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

BEFORE: SMT. ANNAPURNA GUPTA, ACCOUNTANT MEMBER
AND
Ms. SUCHITRA KAMBLE, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No. 392/Ahd/2023

(**निर्धारण वर्ष** / Assessment Year : 2017-18)

Zydus Lifesciences Ltd. 4th Floor, Zydus Corporate Park, Scheme No.63, Survey No.536, Khoraj (Gandhinagar), Nr. Vaishnodevi Circle, S. G. Highway, Ahmedabad, Gujarat – 382481	**बनाम**/ Vs.	**Dy. Commissioner of Income Tax** Central Circle 2(1), Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACC6253G		
(**Appellant**)	..	(**Respondent**)

अपीलार्थी ओर से /**Appellant by :**	Shri Mukesh Patel, Shri Ajit Kumar Jain & Ms. Sonal Pandey, ARs.
प्रत्यर्थी की ओर से/**Respondent by :**	Shri Prathvi Raj Meena, CIT.DR

Date of Hearing	31/10/2025
Date of Pronouncement	29/01/2026

(आदेश)/ORDER

PER ANNAPURNA GUPTA, AM:

The present appeal has been filed by the assessee against the order of the Ld. Dy. Commissioner of Income Tax, Ahmedabad (hereinafter referred to as "DCIT"), dated 30.03.2023 passed under Section 153C r.w.s. 144C r.w.s. 143(3) of the Income Tax Act,

1961 (hereinafter referred to as the "Act") and relates to Assessment Year (A.Y.) 2017-18.

2. The grounds of appeal raised by the assessee are as under:

"1. That the learned Transfer Pricing Officer (TPO) has erred in law and on facts in exceeding the jurisdiction by passing the TP Order under Section 92CA(3) of the Income-tax Act, 1961 (the Act) beyond the mandatorily prescribed time limit as per Section 92CA(3A) read with Section 153(4) of the Act, thereby making the TP Order barred by limitation and invalid in law.

2. That the learned AO/TPO/Dispute Resolution Panel (DRP") has erred in law and on facts in making an addition of Rs 8,54,24,075/ on account of Corporate Guarantee Charges

3. That the learned AO/TPO/DRP has erred in law and on facts in making addition of Rs 2,65,51,520/- on account of interest Imputation on Optionally Convertible Loans advanced to Zydus International Pvt. Ltd.

4. That the learned AO/TPO/DRP has erred in law and on facts in making addition of Rs. 7,61,41,741/- on account of Reimbursement of Expenses to Zydus France SAS (Zydus France') and Zydus Healthcare SA (Pty) Ltd.

5. That the learned AO/TPO/DRP has erred in law and on facts in making an addition of Rs. 72.78,05,930/- on account of sale of finished products to Zydus Pharmaceuticals USA Inc (Zydus USA') Further, the learned AO/TPO/DRP has erred in law and on facts in not providing the benefit of +/- 3 percent variation as per second proviso to section 92C(2) of the Act.

6. That the learned AO / TPO / DRP has erred in law and on facts in rejecting consistent benchmarking approach followed by the Appellant, rejecting functionally comparable companies and arbitrarily cherry-picking companies for the purpose of benchmarking the transaction of sale of goods to Zydus USA.

7. That the learned AO/TPO/DRP has erred in law and on facts in making an addition of Rs.98,41,734/-on account of sale of finished products to Zydus France.

8. That the learned AO/TPO/DRP has erred in law and on facts in rejecting consistent benchmarking approach followed by the Appellant, rejecting functionally comparable companies and not

adhering to Rule 10CA of the Income-tax Rules 1962 for the purpose of benchmarking the transaction of sale of goods to Zydus France.

9. *That the learned Assessing Officer erred in law and on facts in making an addition of Rs. 15,81,02,870/- (Being 200% of Rs.7,90,51,435) by holding that the appellant was not entitled to the weighted deduction for expenditure on Scientific Research u/s 35(2AB) being non-eligible R&D capital expenditure merely on the basis of Form no. 3CL, issued by the DSIR, Delhi, without his own findings and verification of the facts.*

   Further, the learned Assessing officer erred in law and on facts in even not allowing basic deduction of Rs.7,90,51,435/- at the rate of 100% u/s 35(1)(iv) as directed by the Hon'ble DRP vide their directions given under paras 5.3.4 and 5.3.5 of their order dated 28/06/2022.

10. *That the learned Assessing Officer erred in law and on facts in making an addition of Rs. 92,54,99,404/- (Being 200% of Rs.46.27,49,702) by holding that the appellant was not entitled to the weighted deduction for expenditure on Scientific Research u/s. 35(2AB) being non-eligible R&D revenue expenditure merely on the basis of Form no. 3CL issued by the DSIR, Delhi, without his own findings and verification of the facts.*

    Further, the learned Assessing officer erred in law and on facts in not allowing even basic deduction of Rs. 46,27,49,702/- at the rate of 100% u/s 35(1)(i) as directed by the Hon'ble DRP vide their directions given under paras 5.34 and 5.3.5 of their order dated 28/06/2022.

    The learned Assessing Officer also erred in law and on facts in not allowing weighted deduction for expenditure on Scientific Research u/s, 35(2AB) in respect of Clinical Trials and Bio-equivalence Study of Rs. 3,73,40,000/-

11. *That the learned Assessing Officer erred in law and on facts in allowing short credit for TDS and TCS of Rs 9,02,68,127/- in the tax computation even though duly granted under an intimation processed u/s 143(1) by the CPC.*

12. *That the learned Assessing Officer erred in law and on facts in not allowing credit for relief claimed u/s 90 of Rs. 37,46,819/-.*

13. *That the learned Assessing Officer erred in law and on facts in inadvertently adjusting total amount of refund issued u/s. 143(1) amounting to Rs 33,98,42,871/- (including interest u/s 244A of Rs 3.64.11.732), instead of the only adjustment required to the extent of the tax refund amount of Rs 30,34,31,139/-.*

14. That the learned Assessing Officer erred in law and on facts in mechanically initiating Penalty Proceedings u/s 270A of the I.T. Act in respect of each of the additions made in the assessment order u/s 143(3), on the ground that the Appellant has under reported its income for A.Y. 2017-18.

15. That the learned TPO erred in law and on facts in levying Penalty u/s 271G of the I.T. Act in respect to the international transaction of sale of finished goods by the Appellant to Zydus France, on the mere fact that the Appellant was not able to show the physical demonstration of DIANE database at the time of Covid-19 pandemic, thereby subjecting the Appellant to an act of "impossibility of performance".

3. Briefly stated, the assessee company is a manufacturer and trader of pharmaceutical products including veterinary pharmaceutical products operating both at the domestic level and internationally. As regards domestic business, the assessee company employed marketing field force and incurred all marketing and sales promotion expenses. It also appointed C&S agents across the country to carry out selling and distribution functions on behalf of the assessee company. As regards international business, the assessee company exported goods to various foreign countries either directly or through its Overseas Associate Enterprise. The details of international transaction in terms of Section 92B of the Act between the assessee and its associate enterprise were given in Form 3ECB and the aggregate value of the international transactions mentioned therein was Rs.21,54,00,08,465/-. A reference u/s.92CA(1) of the Act was sent by the AO to the TPO to determine the Arm's Length Price of the international transactions undertaken by the assessee company during the impugned year. The TPO passed an order u/s.92CA(3)

of the Act working out an upward adjustment amounting in all to Rs.1,09,40,43,324/- with respect to the international transaction tabulated at page 4 of the assessment order:

Sr. No.	*Particulars*	*Amount INR*
1	*Benchmarking of Corporate Guarantee*	*25,96,89,186*
2	*Benchmarking of Convertible Loan*	*2,65,51,520*
3	*Benchmarking of Reimbursement of Expenses*	*7,61,41,741*
4	*Benchmarking of transactions entered into with M/s. Zydus Pharmaceuticals (USA). Inc.*	*72,78,05,930*
5	*Benchmarking of AEs based in France*	*38,54,947*
	Total Adjustment	*109,40,43,324*

4. The AO further disallowed excess claim of deduction of R & D expenses, claimed u/s.35(2AB) of the Act, amounting to Rs.1,08,36,02,274/-. A draft order incorporating the Transfer Pricing adjustments made and the disallowance of excess claim of deduction u/s.35(2AB) of the Act was passed by the AO. The assessee filed objections to the same to the DRP who, in turn, gave directions in its order passed u/s.144C of the Act following which the AO passed order making addition u/s 92CA(3) of the Act to Rs.92,57,65,000/- and u/s 35(2AB) of the Act to Rs.108,36,02,274/-.

5. Aggrieved by the same, the assessee has come up in appeal before us.

6. Ground No.1 was stated to be not pressed before us by the Ld. Counsel for the assessee. The same is, therefore, dismissed as not pressed.

7. Ground No.2 relates to transfer pricing adjustment made to the international transaction of corporate guarantee commission earned by the assessee amounting to Rs.8,54,24,075/-.

8. At the outset, Ld. Counsel for the assessee stated that this was a legacy issue which had arisen in the case of the assessee in the earlier years also and had repeatedly been decided in favour of the assessee by the ITAT. He contended that the adjustment on account of the impugned international transaction was made by the TPO based on his findings in the preceding years in the case of the assessee and the ITAT in all the preceding years had deleted the adjustment made by the TPO.

9. Drawing our attention to the facts of the case, Ld. Counsel for the assessee drew our attention to Page No.4 of the TPO's order pointing out the corporate guarantees issued by the assessee to its AEs listed thereon. He pointed out that in the TP study report, the assessee had benchmarked corporate guarantee, charged @1%, by taking "*Such Other Method* "as the Most Appropriate Method (MAM). The TPO, however, noted that in the TP orders of the assessee for A.Ys. 2013-14, 2014-15, 2015-16 & 2016-17 the impugned transaction had been benchmarked @2.52%. Noting

so and confronting the same to the assessee and after considering the reply of the assessee, the TPO went on to apply the average rate of 2.52% for the commission earned on corporate guarantees. The TPO followed the benchmarking done in identical transactions of the assessee in A.Y. 2014-15, noting that the rate of 2.52% was the arithmetic mean of external CUP's in the form of corporate guarantee fees charged by the State Bank of India @2.75% and Bank of India @2.16% and the coupon's rate of A rated bonds and B rated bonds of 2.66%. Accordingly, he proposed an upward adjustment to the international transaction commission earned on corporate guarantees by the assessee amounting in all to Rs.25,96,89,186/-. Ld.Counsel for the assessee drew our attention to para 6.2.1 & 6.2.2 of the TPO's order in this regard as under:

> *"6.2.1 During the TP proceedings, the assessee has provided the details of guarantees to banks with respect to borrowings of its AEs. On verification, it is seen that majority of the Corporate Guarantees were given in earlier years and it has continued in this year also. The contentions made in respect of corporate guarantee are identical to those made in AY 2014-15. In AY 2014-15, the Corporate Guarantee fee was benchmarked taking the rate of 2.52%. This rate is the arithmetic mean of external CUPs in the form of corporate guarantee fees charged by State Bank of India @2.75% per annum and Bank of India @2.16% charged by and the coupon rates of 'A' rated bonds and 'BB' rated bonds of 2.66%. The average of the above 3 CUPs comes to 2.52%. The issue is pending before various appellate authorities.*
>
> *6.2.2 Therefore, applying the average rate of 2.52% as ALP rate, the adjustment in respect of corporate guarantee amounting to Rs.25,96,89,186/-is made. The details of working are given below:*

Associated Enterprise	*Amount*
Sentynl Therapeutics Inc., USA	*1,75,56,411*
Laboratories Combix S.L.	*15,26,859*

Zydus France (SAS)	*11,45,163*
Zyclus Pharmaceuticals (USA) Inc.	*12,69,18,816*
Zydus Healthcare S.A. (Pty) Limited	*34,20,932*
Zydus Noveltech Inc	*1,71,10,811*
Zydus Pharmaceuticals Mexico, S. A. de C. V., Mexico	*4,50,700*
Alidac Healthcare (Myanmar) Limited	*15,51,101*
Zydus International Private Limited	*11,67,356*
Total	*17,08,48,149*
ALP	*43,05,37,335*
Adjustment Amount	*25,96,89,186*

10. The DRP, it was pointed out, directed the restriction of the ALP of corporate guarantee commission to 1.5%, following the decision of the Hon'ble Bombay High court in the case of Everest Kanto and the case of Glenmark Pharmaceuticals Ltd.in ITA No.5031/Mumbai/2012 dated 13-11-2013 as affirmed by the Hon'ble High court.

11. Ld. Counsel for the assessee, thereafter, pointed out that the ITAT in the case of the assessee for A.Y.2015-16 had dealt with an identical issue and noting that identical adjustment made in the case of the assessee in A.Y. 2014-15 had been deleted by the ITAT, the adjustment made in A.Y. 2015-16 was also deleted. He drew our attention to para 4 to 11 of the order of the ITAT placed before us in paper book page nos. 111 to 117, more particularly, our attention was drawn to the fact that the ITAT had taken note of its own case in the case of the assessee in A.Y. 2014-15 deleting identical adjustment made in the case of the assessee. He contended, therefore, that since the TPO in the present case had

followed his order for A.Y. 2014-15, similar adjustment made in the impugned year also needed to be deleted.

12. Ld. DR was unable to controvert the factual contention made by the Ld. Counsel for the assessee as above. He was also unable to point out any distinguishable facts in the case of the assesee for A.Y. 2014-15 & 2015-16. More particularly, he was unable to controvert the fact that the TPO had followed his order for A.Y. 2014-15 while making the impugned adjustment, which adjustment in A.Y. 2014-15 already stood deleted by the ITAT's order.

13. In view of the same, we do not find any merit in the adjustment made to the international transaction of commission paid on corporate guarantees amounting to Rs.85,42,04,075/- since admittedly the issue stands covered in favour of the assessee by the order of the ITAT in the case of the assessee for A.Y 2014-15. We accordingly direct deletion of the adjustment made to the international transaction of corporate guarantee to the tune of Rs.8,5424,075/-.

14. Ground of appeal No.2 of the assessee is accordingly allowed.

15. Ground of appeal no.3 relates to the adjustment made to the international transaction of interest earned on convertible loans given by the assessee to its associate enterprise i.e. Zydus

International Pvt. Ltd. and Zydus Worldwide amounting to Rs. 2,65,51,520/-.

16. Ld. Counsel for the assessee contended that this adjustment had also been made following the orders passed by the TPO in the preceding years in the case of the assessee i.e. right from A.Ys. 2012-13 to A.Y. 2016-17 and he again pointed out that in all the said years the matter had travelled to the ITAT and the adjustment stood deleted. Therefore, he stated that the issue should covered in favour of the assessee.

17. Drawing our attention to the facts of the case, Ld. Counsel for the assessee pointed out from page 15 of the TPO's order that the assessee was noted to have advanced optionally converted loans to Zydus International Pvt. Ltd. and Zydus Worldwide amounting to Rs.1,66,47,50,000/- and Rs.7,81,62,53,202/-; respectively. In the transfer pricing study report, the assessee was noted to have benchmarked the interest on the said loans by following "*Other Method"* as the Most Appropriate Method (MAM). The assessee had claimed these transactions to have not given rise to any taxable income and that they had been identified as international transaction as a matter of abundant caution. Accordingly, the transactions had been claimed as to be at Arm's Length. The TPO however noted that in the orders passed in the case of the assessee from A.Ys. 2012-13 to 2016-17 onwards, the transaction was benchmarked at contractual rate applicable to the

said loan by adopting the appropriate US LIBOR/EU LIBOR rates and after giving due opportunity of hearing to the assessee and adopting the same methodology as was adopted in the preceding years in case of the assessee, upward adjustment on account of interest on convertible loans was made amounting in all to Rs.2,65,51,520/-. The DRP, it was pointed out, dismissed the objection of the assessee in this regard following its directions in the preceding years in the case of the assessee. The DRP noted the issue to have been adjudicated in favour of the assessee by the ITAT in preceding years but finding the Revenue to have filed appeal against the orders of the ITAT, therefore to keep the issue alive the DRP rejected assesses objections.

18. Ld. Counsel for the assessee, thereafter, drew our attention to the order of the ITAT in A.Y. 2015-16 placed at paper book page nos. 111 to 117, drawing our attention, more particularly, to para 12 to 17 of the order pointing out that the ITAT had deleted the decision following its order in the case of the assessee from A.Ys. 2008-09, 2010-11, 2012-13, 2013-14 & also 2014-15.

19. Ld. DR was unable to controvert the factual contention of the assessee, more particularly, that the impugned disallowance had been made by the TPO and upheld by the DRP following order in the preceding years in the case of the assessee, which adjustments in the preceding years stood deleted by the ITAT in all the years. No distinguishing facts were brought to our notice. In view of the

same, we find no reason to confirm the adjustment made to the international transaction of interest earned on convertible loans issued by the assessee, finding the same to be admittedly covered in favour of the assessee by the orders of the ITAT in the preceding years. The adjustment, therefore, made to the tune of Rs.2,65,51,520/- on this account is directed to be deleted.

20. Ground of appeal no.3 is, therefore, allowed.

21. Ground No.4 raised by the assessee relates to the adjustment made to the international transaction of reimbursement of expenses, being Rs.7,61,41,741/-.

22. At the outset itself, Ld. Counsel for the aassessee stated that the adjustment made in this case also by the TPO was based on and following his findings in the preceding years in the case of the assessee and the adjustments in the preceding years also stood deleted by the ITAT. Therefore, he stated that the issue was covered in favor of the assessee.

23. Drawing our attention to the facts of the case, Ld.Counsel for the assessee pointed out that the assessee had reported certain transaction of reimbursement of expenses to its AEs in Form No.3CEB which are reproduced at page 44 of the TPO's order. The Assessee had claimed these expenses to have been incurred by the AEs on behalf of the assessee, being in the nature of insurance

charges, legal expenses, clinical charges, product registration charges, regulatory fees, conference registration, etc. He stated these transactions to have been undertaken to ensure that business interest of the assessee is protected in those countries where the AEs distributed products and also to ensure that no intangibles are created in those countries. Thus, it was claimed by the assessee that the actual costs incurred by the AEs had been reimbursed without any mark up and these transactions were considered at arm's length. The TPO, however, held the arm's length price of these international transactions to be made following the order passed in the earlier years in the case of the assessee. His findings in this regard, Ld. counsel for the assessee pointed out, are contained at Para 8.3 to 8.3.5 of his order. Ld. Counsel for the assessee, thereafter, pointed out that identical adjustment made in the case of the assessee in A.Y. 2015-16 was deleted by the ITAT and he drew our attention to the findings of the ITAT in this regard at para 18 to 22 of the order placed at paper book page nos. 120 to 125 as under:

> *"18. Ground No.1(c) (supra) relates to TP adjustment made to the income of the assessee on account of alleged reimbursement of expenses to its AE. This issue was also stated to be covered in favour of the assessee consistently by the decision of the ITAT in preceding assessment years.*
>
> *The ld.DR fairly conceded, though, he vehemently relied on the orders of the authorities below.*
>
> *19. The facts relating to the issue find mentions at para 7.2 to 4.5 of the order of the TPO and emanate from the same that the assessee during the year had reimbursed expenses to its AE's Zydus Pharmaceuticals, Mexico & Zydus France. The assessee's contention was that all these expenses were made by way of reimbursement on cost-to-cost basis to this overseas enterprises.*

20. With respect to Zydus, France, the assessee had contended reimbursement of the product submissions and regulatory fees as also reimbursement of reprinting charges, while with respect to Zydus Pharmaceuticals, Mexico, the assessee had contended reimbursement of clinical research and product registration expenses. The assesee's contention was that the reimbursement had been made for products wherein the assessee was intellectual owner and played role of entrepreneur whereas the associate entity was only a distributor. The TPO and the DRP took a view that there was a contradiction in FAR analysis in the TP report and submissions made by the assessee, while justifying the ALP expenses reimbursed. It was noted that the FAR analysis in the TP report, the assessee had been classified as contract manufacturer, and accordingly, both the TP and DRP held that in such circumstances, the AE cannot be said to have incurred expenses on behalf of the assessee-company. The case of theTPO/DRP was that no contract manufacturer in similar uncontrolled transactions, would reimburse expenses of another third-party, since contract manufacturing is a limited risk activity with no rewards and does not require any other expenses of such nature to be incurred.

21. We have gone through the order of the ITAT for Asst.Year 2014- 15, wherein the issue has been dealt with at para 11 to 14 of its order. The relevant findings of the TPO are as under:

> *"11. The brief facts in relation to this ground of appeal are that during the year under consideration, the assessee had reimbursed expenses to three associated Enterprises: Zydus pharmaceuticals Mexico, Zydus France and Zydus Japan. The assessee's contention is that all these expenses were made by way of reimbursement on cost of cost basis to these overseas associated enterprises. With respect to reimbursements made to Zydus Mexico, the assessee's contention is that Zydus Mexico had incurred certain expenses related to clinical research and product registration for assessee's products. The assessee's contention is that the reimbursements have been made by the assessee for the products wherein the assessee is the IP owner and plays the role of entrepreneur whereas Zydus Mexico is only a distributor entity. With respect to reimbursement of expenses to Zydus France, the assessee submission was that the expenses have been reimbursed to Zydus France only for those matters where the assessee is acting as an entrepreneur (while the assessee admitted that for some products, he also acted as a contract manufacturer, but the assessee submitted that no reimbursements were made by the assessee to Zydus France in respect of the same). During the year, Zydus France had incurred certain expenses related to product submission and regulatory fees, control and testing fees, leaflet replacement cost and production sample cost for assessee's products. These costs have been reimbursed by the assessee to Zydus France on cost to cost basis without any markup. Thirdly, the assessee also made reimbursements to Zydus Japan on Cadila Healthcare Ltd. vs. DCIT cost to cost basis by way of*

reimbursement of certain expenses in the nature of insurance for clinical trial studies on behalf of the assessee for administrative convenience. The TPO as well as the DRP however took the view that there was contradiction in the FAR analysis in the transfer pricing report and the submissions made while justifying the reimbursement of expenses. This was also observed by the TPO in the orders for assessment year 2012-13 and assessment year 2013-14. In the FAR in transfer pricing report for transactions with AEs viz. Zydus France, Zydus Japan, the assessee has been classified as a contract manufacturer. Since the assessee company has been taken to be a contract manufacturer and benchmarked as such, then the expenses incurred by the Associated Enterprises cannot be taken to have been incurred on behalf of the assessee company. The TPO to the view that no contract manufacturer, in similar uncontrolled transactions, would reimburse the expenses of another/third-party. Contract manufacturing is a very limited risk activity with low rewards and hence does not require incurring expenses of such nature. In view of this, the arms- length price (ALP) was taken as "Nil" by the TPO.

12. Before us, the counsel for the assessee reiterated the arguments taken before TPO/DRP to the effect that the assessee had reimbursed the Associated Enterprises on cost to cost basis. The counsel for the assessee submitted that the TPO and DRP has erred in facts in coming to the conclusion that the assessee was acting as a contract manufacturer for the above entities and the cost to cost reimbursements to these entities were in respect of its activities as a contract manufacturer. He submitted that the assessee was the IP owner and all the reimbursements were made with Cadila Healthcare Ltd. vs. DCIT respect to assessee's business interests in these jurisdictions. In respect of Zydus Mexico, the assessee filed submission dated 2ndJune 2022 and drew our attention to relevant extracts of the supply and distribution agreement between the assessee company and Zydus Mexico to demonstrate that in fact, assessee is the IP owner and therefore reimbursements were made in connection with protection of assessee's interest outside of India. He further drew our attention to the Transfer Pricing Study Report at pages 48 and 49 of the paper book to reiterate that the assessee is acting as an entrepreneur/IP owner and Zydus Mexico is acting as its distributor. He further drew attention to pages 593 to 613 of the paper book by giving necessary supporting for expenses reimbursed to Zydus Mexico for clinical research and product registration. The assessee further submitted that similar expenses were reimbursed by the assessee to Zydus USA, who is acting as a limited risk distributor for the assessee. The assessee obtained a favourable order of ITAT for assessment year 2012-13 (copy annexed at pages 166 to 168 of paper book) in respect of these reimbursements made by the assessee to Zydus USA. With respect to payments made to Zydus France, the counsel for the assessee submitted that the fact that the assessee is acting as an entrepreneur/IP owner and Zydus

France is acting as its low risk distributor (LRD) is evident from the transfer pricing report at pages 48-49 of the paper book. He drew attention to the supply and distribution agreement at pages 491-498 of the paper book to reiterate that the assessee is the IP owner. He further drew our attention to pages 505-592 of the paper book, to the supportings for expenses reimbursed by Zydus France for product submission and regulatory fees, control and testing fees, the leaflet replacement cost of product innovator sample costs. The assessee submitted Cadila Healthcare Ltd. vs. DCIT that all these expenses have been reimbursed in respect of those expenses incurred by Zydus France where the assessee company is acting as the entrepreneur/IP owner and Zydus France is acting as low risk distributor. The assessee obtained a favourable order of ITAT for assessment year 2012-13 (copy annexed at pages 166 to 168 of paper book) in respect of these reimbursements made by the assessee to Zydus USA, whereas the latter was acting as the low risk distributor for the assessee. With respect to cost to cost reimbursements made by the assessee to Zydus Japan, the assessee submitted that these were reimbursements made to Zydus Japan for insurance charges and he drew attention to pages 614-15 of the paper book. The assessee's contention is that in all cases, the expenses were reimbursed on cost of cost basis to the overseas entities in respect of those expenses which were incurred by these overseas associated Enterprises on behalf the assessee company wherein the assessee was acting in the capacity of an entrepreneur/IP owner. Accordingly, the AO has erred in facts and in law computing the arm's-length price at "Nil" in respect of these payments.

13. We have heard the rival contentions and perused the material on record. In our considered view, the assessee has been able to demonstrate that these expenses were incurred by way of reimbursement to its associated Enterprises-Zydus Mexico, Zydus France and Zydus Japan in respect of expenses incurred by these overseas Associated Enterprises on behalf of the assessee company, wherein the assessee were acting in the capacity is an entrepreneur/IP owner, on a cost to cost basis. The assessee has given supporting documents in respect of the nature of reimbursements, from which it can be inferred that the expenses were essentially incurred with Cadila Healthcare Ltd. vs. DCIT respect to assessee's business interests in these overseas jurisdictions. The TPO/DRP has not questioned/challenged the assertion of the assessee that these expenses were reimbursed on a cost to cost basis. We further note that the assessee for assessment year 2012-13 and assessment year 2013-14 had reimbursed similar expenses towards associated Enterprise in USA and the TPO had determined the arm's-length price at "Nil". In this respect, the key findings of the ITAT are reproduced below for reference.

> *"23. We find that the TPO has, in essence, proceeded to make disallowance under section 37(1) by holding that there was no*

commercial expediency in making these reimbursements. That is certainly travelling beyond the domain of his powers under the scheme of the Act. The TPO only has to ascertain arm's length price of a transaction in the sense that if the same transaction was to be incurred between unrelated parties as to what would theoretically have been an arm's length price of the transaction in question, and that exercise is to be carried out on the basis of a permissible method of ascertaining arm's length price of a transaction. Whether the transaction should have taken place or not is not any of the TPO's business. It is not his job to decide whether a business enterprise should have incurred a particular expense or not. A business enterprise incurs the expenditure on the basis of what is commercially expedient and what is not commercially expedient. As held by Hon'ble Delhi High Court in the case of CIT v. EKL Appliances Ltd. [(2012) 345 ITR 241 (Del)] "Even Rule 10B(l)(a) does not authorize disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same". The very foundation of the action of the TPO is thus devoid of legally sustainable merits. We have also noted that there is no mark up in the reimbursement of expenses, and, as such, there is no question of making any ALP adjustment in respect of these reimbursements of expenses. We have further noted that similar reimbursement of expenses to the US based AEs were made in the period relating to the assessment years 2010-11, 2011-12, 2013-14, 2014-15 and 2015-16, but no such arm's length price adjustments were made in any of these Cadila Healthcare Ltd. vs. DCIT years. Undoubtedly, there is no res judicata in tax proceedings but principles of consistency definitely have a crucial rule to play- particularly in respect of a factual matter which permeates through the different assessment years. Similar transactions have been accepted to have been entered into on arm's length basis in the preceding, as also succeeding, years. There is thus no justification for deviation in this particular assessment year. In any case, so far product liability insurance is concerned, the assessee has justified bearing the same on the ground that US AE is an LRD (limited risk distributor) with a targeted operated margin, and, therefore, under this business model, these costs are to be borne by the assessee company. We see no infirmity in this approach and this explanation. When AE is only doing distribution, it is entirely a commercial call of the assessee as to which type of product related expenses are to be borne by the assessee. These expenses thus clearly pertain to the assessee as the US AE is admittedly, and beyond dispute, only an LRD. The same is the position with respect to the legal expenses. It has been specifically explained by the assessee, and this explanation has not even been called into question, that the US AE was holding

the ANDAs and patents, as a trustee and in fiduciary capacity, for the assessee company. It would, therefore, be wholly immaterial as to who is holding the patents and the ANDAs- the assessee or the US AE, because, at the end of the day, the beneficiary is only the assessee company. Yet, the TPO has held the legal expenses to be not at an arm's length price only because the ANDA in question was held by the US AE. Whosever owns the IPRs in question, it is related only for the business of the assessee company and not the US AE. The approach adopted by the TPO is erroneous for this reason also. Similar is the position with respect to stability charges and analytical charges. The TPO has held that there is nothing to show that these expenses were for the purpose of business of the assessee, but then there is no dispute that these expenses pertains to the products owned by the company and in respect of which US AE is only an LRD. The expenses in question were thus clearly for the purpose of the business of the assessee, and deserved to be allowed in full. The TPO should not have ventured into the job of the AO, but that technicality apart, even on merits, entire related expenses, which have been wrongly disallowed by making an ALPsomething clearly contrary to the scheme of the Act, these expenses were fully admissible for deduction. In any case, Cadila Healthcare Ltd. vs. DCIT there is not even a whisper of a discussion about the method of ascertaining the ALP employed by the TPO. When a TPO makes an ALP adjustment, he has to justify on the basis of a prescribed method of ascertaining the ALP. Thus, whichever way we look at it, the impugned ALP adjustment cannot be justified. We, therefore, uphold the plea of the assessee on this point as well, and direct the Assessing Officer to delete the impugned ALP adjustment of Rs 21,43,79,368- subject to necessary verifications about the figures.

24. Ground no. 3 is thus allowed."

13.1 Respectfully following the observations of the ITAT in assessee's own case for assessment year 2012-13 and assessment year 2013-14 in ITA number is 954/AHD/17 and 213/AHD/18, referred to above, we are of the considered view that the TPO has erred in fact and law in holding that the arm's-length price in respect of these cost to cost reimbursements should be determined at "Nil". Further, we also observed that the High Courts in various cases have held that the TPO cannot determine the arm's-length price of transaction as "Nil" on ad- hoc basis without employing any of the prescribed methods as the same is against the scheme of the Act. [Johnson & Johnson Ltd (Bombay High Court) (ITA No. 1030 of 2014), Kodak India Private Limited (Bombay High Court) (ITA No. 15 of 2014), Merck Limited (Bombay High Court) (ITA No. 1272 of 2014)]. Further, the High Court's have also held on various occasions that the TPO's jurisdiction is limited to

> *determine the arm'slength price of a transaction and does not have the jurisdiction to examine the allowability of expenses as provided in section 37 of the Act. [Luwa India Pvt. Ltd (Karnataka High Court) (I.T. A.No.296 of 2017), Lumax Industries Limited (Delhi High Court) (ITA Nos. 102,103, 104 & 587/2014), Cushman and Wakefield (India) Pvt. Ltd. (Delhi High Cadila Healthcare Ltd. vs. DCIT Court) (ITA No. 475 OF 2012), EKL Appliances Ltd. (Delhi High Court) (ITA No. 1068 & 1070 OF 2011), Hive Communication Private Ltd. (Delhi High Court) (ITA No. 306 OF 2011).]*
>
> *14. In view of the above observations, ground number 1(c) of the assessee's appeal is allowed."*

22. We have noted from the above that the ITAT took note of the facts of the case, and found that the assessee had reasonably demonstrated through documents that the expenses were incurred in respect of the assessee's business interest in the overseas jurisdiction and further noting that similar expenses reimbursed by AEs in Asst.Year 2012-13 and 2013-14 had been held to be at arm's length by the ITAT in its order passed for the said year. Since no distinguishing facts have been pointed out by the ld.DR from the facts of the preceding years, the decision rendered by the ITAT in Asst.Year 2014-15 will apply to the impugned year also, following which, we direct deletion of the adjustment made to the transaction of reimbursement of the expenses by AE to the assessee.

Ground No.1(c) of the assessee is, accordingly, allowed."

24. Ld.DR was unable to draw our attention to any distinguishing facts from the preceding year and he fairly agreed that the TPO while making the impugned adjustment had followed his orders in the preceding years in the case of the assessee, which stood deleted by the ITAT.

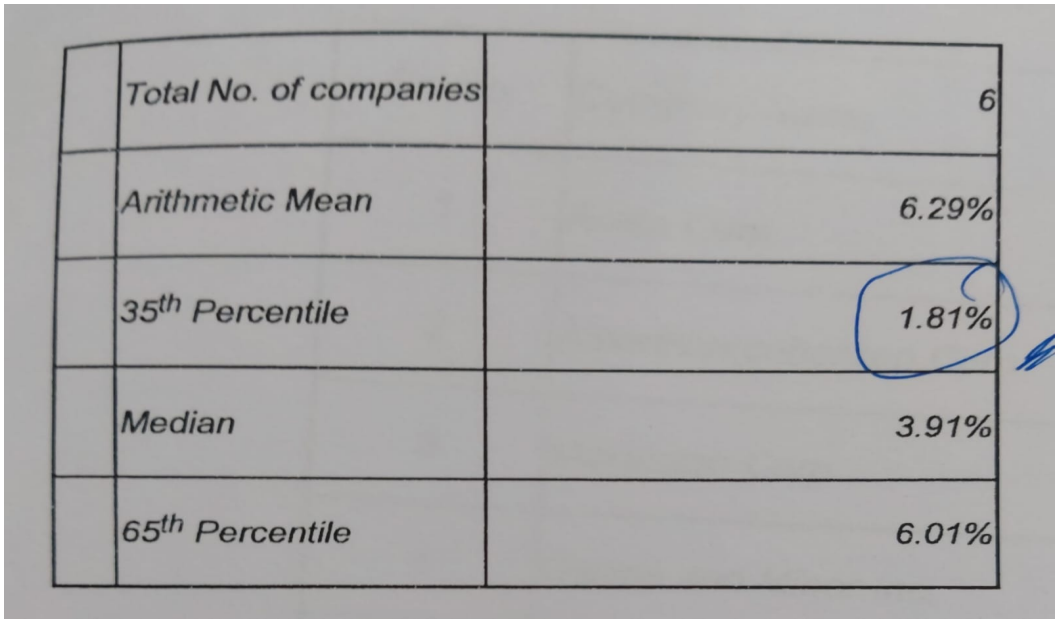
25. In view of the same, we see no reason to confirm the addition made to the income of the assessee on account of adjustment/ upward adjustment made to the international transaction of reimbursement of expenses to the tune of Rs.7,61,41,741/-. We, accordingly, direct deletion of the same.

26. Ground of appeal No.4 raised by the assessee stands allowed.

27. Ground Nos. 5 and 6 raised by the assessee relate to the transfer prising adjustment made to the international transaction of sale of goods by the assessee to Zydus Pharmaceuticals USA INC amounting to Rs.72,78,05,930/-.

28. The facts relating to the issue are that the assessee while benchmarking its transaction of sale of goods to its AE ,Zydus USA, had treated its AE as the tested party and benchmarked the transaction by conducting an independent search on Compustat North America, database of North American companies. The assessee selected six comparable companies, the details of which are given at page 56 and 57 of the TPO's order as under:

Sr. No.	Company Name	Dec-14	Dec-15	Dec-16	Weighted Average
		%			
1	Amerisourcebergen	1.20	1.25	1.20	1.22
2	Mckesson Corp	1.73	1.89	1.72	1.78
3	Owens & Minor	1.86	1.78	1.80	1.81
4	Schein Henry Inc.	6.10	6.10	5.85	6.01
5	Aceto Corp	12.30	15.60	15.95	14.87
6	Patterson Companies	12.44	12.61	11.03	12.03



Total No. of companies	6
Arithmetic Mean	6.29%
35th Percentile	1.81%
Median	3.91%
65th Percentile	6.01%

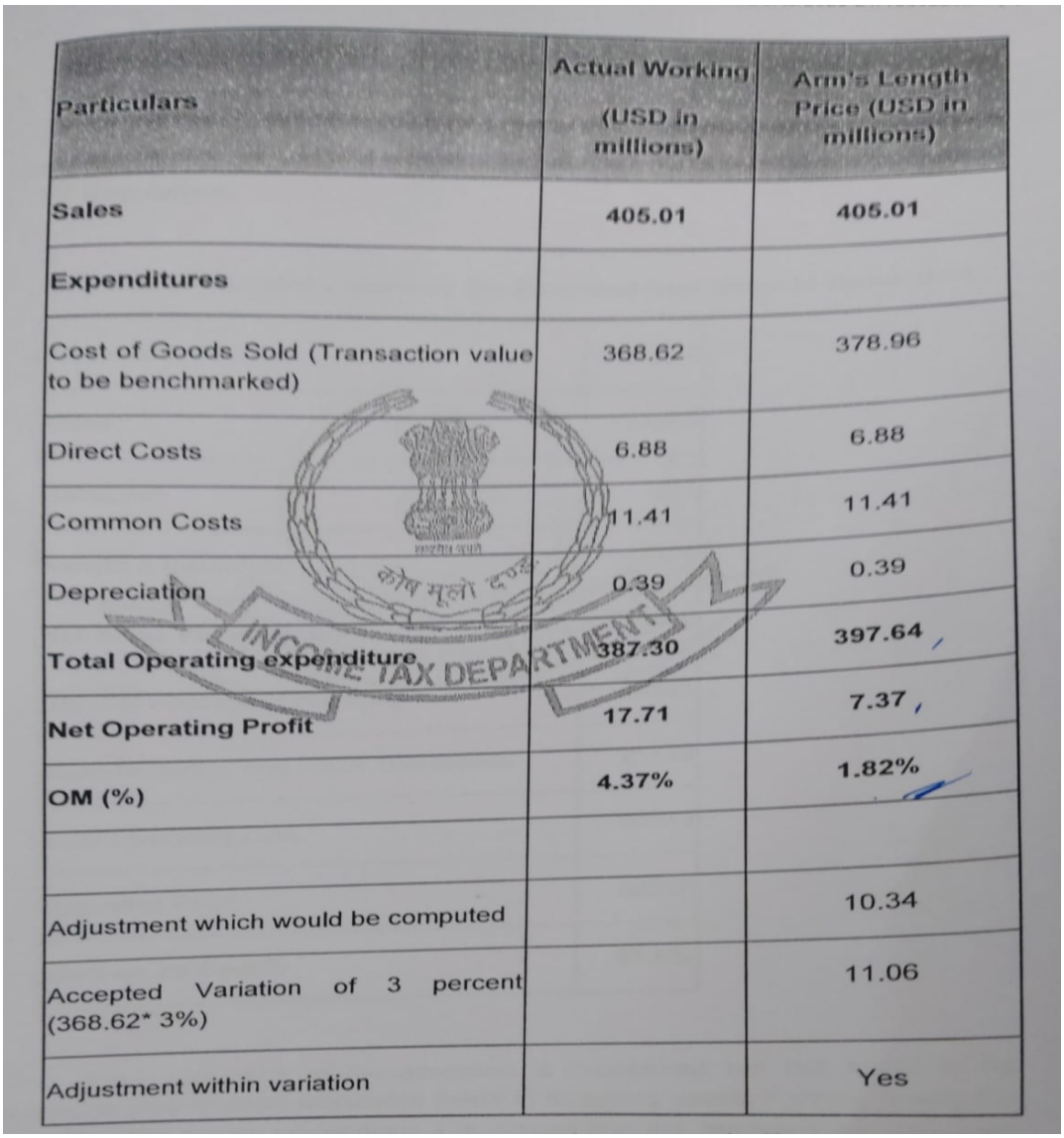
29. The assessee's AE was shown to have retained an operating margin of 4.37% on sales and the remaining profits had come back to India in the form of true up. The broadly comparable independent companies were shown to have earned a segmental margin ranging from 1.81% to 6.01% with a median of 3.91%. Further, the assessee had provided entity level margins of comparable companies during the proceedings which led to an updated range of 2.19% to 6.96% with a median of 4.57%. The TPO however retained and accepted only three comparable companies shown to be having a mean of 1.82% at entity level and 1.60% at the segment level and worked out the amount of adjustment to be made to the international transaction to the tune of Rs.72,78,05,930/-. His adjustment in this regard is contained at page 76 and 77 of the TPO's order as under:

Particulars	*Amount*	*ALP taking*	*Adjustment*

		1.82%	
Sales	*405.01*	*405.01*	
Expenditures			
Cost of Goods Sold (Transaction value to be benchmarked	*368.62*	*379.85*	*11.23*
Direct Costs	*6.88*	*6.688*	
Common Costs	*11.41*	*11.41*	
Depreciation	*0.39*	*0.39*	
Total Operating Profit	*387.3*	*398.53*	
Net Operating Profit	*17.71*	*6.48*	
OM%	*4.37*	*1.60*	

Amount of Adjustment USD (Million)	*11.23*
Exchange rate on 31st March 2017	*64.81*
Amount of Adjustment in INR	*72,78,05,930*

30. In Ground No. 5 raised before us, Ld. Counsel for the assessee contended, that the adjustment made has been challenged on the ground that it is within the benefit of plus minus 3% as provided in Rule 10CA of the Income Tax Rules, 1962. The contention of the Ld. Counsel for the assessee was that the TPO had worked out the weighted average of the operating margins of the comparables at 1.82% and applying the same while computing the arm's length price of the international transaction in the present case the adjustment made would fall within the accepted variation of 3%. In this regard, he drew our attention to the working submitted by the assessee to the TPO during proceedings before him reproduced at page 74 of the TPO's order as under:



Particulars	Actual Working (USD in millions)	Arm's Length Price (USD in millions)
Sales	**405.01**	**405.01**
Expenditures		
Cost of Goods Sold (Transaction value to be benchmarked)	368.62	378.96
Direct Costs	6.88	6.88
Common Costs	11.41	11.41
Depreciation	0.39	0.39
Total Operating expenditure	**387.30**	**397.64**
Net Operating Profit	**17.71**	**7.37**
OM (%)	**4.37%**	**1.82%**
Adjustment which would be computed		10.34
Accepted Variation of 3 percent (368.62* 3%)		11.06
Adjustment within variation		Yes

31. At this juncture, the department was asked to seek a report from the TPO on the contention of the assessee. Subsequently, a report was submitted to us vide letter dated 20th February, 2025, wherein the TPO pointed out that the weighted operating margin of the comparables was 1.60% and not 1.82% as contended by the assessee. In the submissions, it was stated that this was categorically pointed out to the assessee in the show cause notice

issued by the TPO also. The Ld.DR contended that the operating margin of the comparables was inadvertently taken at 1.82% though it was 1.60% and the correct operating margin of 1.60% was specifically mentioned in the show cause notice. When confronted with the same, the Ld. AR was unable to controvert the said fact. He conceded that the operating margins of the comparables was correctly taken by the TPO at 1.60% and taking the same there was no scope of the adjustment made to the international transaction falling within the 3% margin as specified in Rule 10CA. He fairly conceded that there was no merit left in the ground so raised by the assessee.

32. Accordingly, Ground No. 5 raised by the assessee is dismissed finding the contention raised of the adjustment made to the international transaction of sale to ZYDUS USA being within the safe harbour 3% range as per rule 10CA, to be admittedly factually incorrect.

33. In Ground No. 6, Ld. counsel for the assessee contended that his arguments were against the rejection by the TPO of three comparables selected by the assessee company, i.e SCHEIN (HENRY) INC, ACETO CORP, and PATTERSON COMPANIES INC. His arguments, in brief, were to the effect that the reasons for rejection by the TPO were all incorrect and they had been rightly selected as comparable by the assessee company. He contended that all the three companies were rejected by the TPO

finding them to be not functionally comparable and to be having wider geographical or expanded territorial jurisdiction.

34. With respect to SCHEIN (HENRY) INC, Ld.Counsel for the assessee pointed out that it was noted to be engaged by the TPO in two segments healthcare distribution and technology and value added services and having operations all over the world. With respect to Aceto Corp also the company was found to be dealing in different and diversified product categories in the field of performance chemicals, such as, antioxidants, photo initiators, catalyst as well as in photo tooling of printed circuit boards and to have its operations in United States Europe and Asia territory. With respect to Patterson and company, it was found that the said company was engaged in the distribution of dental veterinary and rehabilitation supplies. The tested company selected for determination of ALP, was however noted to be dealing only in pharmaceutical products within the territorial jurisdiction of USA and, therefore, all the three entities were found to be functionally not comparable and also having an expanded territorial jurisdiction and for this reason the TPO rejected all the three for comparison.

35. The rebuttal or the counter of the assessee to the same was that with respect to all the three entities segmental information had been furnished and it had also been pointed out that majority of the operations of all the three entities was in USA. It was

contended that with respect to SCHEIN, ACETO and Patterson, the segmental information of their pharmaceutical segment was duly furnished to the TPO and it was pointed out that in all the three cases the revenue generation from the territory of USA was more than 60% being 65.13% in the case of SCHEIN, 72% in the case of ACETO Corp and 84% in the case of Patterson company. It was, therefore, contended that with respect to all the three comparables, it was demonstrated that only segmental information with respect to the pharmaceutical division of these entities was furnished to the TPO for comparison and it was also demonstrated that majority of their operations were in USA. Ld. Counsel for the assessee further contended that these three comparables were all accepted as comparables in the TP assessment of the assessee conducted right from A.Y. 2011-12 to A.Y. 2015-16 and he further pointed out that Zydus USA, the tested party, had consistently shown net operating margin of 4.5% from A.Y. 2012-13 to A.Y. 2015-16 and, therefore, any adjustment made on account of sales made by the assessee to this AE was not justified.

36. Learned DR, however, relied on the findings of the authorities below contending that the three comparables had been rightly rejected by the TPO finding them to be not functionally comparable and also finding them to be operating in an expanded jurisdiction. He further contended that the assessee's contention with respect to the said entities having been accepted in the preceding years and the AE i.e. Zydus USA consistently returning

huge margins in the preceding years also was not sufficient argument to reject the adjustment made by the TPO in the impugned year, since each year was to be considered separately for Income Tax purposes.

37. We have heard the rival contentions and we find merit in the argument of the Learned Counsel for the assessee. The Learned Counsel for the assessee has agitated the rejection of three comparables selected by it while benchmarking its international transaction of sale made to its Associate Enterprise Zydus USA. The three entities rejected by the TPO are SCHEIN Henry Inc, ACETO Corp and Patterson Companies Inc.

38. Undoubtedly, these three entities have been found to be functionally not comparable, since, they have been noted by the TPO to have been dealing in products other than that in which the tested entity of the assessee company, ZYDUS USA, dealt with i.e. pharmaceutical products and they were also found to be operating in a wider territorial jurisdiction while the tested entity operated only in the jurisdiction of USA. The Learned Counsel for the assessee has pointed out that it had submitted segmental results of the pharmaceutical division of all the three entities to the TPO. This fact has not been controverted by the Learned DR. Learned Counsel for the assessee has demonstrated the same from relevant pages of the paper book reflecting the segmental results of these three entities, which was furnished to the TP. Further, Ld.

Counsel for the assessee has also demonstrated that the majority of the revenue or operations of all the three entities was in the jurisdiction of USA. This fact has also been pointed out from the documents submitted to the TPO placed in the paper book before us and has not been controverted by the Learned DR.

39. In the light of the same, we find merit in the contention of the Learned Counsel for the assessee that the authorities below had erred in rejecting these three entities as comparables, since, the basis for rejecting the same by the TPO does not survive i.e. the entities not being functionally comparable and operating in a wider jurisdiction, since, the assessee has furnished segmental data of the pharmaceutical division with respect to the three entities and has also demonstrated the three entities to be operating majorly in the jurisdiction of USA. Besides, Learned Counsel for the assessee has pointed out that the three entities have been accepted as comparable in the past years also, right from A.Y. 2011-12 onwards. And the fact that the tested party, that is the AE, has consistently been returning profits in the past of 4.5%, which have not been visited with any adjustment in the hands of the assessee in the past, add strength to the argument of the Learned Counsel for the assessee in support of the arm's length price of the transaction entered into by the assessee with its AE. In view of the above, we hold that the AO / TPO was not justified in rejecting the three comparables selected by the assessee for determining the arm's length price of its international transaction

of sales to Zydus USA. All the three entities are held to be comparable by us and the transfer pricing adjustment made to the international transaction of sales to Zydus USA amounting to Rs.72,78,05,930/- is accordingly directed to be deleted.

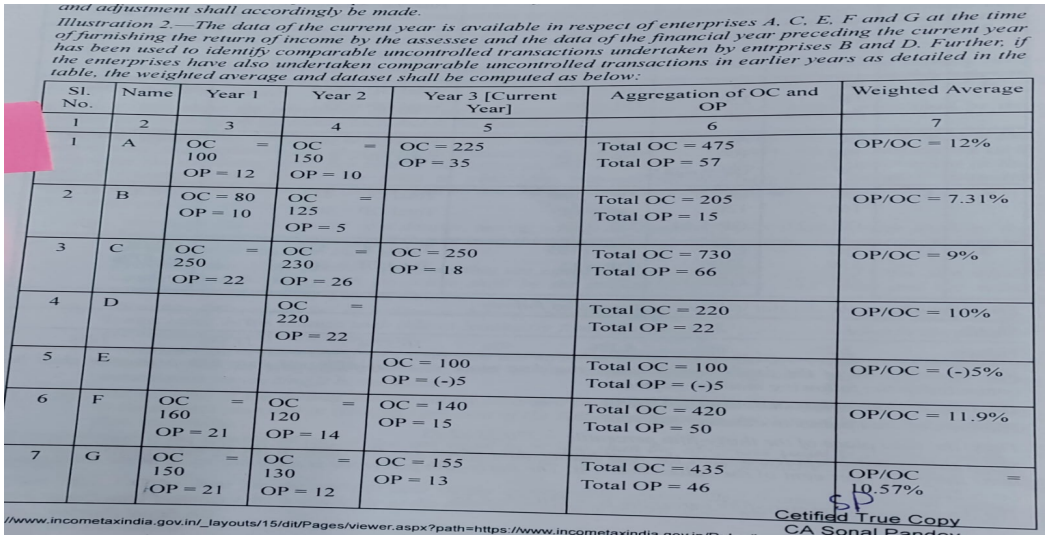
40. Ground of Appeal No. 6 raised by the assessee is, accordingly, allowed.

41. Ground no.7 and 8 relate to the issue of adjustment made in the International Transaction pertaining to sale of finished goods to Zydus France. The Transfer Pricing Officer (TPO) had proposed an adjustment of Rs.38,54,947/-, rejecting 4 comparables selected by the assessee in its benchmarking exercise. The Dispute Resolution Panel (DRP) additionally rejected four more comparables finding them to be functionally not comparable to the tested party and directed that the adjustment be made to impugned International transaction to the tune of Rs.98,41,734/-. Aggrieved by the aforesaid adjustment made to the International transaction of sale of finished goods to Zydus France, the assessee has raised ground no.7 and 8 before us.

42. We have heard both the parties. Undoubtedly, the adjustment to the International Transaction of sale of finished goods to Zydus France has been made by rejecting in all 8 comparables selected by the assessee in its benchmarking exercise. The facts on record show that that the assessee had benchmarked its transaction selecting 23 comparables companies, out of which four were

rejected by the TPO and further four were rejected by the DRP. The four comparables rejected by the TPO were on account of the fact that the result for the Financial Year ending December 2016 had not been provided in case of the 3 companies and in one company the result for FY ending 2015 had not been provided.

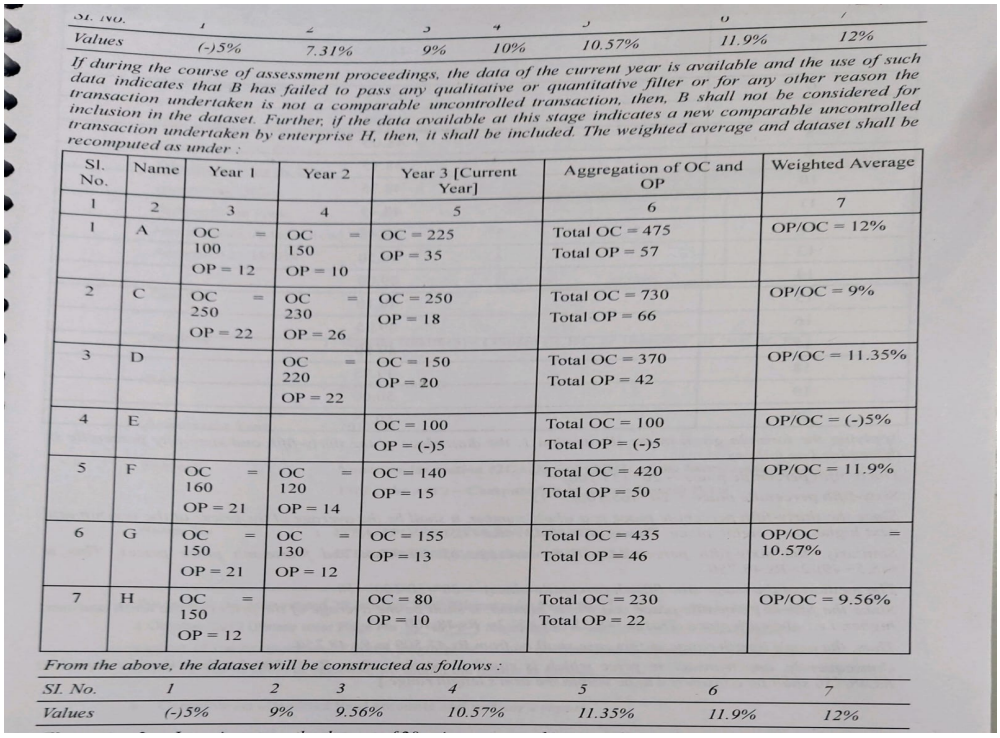
43. One of the arguments of the Ld. Counsel for the assessee before us was that it was pointed that as per Rule 10CA of Income Tax Rules, 3 years data of each comparable company was to be taken for the Bench marking exercise, however he contended that as per Rule 10CA itself the mere non availability of data for one year could not be the reason for rejection of comparables. In this regard he contended that as per illustration 2 provided in Rule 10CA the absence or the non-availability of data for one of the assessee could not be the reason for rejection of comparable. Our attention was drawn to the relevant illustration of the Act provided in Rule 10CA which is placed at page no.380 of the paper book.



and adjustment shall accordingly be made.

Illustration 2.—The data of the current year is available in respect of enterprises A, C, E, F and G at the time of furnishing the return of income by the assessee and the data of the financial year preceding the current year has been used to identify comparable uncontrolled transactions undertaken by entrprises B and D. Further, if the enterprises have also undertaken comparable uncontrolled transactions in earlier years as detailed in the table, the weighted average and dataset shall be compued as below:

Sl. No.	Name	Year 1	Year 2	Year 3 [Current Year]	Aggregation of OC and OP	Weighted Average
1	2	3	4	5	6	7
1	A	OC = 100 OP = 12	OC = 150 OP = 10	OC = 225 OP = 35	Total OC = 475 Total OP = 57	OP/OC = 12%
2	B	OC = 80 OP = 10	OC = 125 OP = 5		Total OC = 205 Total OP = 15	OP/OC = 7.31%
3	C	OC = 250 OP = 22	OC = 230 OP = 26	OC = 250 OP = 18	Total OC = 730 Total OP = 66	OP/OC = 9%
4	D		OC = 220 OP = 22		Total OC = 220 Total OP = 22	OP/OC = 10%
5	E			OC = 100 OP = (-)5	Total OC = 100 Total OP = (-)5	OP/OC = (-)5%
6	F	OC = 160 OP = 21	OC = 120 OP = 14	OC = 140 OP = 15	Total OC = 420 Total OP = 50	OP/OC = 11.9%
7	G	OC = 150 OP = 21	OC = 130 OP = 12	OC = 155 OP = 13	Total OC = 435 Total OP = 46	OP/OC = 10.57%



Sl. No.	*1*	*2*	*3*	*4*	*5*	*6*	*7*
Values	*(-)5%*	*7.31%*	*9%*	*10%*	*10.57%*	*11.9%*	*12%*

If during the course of assessment proceedings, the data of the current year is available and the use of such data indicates that B has failed to pass any qualitative or quantitative filter or for any other reason the transaction undertaken is not a comparable uncontrolled transaction, then, B shall not be considered for inclusion in the dataset. Further, if the data available at this stage indicates a new comparable uncontrolled transaction undertaken by enterprise H, then, it shall be included. The weighted average and dataset shall be recomputed as under :

Sl. No.	Name	Year 1	Year 2	Year 3 [Current Year]	Aggregation of OC and OP	Weighted Average
1	2	3	4	5	6	7
1	A	OC = 100 OP = 12	OC = 150 OP = 10	OC = 225 OP = 35	Total OC = 475 Total OP = 57	OP/OC = 12%
2	C	OC = 250 OP = 22	OC = 230 OP = 26	OC = 250 OP = 18	Total OC = 730 Total OP = 66	OP/OC = 9%
3	D		OC = 220 OP = 22	OC = 150 OP = 20	Total OC = 370 Total OP = 42	OP/OC = 11.35%
4	E			OC = 100 OP = (-)5	Total OC = 100 Total OP = (-)5	OP/OC = (-)5%
5	F	OC = 160 OP = 21	OC = 120 OP = 14	OC = 140 OP = 15	Total OC = 420 Total OP = 50	OP/OC = 11.9%
6	G	OC = 150 OP = 21	OC = 130 OP = 12	OC = 155 OP = 13	Total OC = 435 Total OP = 46	OP/OC = 10.57%
7	H	OC = 150 OP = 12		OC = 80 OP = 10	Total OC = 230 Total OP = 22	OP/OC = 9.56%

From the above, the dataset will be constructed as follows :

Sl. No.	*1*	*2*	*3*	*4*	*5*	*6*	*7*
Values	*(-)5%*	*9%*	*9.56%*	*10.57%*	*11.35%*	*11.9%*	*12%*

44. We have gone through the said illustration 2 provided under Rule 10CA and we are not in agreement with the contention of the Ld. Counsel for the assessee that the non-availability of one year data of a comparable can be ignored for the purposes of determination of arm's length price of an International transaction. What the illustration 2 provides is that in case, at the time of benchmarking transaction by the assessee the data of that comparable is not available, however it is available during the assessment proceedings then that data is to be considered for the purposes of benchmarking of transaction and if during the assessment any new comparable also arises then that is also to be considered for determining of arm's length price of the transaction. This does not mean that and in no way implies that if the data of the particular year relating to the comparable is not

available the same can be ignored. On the contrary, the illustration emphasises the consideration of 3 years data of comparables. The orders of the authorities below reveal that the assessee had contended the non-availability of data even at the time of conclusion of the assessment proceedings. However, the DRP proceedings are continuation of the assessment proceedings and assessee has failed to demonstrate whether data relating to said four comparables was available during the pendency of the DRP proceedings. Further, even appellate proceedings are continuation of the assessment proceedings and if the data is available even at this stage it is to be considered for determining arm's length price of the transaction. It is not the case of the assessee that the Rule 10CA of the Rules does not prescribed 3 years data of comparables to be considered. Therefore, if the prescription as per the Rule to consider 3 years data of comparable, the same has to be adhered to. Since the issue before us relates to AY 2017-18 and pertains to unavailability of financial data of FY 2016 surely, the same must very well be available now in 2025. The assessee is directed to produce the data to the TPO for determining the arm's length price of the transaction and for this limited purpose, the issue is restored back to the TPO to take into consideration the missing data of the four comparables noted by the TPO and thereafter, determine the arm's length price of the international transaction of the sale of goods to Zydus France.

45. With respect to 4 comparables rejected by the DRP, it was pointed out that the same were rejected for the reason that DRP found was to be functionally non comparable with the tested party i.e Zydus France. While Zydus France was noted to be a wholesale distributor of the assessee products, the four comparables found to be rejected by the DRP were found to be operating for the retail segment. The argument of the Ld. Counsel for the assessee was that the tested party i.e Zydus France was operating both for the retail and wholesale segment and for the purposes of TNMM, which method was adopted as most appropriate method for benchmarking the transaction, a broad functional comparison needed to be done.

46. We are not in agreement with the contention of the Ld. Counsel for the assessee. The dis-similarity in the function of the comparables rejected by the DRP with the tested parties has vide ramifications. Even if agreeing that the tested party was operating both in the wholesale and retail segments, the comparables rejected by the DRP were noted to be operating only in the retail segment. There is no doubt that the functions, risks and margins of the retail segment and wholesale segment are markedly different. In the light of the same the functional dissimilarity noted between the comparables rejected by the DRP and the tested party cannot be ignored, even taking a broader view as contended by the Ld. Counsel for the assessee. Therefore, the rejection of four comparables by the DRP is confirmed by us.

47. Another argument of the Ld. Counsel for the assessee before us was that the assessee had undertaken its benchmarking exercise taking Zydus France as the tested party and selecting comparable from the DIANE data base. His contention was that the TPO/DRP had rejected this exercise carried out by the assessee since the assessee was unable to demonstrate its benchmarking exercise using this data base, DIANE, both to TPO/DRP. The assessee subsequently, used another data base before the TPO and exhibited its benchmarking exercise to the TPO selecting 23 comparables out of which four were rejected by the TPO and four by the DRP.

48. The argument for the Ld. Counsel for the assessee before us was that even in earlier years the same data base i.e DIANE had been used for undertaking benchmarking exercise which was accepted by the TPO in the preceding years .That as per Rule of consistency the benchmarking exercise carried out by the assessee using DIANE data base needed to be accepted.

49. We do not find any merit in the contention of the Ld. Counsel for the assessee since we have noted from the order of the DRP that using the DIANE database to identify the independent companies in distribution of pharmaceuticals goods in France office, the assessee had run search for calendar year 2012 to 2014 only. The DRP has stated that it is evident from the same the assessee had failed to substantiate that the search process had been carried out independently and in an independent fashion resulting

in selection of proper independent company. Noting so the DRP rejected benchmarking exercise of the international transaction of sale of finished goods to Zydus France based on DIANE data base. The Ld.Counsel for the assessee, before us, was unable to controvert the factual findings of the DRP that the search on the DIANE data base for comparable companies related to calendar year 2012 to 2014 only. The impugned year before us is AY 2017-18, therefore no comparables for the impugned year or the immediately preceding year was done on the DIANE data base which is the requirement for 10CA of the Rules. Therefore, we do not find any infirmity in the order of the DRP rejecting the assessee's search of comparables on the DIANE data base. This argument of the Ld. Counsel for the assessee is also rejected.

50. In view of the above grounds nos. 7 and 8 raised by the assessee relating to the issue of adjustment made to the international transaction of sale of finished goods to Zydus France is partly allowed for statistical purposes.

51. Ground Nos. 9 & 10 raised by the assessee relate to the issue of weighted deduction claimed by the assessee of Research & Development expenditure incurred by it in terms of the provisions of Section 35(2AB) of the Act. The assessee had claimed weighted deduction on account of capital expenditure incurred amounting to Rs.13,12,58,435/-. and revenue expenditure incurred on R&D amounting to Rs.3,79,28,52,702/-. Reducing R&D income

of Rs.5,45,90,300/- therefrom, weighted deduction @ 200% on the balance of Rs.3,86,95,20,837/- was claimed amounting to Rs7,73,90,41,674/-. The AO restricted the claim of deduction of capital and revenue expenditure to the extent approved by the competent authorities specified in law i.e. DSIR in Form No. 3CL amounting to Rs.3,32,77,19,700/- resulting in restricting the claim of weighted deduction to Rs.6,65,54,39,400/-. As a result, deduction claimed by the assessee u/s 35(2AB) of the Act was disallowed to the tune of Rs.1,08,36,02,274/-. The working of the disallowance is reproduced at page 8 of the assessment order.

52. The assessee objected to the same before the DRP who, in turn, though found merit in the findings of the AO that of the weighted deduction to be allowed only to the extent approved by the DSIR, however, at the same time, the DRP directed the AO to allow assesses alternative claim to such expenditure not considered for the purposes of section 35(2AB) of the Act, u/s 35(1)(i) and 35(1)(iv) of the Act, if found eligible. The AO however disallowed claim of deduction u/s 35(2AB) of the Act to the tune of Rs.108,36,02,274/- noting that the DRP had rejected the objections of the assessee.

53. During the course of arguments made by both the sides before us, it emerged that Section 35(2AB) of the Act read with the relevant Rule, i.e Rule 6 of the Income Tax Rules, 1962, underwent an amendment relevant for the impugned assessment

year before us, A.Y 2017-18. It was pointed out that section 35(2AB) of the Act was amended by Finance Act 2015 and sub Rule (7A) to Rule 6, was amended by the IT (Tenth Amdt) Rules, 2016 we.f. 01-07-2016, effecting the provisions applicable for the impugned year before us, A.Y 2017-18. Both the parties agreed that by virtue of the said amendment, the competent authority, i.e DSIR, was to approve the quantum of eligible expenditure for claiming weighted deduction u/s.35(2AB) of the Act. It was common ground that prior to the amendment to the Section along with the Rules applicable thereto, the section read with the Rules, was judicially interpreted as empowering the competent authority only to approve the R&D facility and that the competent authority was not empowered to approve the quantum of eligible deduction. That subsequent to the amendment, the competent authority was to approve the quantum of expenditure on R&D eligible for deduction . Both the parties agreed that there were decisions of the ITAT holding so with respect to the position of law prior to the amendment to the Section alongwith the Rules. With regard to the decisions with respect to the position of law prior to the amendment in the Section to the effect that the competent authority i.e. DSIR was not empowered to approve the quantum of expenditure our attention was drawn to the following decision:

Pharmanza Herbal (P) Ltd. Vs DCIT (2023) 155 taxmann.com 56(Ahd Trib)

54. With respect to the position of law post amendment holding that DSIR was entitled and empowered to approve the quantum of deduction, Ld.DR drew our attention was drawn to the following decisions:

- Ashok Leyland Ltd. Vs ACIT (2025) 172 taxmann.com 42 (Chennai-Trib)
- Mahle Behr India (P) Ltd.vs DCIT (2025) 171 taxmann.com 96 (Pune-Trib)
- Britannia Industries Ltd.vs DCIT (2024) 161 Taxmann.com 393 (Kolkatta-Trib)

55. Having noted so, the argument of the Ld. Counsel for the assessee before us was that DSIR had been empowered to approve quantum of expense eligible for deduction by virtue of amendment made to Rules and there was no change in the provision of law with regard to claim of deduction u/s.35(2AB) of the Act. He contended that any provision made under Rules could not circumvent or transgress the legislative intent of the relevant provisions under the Act. He submitted his submissions in writing in this regard before us.

56. Ld. DR, however, contended that the proposition of law applicable to the impugned year had been interpreted by judicial authorities against the assessee and, therefore, the issue stood covered against the assessee. That, the assessee was entitled to claim weighted deduction on the capital and revenue expenditure

incurred on R&D only to the extent approved by the DSIR in Form No.3CL, which had been rightly done so by the authorities below and there was no reason for interfering in the orders of the authorities below.

57. We have heard the contentions of both the parties. Admittedly, in the facts of the present case, the assessee's claim of deduction u/s.35(2AB) of the Act has been restricted to the extent approved by the competent authority i.e. DSIR in Form No. 3CL. The case of the assessee is that the competent authority was not empowered to approve the quantum of deduction. It is not disputed that by virtue of amendment made to the Rules applicable to the impugned year the DSIR was empowered to quantify and approve the quantum of revenue and capital expenditure incurred on R&D eligible to deduction u/s.35(2AB) of the Act. The Ld. Counsel for the assessee does not dispute this position and the same emanates from the Rules itself, which are reproduced hereunder:

> **"RULE 6**……
> **…**…….
> **……..**
> (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;
>
> [43][(*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) of section 35 of the Act in Part B of Form No. 3CL;"

58. The argument of the Ld. Counsel for the assessee before us is that the authority sought to be granted to the DSIR merely by an amendment to the Rule was not in consonance with the scope of the amended provisions of the Section 35(2AB) of the Act as made effective from A.Y.2016-17 and applicable to the impugned year before us.

59. The argument in effect of the Ld.Counsel for the assessee is with respect to the vires of the Rules. Determining the validity of Rules we may respectfully state, is beyond the scope of the powers of the ITAT.

60. Be that so we find no merit in the contention of the Ld.Counsel for the assessee that the amendment to the Rules was not in consonance with the scope of the amended provision of section 35(2AB) of the Act. In terms of sections 35(2AB) of the Act, weighted deduction of R&D expenditure is allowed to eligible entities. The reading of the entire section reveals that this entitlement of weighted deduction is subject to approval by a designated authority which is the Department of Scientific and Industrial Research, DSIR which is a government authority technically competent to approve R&D activities. The intent of the legislation is to give incentive to research and development

activities by granting weighted deduction to expenditure incurred on account of the same. To make it workable and feasible, Rules have been framed by CBDT stating the approving authority to be DSIR who approves the facility and by virtue of an amendment to the rules even the quantum of expenditure is required to be approved by the competent authority. This amendment to the rules in our view does not in principle defeat the policy objective of the section i.e. the grant of weighted deduction to R&D expenditure. In fact, the amendment to the Rules has made the section workable, granting the power to scrutinize the eligible expenditure to the authority which is technically competent to do so and thus ensuring that only eligible R&D expenses are allowed the benefit of weighted deduction. The arguments of the ld. counsel for the assessee that the rules has effected substantively the parent provision is therefore incorrect. Ld.Counsel for the assessee cited decisions in support of its contention that any provision made in Rules could not circumvent or transgress the legislative intent, but since this principle laid down by the courts is not disputed , and on the contrary however it is found that in the present case the rules have not transgressed the legislative intent, the said decisions do not help the case of the assessee.

61. In the light of the same, we reject the argument of ld. counsel of the assessee. The order of the authorities below restricting assessee's claim of weighted deduction u/s 35(2AB) of

the Act to the extent approved by the DSIR in Form 3CL is therefore upheld.

62. Another argument of the Ld.Counsel for the assessee was that the AO had not followed the directions of the DRP to allow assesses claim of deduction to the expenses not considered eligible for weighted deduction u/s 35(2AB) of the Act, u/s 35(1)(i) & 35(1)(iv) of the Act if found eligible.

63. Ld.DR fairly agreed that the AO had followed the directions of the DRP as above.

64. In view of the same the AO is directed to consider the claim of the assessee to deduction u/s 35(1)(i) & 35(1)(iv) of the Act as directed by the DRP.

65. The Ld.Counsel for the assessee has also raised a contention that weighted deduction be allowed on Clinical Trials and Bio-equivalence study amounting to Rs.3,73,40,000/-. His contention is that the jurisdictional High court has held such expenses to be eligible to weighted deduction in the case of the assessee in preceding years.

66. Since, we have held that the assessee is entitled to weighted deduction only to the extent approved by DSIR in Form 3CL, as per law, this argument of the assessee merits no consideration.

Even otherwise it has not been demonstrated before us that the expenses not approved by DSIR were in relation to that stated by the assessee, i.e clinical trials & Bio equivalence. Therefore, this contention of the assessee is also rejected.

67. Ground No.9 & 10 raised by the assessee are therefore partly allowed for statistical purposes.

68. In the result, appeal filed by the assessee is partly allowed for statistical purposes.

This Order pronounced on 29/01/2026

Sd/-	Sd/-
(SUCHITRA KAMBLE)	(ANNAPURNA GUPTA)
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Ahmedabad; Dated 29/01/2026

S. K. SINHA *True Copy*

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

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

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad