आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH: CHENNAI

श्री एबी टी. वर्की, न्यायिक सदस्य एवं श्री अमिताभ शुक्ला, लेखा सदस्य के समक्ष
BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER AND
SHRI AMITABH SHUKLA, ACCOUNTANT MEMBER
आयकर अपील सं./ ITA No.73/Chny/2017
निर्धारण वर्ष /Assessment Years: 2012-13

M/s. Orchid Pharma Ltd. **(Formerly Orchid Chemicals and Pharmaceuticals Ltd.),** **No.313, Orchid Towers,** **Valluvarkottam High Road,** **Nungambakkam,** **Chennai-34.** **[PAN: AAACO0402B]**	**Deputy Commissioner of Income Tax,** **Company Circle-5(1),** **Chennai-34**
(अपीलार्थी/Appellant)	**(प्रत्यर्थी/Respondent)**

अपीलार्थी की ओर से/ Assessee by	:	Shri B.Ramakrishnan, FCA & Shri Shrenik Chordia, CA.
प्रत्यर्थी की ओर से /Revenue by	:	Shri A.Sasikumar, CIT
सुनवाई की तारीख/Date of Hearing	:	19.09.2024
घोषणा की तारीख /Date of Pronouncement	:	11.12.2024

आदेश / O R D E R

PER AMITABH SHUKLA, A.M :

This appeal is filed against the order bearing F.No.106/DRP-2/BANG/2016-17/ dated 11.11.2016 of the DRP panel-2 Bangalure in respect of assessment u/s 143(3) r.w.s. 144C(1) dated 08.12.2016 for AY-2012-13 passed by DCIT, Corporate Circle-5(1), Chennai .

2.0 The appellant has in its appeal raised 24 grounds of appeal comprising transfer pricing issues as well as corporate additions. **Ground of appeal no. 1, 2 and 24 are general and do not require any specific adjudication. Similarly during the course of appeal, ground of appeal no.18 & 19 was not pressed and hence dismissed.**

3.0 The first ground raised by the assessee vide grounds of appeal number 3-7 is regarding the adjustment made by the Ld. TPO of Rs.1,01,40,092/- by making adjustments in respect of international transactions made with M/s. Northstar Health Care. The Ld. TPO had treated the said entity as a deemed AE. The Ld. DRP has discussed the findings of the Ld. TPO in para 3.2 to 3.3 of its order on page-3 respectively before confirming the action of the Ld. TPO.

3.1 The Ld. Counsel for the assessee informed the matter is covered in assessee's case by virtue of order of Hon'ble Coordinate Bench of this Tribunal vide ITA No.771/Chny/2016 dated 30.11.2016 for AY-2011-12 passed in assessee's own case. It was held therein that M/s.Northstar Health Care cannot be treated as deemed AE of the assessee. The Ld. DR argued in favour of order of the authorities down below.

3.2 We have heard the rival submissions in the light of material available on records. We have noted that an identical issue has been considered by the Hon'ble Coordinate Bench of this Tribunal whereby the

addition made by the Ld. TPO was deleted. We have noted the following observations of the Hon'ble Coordinate Bench:-

"*….17. Viewed in this perspective, we must adopt a sensible meaning of expression 'influence' which advances the scheme of the transfer pricing provisions rather than making these provisions unworkable. That meaning had to be a dominant influence which leads to de facto control over the other enterprise rather than an influence simplictor. If we are to adopt literal meaning of influence, as has been adopted by the authorities below, all the transactions on negotiated prices will be hit by the provisions of Section 92A(2)(i). In the light of the discussions above, the expression 'influence', in the present context, must remain confined to dominant influence which amounts to de facto control. Acceptance of terms of the buyer on commercial considerations, as in this case, cannot be treated as influence of the buyer. It is a commercial decision whether to accept the terms of the buyer, with respect to the price or related conditions, or not. It becomes influence, for the purpose of Section 92A(2)(i), when the seller is placed in such a situation that he has no choice, because of buyer's dominant influence, but to accept it. It is thus clear that context in which a reference is made to the expression 'influence' in section 92A(2)(i) I.T.A. No. 771/CHNY/2016 Assessment year: 2011-12 requires this expression to be read as a dominant influence in the sense of control by one enterprise over the other. Given the fact that the assessee's exports through the distribution part constitutes less than 5% of its entire exports, and less than 6% of its entire sales, Northstar is certainly not in a position to exercise any dominant influence, over the assessee. The assessee's decision to accept the terms set out by Northstar, even if that be so, may be justified on account of commercial expediencies or warranted by business exigencies or may simply be compulsion of this somewhat unique and complex business model, but it cannot, by any stretch of logic, be on account of dominant influence of Northstar as a customer. It may even be a sound business strategy to accept a rather passive and back seat role, if one can term it that way, in day to day decision making under this business model, but cannot be on account of dominant influence that Northstar exercises on buying of products from the assessee. The influence of Northstar, given the scale of business through Norrthstar as a distribution part, is too modest to make it a dominant influence in the nature of control. In this view of the matter, as also bearing in mind the earlier discussions on the issue, the assessee and Northstar can not be treated as 'associated enterprises' under section 92 A. We uphold the plea of the assessee.*

18. Ground no. 2 is thus allowed…."

3.3 The facts of present case and those of AY-2011-12, on this issue have been found to be identical and no differences were brought on record. It has also been noted that in assessee's own case for AY-2017-18 and AY-2018-19 the same issue was existing and the decision of Hon'ble Coordinate Bench of this tribunal in ITA No.771 supra was respectfully followed by an order vide IT(TP)A No.3 and 4 /Chny/2023 authored by me. Accordingly, in respectful compliance to the decisions of the Hon'ble Coordinate Bench, in assessee's own case supra, we direct the Ld. AO to delete the addition made of Rs.1,01,40,092/- on account of adjustment made by the Ld. TPO in respect of M/s.Northstar Health Care. **The ground of appeal no. 3 to 7 raised by the assessee are therefore allowed.**

4.0 The next issue raised by the assessee vide ground of appeal no. 8 to 9 is regarding the upward adjustments made by the Ld. TPO on account of sale of cephalexin and Levetiracetam Drugs to M/s. Karalex Pharma LLC USA amounting to Rs.5,53,17,014. The Ld. Counsel for the assessee informed that a similar issue was existing in AY-2017-18 and AY-2018-19 in assessee's case and vide IT(TP)A No.3 and 4 /Chny/2023, Coordinate Bench of this Tribunal had ruled the issue in favour of the assessee. The Ld. Counsel for the assessee thus placed

his reliance on the ratio laid down in order dated 27.09.2024 of this bench supra. The Ld. DR would like to make us believe on the correctness of order of authorities below.

4.1 We have heard rival submissions in the light of material available on records. We have also noted that the facts of the present case are akin to those existing in AY-2017-18 & 2018-19 supra. In assessee's case vide IT(TP)A No.3 and 4 /Chny/2023 dated 27.09.2024 this bench had decided as under:-

"…..9.0 We have heard the rival submissions in the light of material available on records. The only issue at the base of the controversy is the determination of ALP by the Ld. TPO. Whereas both the parties are in agreement over the method of ALP to be adopted i.e TNMM, the dispute is in respect of aggregate of transactions with ALPs viz-a-viz individual transactions with AE's. The action of the Ld. TPO in only considering transaction where margins were lower and ignoring those where margins were higher is also the bone of contention. We find that the OECD guidelines referred by the assesse comes to its rescue. We further note that a transaction defined in rule 10A(d) includes a number of closely linked transaction. Consequently for a comparability analysis a number of similar transaction may be required to be aggregated as Indian TP regulations do not have any guidelines for aggregation beyond the norm of closely linked transactions, reliance is required to be made to OECD and American guidelines. According to s 482-1-1(f)(2)(i) of the US regulation the combined effect of two or more separate transactions may be considered if such transactions taken as a whole are interrelated. It thus postulates that transactions are to be aggregated when they involve related product / services. We have also noted that the Hon'ble Coordinate Bench of this tribunal in the case of Mainetti India Pvt. Ltd., ITA No.1789 / Mds / 2011 for AY-2007-08 Supra has, ruling on nearly identical facts postulated that fairness requires that while determining ALP a TPO must consider all transaction i.e those where margins were lower as well as those where margins were higher to arrive at holistic

picture. The argument of the Ld. CIT(A) that the said decision is distinguished on the basis of being relevant to CUP method only and not TNMM is misplaced. The Hon'ble Coordinate Bench in principle has decided that in such situations, aggregation of transaction has to be done and that a TPO must consider all transaction i.e those where margins were lower as well as those where margins were higher to arrive fair ALP. True the CUP was involved in the impugned case but the same is irrelevant since the Hon'ble Coordinate Bench decided upon the governing principle of determination of ALP and not on the methodology prescribed in section 92C(1). To this extent the observation of Ld. CIT(A) that decision in the case of Mainetti India Pvt. Ltd., ITA No.1789 / Mds / 2011 for AY-2007-08 Supra is not correct. In the above view of the matter we hereby direct the Ld. TPO to recompute the ALP following the ratio laid down in ITA No.1789 Supra. The Ld. TPO would be required to give all opportunities of being heard to the assesse who shall comply with all the notices issued to him in this regard. Accordingly, the ground of appeal No.4 & 5 raised by the assesse are allowed for statistical purposes only….".

4.2 We have noted that the facts of the present case are akin to those as available in AY-2017-18 and 2018-19 and nothing has been brought on record to indicate that they are distinguished in any matter. Accordingly, in the line of decision in assessee's own case qua AY-2017-18 & 2018-19 supra the Ld. TPO is directed to recompute the ALP following the ratio laid down in IT(TP)A No.3 & 4/Chny/2023 Supra. The Ld. TPO would be required to give all opportunities of being heard to the assesse who shall comply with all the notices issued to him in this regard. Accordingly, the ground of appeal No.8 & 9 raised by the assesse are allowed for statistical purposes.

5.0 The next issue raised by the assessee vide ground of appeal No.10 is regarding the addition made by the Ld.AO of Rs.95,95,609/- by disallowing community development expenses claimed by the assessee and its confirmation by the Ld.DRP. The Ld. AO has discussed the issue in para 3 of his order. Before the Ld. AO the assessee had taken a plea that incurring of community development expenses is related to Corporate Social Responsibility(CSR) of the company. It was argued that the Government of India has mandated CSR expenditure as a mandatary requirement for Corporates in the country. The Ld. Counsel for the assessee submitted that the Ld. AO made the addition on the premise that the impugned expenses incurred by the assessee are not relatable to purposes of business and there is nothing in the act to justify allowability of expenses which are expended for non-business purposes. The Ld. AO also argued that there are a specific provisions under the act mainly Chapter-VIA which mandates spending for benefits of society at large. The DRP confirmed the findings of Ld. AO albeit without much discussions. The Ld. DR would like to place emphasis upon findings of lower authorities. The Ld. DR also argued that the amendment to the CSR expenses vide Finance Act 2014 in explanation-2 to section 37 of the act has prohibited allowance of expenditure on CSR activity.

5.1 We have heard rival submissions in the light of material available on records. It is the case of the assessee that as a responsible corporate it had incurred expenses towards community development in the field of education, health, youth development, woman empowerment etc. and therefore the said expenses are an integral part of its CSR activity. The Ld. Counsel for the assessee argued that the amendment brought in explanation-2 of section 37 in the act is operative from AY-2015-16 and that the said amendment is not retrospective in nature so as to hit the assessee in AY-2012-13. We find sufficient force in the argument of the assessee. No doubt by finance act 2014 amendments have been brought to section 37, the fact of the matter remains that for the assessment year under consideration no such prohibition was on statute. We have noted that to justify claim of an expenditure u/s 37, an assessee is required to prove firstly that the expenditure is not of capital nature, is not personal in nature and has been expended for business purposes. There is nothing on record that the impugned expenditure is either personal or capital or not incurred for the purposes of business. At least no evidence to this effect has been on records by the lower authorities. There is nothing on record to suggest or cast a shadow of doubt upon the genuineness of the said expenses. Consequently we are not in a position to sustain the order of lower authorities. Accordingly, we

set aside the order of lower authorities and direct the Ld. AO to delete the impugned addition. **Accordingly, the ground of appeal no. 10 raised by the assessee is allowed.**

6.0 The next issue raised by the appellant vide ground of appeal no. 15 to 17 is regarding an addition of Rs. 33,20,75,858/- made by the Ld. AO. The Ld. AO has discussed the issue in para 6 of his order. The Ld. AO had observed that the assessee had claimed, in its computation of income, deduction of Rs. 107 Crs app. as provision for rebates and discounts written back. In response to Ld. AO's query the assessee had informed that during AY-2009-10 and 2010-11 the assessee had created provisions of Rs. 40 Crs and Rs. 80 Crs respectively aggregating to Rs.120 Crs. It was argued that these amounts have been disallowed / added back while computing total income for respective years. Out of the above provisions amount of Rs.107 Crs has been reversed during previous year under consideration in its financial statements. As regards AY-2009-10 the Ld. AO noted that the assessee added provisions for rebates and discount to the tune of Rs.6,79,24,142/- while computing its export oriented unit (EOU) operations and Rs.33,20,75,858/- for its non-EOU operations. The Ld. AO allowed assessee's claim in respect of Rs.6,79,24,142/- only, holding that the claim of Rs.33,20,75,858/- was not

allowable as the impugned claim though added in the computation was not subjected to tax earlier as the assessee was eligible to claim deduction u/s 10B in AY-2009-10. The Ld. AO had argued that the claim, if allowed now, would amount to double deduction.

6.1 As regards the claim qua provisions of Rs.80 Crs. pertaining AY 2010-11, the Ld. AO noted that the assessee has sold the business of the undertaking to which the impugned claim pertained to, and that therefore the said reversal was not acceptable. The Ld. AO also noted that while adding back the impugned provisions the assessee had calculated tax at 20% whereas while reversing the same it has claimed the benefit at 30%.

6.2 We have heard the rival submissions in the light of material available on records. As far as action of the AO in disallowing Rs.33.20 Crs. is concerned we find force in the argument of the Ld. Counsel that the assessee, as per stipulations of section 36(1)(vii), a provision is allowed as deduction only in the year of write off and the contention of the Ld. AO regarding appellant enjoying tax holiday is therefore not relevant. The argument of the Ld. AO that the assessee's claim is inadmissible as it was eligible for claim of deduction u/s 10B is difficult to be accepted. The fact of the matter which has been admitted by the AO itself the assessee had offered the impugned amount during AY 2009-10 and added it back as provision in the computation of income. The mere fact

that it was otherwise a tax free income would not change the nature of the transaction. The reversal by the assessee has to be accordingly viewed in the light of accounting principles. A benefit accruing to a tax payer on account of a statutory stipulations cannot be taken away by the assessing authority on account of mere adverse presumption. In support of its contentions the Ld. AR of the assessee has placed reliance upon the decision of Hon'ble Gujarat High Court in the case of Banyan and Berry 222 ITR 831 and of Hon'ble Apex Court in the case of Walfort share and stock broker private limited 192 taxmann 211. We have also noted that the Ld. DRP has also not confirmed the order of the Ld. AO with any detailed findings and has only confirmed Ld. AO's findings in a summary manner. Accordingly, we are of the view that the addition made by the Ld. AO is not correct. We therefore set aside the order of the lower authorities and direct the Ld. AO to delete the addition of Rs. 33,20,75,858/-.

6.3 As regards the next limb of addition of Rs. 67 Crs is concerned, we have noted that the impugned provision pertains to AY-2010-11 and the assessee has reversed the transaction in AY-2012-13. We find as per the facts on records, the impugned provision was pertaining to transactions of assessee's generic injectable finished dosage business

which stood transferred to Hospira Health Care India Private Limited on account of some take over / restructuring of business, prior to previous year 2011-12 relevant to AY- 2012-13. At any take over / restructuring of business a contractual condition exists that the new party will take over all the assets and liabilities of the old party. Thus the new entity namely Hospira Health Care India Private Limited which had taken over assessee's generic injectable finished dosage business also become entitled to all the assets and liabilities of the of the assessee. To this extent we find force in the arguments of the Ld. AO that the said amount cannot be claimed by the assessee. We have also noted the concerns of the Ld. AO that assessee had calculated tax at 20% whereas while reversing the same it has claimed the benefit at 30%. We are therefore of the view that there is no merit in the case of the claim of the assessee when viewed in the light of peculiar facts of the present case. The Judicial Pronouncements also cited by the assessee would not come to his rescue given the existence of peculiar facts of the present case. **Accordingly, the addition made by the Ld. AO is confirmed. Consequently, the grounds of appeal no. 15 to 17 are partly allowed.**

7.0 The next issue raised by the appellant vide ground of appeal no. 13 and 14 is regarding an addition of Rs. 28,32,000/- made by the Ld. AO by invoking provisions of section 37(1) of the act. The Ld. AO has

discussed the issue in para 5 (iii) of his order. It was noted that the provisions were created at the end of the year and no party account was credited. In the absence of satisfactory explanation coming from the assessee, the AO proceeded to make the addition. The DRP confirmed the findings of the Ld. AO on the premise that a provision can be made when actual liability has been accrued in a year but could not be spent for some justified reasons. It was held that under the mercantile system of marketing accrual of liability for any expenditure is not depended upon receipt of invoice from the person to whom payment for expenditure has to be made and that the accounting practice followed by the assessee was contrary to the mercantile system of accounting. The assessee had also reportedly not made any TDS on the amounts of provision. The Ld. Counsel for the assessee argued that appellant had manufactured certain products through job works and as bills were received in subsequent years it merely created a provision. It argued that the impugned products on which job work was executed was sold during the year under consideration and hence provisions were raised. The Ld. Counsel for the assessee further argued that there is no loss to the revenue as the tax rates for the present year and those of subsequent year are the same, the issue is tax neutral.

7.1 We have heard rival submissions in the light of material available on records. The genuineness of the impugned job work charges is not in dispute. It is also not in dispute that the assessee has offered the corresponding sales attributable to the job work during the said year. We have also found that there is no dispute qua regarding any benefit accruing to the tax payer on account of differential tax rates. It is also not a case of a provision being created qua an unascertained liability. This being the case we do not find any infirmity in the demand of the assessee regarding the allowance of the impugned expenses. Accordingly, we direct the Ld. AO to delete the impugned addition of Rs.28,32,000/-. **The ground of appeal raised 13 & 14 are therefore allowed.**

8.0 The next issue raised by the assessee vide ground of appeal no. 11 and 12 are regarding an addition of Rs.34,90,37,833/- made by the Ld. AO while disallowing claim of deduction u/s. 35(2AB) of the act. The Ld. Counsel for the assessee invited our attention to para 4 of the order of the Ld. AO. According to AO, the assessee had not filed supporting evidence as well as the required Form 3CL and therefore he proceeded to add the impugned addition. The Ld. Counsel for the assessee argued that though admittedly the assessee is not having Form 3CL, it is nonetheless entitled for deduction u/s 37 r.w.s. 32 of the Act. In support

of its arguments the Ld. Counsel for the assessee relied upon the decision of Hon‘ble Coordinate Bench of Ahmadabad Tribunal in the case of Sun Pharmaceutical industries (TS-6785-ITAT-2016) wherein it was held that where form 3CL is not available, weighted deduction u/s. 35(2AB) can be allowed. The Ld. DR relied upon the order of the authorities below.

8.1 We have heard the rival submissions in the light of material available on records. Form 3CL is a mandatory requirement for claiming deduction u/s 35(2AB). Non-availability thereof would preclude the assessee from rightfully claiming the statutory deduction. It is trite law pronounced and reiterated by Hon’ble Supreme Court in a catena of judgements that where law is unambiguously candid, there is no scope for any different interpretation by the courts than the one specified therein. We have however found sufficient force in the alternate argument of the appellant that in the event of denial of weighted deduction u/s 35(2AB), for want of prescribed Form 3CL, the assessee would be eligible to at least the deduction u/s 37 / section 32 of the act. The Ld. Counsel for the assessee submitted that during the year it has incurred Rs.34,90,37,833/- on account of expenditure on scientific research etc. It was stated that within the meanings of provisions of 37 a

part of the same would be classified as capital expenditure and the balance as revenue expenditure. It was also urged that on the component of capital expenditure the assessee would be entitled for depreciation u/s 32. Accordingly, the order of lower authorities on this issue is set aside. The Ld. AO is directed to readjudicate the matter de novo and consider allowing assessee's claim of deduction u/s 37 / 32 in accordance with law after giving opportunity of being heard to the assessee. The assessee shall provide the Ld. AO bifurcation of the capital and revenue expenditure as available in its records. The Ld. AO would then allow the assessee the impugned expenses u/s 37 and 32 in accordance with law. The assessee shall comply with all the notices issued by the Ld.AO on the matter. **Accordingly ground of appeal no.11 is dismissed and 12 is allowed for statistical purposes.**

9.0 The next issue raised by the assessee vide ground of appeal no. 20 to 23 are regarding an addition of Rs.2,46,87,24,112/- made by the Ld. AO while disallowing claim of deduction in respect of FCCB issued by the assessee during 2006-07 and which was redeemed during the previous year under consideration at a premium of Rs. 42.87%. The assessee had incurred expenditure of Rs.247.87 Crs towards premium on redemption of said FCCB and the same was claimed in the computation of income. The Ld. AO had discussed this issue in para 8

of its order. While making the impugned addition, the Ld. AO noted that admittedly the assessee had not deducted any TDS in compliance to provisions of section 196D of the act. The Ld. AO had further observed that the impugned FCCB or debentures were issued subject to condition that they will be redeemed in Feb-2012 that is after five year period. It is the case of the Ld. AO that the impugned deduction has to be amortized and spread over five year period else it will give a distorted picture of its profits if claimed in one year. The Ld. AO also relied upon the decision of the Hon'ble Supreme Court in the case of Madras Industrial investment corporation Vs CIT holding that discount of debentures is to be spread over the period of debentures and that the same analogy would also apply even though the case at hand issue of premium paid / payable on debentures.

9.1 The Ld. Counsel for the assessee argued that the expenditure in the nature of premium is akin to a liability to obtain the usage of funds for its business and therefore is in the nature of revenue expenditure and therefore allowable. The Ld. Counsel argued that 196D is not applicable as the funds are not payable to foreign institutional buyers nor it is a securities as falling under meaning of section 115AD(1)(a). The assessee submitted that section 196C would however be applicable as no TDS deduction u/s 40(a)(i) was done. The Ld. Counsel therefore

pleaded that the deduction may be directed to be allowed in the year when TDS is made. The Ld. DR placed reliance upon the lower authorities.

9.2 We have heard rival submissions in the light of material available on records. It is an undisputed fact of the case that the assessee has issued FCCB during 2006-07 and which have been redeemed by incurring a premium expenditure of Rs. 246.87 Crs during the year under consideration. It is also an undisputed and rather admitted fact on records that no TDS deduction u/s 40(a)(i) was done by the assessee. To this extent the disallowance made by the Ld. AO has been found to be in order. However we have also noted that no adverse findings have been given by the Ld. AO as regards to commercial expediency of the impugned expenditure on premium or regarding the genuineness of the said expenditure. The argument of the Ld. AO about amortization also does not find favour with us since even though he argued for amortization he has himself chosen not to allow the assessee 1/5th of Rs.246.87 Crs and proceeded to add the entire figure. In the absence of any adverse findings qua commercial expediency of the impugned expenditure on premium or regarding the genuineness of the said expenditure brought on records we are unable to concur with the findings of the lower authorities. The order of Ld. Lower authorities is therefore set aside. However, we

have also noted that the impugned expenditure cannot be allowed as deduction in the year under consideration on account of the same not being exposed to any TDS deduction u/s 40(a)(i). Accordingly, we direct the Ld. AO to allow the impugned expenses in the year when TDS deduction u/s 40(a)(i) is made by the assessee. Accordingly, the grounds of appeal no. 20 to 23 are allowed for statistical purposes.

10. In the result, the appeal of the assessee is partly allowed.

Order pronounced on 11th , December-2024 at Chennai.

Sd/-	**Sd/-**
(एबी टी. वर्की)	**(अमिताभ शुक्ला)**
(ABY T VARKEY)	**(AMITABH SHUKLA)**
न्यायिक सदस्य / Judicial Member	**लेखा सदस्य /Accountant Member**

चेन्नई/Chennai, **दिनांक**/Dated: 11th , December-2024.

KB/-

आदेश की प्रतिलिपि अग्रेषित**/Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त/CIT – Coimbatore.
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF