deduction of claim u/s.35(2AB) of the Act, this issue has been restored back to the file of the ld. AO for proper examination in line of the directions given in the A.Y.2016-17 and 2017-18.

92. Ground No.II: In so far as disallowance of 25% of expenses on distribution of gift articles, the same has been reduced to 10%, accordingly, this issue is partly allowed.

93. Thirdly, in so far as disallowance u/s.14A r.w.r.8D, since similar issue is permeating in this year also, therefore, this issue is allowed in favour of the assessee.

94. Fourthly, in so far as disallowance of provision for doubtful debts under the Act and also under the book profit, the same has also been allowed in favour of the assessee according to the judgment of the Hon'ble High Court.

95. In so far as issue relating to disallowance trip expenses, colour idea store expenses and post invoice incentives / discounts is target based for increase of sales given to the dealers. This issue is decided in favour of the assessee as we have held that these are purely business expenditure and allowable u/s. 37(1).

96. In so far as issue relating to Non-Acceptance of additional claim of applicability of beneficial rate as per DTAA to the DOT, in all the years this ground has not been pressed, therefore, same is dismissed as not pressed.

97. In so far as issue relating to disallowance of Colour Idea Stores expenses, since this is an alternative ground and ld. AO allowed it as revenue expenditure, this issue is infructous.

98. In so far as issue of Non-Acceptance of additional claim of Foreign Tax Credit (FTC) and disallowance of foreign tax credit, we have already set aside this issue to the file of the ld.AO.

99. Lastly, coming to the issue of disallowance of deduction u/s.80G which has been raised by Ground No.4 of the Revenue.

100. The brief facts are that during the year under consideration, the assessee incurred a CSR expenditure of Rs.46,51 crores and the same has been offered to tax as per section 37 of the Act. Out of which, Rs.9.44 crores are eligible (i.e. 50% of amount) for deduction/claim u/s. 80G of the Act and the assessee has claimed such deduction in its ROI.

101. The AO denied such deduction on the premise that such being part of mandatory CSR expenditure as per section 135 of the Companies Act, it loses the essence of being a 'donation' which is typically understood as voluntary' act, element of charity is missing. Further, considering the legislative intent of insertion of CSR and its implication u/s. 37, deduction u/s 80G could not be allowed. However, the CIT(A) allowed the claim of the assessee and dismissed the AC's observation by observing as under:-

- The assessee has chosen voluntarily the organisation to which donation is given. Neither the donee organisation had a right to receive nor the assessee was under any obligation to donate to donee only, it could have given to any of the entities covered within the scope of section 135 of the Companies Act;
- On the part of element of charity, the CIT(A) held that the activities of list of organisations covered under Schedule VII of the Companies Act, 2013 are related to social benefit and eligible to issue certificates u/s. 80G. Therefore, the element of charity cannot be missing and the assessee is eligible to claim deduction u/s. 80G of the Act.

102. Before us, ld. Counsel submitted that this issue stands covered in favour of the assessee and reliance was placed on the following judgment:-

Hon'ble Jurisdictional Tribunal *in the case of* ***Societe Generale Securities India (P.) Ltd. v. Principal Commissioner of Income-tax*** *[2024] 204 lTD 796 wherein it is held that - Explanation 2 to section 37(1) which denies deduction for CSR expenses by way of business expenditure is applicable only to extent of computing 'business income' under Chapter IV-D and; there would be no bar for assessee to claim benefit under section 80G, falling in Chapter VIA. Relevant extract of the decision is reproduced as under:*

".....By this, the assessee seeks compliance with Explanation 2 of section 37 of the Act and, therefore, the revenue shall not have any grievance. Whether or not the assessee suo moto disallowed the amount spend towards the CSR while computing the business income is a verifiable fact.

6. After computing the business income, while computing the total income of the assessee, the assessee is invoking the benefit under Chapter VIA by claiming deduction of the sums under section 806 of the Act. According to the revenue, when once such sum went to satisfy the requirement of section 135 of the Companies Act, the benefit gets exhausted and such an amount is no more available for the purpose of claiming deduction under section 80G of the Act. There is no express provision to support the contention of Revenue. On the other hand, section 80G (2) (iiihk) and (iiihl) of the Act expressly provide that such sums donated for Swatch Bharath Kosh and Clean Ganga Fund shall be the amounts other than the sums spent by the assessee in pursuance of CSR, ... Out of so many entries under section 80G(2) of the Act, only donations in respect of two entries are restricted if such payments were towards the discharge of the CSR. The Legislature could have put a similar embargo in respect of the other entries also, but such a restriction is conspicuously absent for other entries. The irresistible conclusion that would flow from it is that it is not the legislative intention to bar the payments covered by section 80(5(2) of the Act which were made pursuant to the CSR, and other than covered by section 80G(2) (iiihk) and (iiihk) of the Act. As stated above, clue can be had from the restrictions by way of section 80G (2) (iiihk) and (ii/hl) of the Act. Explanation 2 to section 37(l) of the Act which denies deduction for CSR expenses by way of business expenditure is applicable only to extent of computing 'business income' under Chapter IV-D of the Act and; it could not be extended or imported to CSR contributions which was otherwise eligible for deduction under Chapter VI-A of the Act.

7. Where the deduction under section 806 of the Act is also disallowed, since CSR qualifying donations are not 'voluntary contributions', it will be a double jeopardy in the case of assessee. Assessee cannot be denied the benefit of claim under Chapter VIA of the Act, which is considered for computing 'Total Taxable Income". If assessee is denied this benefit, merely because such payment forms part of CSR, it

would lead to double disallowance, which is not the intention of Legislature at all. Legislature on this matter simply dealing with the computation of total income under chapter IVD pertaining to "Income under the head Business and Profession" and not at all dealt with the eligibility of assessee to claim deduction Li/S. 806 of the Act, falling in chapter VIA of the Act. It is further observed that genuineness of the transactions and identity of the donees are also not under challenge. All the payments were made through proper banking channel and appropriate donation receipts were also produced before the lower authorities and before us also.

8. As discussed and observed (supra), there is no bar for the assessee to claim benefit u/s. 806 of the Act, falling in Chapter VIA of the Act, we found observations of the Ld. PCIT as untenable in law, in the result grounds raised by the assessee are allowed and order of Ld. PCIT passed u/s. 263 of the Act is set-aside.

103. He further submitted that this issue is also covered in favour of the following decisions of the Tribunal.

- *DCIT-7(1)(1) v. MIs. Motilal Oswal Securities Ltd (ITA No. 1795/Mum12023) datec August 18, 2023*
- *EDO Ltd v. Principal Commissioner of Income-tax [2023] 157 taxmann.com 387 (Mum. Trib.)*
- *DOlT v. Peerless General Finance & Investment & Co. Ltd. [2019] 112 taxmann.com 410 (Kolkata Trib.)*
- *FNF India (P.) Ltd. v. Assistant Commissioner of Income- tax [2021] 133 taxmann.com 251 (Bangalore Trib.)*
- *Sling Media (P.) Ltd. v. Deputy Commissioner of Income- tax [2022] 194 lTD 1 (Bangalore - Tub)*
- *Infinera India (P.) Ltd. v. Joint Commissioner of Income- tax [2022] 194 lTD 463 (Bangalore Trib.)*
- *Allegis Services (India) Pvt Ltd vACIT (ITA No. 1693/Bang/2019)*
- *JMS Mining (P.) Ltd. v. Principal Commissioner of Income-tax, Kolkata-2 [2021] 91 ITR(T) 80 (Kolkata Trib.)*
- *M/s Goldman Sachs Services Pvt. Ltd. v JOlT (IT(TP)A*

NO. 2355/BangI2019)

- *First American (India) Pvt Ltd. vACIT (ITA N0 1762/Bang/2019)*
- *DCITv. Hira Industries Ltd.[2018] 90 taxmann.com 42 (RaipurTrib.)*

103. It is an undisputed fact that in so far as CSR expenses of Rs. 46.51 Crores, the assessee has already offered to tax in accordance with Section 37 and therefore, there is no issue of claiming of deduction on account of CSR expenses. However, out of the said amount, assessee has made donation to the institutions which are covered u/s.80G and has claimed 15% of the amount of Rs.9.44 Crores which were claimed at deduction in its return of income. This issue has been held by the Tribunal in series of cases wherein it has been held that the claim of deduction u/s.80G is independent of CST and the same has to be allowed in accordance with Chapter VIA was itself independent of prohibition provided in Section 37(1) which only pertains to CSR expenses, accordingly, the ground raised by the Revenue is dismissed.

104. In the result, appeals filed by assessee and Revenue for A.Yrs. 2016-17, 2017-18 and 2018-19 are partly allowed for statistical purposes.

Order pronounced on 26th July, 2024.

Sd/-	**Sd/-**
(RENU JAUHRI)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 26/07/2024

KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy// BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai