Income Tax Appellate Tribunal - Ahmedabad
Torrent Pharmaceuticals Ltd.,, ... vs The Deputy Commissioner Of Income ... on 22 February, 2022

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IN THE INCOME TAX APPELLATE TRIBUNAL,
"D" BENCH, AHMEDABAD
BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
AND
Ms. MADHUMITA ROY, JUDICIAL MEMBER

./ITA.No.1285 and 1286/Ahd/2017
/Asstt. Year: 2009-10 and 2010-11
AND
ITA No.1396 and 1397/Ahd/2018
Asstt.Year 2011-12 and 2012-13

Torrent Pharmaceuticals Ltd.	ACIT, Circle-4(1)(2)
Torrent House	Vs. Ahmedabad.
Off.Ashram Road	
Ahmedabad 380 009.	

./ITA.No.1327 and 1328/Ahd/2017
/ Asstt. Year: 2009-10 and 2010-11
AND
./ITA.No.1414 and 1415/Ahd/2018
/ Asstt. Year: 2011-12 and 2012-13

ACIT, Circle-4(1)(2)	Torrent Pharmaceuticals Ltd.
Ahmedabad.	Vs. Torrent House
	Off.Ashram Road
	Ahmedabad 380 009.

	(Applicant)	(Responent)
Assessee by	:	Shri Vartik Choksi, With Shri Biren Shah, ARs.
Revenue by	:	Shri Mohd. Usman, CIT-DR

/ Date of Hearing : 23/11/2021
/ Date of Pronounceme nt: 22/02/2022

/O R D E R

PER BENCH

1. The above captioned appeals have been filed by the assessee and the revenue against the separate orders of ld. Commissioner of Income-Tax (Appeals), Ahmedabad arising in the matter of assessment order passed under

section 143(3) of the Income tax Act 1961 (in short the 'Act') involving respective Assessment Years. Since issues are inter-connected, we dispose of all these appeals by way of this common order.

2. First we take up assessee's appeal in ITA No. 1285/Ahd/2017 for the Asstt. Year 2009-10 for adjudication.

3. In this appeal, the assessee challenges respective order of the Revenue authorities below on the following grounds:

"1. On the facts and in the circumstances of the case, the learned CIT(A) erred in confirming addition of Rs. 1,92,04,765 from out of total addition of Rs.1,93,56,012 made by the Assessing Officer on the basis of the order u/s. 92CA(1) passed by the Transfer Pricing Officer.

2. On the facts and in the circumstances of the case, the learned CIT(A) erred in confirming disallowance of Rs.3,33,478 made by the Assessing Officer in respect of Employees' Contributions to ESI on the ground that the same was not paid within the prescribed time limit under the ESI Act even though the payment was made within the time limit for filing the return of income u/s. 139(1) of the Income-tax Act.

3. On the facts and in the circumstances of the case, the learned CIT(A) erred in rejecting the appellant company's relevant ground of appeal that from out of the total development cost incurred by the appellant company for the products to be sold in domestic as well as international market, only the portion of development cost pertaining to the products to be sold in domestic market should be allocated to Baddi Unit for the purposes of Section 80-IC as the said unit is solely engaged in the manufacturing products to be sold in the domestic market, in spite of the fact that the appellant company wrongly considered total development cost for allocating to Baddi unit while filing the return of income.

4. On the facts and in the circumstances of the case, the learned CIT(A) erred in rejecting the relevant ground of appeal raised by the appellant company before him that while computing deduction u/s. 80-IC of the Income-tax Act the Assessing Officer wrongly reduced the quantum of eligible income by reallocating administrative expenses of Rs. 3,75,57,364 to Baddi unit.

5. On the facts and in the circumstances of the case, the learned CIT(A) erred in rejecting the relevant ground of appeal raised by the appellant company before him that while computing deduction u/s. 80-IC of the Income-tax Act the Assessing Officer wrongly reduced the quantum of eligible income to the following extent:

(a) Excluding Miscellaneous income being penalty recovered from suppliers 5,13,647
(b) Excluding other income 1,05,607
(c) Excluding export income 40,44,949

6. On the facts and in the circumstances of the case, the learned CIT(A) erred in upholding the Assessing Officer's finding that deduction admissible u/s. 80-IC of the Income-tax Act is to be restricted to the extent of income from business and profession as against the gross total income of the assessee."

Additional Ground of appeal: the assessee has filed the additional ground of appeal vide letter dated NIL which is reproduced as under:
"1. Without prejudice to all the grounds raised, in law and in the facts and circumstances of appellant's case, following the decision of the Hon'ble Gujarat High Court in assessee's own case, the appellant craves that no R & D expenditure including development cost and capital expenditure incurred and claimed under section 35 (2AB) or section 35 (1)(iv) should be allocated to industrial unit eligible for deduction u/s 80-IC of the Income Tax Act"

4. Briefly, we would take note of facts of the case of the assessee. The assessee company is engaged in the business of manufacturing and marketing of pharmaceutical products. It filed its return of income on 29-9-2009 declaring total income at NIL under normal provisions of the Act. Thereafter, under scrutiny assessment several additions and/or disallowances were made. Upon determination of the total income of the assessee at Rs. 30,74,68,950/- an appeal was preferred by the assessee against the said order before the first appellate authority. The ld. CIT(A) vide order dated 21.3.2017 partly allowed the appeal filed by the assessee against the said assessment order. Being aggrieved by order of the ld. CIT(A), both the assessee and Revenue are before us with respective grievance.

5. Now we adjudicate the issues ground wise raised in the above appeal as follows.

6. Ground No.1: In this ground, the grievance of the assessee is that the ld. CIT(A) erred in confirming the addition of Rs. 1,92,04,765/- out of total addition of Rs. 1,93,56,012/- made by the ld. AO on the basis of order under section 92CA(3) of the Income Tax Act, 1961 passed by Transfer Pricing Officer (TPO).

7. During the course of assessment proceedings, the issue was referred to the TPO, who vide his order dated 29.1.2013 read with subsequent order dated 22.3.2013 passed under section 154 of the Act made the following adjustment on account of Arm's Length Price (ALP) in respect of international transactions as detailed below:

1)	Interest on loans to Associate Enterprises	1,37,31,228/-
2)	Guaranty fee charges in respect of Associate Enterprises	Rs.54,73,537/-
3)	Fees paid to Associate Enterprises for Liaison Services	Rs.1,51,247
	Total	Rs.1,93,56,012/-

8. First we take up corporate guarantee of Rs. 54,73,537/-:

8.1. The facts relevant to this issue are that the assessee-company provided guarantees to the Associate Enterprises ("AE" for short) in respect of credit facilities obtained from bank without charging any fees for providing such guarantees. The details of such guarantees are as follows:

Guarantees given on behalf of	Amount in Rs.(crore)
Zao Torrent Pharma, Russia	5.095
Torrent Pharma GmbH	43.862
Torrent Do Brazil Ltda	25.475
Total	74.432

8.2. In Notes to the audit report, the assessee has submitted that during the year the company has given corporate guarantee on behalf of the subsidiaries for obtaining loans. As such, the assessee- company has not incurred any cost for granting such guarantee. Therefore, company has not charged any cost from its subsidiaries. It further appears that no commission from any of the

above AEs for providing the above services was charged by the assessee. However, the ld. TPO was of the view that most of the entities are non-rated and rely on the credibility for their loans/limits/guarantees, a substantial portion of risk was transferred to the assessee during the course of assumption of guarantees. Apart from that, there was a direct benefit accruing to the AEs in the form of charge of lesser interest in case of credit off take against this guarantee. He was of the view that services have been rendered by the assessee-company to its AEs in the form of provision for guarantees to them and this service needed to be benchmarked, and to that extent, the transaction could not be treated as tax neutral. In a third party scenario any corporate would be charging a certain fee for extending such facilities, as the risk assumed was of quite onerous nature. Therefore, TP study conducted by the assessee in respect of giving guarantees to the AEs was found to be inaccurate and not in terms of the provisions of section 92C of the Act. As such, the study conducted by the assessee was rejected by the ld. TPO. Thereafter, the ld. TPO issued a show cause notice as to why service provided by the assessee to its AEs should not be benchmarked and as to why a suitable commission of 3% should not be taken as arm's length price for providing corporate guarantee in respect of these entities. The assessee was accordingly supplied with requisite data on which benchmarking was based, in a CD. The assessee by and under a written submissions dated 18.1.2013 pleaded that benchmarking in the instant case did not require, because there was an implicit parent support to the subsidiary, more so when, subsidiary companies are carrying on the business of marketing of assessee's products, and the

assessee company was simply helping its AEs in its growth by taking risk factors. Relying on the decision of ITAT, Hyderabad Bench in the case of Four Soft Limited, it was pleaded by the assessee that corporate guarantee was not covered within the scope of the international transactions under

section 92B of the Act. The contents of submissions of the assessee are as under:

> "The assessee has contended that yield method is not the correct method to evaluate guarantees and that the difference between two differently rated bonds cannot indicate guarantee rates. The corporate guarantee is very much incidental to the business of the assessee and hence same cannot be compared to a bank guarantee transaction.
>
> The assessee has relied on the Canada Tax Court decision for benchmarking. However, it is seen that in its own TP report, it has not even acknowledged that the guarantee needs benchmarking. \The assessee has claimed that the parent subsidiary relationship and implici support needs to be nullified before adopting this approach. The assessee has treated the entire value of the guarantee as implicit paren support to the subsidiary.
>
> The wholly owned subsidiaries are carrying on the business of marketing assessee's products and hence helping the assessee company in its growth as well as taking (i) foreign exchange risk, (ii) Marketing risks (iii) Inventory arid distribution risk (vi) Price risk on behalf of the assessee. The guarantees enable the companies to avail of loans and in alternate the assessee would be forced to infuse equity in these companies as these companies are essential for the export business of the company. The assessee has further claimed that all the guarantee amounts have not been availed by the associates. A list of utilized amount has been enclosed with the letter. The company has relied on a recent decision by Hyderabad bench of ITAT in the case of Four Soft Ltd wherein it has been held by the bench that corporate guarantees are not covered within the scope of the international transaction under section 92B."

8.3. However, such contentions were not acceptable to the ld. TPO. He rejected the claim of the assessee by making upward adjustment of Rs. 54,73,537/-. The observations of the ld. TPO, in this behalf read as under:

> "7.5 The various submissions made by the assessee have been considered. A guarantee is a legally enforceable agreement that intends to survive the insolvency of the person or concern on whose behalf it is issued and obliges th guarantor to provide for payment if that person or concern fails to. In case th guarantee is valid, unconditional and irrevocable and it requires prompt payment in full before pursuit of remedies, in principle it provides full credi substitution. If sufficient funding is not provided by the parent company for some reason, subsidiaries that attract funding from third parties are necessari

required to arrange additional collateral from related (parent) company in the form of guarantees. At the same time, guarantees are also being used, at the option of the borrower, to obtain better conditions, notably interest rates, on external financial transactions, creating a benefit on a group -wide basis.
7.6. The claim of the assessee that the guarantee has been provided for working capital and financial needs of the AE and hence it should be treated as implicit parent support and hence the guarantee needs to be benchmarked at

nil is not found an acceptable argument. For an arm's length study, the parent-subsidiary obligation needs to be set aside and it needs to be determined as to what would be the behavior of an independent party in the same scenario. The plea of implicit support would need to be discarded. Once it is acknowledged that a service has been rendered (as it has been done in this case -as the guarantee enables the AE to handle its finances more efficiently), then the service needs to be benchmarked.

7.7 The assessee has contended that providing guarantee is a more efficient way of providing support to the AE as this does not involve any liquid fund outflow and enables the AE handle its financials. The company being the sole shareholder benefits as by providing guarantees, it is prevented from investing in equity. The contention is not found acceptable. A transaction has to be identified by what it actually is - rather than what it could have been. In the case of Perot Systems TSI Vs. DCIT (ITAT Delhi) the assessee, an Indian company, advanced interest free loans to its 100% foreign subsidiaries. The subsidiaries used those funds to rnake investments in other step-down subsidiaries. On the question whether notional interest on the said loans could be assessed in the hands of the assessee under the transfer pricing provisions of Chapter X, the assessee argued that the said "loans" were in fact "quasi-equity" and made out of commercial expediency. It was also argued that notional income could not be assessed to tax, HELD rejecting both arguments:

(i)) The argument that the loans were In reality not loans but were quasi-capital cannot be accepted because the agreements show them to be loans and there is no special feature in the contract to treat them otherwise. There is also no reason why the loans were not contributed as capital if they were actually meant to be a capital contribution;

(ii) The argument that the loans were given on interest -free terms out of commercial expediency is not acceptable because this was not a case of an ordinary business transaction but was on international transaction between associated enterprises. One had to see whether the transaction was at arm's length under the transfer pricing provisions;

(iii) The argument that notional interest income cannot be assessed is not acceptable in the context of transfer pricing. S 92(1) that any income arising from an international transaction has to be computed having regard to the arm's length price. S.92B (1) defines an "international transaction" to mean "a transaction between two or more associated enterprises ... in the nature of ...lending or borrowing money...." In considering the "arms length" price of a loan, the rate o interest has to be considered and income on account of interest

can be attributed;

(iv) The result of the transaction was that the income of the assessee in India would reduce while that of the AE would increase. This was a classic case of violation of transfer pricing norm where profits were shifted to low tax jurisdiction to bring down the aggregate tax incidence of a multinational group.

7.8 The assessee has elaborately discussed the benefits being given by the AEs to the assessee company. However, for this, these companies are being remunerated at arm's length rate. Providing free guarantee support cannot be a reward for providing market access. For that a separate reward system exists. As far as guarantee is concerned, it needs to be benchmarked a suitable rate.

7.9 The reliance placed by the assessee company on the decision of Hon'ble ITAT in the case of Everest Kanto Cylinder Ltd ITA No. 542/Mum/2012 is examined. The decision of the Hon'ble ITAT has many contradictions built into it. While it mentions that the HSBC guarantee cannot be compared to assessee guarantee as assessee does not incur a cost while giving guarantee, it has failed to mention the costs incurred by HSBC in giving the guarantee. While it has talked about discussing the terms, conditions and circumstances in which the third party guarantees have been given, it has accepted guarantee between a Bank and the assessee itself as a proper internal CUP for the guarantee between the assessee and its AE, both being non-banking corporations. No need has been felt to discuss the conditions, circumstances and the financial position in this cast. Without prejudice to this discussion, in the current case, we are not banking on the guaranty given by any person but merely relying on the coupon rates of bonds traded freely in the market to arrive at the benefit enjoyed by the AE through the guarantee of the parent because of better credit rating of the parent. In view of the large number of bonds being freely traded in the market, the specific variations iron out and there is no need to have specific study of various parameters mentioned by the ITAT in the above judgement.

7.10 The assessee has claimed that the guarantee of the AE is the residuary guarantee as the assets of the AE are also hypothecated while taking loans. The assessee has submitted that the maximum guarantee can be the guarantee assessee is paying to IDBI which is a direct CUP. In this regard, it is submitted that guarantee of the IDB! in respect of an Indian company cannot be a proper arm's length of guarantee being charged from a company dealing in a different currency and operating En another territorial jurisdiction and having much lower financial stability. Hence, the guarantee in the case of the assessee 'company cannot be treated as an arm's length comparable CUP forth guarantee of the AE. -

7.11 The principle involved in charging of guarantee fee is the same as in the case of notional interest. The guarantee given by the assessee to its AE has to be benchmarked against what independent parties would do in similar circumstances. Guarantees given by an assessee makes its own borrowing costlier as its assets get used to guarantee and in case it has to raise capital it would be costlier to him as those very assets have already been used. It is not correct to state that there were no costs to the assessee for the guarantees

given to the banks as in case of failure of repayment of the loan taken; the assessee would have to pay 100% of the amount while in case of payment already made only a percentage is charged.

7.12 In light of the discussion above, no case is made to alter the charge of guarantee as per the process described in the show cause notice. An attempt has been made to analyze the bond data in US market to arrive at various levels of yields for differently rated bonds in a global scenario since the US bond market is a mature one and is freely traded globally. The coupon rate represents yield on various bonds and the rate is directly proportional to the rating given to the bond. Higher the risk of default by the issuing company on this bond, higher the coupon rate. .Details of these bonds are available on the web. The details of such corporate bonds available on www.finanace.yahoo.com (publicly available) was gathered. On analysis of over 1100 bond data, from where the bonds Issued during the F:V 2008-09 were segregated, it is seen that the difference in coupon rate (yield or interest rate) in respect of AA rated bonds and RS rated bonds cornes to 2.706 %age points. A copy of the data mentioned above is supplied to you in a CD. By taking guarantee for payments on behalf of its AC, the assessee has incurred significant currency risk as evident by general depreciation of rupee against dollar. In order to factor this currency risk, the above spread is increased to 3% which is found to be

reasonable spread which the assessee should have charged as benefit granted to the AE. . . 7.13 The assessee has contended that the guarantees have not been utilized during the year. However, it is seen from the annual accounts of the assessee that the guarantees in the case of Zao, Russia, the guarantees have been reduced from Rs 120 crore last year to Rs 51 crore this year, in case of Torrent Pharma GmbH, they have reduced from Rs 47.32 crore to Rs 43.86 crore and in the case of Torrent Pharma Brazil, they have increased from 19.98 crore to Rs 25.47 crore. In case of Torrent Inc, the guarantees have reduced to nil. Hence, in case of the other three companies, the guarantees have been used during the year although the closing balance of loans is shown at nil. The contention of the assessee company that the guarantees have not been utilized during the year is not acceptable. The entire value of outstanding guarantee's is, therefore, benchmarked at 3% of the total amount.

7.14 The assessee has submitted a working sheet with guarantee working at Euro 26,693/- @ 1%. At 3%, this amount comes to Euro 80081 @ 68.35 comes to 5473537/- ."

8.4. Simply based on the order of the ld. TPO passed under section 92CA(3) of the Act, the ld.AO added the amount of Rs. 54,73,537/- as upward adjustment in regard to the guarantee fees provided to the AEs. In appeal, before the first appellate authority, the assessee did not get any relief. The ld. CIT(A) rejected the claim of the assessee, relying upon the order passed by his predecessor in the assessee's own case for the Asstt. Year 2007-08 and 2008-09. The ld. CIT(A) confirmed the impugned addition made by the ld. TPO/AO with the following observations:

"6.1 I have carefully perused the assessment order and the submissions given by the appellant which is on similar lines as in last two assessment years in which similar grounds were raised. The TPO has made adjustment u/s. 92CA on

account of the corporate guarantee given by the appellant company to its subsidiary company in other countries and worked out the adjustment of Rs.54,73.537 /-. Similar issue had arisen in appellant's appeal for A. Y. 2007-08 and 2008-09 wherein for similar reasons, addition was made by the TPO on account of corporate guarantee fees. The submissions made by the appellant are similar to that of A. Y, 2007-08 and 2008-09. The CIIT(A) has decided the appeal raised by the appellant in these years i.e. AY 2007-08 and 2008-09 and have confirmed the adjustment made by TPO and addition made by the AO. For convenience sake the findings of CIT(A) in AY 2007-08 is reproduced as under:

....

In AY 2008-09 also the CIT(A) has taken the same view and confirmed the addition made by the AO on similar facts following his own order in AY 2007-08. In the current year under appeal i.e. AY 2009-10, the issue is the same and I find no reason to differ from the findings of CIT(A) as quoted above. Hence following the same reasoning, I uphold the addition made by the A. O. Accordingly, the ground on this issue is dismissed."

9. Being aggrieved by the order of the ld. CIT-A, the assessee is now in appeal before the Tribunal.

10. Before us, the ld. counsel for assessee, besides reiterating the submissions made before the ld. Revenue authorities, further contended that the issue is covered in the favour of the assessee in its own case in ITA 907/AHD/2012 for the AY 2007-08 after referring the decision rendered by the ITAT, Ahmedabad Bench in the case of Micro Ink Ld. Vs. ACIT, reported in 63 taxmann.com 353.

11. On the other hand, the learned DR submitted that the order of this Tribunal in the case of Micro Ink Ld. Vs. ACIT, reported in 63 taxmann.com 353 has been reversed by the judgment of Hon'ble Madras High Court in the case of PCIT Vs. Redington (India) Limited. Therefore, no reliance can be placed in the own case of the assessee for the year under consideration as contended by the learned AR for the assessee. The learned DR vehemently supported the order of the authorities below.

12. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset we note that the fact of the issue on hand has been elaborated in previous paragraph, therefore we are not inclined to repeat the same for the sake of brevity. Hence, we proceed to adjudicate the same accordingly. The provisions of section 92B of the Act defines the parameters of what constitutes an international transaction. Although the ambit of international transaction was wide enough, yet due to judicial interpretation, certain classes of transactions were being left out of the transfer pricing net. To tackle the same, by the Finance Act of 2012 an Explanation to Section 92B[2] of the Act was brought on the statute with retrospective effect from 1st April 2002. The explanation is clarificatory in nature and added certain categories of transactions, inter alia, the transaction

as specified under clause (c) of explanation (i) to section 92B of the Act within the ambit of international transactions which is reproduced as under:

[Explanation.--For the removal of doubts, it is hereby clarified that--

(i) the expression "international transaction" shall include--

(a) **********

(b) **********

(c) capital financing, including any type of long-term or short-term borrowin lending or guarantee, purchase or sale of marketable securities or any ty of advance, payments or deferred payment or receivable or any other debt arising during the course of business;

12.1. It can be seen that the guarantee was included within the ambit of international transaction vide the Finance Act 2012 with retrospective effect. Thus there remains no ambiguity to the fact that corporate guarantee extended by the assessee to its AE is an international transaction and therefore the same has to be benchmarked at the arm length price. However, we note that the different benches of the ITAT have taken different view. Some of them held that the transaction of corporate guarantee is an international transaction whereas some of them held that the transaction of corporate guarantee is outside the purview of the international transaction including the Ahmedabad tribunal in the case of Micro Ink Ltd. vs. Addl. CIT reported in [2015] taxmann.com 353, wherein it was held that the corporate guarantee is not international transaction. At the time of hearing, the learned AR heavy relied on this order of the tribunal.

12.2. However, we find that the Hon'ble Madras High Court in the case of PCIT vs. Redington (India) Ltd. reported in 122 taxmann.com 136 has held that corporate guarantee is covered under the limb of international and having bearing on profit and loss account. The relevant finding of the Hon'ble court reads as under:

> The concept of bank Guarantees and Corporate Guarantees was explained in the decision of the Hydrabad Tribunal in the case of Prolifics Corpn. Ltd v. Dy. CIT [2015] 55 taxmann.com 226/68 SOT 104 (URO). In the said case, the

> revenue contended that the transaction of providing Corporate Guarantee is covered by the definition of international transaction after retrospective amendment made by Finance Act, 2012. The assessee argued that the Corporate Guarantee is and additional guarantee, provided by the Parent company. It does not involve any cost of risk to the shareholders. Further, the retrospective amendment of section 92B does not enlarge the scope of the term 'international transaction' to include the Corporate Guarantee in the nature provided by the assessee therein. The Tribunal held that in case of default, Guarantor has to fulfil the liability and therefore, there is always an inherent risk in providing guarantees and that may be a reason that Finance provider insist on non-charging any commission from Associated Enterprise as a commercial principle. Further, it has been observed that his position indicates

that provision of guarantee always involves risk and there is a service provided to the Associate enterprise in increasing its creditworthiness in obtaining loans in the market, be from Financial institutions or from others. There may not be immediate charge on profit & loss account, but inherent risk cannot be ruled out in providing guarantees. U1 and adjustment are to be made on guarantee commissions on such guarantees provided by the Bank directly and also on the guarantee provided to the erstwhile shareholders for assuring the payment of Associate Enterprise.

In the light of the above decisions, the Tribunal committed an error in deleting the additions made against Corporate and Bank Guarantee and the order passed by the DRP is to be restored. [Para 76]

12.3. Thus in view of the above, we hold that the bank guarantee is an international transaction. Therefore, the same has to be bench marked for determining the ALP.

12.4. A question may also arise for adjudication whether such amendment is applicable retrospectively i.e. 1-4-2002 though the same was brought the finance Act 2012. In this regard, we note that the Hon'ble Madras High Court in the case of PCIT vs. Redington (India) Ltd. reported in 122 taxmann.com 136 has held that such amendment was applicable retrospectively. The relevant portion of the judgment reads as under:

> 72. A new Enactment or an Amendment meant to explain the earlier Act has to be considered retrospective. The explanation inserted in section 92B by Finance Act 2012 with retrospective effect from 1-4-2002 commences with the sentence "For the removal of doubts, it is hereby clarified that -"
>
> 73. An Amendment made with the object of removal of doubts and to clarify, undoubtedly has to be read to be retrospective and Courts are bound to give effect to such retrospective legislation.

12.5. In view of the above, we hold that the amendment as discussed above was brought by the finance Act 2012 but the same is applicable retrospectively i.e. 1-4-2002. Thus the amendment is applicable to the year under consideration.

12.6. The next aspects arises for the determination of the benchmarked for working out the ALP of the impugned international transaction. The TPO/AO in the case on hand has adopted US bond data for working out the ALP by using the data of bond obtained from the finance yahoo.com by observing as under:

> 7.12 In light of the discussion above, no case is made to alter the charge of guarantee as per the process described in the show cause notice. An attempt has been made to analyze the bond data in US market to arrive at various levels of yields for differently rated bonds in a global scenario since the U5J bond market is a mature one and is freely traded globally. The coupon rate represents yield on various bonds and the rare is directly proportional 10 the

> rating given to the bond. Higher the risk of default by the issuing company on this bond, higher the coupon rate. .Details of these bonds are available on the web. The details of such corporate bonds available on www.finanace.yahoo.com (publicly available) was gathered. On analysis of over 1100 bond data, from where the bonds issued during the FY 2008-03 were segregated, it is seen that the difference in coupon rate (yield or interest rate) in respect of AA rated bonds and BB rated bonds comes to 2.706 % age points. A copy of the data mentioned above is supplied to you in a CO. By taking guarantee for payments on behalf of its AE, the assessee has incurred significant currency risk by general depreciation of rupee against dollar. In order to factor this currency risk, the above spread is increased to 3% which is found to be reasonable spread which the assessee should have charged granted to the AE.

12.7. However we find that Bombay high court in case of CIT vs. Everest Kento Cylinders Ltd reported in 58 taxmann.com 254 held that while determining the ALP the rate charge by the bank or financial institution cannot be taken as comparable. The relevant finding of the Hon'ble bench reads as under:

> In the present case, it is assessee-company that is issuing corporate guarantee to the effect that if the subsidiary AE does not repay loan availed of it from ICICI, then in such event, the assessee would make good the amount and repay the loan. The considerations which apply for issuance of a corporate guarantee are distinct and separate from that of bank guarantee and, accordingly, commission charged cannot be called in question, in the manner TPO has done. The comparison is not as between like transactions but the comparisons are between guarantees issued by the commercial banks as against a corporate Guarantee issued by holding company for the benefit of its

AE, a subsidiary company. In view of the above discussion, appeal does not raise any substantial question of law and it is dismissed

12.8. Now question arose what should be the ALP rate of the commission on corporate guarantee? In this regard we find that The Tribunal in several cases has considered 0.50% (of corporate guarantee given) as ALP rate of Corporate Guarantee commission. Some of these cases are as under:

(i) Videocon Industries Ltd. v. Dy. CIT [2017] 79 taxmann.com 216 (Mumbai - Trib.), Parent company charged commission at 0.25 %. The ALP was determine by the Tribunal at 0.50%.

(ii) Hindalco Industries Ltd. v. Addl. CIT [2015] 62 taxmann.com 181 (Mum.), Pa company charged commission at 0.50% which was considered as at ALP.

(iii) Manugraph India Ltd. v. Dy. CIT [2015] 62 taxmann.com 347 (Mum. - Trib.), corporate guarantee was not treated as international transaction by the pa company but the Tribunal treated it as international transaction u/s 92B a the ALP of 0.50%, following the order in the case of the assessee for the year. The Tribunal followed Everest Kento Cylinder Ltd. v. Asstt. CIT [201 taxmann.com 361 (Mum-Trib). It seems that the decision in Bharti Airtel Ltd. (supra) was not referred to in this case.

(iv) Aditya Birla Mincas Worldwide Ltd. v. Dy. CIT [2015] 56 taxmann.com 317/69 SOT 18 (URO) (Mum - ITAT). The assessee had not classified this transactio international transaction. However, guarantee commission was fixed at 0.50

(v) Mylan Laboratories Ltd. v. Asstt. CIT [2015] 155 ITD 1123/63 taxmann.com 1 (Hyd. - Trib.). The assessee admitted corporate guarantee as international transaction, then as against 2% fixed by TPO the Tribunal upheld the claim assessee at 0.53% following the decision in Prolifics Corpn. Ltd. v. Dy. CIT [2015] 68 SOT 104 (URO)/55 taxmann.com 226 (HYD - Trib.).

(vi) Everest Kanto Cylinder Ltd. (supra) - Assessee paid guarantee commission a of 0.5 per cent for obtaining guarantee. This was accepted as ALP for all guarantees given by the assessee.

(vii) Godrej Consumer Products Ltd. v. Asstt. CIT [2016] 69 taxmann.com 436 (Mumbai - Trib.)- The assessee suo motu benchmarked the commission chargeable on bank guarantee @ 0.25%. It was determined at 0.50%.

12.9. Thus, in view of the above we are also of the opinion that 0.5% of commission on the value of corporate guarantee will serve the justice to both the assessee and the Revenue. Hence, the contention of the assessee is partly allowed.

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13. The next issue involved in the first ground of appeal is upward adjustment by the TPO/AO on account of interest on Loan given to AEs. The assessee has given loan to its AE's as detailed under:

S. No.	Name of AE	Nature of loan	Amount (Rs.)	Note
1.	Zao Torrent Pharma Russia	Short term finance	67,58,31,000	No interest c benchmarked 2,55,97,145/-
2.	Torrent Do Brazil Ltda. Rua	Short term finance	12,39,69,000	Interest char 14,25,759/- @ 200 BPs
3.	Torrent Pharma Philippines	Short term finance squared up during the year	Various amount	Interest char benchmarked 12,62,288/- @ 100Bps

13.1. In response to SCN issued by TPO, assessee submitted that it has provided short term finance to its AEs and charged interest at the rate of LIBOR plus 100/200 basis points per annum whereas it has taken the foreign currency term loan at the rate of LIBOR plus 62.5 basis points. Accordingly, the assessee contended that the interest charged from AEs is comparatively on higher side from interest paid to the third party and thus the interest charged from the AE is at ALP. The Assessee further submitted that it is not in the business of lending money, therefore the margin charged by bank/financial institution cannot be taken as comparable. However, TPO disregarded the contention of the assessee by observing that there are certain clauses in the Loan agreement which should be considered while determining the ALP as detailed under:

i. "The loan has a commitment fee of 0.25% on the undrawn balance of the facilities i.e. the bank would be paid a fee even if the loan has not been availed.
ii. The interest charged is Libor plus 62.50 bps per annum (Libor plus 0.625%)

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iii. Agreement fees @0.5% to be paid immediately on signing the documents.
iv. Collateral security of all movable and immovable present and future properties of the company including manufacturing facilities, research facilities and office premises.
v. A minimum fixed asset cover of 1.1 times over these assets.
vi. Net debt / EBIDTA to be not more than 4.5 times
vii. Debt gearing not to exceed 1.65 times during the currency of facility.
viii. Debt service cover ratio shall not be less than 1.33 times during the currency of facility.
ix. Tangible net worth shall not be less than INR 3.4 billion at all times during the currency of the loan.
x. Exposure to non-pharmaceutical group companies not to exceed 15% of tangible net worth,
xi. Currency risk on the borrower.
xii. The loan documents related to the loan drawn by Torrent Pharmaceuticals Ltd, the parent company at its own financial creditworthiness and rating."

13.2. In view of the above, the TPO rejected the comparable considered by the assessee and submission made during proceeding and made the upward adjustment by holding as under:

6. in light of the above discussion, the various objections raised by the against the rate proposed by this office on the basis of benchmarking study co not found acceptable. The transactions of the assesses company are not found t arm's length and the interest rate required to be charged is as given below. T rate on the loans is imputed as given in the table.

Sl	AE Name	ALP Interest rate	Amount	Arm''s length interest	Intt charg
	Zao Torrent Pharma, Russia	7.85	67,58,31,000	38175547	25597

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	Torrent DO Brazil Ltda Rua	6.84	12,39,69,000	2049284	1425750
	Torrent Pharma	7.85	Various amounts	1791580	978239

Phillipines

6.1 Based on the above computation, s total upward adjustment of Rs 1,40,15,277/- corn mended on account of wrong, benchmarking of interest on loans given to the re parties.

13.3. However the upward adjustment on account loan given to Torrent Pharma Philippines for Rs. 8,13,341/- has been reduced to Rs. 5,29,292/- vide order dated 22-03-2013 passed under section 154 of the Act.

14. The aggrieved assessee preferred an appeal to Ld. CIT (A) who confirmed the order of the AO/TPO by observing as under:

The appellant had given inter-corporate loan to its associate enterprise in foreig and had charged interest at the rate of LIBOR + 100 BP from its associate enterpri stated that the loan advanced to the associate enterprise which is mainly subsidia advancing appellant's own business interest and it supports the business of the ap in creating market. Il is further stated that the appellant has not incurred any l shifted any profit by advancing1 loan. It has been getting loan at the rate of LIB basis and is charging interest at LIBOR + 100 basis. Thus, it has not incurred any transferred any profit. It is also argued that on account of conversion rate havin changed from the date of advancing loan and as on the close of the year it has ear foreign exchange gain on substantial basis. Therefore, there is no loss of revenue hence the adjustment made is not justified.

The claim of the appellant is that the motive is not to earn the interest income b the business through AE smoothly. Further, the appellant has not disclosed lesser has not shifted any profit outside India. The claim of the appellant is not accept the purpose of giving the money been to further the interest of the business, the could have easily given the money as share capital and not as loan. Once the amoun been given as loan and has .been shown in the balance sheet as such the appellant charge market rate of interest at Arm's Length Price. The basic principle of deter Arm's Length Price is by assuming that the transaction has taken place between unr parties. Therefore, the reasoning given by the appellant is not acceptable. The TP given detailed justification while adopting the Arm's! Length interest rate which have been charged by the appellant from the AE. I am in complete agreement with th finding given by him and no interference is required in the order of the TPO. The has taken the same view and confirmed the addition made by the AO on similar facts 2008-09 and 1 find no reason to differ. The adjustment on account of interest at L 4.48 basis point is accordingly upheld. The ground of appeal is accordingly dismis

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15. Being aggrieved by the order of the learned CIT(A) the assessee is in appeal before us.

16. The learned AR before us submitted besides reiterating the submissions made before the ld. Revenue authorities, further contended that the issue is covered in the favour of the assessee in its own case in ITA 1634/AHD/2012

for the AY 2008-09.

17. On the other hand learned DR before us reiterated the contentions after making a reference to the order of the authorities below. As such the learned DR vehemently supported the order of the authorities below.

18. We heard that rival contention of both the parties and perused the material available on record. At outset we note that the issue of determination of ALP of interest on loan and advances is covered by the consolidated order this tribunal in own case of the assessee in ITA No. 1634/Ahd/2012 for A.Y. 2008-09. The finding the coordinate bench reads as under:

> 53. We have heard the rival contentions and perused the materials available on rec
> The issue in the instant case relates to the determination of ALP of the interest
> loan given by the assessee to its AE's. The first contention of ld. AR of the asse
> us is that in the given facts, it would be appropriate to accept internal CUP meth
> the rate at which the assessee had obtained foreign exchange borrowings at arm's l
> price under CUP method.
> 53.1 Regarding the contention of the assessee, we are of the view that the transac
> obtaining the loan is a different transaction from the lending even if both the lo
> transactions are in foreign currency. It is because the loan was accepted from the
> whereas the loan was advanced to the subsidiary company in the given facts &
> circumstances. Therefore, we disagree with the contention of ld. AR.
> 53.2 The TPO indeed has taken the AE as the testing party. Accordingly, the TPO ha
> worked out the ALP taking 6 month average LIBOR rate which has not been disputed.
> the TPO has added the credit risk at 3.50% and the margin @ .50% to determine the
> of the interest which should have charged from the AE by the assessee.
> 53.3 Now the first controversy arises about the basis of charging 3.50% credit fro
> AE. Regarding the addition of 3.5% for credit Risk in 6 Month Libor rates we note
> represents the difference in the credit rating of AAA Indian companies which was o
> from the CRISIL in response to the notice issued under section 133(6) of the Act v
> the credit rating of BBB of the AE which was determined by the TPO on the basis of
> financial documents of the AE.
> 53.4 However, we note that the approach of the TPO suffers from certain infirmitie
> detailed under:
>
>
>
> i. Once the AE has taken as a tested party, then the comparables of AE should b
> obtained to determine the ALP. However, the TPO in the case compared the AE
> with the credit rating of Indian companies as discussed above. In our view, the
> comparables with the AE should have taken and not with the comparables
> available with the assessee.
> ii. The TPO at his own determined the credit rating of the AE based on the
> financial documents provided by the assessee. In our view, the TPO is not the
> right person to determine the credit rating of the AE. As such he should have
> taken the report from some authorized agency.
> iii. The TPO in his order has admitted the fact that the rate of interest and a
> as margins in the international markets are slightly lower than the Indian rate
> Accordingly, the TPO proposed risk of 3.50%. However, the observation of the
> was based on his wisdom but without referring to any evidence.
>
> 53.5 We further note that the loan is given in foreign currency which is to be repaid in

foreign currency only. Therefore there was no need to make any adjustment in the rate of interest on account of Risk. The ITAT Delhi also took the same view in case of JSL Ltd v ACIT (100 taxmann.com 268) by following the Hon'ble Delhi high court in case of CIT v. Cotton Naturals (I) (P.) Ltd (55 taxmann.com 523)

53.6 The relevant finding given by the Delhi tribunal in case of JSL Ltd vs. ACIT (supra as under:

> "59. Now we come to the other issue where there should be an adjustment of the transaction cost and adjustment for security. The learned Transfer Pricing Offi has made addition of 300 basis points on account of transaction cost. Learned Transfer Pricing Officer has made an adjustment at the rate of 3% on account of transaction cost, security, and single customer risk on interest rate. Contesti adjustment the learned authorised representative has relied upon the decision o the coordinate bench in case of Bharti Airtel Ltd. (supra) wherein it has been that that when the Transfer Pricing Officer has taken the lender as the tested party and yet made adjustment for higher risk on account of assumed lack of security and increased risk of single party dealing is not based on any rationa adjustment on account of higher risk. Apparently, in this case the assessee, le is a tested party and further the loan is advanced to 100% wholly owned subsidiary in Indonesia the facts of the case are clearly covered by the decisi coordinate bench. The Hon'ble Delhi High Court in Cotton Naturals (I) (P.) Ltd. (supra) has already held that the transaction cost of hedging cost is borne and paid by the borrower therefore transaction cost is not applicable in case in question the loan had to be repaid in the foreign currency. Even otherwise according to us the markup towards the transaction cost is exorbitant and comparison with the bank is also untenable. In view of this, we do not see any rational in the impugned in further cost and risk premium on the rate directed the learned Dispute Resolution Panel. Accordingly we direct the learned Transfe Pricing Officer to not to charge any risk premium following the decision of the coordinate bench. In view of this, the transaction cost imputed of 300 basis po cannot be sustained."

53.7 Accordingly, we are also of the view that addition in the rate of interest on accou the credit risk suggested by the TPO is not sustainable.

53.8 We also note that there was no addition on account of interest rate in the immediat preceding AY 2007-2008 though the assessment was framed under section 143(3) of the Act.

53.9 Now the second controversy arises about the basis of charging .50% margin from the AE. Regarding this, we note that the assessee is charging margin at 37.50 bps from the A which appears quite low as even the bank charges from the company having high net worth a margin of .50%. Therefore we are inclined to uphold the finding of the TPO for charging the margin at .50% over and above the 6 month average labor rate. In effect, the rate of interest charged by the assessee from the AE shall increase by 12.5 bps. Thu the ground of appeal of the assessee is partly allowed.

18.1. In view of the above and respectfully following the above order of the coordinate bench in own case of the assessee, the contention of the learned AR with respect to ALP of interest on loan to AE is partly allowed.

19. In view of the above ground of appeal raised by the assessee is partly

allowed

20. The ground no. 2 relates to disallowance of Rs. 3,33,278/- made by the AO in not depositing employees' contribution to ESI on the ground that the same was not paid within the time limit prescribed under ESI Act. Disallowance made by the ld. AO was further being confirmed by the ld. first appellate authority, hence assessee is in appeal before us.

21. The assessee's case is this that the above payment was made before the expiry of filing of return of income under section 139(1) of the Act, and hence, the assessee is entitled to get relief. However, at the time of hearing, the ld. counsel for the assessee, in all fairness, submitted that this issue stands covered against the assessee by decision of Hon'ble Jurisdictional High Court in the case of Gujarat State Road Transport Corporation Ltd. Vs. CIT, reported in 366 ITR 170. However, the ld. counsel further relied on certain judgment passed by other High Courts contrary to the view taken by the jurisdictional High Court on the issue. On the other hand, the ld. DR relied upon the orders passed by the authorities below.

22. We have considered rival submissions of the respective parties, and also perused relevant material available on record. We find that the ld. CIT(A) while deciding the issue considered section 2(24)(x) read with section 36(1)(va) of the Act and observed that the assessee shall be entitled to

deduction of such amount while computing the income referred to in section 28, if said sum has been credited by the assessee to employees' account in the relevant fund/(s) on or before due date i.e. date by which the assessee is required as employer to credit the same to the employees' account in the relevant fund. It is admitted position that the assessee has not credited the same amount within the prescribed time limit of the relevant Act, and hence following ratio laid down by the Hon'ble jurisdictional High Court in the case of Gujarat State Road Transport Corporation (supra), the ld. CIT(A) upheld the order passed by the ld. AO in disallowing the said sum of Rs. 3,33,489/- and added the same to the total income of the assessee, which in our considered opinion is without any ambiguity so as to warrant our interference. Thus, this ground of appeal preferred by the assessee is found to be devoid of any merit, and hence dismissed.

Ground No. 3 and additional ground of appeal

23. This issue relates to non-allocation of R&D cost relating to discovery and research expenditure while computing profit eligible for deduction under section 80-IC of the Act in respect of Baddi Unit.

24. During the course of assessment proceedings, upon verification of the details filed by the assessee, it was found by the AO that the assessee did not

allocate R&D expenditure relating to discovery and research expenditure while computing profit eligible under section 80-IC in respect of Baddi Unit, whereupon explanation was sought from the assessee as to why the same should not be allocated to Baddi Unit. In reply whereof, the assessee submitted the following:

"Your honour have observed that the as$essee company has not allocated R & D cost relating to discovery and R & D capital expenditure, white computation of profit eligible for deduction ii/s, 801C in respect of Baddi unit. In this

regards, the assesses has been asked to explain as why the same should not be allocated and the deduction u/s. 80IC should not be reduced.

In this regards, it may be noted that the assesses company has incurred following expenses on R & D:

Particulars	Total	Baddi	Indrad	TRC
Revenue Expenses				
Dscovery cost	400,160,746	-	-	400
Development Cost	658,019,561	339,252,691	318,766,870	-
Capital Exepnses	26,855,078	-	-	26,
Building	26,855,078	-	-	26,
Other than building	49,533,572	-	-	49,

During the period under consideration, the assessee company has claimed weighted deduction @150% of Rs. I,58,72,70,461/-, on revenue spend ofRs.105,81,80,307/-. Of this the Development cost amounts to Rs 65,80,09,561/-. Out of this development cost Rs. 33,92,52,691 /- has been allocated to Baddi unit the basis of turnover, being 51.56% of total turnover ofBaddi and Indra Unit, excluding Insulin sates.

The deduction under section 80IC has to be computed as if such eligible business was the only source of income of the assesses. This follows from the provisions of section 8010(7), which stipulates that the provisions of section 801A (5) and sub section (7) to (12) shall apply to section 80IC (is well Section 80IA(5) is reproduced for ready reference.

> "(5) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subseqitent assessment year up to and including the assessment year for which the determination is to be made."

Since the profit of the eligible unit has to be computed, as if it is the only uni then there is no reason to bring in expenditure which is not incurred by the eligible unit. Under the circumstances there is no need to attribute R&D spend

by virtue of force of attraction, if no direct service is rendered by the R&D center to Baddi unit.

Even if one were to attribute R&D expenditure to Baddi unit, then there is no justification for allocation of R&D spend in relation to discovery research. Discovery research is in relation to new molecule where there is no guarantee of success. It is only after the results of discovery research have passed the requisite pre-trials, the research would enter the development phase. It is likely that the discovery project may fail and it may be a sunk cost from the company's perspective. Accordingly, it may be emphasized that the advantage of discovery research cannot be said to have benefited the Baddi unit and hence there is no need to allocate such expenditure to Baddi utiit. Following the same logic for R&D discovery expenses, the capital expenditure on R & D should also not be so allocated,

Without prejudice to the above contentions, it is submitted that even if as per your goodselves stand that all the R&D cost should be allocated, the allocation would work out as under:

Particulars	Total	Baddi	Indrad	TRC
Revenue Expenses				
Discovery cost	400,160,746	206,322,881	193,837,865	
Development Cost	658,019,561	339,252,691	318,766,870	-
Capital Exepnses	26,855,078	-	-	26,85
Building	26,855,078	13,846,478	13,008,600	
Other than building	49,533,572	25,539,510	23,994,062	

24.1. The above explanation was not found acceptable by the AO, and thus deduction under section 80IC in regard to R&D allocation to the tune of Rs. 36,16,40,065/- was disallowed by the ld.AO, which in turn confirmed by the ld. CIT(A). Hence, the instant appeal by the assessee before us.

24.2. The case of the assessee is that there is no direct service rendered by the R&D centre to Baddi Unit, and therefore, there is no need to attribute R&D expenditure by virtue of force of attraction. In fact the assessee allocated entire development related of R&D expenditure to the said Baddi Unit in its return of income. During the assessment proceedings, the case sought to be made out by the assessee is this that only development related to R&D expenditure in relation to domestic products should be allocated to the said Baddi Unit. So far as the dispute in relation to non-allocation of discovery expenses and R&D expenses are concerned, the assessee has not allocated such expenses as no service is rendered by the assessee in regard to R&D expenses to Baddi Unit qua discovery expenses. More so, discovery/ research is in relation to new molecule where no guarantee of success is ordinarily found. It is only after discovery/ research has passed the requisite pre-trial, the research would enter the development phase. Discovery project may fail and it may be a sunk cost from the company's prospective. Therefore, the advantage of discovery research cannot be said to have

benefitted Baddi Unit, and the assessee did not feel it necessary to allocate

such expenditure to the said unit, as the case made out by the assessee before the Revenue.

24.3. Even, if it was not in research, and as such only those products with proven knowhow and transferred to the production, is manufactured and therefore allocation of expenses on new discovery research at this particular unit found to be irrational. Such plea of the assessee was not even found to be convincing before the ld. CIT(A). At the time of hearing, the ld. counsel appearing for the assessee submitted before us that the ld. AO ought to have considered that out of the development cost incurred by the appellant company for the products to be sold in the domestic and the international market as well, only that portion of the development cost pertaining to the products to be sold in domestic market shall be taken for making allocation to Baddi unit, since the said unit is solely engaged in manufacturing of products and that too to be sold in domestic market. However, the appellant company incorrectly considered development cost for allocating to Baddi Unit while filing return of income. It was further argued by the ld. counsel for the assessee that instead of deciding the issue on merit, the ld. CIT(A) only took into consideration this particular aspects of considering total development cost for making allocation to Baddi Unit while filing return of income, and disallowed the claim of the assessee. It is a fact that such mistake was done by the assessee inadvertently while filing return of income. However, the assessee filed additional ground of appeal before us to consider the judgment passed by the Hon'ble jurisdictional High Court in assessee's own case whereby and where under it was held that no R&D expenditure included development cost, and capital expenditure claimed under section 35(2AB) or 35(iv) should be allocated to industrial units eligible for deduction under section 80IC of the Act. This additional ground has been filed by the assessee before us. At this stage, reliance was placed on the ratio laid down by Hon'ble

Supreme Court in the case of National Thermal Power reported in ITA No. 229 ITR 383. On the other hand, the ld. DR relied upon the order passed by the authorities below in disallowing the deduction under section 80IC of the Act in relation to R&D allocation to the tune of Rs. 36,16,40,065/- .

25. We have considered rival submissions and gone through the materials available on record. We have further considered order passed by the Co-ordinate Bench of the ITAT, Ahmedabad Bench in assessee's own case vide consolidated order in ITA No. 907/Ahd/2012 (Department) 938/Ahd/2012 (assessee) for the assessment years 2007-08 and ITA No.1634/Ahd/2012 (assessee's) and 1725/Ahd/2012 (department) for the assessment years 2008-09 (Revenue's appeal). While dealing with th identical issue, the Coordinate Bench has observed as under:

"40. We have heard the rival contentions and perused the materials available on re

There is no dispute about the facts of the case. Therefore we are not inclined to same for the sake of brevity and convenience. The issue in the instant case relate whether the expenditure incurred by the assessee on research under the head discov cost and capital cost is to be allocated to the unit eligible for deduction under of the Act. 40.1 The provisions of section 80IC of the Act mandates to claim the d in respect of eligible unit considering the income from such unit as only the sour income. The assessee in the case on hand has allocated the cost of research expend which was directly connected with its eligible unit. The assessee besides the dire also incurred the cost of scientific research activity which did not materialize. same was not allocated to the eligible unit as the same was not directly connected eligible unit. In our considered view the cost which is directly connected with th unit is eligible for deduction while determining the deduction under section 80 IC Act. 40.2 We further note that the Hon'ble ITAT in the own case of the assessee (s has not allocated the cost incurred on the scientific research activity while work deduction under section 80-HH/80-I of the Act. Though the decision of the tribunal about the deduction under section 80HH/80I of the Act, in our considered view the principles laid down by the Tribunal are directly applicable to the facts of the c At this juncture we find important to refer the relevant extract of the order of t in the own case of the assessee (supra) which reads as under: 5. We have heard the submissions, perused the material available on record and the judgment cited by th parties. There is no dispute that the facts in the present case are identical with the case pertaining to A.Y. 2004-05. We have perused the order of the Hon'ble co-o Bench in assessee's own case in ITA No.4356/Ahd/2007 (supra). The Hon'ble Tribunal following the decision of coordinate Bench in ITA No.1347/Ahd/2007 for A.Y. 2003-0 dismissed the ground of appeal raised by Revenue. In view of the fact that issue h already been decided by Hon'ble co-ordinate Bench in ITA No. 4356/Ahd/2007 for A.Y 2004-05 and ITA 44 ITA Nos. 907, 938, 1634 & 1725/Ahd/No.1347/Ahd/2007 for A.Y. 2003-04 in assessee's own case. Respectfully following the order of the coordinate this ground of Revenue's appeal is dismissed. 40.3 It is also important to note th

in the subsequent assessment year 2008-09 has not allocated the cost on scientific research under the head discovery and capital cost to the eligible unit. Thus in o considered view the principle of consistency needs to be applied in the case on ha held by the Hon'ble apex court in the case of RadhaswoamiSatsang v/s CIT reported 193 ITR 221 wherein it was held as under: "13. We are aware of the fact that stric speaking res judicata does not apply to income-tax proceedings. Again, each assess year being a unit, what is decided in one year may not apply in the following year where a fundamental aspect permeating through the different assessment years has b found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allo position to be changed in a subsequent year." After considering the facts in total discussed above, we do not find any infirmity in the order of the learned CIT-A. H decline to interfere in his order. Thus the ground of appeal raised by the Revenue dismissed."

25.1. We find that while allowing the issue, Coordinate Bench has taken into consideration the order passed by the ITAT in assessee's own case where it has not allocated cost incurred on scientific research activity while working out deduction under section 80HH/80I of the Act, although relied upon the principle laid down therein that there is no need to allocate cost of scientific research under the head discovery and capital cost to the eligible unit.

Needless to mention that principle of consistency has been applied, as held by the Hon'ble Supreme Court in the case of Radhaswoami Satsang Vs. CIT reported in 193 ITR 121 (SC).

25.2. It is also important to note that the Hon'ble Gujarat High Court in the own case of the assessee reported in 88 taxmann.com 530 has held that the R and D expenses should not be allocated to the units eligible for deduction under section 80-IA of the Act. The relevant extract of the judgment is reproduced as under:

> 8.1 It is not in dispute that research centre is an independent centre and that its main object is to conduct research for the business of the assessee. The research centre, therefore, in our opinion, is not directly linked with the eligib undertaking. Thus, for the purpose of computing deduction u/s.80HH and 80I, profit from eligible undertaking is to be computed on the basis of gross income by reducing expenditure which has been incurred for the eligible undertaking out of the gross income derived from the industrial undertaking. In view of the aforesaid, question no.(A) is answered in favour of the assessee and against the Revenue.

25.3. In that view of the matter, we do not hesitate to hold that R&D expenditure is need not to be allocated to Baddi Unit as the case made out by the assessee are to be viewed this particular fact of not extending any research work by the said unit, and no benefit thereof was being rendered by it. In view of the matter, we delete the impugned addition of Rs. 36,16,40,065/- disallowed by the ld.AO. Hence the ground of appeal of the assessee is allowed.

Ground No.4

26. Quantum of eligible income by reallocating administration expenses to the tune of Rs. 3,75,57,364 to Baddi Unit is the subject matter before us.

27. During the assessment proceedings, it is found that the assessee allocated common administrative expenses on the basis of number of employees of Indrad and Baddi units. However, according to the ld.AO, the same was not found suitable, rather allocation on the basis of turnover of the respective units was found to be fit by the ld.AO, as a result whereof, deduction under section 80IC was reduced by Rs. 3,75,57,364/- which was in turn confirmed by the ld.CIT(A). Hence, aggrieved by this action of both the authorities, the assessee is before us.

27.1. In reply to show cause notice with regard to the basis of allocation of administrative expenses, the assessee submitted the following figures:

> "The allocation of administrative expenses during the year under consideration on the basis of number of employee is as under:

Administrative expenses ((Rs.)	No. of employees (Baddi : Indrad) Ratio	Baddi (Amount of Rs.)	Indra (Amount Rs.)
324,609,888	39.99: 60.01	129,811,494	194,798,394

28. We have considered rival submissions of both the representatives of the parties, and also gone through the available materials on record. Plea of the assessee is that administrative expenses have direct nexus to manpower. Even if unit does not have turnover, administrative expenses would have to be incurred, and the same was to be allocated to both the units. Such expenses are, therefore, manpower driven expenses, and not depended upon on quantum of turnover. However, in the event such administrative expenses are computed on the basis of turnover of the respective units, then the following would have been the expenses, as submitted by the assessee before the ld.AO.

Administrative expenses ((Rs.)	No. of employees (Baddi : Indrad) Ratio	Baddi (Amount of Rs.)	Indra (Amount Rs.)
324,609,888	51.56 : 48.44	167,368,5858	157,241,030

28.1. The reply of the assessee was not found suitable, rather size of the company, which can be measured by the turnover of the company should be the mode of allocation for such expenses, as found to be the view of the ld.AO. On the basis of the turnover, the said allocation has been worked out to 51.56% of the total administrative expenses, accordingly, additional amount of Rs. 3,75,57,364 (Rs.16,73,68,858/- minus Rs.12,98,11,494/-) has been allocated by the ld. AO resulting into reduction in the deduction to the tune of Rs. 3,75,57,364/- under section 80IC of the Act was made, which was in turn confirmed by the ld.CIT(A) by following order of his predecessor passed in the assessee's own case for the Asstt.Year 2007-08.

28.2. Therefore, we find that the dispute regarding basis of allocation of administrative expenses revolves within the periphery of turnover or employees, is before us. We find that the issue is squarely covered in assessee's own case in ITA No. 907/Ahd/2012 for the Asstt.Year 2007-08

while dealing with the issue, and deciding in favour of the assessee, the Co-ordinate Bench has observed as under:

> "21. We have heard the rival contentions and perused the materials available on re
> The issue in the instant case relates to the allocation of the said expenses betwe
> and Baddi unit. As per the assessee, the administrative expenses need to be alloca
> based on the number of employees working whereas the AO allocated the expenses bas
> on the turnover. The learned CIT (A) subsequently confirmed the order of the AO.

21.1 Now the issue before us arises so as to adjudicate the basis of allocation of administrative expenses. At the outset, we note that the impugned issue of the all of the administrative expenses was also there in the assessment year 2008-09. Ther the argument of the learned AR for the assessee is not correct. As such the AO has disputed the basis of allocation of the administrative expenses in the year 2008-0

21.2 Administrative expenses are the expenses which are not directly connected/ attributable with a specific function/ department/ undertaking such as manufacturi production or sales of the organization. But these represent essential costs to ma company's daily operations and administer its business. The administrative expense generally include:

- Rent
- Utilities
- Insurance
- Executives wages and benefits ·

The depreciation on office fixtures and equipment · Legal counsel and accounting s salaries · Office supplies · Salary to the management · Audit Fees

21.3 These expenses are incurred by a company regardless of whether the company produces or sells anything, generates income or incurs a loss. Most of these expen either are fixed or semi-fixed, and there is a limited scope to reduce them. The c that have a centralized management system tend to have higher general and administrative expenses. On the contrary in the case of decentralizing system, cer functions are delegated to subsidiaries.

21.4 Similarly these expenses cannot be linked to any particular undertaking of th company in a case the assessee has more than one undertaking. Thus the dispute ari for the allocation of such expenses among the different unit/ undertaking of the a Regarding the allocation, we are of the view that these expenses cannot be allocat based on the turnover. It is because the turnover of any undertaking is very much and keep on changing depending upon the market forces, competition, Government policies, etc. There can be a situation that the turnover of one undertaking is ve particular year but in the subsequent year the turnover may go done or vice versa will affect the pattern and consistency in the allocation of the administrative ex distort the presentation of the financial statements for different years. Therefor the considered view that the basis of the allocation of administrative expenses ba the turnover is not advisable.

21.5 The next controversy arises what should be the basis of the allocation of the expenses in the given facts and circumstances. Generally, the human resources work any of the undertakings of the assessee does not frequently change as the market f do not regulate it, unlike the sales. Therefore in the given facts and circumstanc of the view that the allocation of the administrative expenses should be done base human resources engaged in the different undertaking of the assessee.

21.6 In view of the above, we reverse the order of the learned CIT (A) and direct to delete the addition made by him. Hence the ground of appeal of the assessee is allowed."

28.3. We find that the Coordinate Bench was of the view that the expense was not linked to any particular undertaking of the company, in a case where the assessee has more than one undertaking. Such expenses cannot be allocated on the basis of turnover also. Since turnover of any undertaking is volatile depending on varied situations, as has been indicated hereinabove. On the other hand, human resources work in any particular undertaking do not frequently change as the market forces do not regulate the same, unlike sales, and therefore, it is nothing but the human resources engaged in different undertaking of the assessee, that should be the consideration for allocation of administrative expenses, as held by the Coordinate Bench, from which we are not inclined to deviate, and hence respectfully following the decision, we delete the addition made by the Revenue in reducing deduction under section 80IC of the Act to the tune of Rs. 3,75,57,364/- . Hence, the ground of appeal of the assessee is allowed.

29. Ground No.5 : By this ground, the assessee challenges the order of the ld. CIT(A), vide which, the ld. CIT(A) has confirmed the action of the ld. AO in reducing the following income while computing deduction under section 80IC of the Income Tax Act, 1961.

(a) Other income Rs. 1,05,607

(b) Export Benefits Rs.40,44,949/-

(c) Penalties recovered from suppliers Rs.5,13,647/-

30. At the outset we note that the issues raised by the assessee in its grounds of appeal for the AY 2009-10 are identical to the issues raised by the

assessee vide ground no. 5 in ITA No. 1286/AHD/2011 for the assessment year 2010-11. Therefore, the findings given in ITA No. 1286/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2009-10. The appeal of the assessee for the assessment 2010-11 has been decided by us vide paragraph Nos. 94 of this order and allowed in favour of assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2010-11 shall also be applied for the year under consideration i.e. AY 2009-10. Hence, the grounds of appeal filed by the assessee is allowed.

Ground no.6

31. In Ground no. 6, the grievance of the assessee is that the ld. CIT(A) has erred in upholding Assessing Officer's finding that deduction admissible under section 80IC of the Income Tax Act, 1961 is to be restricted to the extent of income from business and profession, as against gross total income of the assessee.

31.1. In response to the show cause issued to the assessee on this ground, the assessee submitted as follows:

"With regards to the ongoing assessment proceedings, your good selves have asked the assessee company to show cause that why claim for deduction under section 80IC of the Income Tax Act, 1961 (the Act) shall not be restricted upto the extent of Income from Business/and Profession, as against the claim put up by the assessee company in its return of income against the Gross Total Income. In this context the assessee company as under:

1. During the year under review, the Gross Total Income of the assssee company is Rs.151.10. crores, which includes the profit of Rs.183.91 crores earned from an undertaking eligible under Section 80IC of the Act and as well as other business income and short-term capital gains.

2. The assessee company submits that it had duly computed the quantum of deduction of eligible undertaking as per the mechanism provided under Section 801C of the Act of the Act same has been certified by the chartered accountant vide the report given in Form 10CCB

Before discussing the issue involved, the assessee company hereby discusses the provision of Section 80IC of the Act, which reads as under -

"80-IC(1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (2), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains, as specified in sub-section (3) (2) .....

(3) The deduction referred to in sub-section (1) shall be --

(i) in the case of any undertaking or enterprise referred to m sub-

clauses (i) and (in) of clause (a) or sub-clauses (i) and (Hi) of clause (b), of sub-section (2), one hundred per cent of such profits and gains for ten assessment years commencing with the initial assessment year;

(ii) in the case of any undertaking or enterprise referred to in sub-

clause (ii) of clause (a) or sub-clause (ii) of clause (b), of sub- section (2), one hundred per cent of such profits and gains for five assessment years commencing with the initial assessment year and thereafter, twenty-five per cent (or thirty per cent where the assessee is a company) of the profits and gains....."

On plain rending of the aforementioned section, it can be inferred that deduction under this section can be availed when gross total income of an assesses includes any gains derived by an undertaking

or any enterprise from any eligible business and subject to such other conditions as specified therein. The assessee-company submits that Section 80IC of the Act only provides for the conditions subject to which deduction can be availed and upto what extent the quantum of deduction can be availed. The section no where provides for any condition pertaining to utilization / adjustment of such deduction once available in the hands of assessee company.

3. Further, in this regards, a reference is invited to Section 80AB of the Act which states that deduction is to be made with reference to the income included in the gross total income. The relevant extracts of the same are furnished hereunder:

> "Where any deduction is required to be made or allowed under any section included in this Chapter under the heading " C. - Deductions in respect of certain incomes" in respect of any income of the nature specified in that section which is included in the gross total income of the assessee, then, notwithstanding anything contained in that section, for the purpose of computing the deduction under that section, the amount of income of that nature as computed in accordance with the provisions of this Act (before making any deduction under this Chapter) shall alone be deemed to be the amount of income of that nature which is derived or received by the assessee and which is included in his gross total income."
>
> ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 On account of the non obstante nature of above provisions, the amount of deduction available under any of the section of Part C of Chapter V7-A shall be restricted to the amount of income of that nature, which is derived by the assessee and is included in the gross total income. On careful perusal of this section, it can be inferred that benefit of deduction under Part C of Chapter VI- A can extend only upto the limit of Gross Total income and cannot be extended beyond that. It shall be noteworthy to take into account that for restricting the claim of deduction under Part C of Chapter VI-A, what is to be seen is the amount of Gross Total income. It is on computing income under individual heads and after clubbing, and set off of losses, the Gross Total Income is arrived at. And once the Gross toll Income of an assesses is arrived at, after rightly applying the provisions of the Act, it shall not be open for revenue to segregate individual dements of the Gross Total Income and restrict the amount of deduction any further.
>
> Further, in this context, it is submitted that if real intention of the lawframers was to restrict the benefit of deduction only upto the extent of income derived under the head business and profession, then they would have explicitly mentioned the term 'Profits and Gains from Business and Profession', instead of referring to the term 'Gross Total Income' as provided under Section 80AB of the Act. It is hereby, most humbly submitted that, in absence of any express provision under the present Act/ for restricting the quantum of deduction upto the extent of income under the head Income form business or profession, it shall not be right to extend the ambit of restrictive provisions crafted under Section 80AB of the Act, to reduce the quantum of allowable deduction only upto such amount Your good selves may acknowledge the

fact that it is on considering the provisions of Section 80AB of the Act, the assesses company has out of the total available deduction of Rs. 183.91 crores under section 80IC, has restricted its claim of deduction upto the extent of Rs.151.20 crores i.e. upto the extent of Gross Total Income computed for the year under review.

Having said that, your good selves shall appreciate that fact the assessee company has strictly complied with all the provisions wider the Act while computing the amount of deduction under section 80IC of the Act and while claiming deduction under the said section at the time of filing the return of income. And hence, the assesses company submits that out of total claim for deduction of Rs.183.91 crores under section 80IC of the Act, benefit of deduction shall extend upto the Gross Total Income, and shall not be limited upto the extent of profits and gains from business activity only."

31.2. The case before the ld. AO is this that its gross total income of Rs.

151.09 crores includes the profit of Rs. 183.91 crores earned from undertaking eligible under section 80IC of the Act, as well as other business income as short term capital gain. It was the further contention of the assessee ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 that as per mechanism provided under section 80IC of the Act, the assessee duly computed the quantum of deduction of undertaking. The assessee further contended that deduction under this section can be availed when gross total income of assessee includes any gains derived by an undertaking or any enterprise from any eligible business, and subject to such other conditions as specified therein. According to the assessee, the provision of section 80IC stipulates conditions subject to which deduction can be availed and only up-to that extent quantum of deduction can be availed. However, the section does not provide any conditions pertaining to utilization/adjustment of such deduction, once the deduction is available in the hands of the assessee- company. The contention raised by the assessee was not found acceptable by the ld. AO. The ld. AO was of the view that section 80AB lays down limit of such deduction allowable in computation of total income. It further clarifies that for the purpose of deduction, the income of that nature herein "business income" as computed in accordance with the provisions of this Act, shall alone deem to be the amount of income of that nature, which is derived or received by the assessee, and which included in the gross total income. Therefore, according to him, section 80AB speaks of gross total income consisting of only income of that nature for the purpose of claiming deduction under section 80IC of the Act, which in the case on hand is nothing but business income. The ld. AO came to a finding that though deduction under section 80IC is allowed in respect of eligible profit of Baddi Unit, same shall be restricted to the income from profession or business only, and it cannot be extended to the exclusion of income under the head capital gain. The assessee reiterated the stand taken by it before the ld.AO. However, the ld. CIT(A) while upholding the order passed by the ld.AO observed as follows:

"The assessment order and the submission of the appellant is considered. On the perusal of the Facts of the case it is noticed that the AO has rightly restricted the deduction u/s.801C to income derived from business by stating as under:

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 "Since the profit from eligible business forms part of business which is included Gross Total Income, the deduction u/s.80IC cannot exceed income of business nature included in Gross Total Income. It is also important to note that the provision of section 80 AB are overriding provisions and therefore, the restriction contained in the said section applies irrespective of the eligible profit determined as per the other provisions of the Act. furthermore what has been denied directly cannot be taken indirectly. When the deduction as per section 80AB and 80IC is restricted to income derived from business the assessee cannot claim deduction from income from other heads of income (including, income under the head Capital gains) on the pretext that it forms part of Gross Total Income. Further it needs to be stated that the assessee itself in earlier years has restricted the said claim Jo business profits and therefore the sudden change in opinion is not justified as it will lead to inconsistency. "

It is evident from the AO's order that deduction u/s.801C cannot exceed income derived from business and he has rightly interpreted that as per section 80AB the gross total income will consist of only business income for the purpose of claiming deduction U/S.80IC. In view of above discussion ground of appeal on this issue is dismissed.

31.3. However, it appears from the order passed by the ld. CIT(A) that he has only approved/confirmed order passed by the ld.AO. He has not appreciated the facts in right perspective, rather, while confirming order of the ld.AO, the ld. CIT(A) has simply upheld his finding without assigning any reason whereof. The ld. CIT(A) only reproduced the operative part of the assessment order in rejecting claim of the assessee under section 80IC of the Act, restricting it only to the income derived from business.

32. At the time of hearing of instant appeal, the ld. counsel for the assessee submitted before us that the gross total income of the assessee was of Rs.151.09 crores and the deduction admissible under section 80IC in respect of the profit of the eligible units viz. Bhaddi unit was of Rs.183.91 crores. The break up whereof was directed to be produced by the ld.AR, upon which the following were submitted before us along with the statement of income with reference to the revised return filed by the assessee.

Particulars		Total for Assessee	Allocated to Baddi
R&D Expenses component	Revenue - Wt	529,090,154	170,021,131
			ITA.Nos.1285/Ahd/2017 & 7 A.Y.20
R&D Capex (other than Building)		74,300,359	Nil
R&D -Building		26,855,078	Nil
Provision on diminishing value of Investment		29,236,868	Nil

Disallowance as per TP report	25,881,195	Nil
Impairment loss on asset held for sale	2,556,779	NIL
Tax Depreciation	340,762,513	164,830,419

32.1. The ld. counsel for the assessee has drawn our attention to statement of income, wherein the assessee has claimed deduction of Rs.183.91 crores under section 80IC being the profit eligible for Bhaddi units as contained in Annexure-1 attached along with paper book.

33. On this aspect, we have further considered judgment of Hon'ble Supreme Court in the case of CIT Vs. Reliance Energy Ltd. [2021] 127 taxmann.com 69 (SC). On an identical situation, question arose before the Hon'ble Apex Court as to whether provision of section 80IA(5) of the Act cannot be pressed into service for reading a limitation of deduction under sub- section (1) of section 80IA only to the "business income". While deciding the issue in favour of the assessee, Hon'ble Court was pleased to observe as follows:

> "12. The import of Section 80-IA is that the 'total income' of an assessee is computed by taking into account the allowable deduction of the profits and gains derived from the 'eligible business'. With respect to the facts of this Appeal, there is no dispute that the deduction quantified under section 80-IA is Rs. 492,78,60,973/-. To make it clear, the said amount represents the net profit made by the Assessee from the 'eligible business' covered under sub-

section (4), i.e., from the Assessee's business unit involved in generation of power. The claim of the Assessee is that in computing its 'total income', deductions available to it have to be set-of against the 'gross total income', while the Revenue contends that it is only the 'business income' which has to be taken into account for the purpose of setting-off the deductions under sections 80-IA and 80-IB of the Act. To illustrate, the 'gross total income' of the Assessee for the assessment year 2002-03 is less than the quantum of deduction determined under section 80-IA of the Act. The Assessee contends that income from all other heads including 'income from other sources', in addition to 'business income', have to be taken into account for the purpose of allowing the deductions available to the Assessee, subject to the ceiling of ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 'gross total income'. The Appellate Authority was of the view that there is no limitation on deduction admissible under section 80-IA of the Act to income under the head 'business' only, with which we agree.

13. The other contention of the Revenue is that sub-section (5) of Section 80- IA refers to computation of quantum of deduction being limited from 'eligible business' by taking it as the only source of income. It is contended that the language of sub-section (5) makes it clear that deduction contemplated in sub- section (1) is only with respect to the income from 'eligible business' which indicates that there is a cap in sub-section (1) that the deduction cannot exceed the 'business

income'. On the other hand, it is the case of the Assessee that sub-section (5) pertains only to determination of the quantum of deduction under sub-section (1) by treating the 'eligible business' as the only source of income. It was submitted by Mr. Vohra, learned Senior Counsel, that the final computation of deduction under section 80-IA for the assessment year 2002-03 as accepted by the Assessing Officer, was arrived at by taking into account the profits from the 'eligible business' as the 'only source of income'. He submitted that, however, sub-section (5) is a step antecedent to the treatment to be given to the deduction under sub-section (1) and is not concerned with the extent to which the computed deduction be allowed. To explain the interplay between sub-section (5) and sub-section (1) of Section 80-IA, it will be useful to refer to the facts of this Appeal. The amount of deduction from the 'eligible business' computed under section 80-IA for the assessment year 2002-03 is Rs. 492,78,60,973/-. There is no dispute that the said amount represents income from the 'eligible business' under section 80-IA and is the only source of income for the purposes of computing deduction under section 80-IA. The question that arises further with reference to allowing the deduction so computed to arrive at the 'total income' of the Assessee cannot be determined by resorting to interpretation of sub-section (5).

14. It will be useful to refer to the judgment of this Court relied upon by the Revenue as well as the Assessee. In Synco Industries (supra), this Court was concerned with Section 80-I of the Act. Section 80-I(6), which is in pari materia to section 80-IA(5), is as follows:

"80-I(6) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an industrial undertaking or a ship or the business of a hotel or the business of repairs to ocean-going vessels or other powered craft to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under sub-section (1) for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such industrial undertaking or ship or the business of the hotel or the business of repairs to ocean-going vessels or other powered craft were the only source of income of the assessee during the previous years relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made."

It was held in Synco Industries (supra) that for the purpose of calculating the deduction under section 80-I, loss sustained in other divisions or units cannot be taken into account as sub-section (6) contemplates that only profits from the industrial undertaking shall be taken into account as it was the only source of income. Further, the Court concluded that Section 80-I(6) of the Act dealt with actual computation of deduction whereas Section 80-I(1) of the Act dealt with the treatment to be given to such deductions in order to arrive at the total income of the assessee. The Assessee also relied on the judgment of this Court in Canara Workshops (P.) Ltd. (supra) to emphasize the purpose of sub-section (5) of Section 80-IA. In this case, the question that arose for consideration ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 before this Court related to computation of the profits for the purpose of deduction under section 80-E, as it then existed, after setting off the loss incurred by the assessee in the manufacture of alloy steels. Section 80-E of the Act, as it then existed, permitted deductions in respect of profits and gains attributable to the business of generation or distribution of electricity or any other form of power or of construction, manufacture or production of any one or more of the articles or things specified in the list in the Fifth Schedule. It

was argued on behalf of the Revenue that the profits from the automobile ancillaries industry of the assessee must be reduced by the loss suffered by the assessee in the manufacture of alloy steels. This Court was not in agreement with the submissions made by the Revenue. It was held that the profits and gains by an industry entitled to benefit under section 80-E cannot be reduced by the loss suffered by any other industry or industries owned by the assessee.

15. In the case before us, there is no discussion about Section 80-IA(5) by the Appellate Authority, nor the Tribunal and the High Court. However, we have considered the submissions on behalf of the Revenue as it has a bearing on the interpretation of sub-section (1) of Section 80-IA of the Act. We hold that the scope of sub-section (5) of Section 80-IA of the Act is limited to determination of quantum of deduction under sub-section (1) of Section 80-IA of the Act by treating 'eligible business' as the 'only source of income'. Sub-section (5) cannot be pressed into service for reading a limitation of the deduction under sub-section (1) only to 'business income'. An attempt was made by the learned Senior Counsel for the Revenue to rely on the phrase 'derived ... from' in Section 80-IA (1) of the Act in respect of his submission that the intention of the legislature was to give the narrowest possible construction to deduction admissible under this sub-section. It is not necessary for us to deal with this submission in view of the findings recorded above. For the aforementioned reasons, the Appeal is dismissed qua the issue of the extent of deduction under Section 80-IA of the Act."

33.1. The claim of the assessee therein is that in computing the deduction available to it, it has to be set off against "gross total income"; while Revenue contention was that it is only the "business income" which has to be taken into account for the purpose of set off of the deduction under sections 80IA and 80IB of the Act. Question before us is exactly on the same ratio.

33.2. It is relevant to mention that "gross total income" of the assessee for the assessment year in question is less than the quantum of deduction under section 80IA of the Act, is similar to that of the case before us. Further contentions of the assessee that income from other sources under the head "income from other sources" in addition to business income have to be considered for the purpose of allowing deduction to the assessee subject to ceiling of gross total income. It was also the contention of the Revenue ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 before the Hon'ble Court that language of sub-section 5 clearly specifies that deduction contemplated in sub-section 1 is only with respect of income from eligible business which indicate that there is a cap in sub-section 1 that deduction cannot exceed business income. On the other hand, the assessee submitted that sub-section 1 pertained only to determination of quantum of deduction under sub-section 1 by treating the eligible units as only source of income. In that particular case, the amount of deduction from eligible business computed under section 80IA for the concerned assessment year was of Rs. 492,78,60,973/- which represents income from eligible business under section 80IA and is the only source of income for the purpose of computing deduction under section 80IA of the Act. Question, therefore, arose with regard to allowing deduction so computed to arrive at "total income" of the assessee can be determined by resorting to interpretation of sub-section (5) of section 80-IA of the Act. Hon'ble Court ultimately pleased to hold that sub- section 5 of section 80IA of the Act is limited to determination of quantum of deduction under sub-section 1 of section 80IA of the Act by treating eligible business as the only source of income. But sub-section 5 cannot be pressed into service for

reading a limitation of deduction under sub-section 1 only to business income. Hence, relying upon ratio laid down by the Hon'ble Apex Court, we find no justification in restricting the deduction under section 80IC of the Act to the extent of income from business and profession, rather to be extended against the gross total income of the assessee. Thus, we find merit and considerable substance in the case made out by the assessee, and therefore, we direct the ld.AO to work out the deduction available to the assessee keeping in view of the above observation made by us hereinabove, based on the judgment of Hon'ble Supreme Court cited (supra). We allow this ground of appeal of the assessee, and set aside the orders of the Revenue authorities on this issue.

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34. Ground no. 7 is general in nature and does not require any adjudication. Hence the same is dismissed as infructuous.

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

ITA No. 1327/Ahd/2017, an appeal by the Revenue for the Asstt. Year 2009-10

36. In this appeal, the Revenue has raised as many as eight grounds of appeal for adjudication which are reproduced as under:

> 1) "Whether the Id- CIT(A) is right in law and on facts in deleting the disallowance of Rs. 14,94,163/- made by the A.O. on account of garden expenses."
>
> 2) "Whether the Ld. CIT(A) is light in law and on facts in allowing depreciation @50% in. place of 15% on the basis of Notification No. 10/2009 dated 19.01.2009 issued by CBDT."
>
> 3) "Whether the Ld. CIT(A) is right in law and on facts in deleting the disallowance of Rs. 7,84,88,OOO/- made by the A.O. out of deduction claimed by the assessee u/.s 35(2AB) of the I. T. Act in respect of research and development expenditure."
>
> 4) "Whether the Ld. CIT(A) is right in lain and on facts in allowing depreciation @60% in place of 25% on computer and computer software."
>
> 5) "Whether the Ld. CIT(A) is right in law and on facts in deleting the addition of Rs. 3,54,21,202/- made by the A.O. on account of unutilized MODVAT/CENVAT credit made u/.s 145A of the I. T. Act.'"
>
> 6) "Whether the Ld. C1T(A) is right in law and on facts in deleting the disallowance of Rs. 4,50,000/- made by the A.O. on account of capital investment subsidy."
>
> 7) "Whether the Ld.CIT(A) is right in law and on facts deleting the disallowance made u/s.80IC of the Act attributable to amount pertains to:

i) Allocation of R & D expenses.

ii) Deduction in respect of Notice Pay.

iii) Sale of scrap.

8) "Whether the Ld.CIT(A) is right in law and on facts deleting the disallowa
Rs.30,21,416/- made u/s.80G of the Act"

37. In Ground no.1, the Revenue has challenged the deletion of disallowance of Rs. 14,94,163/- on account of garden expenses.

38. For claiming garden expense as revenue expenditure, the explanation of the assessee was that the said expenditure was required to be incurred regularly for gardening inside the factory premise as per the requirement of Gujarat Pollution Control Board, in order to minimize the effect of pollution arising out of chemical process, and therefore, the same is an allowable deduction. However, the AO was of the view that since the assessee has incurred substantial expense in this behalf, the same has resulted in enduring benefit to the assessee, and therefore, expenditure was of capital nature. Accordingly, he disallowed the claim of the assessee. However, the ld. CIT(A) deleted the disallowance made by the AO by observing that in the assessee's own case from the Assessment Year 2003-2004 to 2008-09, the impugned claim allowed consistently right up-to the Tribunal. As such, the Tribunal dismissed the appeal of the Revenue. Accordingly, the ld. CIT(A) has allowed claim of the assessee, and deleted the impugned disallowance. Revenue is therefore in an appeal before the Tribunal.

39. After hearing both the parties, and after considering materials available on record, we find no disparity on the facts of the present case with that of earlier years. In other words, the fact is same and issue is identical. The Revenue has not disputed factum of allowance of similar claim being allowed consistently in the earlier years. Therefore, following the principle of consistency, we uphold order of the ld. CIT(A) on this issue, and reject the ground no.1 of appeal of the Revenue.

40. In ground no. 2, the Revenue is aggrieved by the action of the ld. CIT(A) in allowing depreciation at the rate of 50% in place of 15% on the basis of notification of the CBDT dated 19.1.2009.

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41. As the facts emerge, the claim of the assessee for higher depreciation was based on the notification of the CBDT circular No. 10/2009 dated 19.01.2009, according to which, new commercial vehicles which were acquired on or after the 1st day of January 2009, but before the 1st day of April, 2009 and put to use 1st day of April, 2009 for the purpose of business or profession, would get 50% depreciation. The assessee submitted during the assessment proceedings that all the conditions stipulated in the above notification were fulfilled, and therefore, the assessee was entitled for higher rate of deprecation at 50%. However, the ld. AO did not accept the claim of the assessee.

Therefore, he rejected its claim by observing that the vehicle was not registered as "commercial vehicle" with the RTO, and therefore, the assessee was not entitled for the same. He allowed depreciation at the rate of 15% instead of 50%. In appeal before the first appellate authority, the ld. CIT(A) considered the Notification of the CBDT, and arrived at a conclusion that claim of the assessee for higher depreciation is covered by all the parameters, and therefore, assessee has rightly made the claim. Accordingly, the ld. CIT(A) directed the AO to allow deprecation @ 50%. Aggrieved Revenue is now before the Tribunal.

42. We have heard both the parties, and gone through the impugned orders and also the Notification of the CBDT circular cited supra. We find that the ld. AO has not appreciated whole facts of the case while deciding the applicability of Notification cited (supra). On the contrary, the ld. CIT-A observed that parameters provided in the Notification clearly applicable to the case of the assessee, and therefore, assessee is entitled for higher depreciation. To support his finding, the ld.CIT(A) has also relied upon decision of the ITAT, Ahmedabad Bench in the case of Voltamp transformer in ITA No.1676/Ahd/2021. The ld. CIT(A) allowed depreciation at 50% on sound footing, based on the above notification. This view of the matter, we do not ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 find any infirmity in the order of the ld. CIT(A) on this issue, which we confirm, and the ground no. 2 of the Revenue's appeal stands rejected.

Ground No. 3:

43. The issue raised by the Revenue in ground no. 3 is that the learned CIT (A) erred in deleting the addition of Rs. 7,84,88,000/- on account of deduction claimed under section 35(2AB) of the Act.

44. The assessee during the year under consideration claimed deduction under section 35(2AB) of the Act for Rs. 168,84,25,897/- only. The AO from the details in form 3CL found that there were certain expenses amounting to Rs. 218. 31 Lacs which has not been approved by the DSIR. Similarly, an amount of Rs. 1351.45 Lacs has been approved by DSIR as incurred outside the approved facility. Thus, the AO purposed to disallow the claim of weighted deduction on the same.

44.1 The assessee submitted that the expenses of Rs. 218.31 Lacs which has not been approved by DSIR include an amount Rs. 15.63 Lacs and Rs. 158.60 lacs on account of rates & taxes and salary to Dr. C Dutt respectively. The rates & taxes are entirely connected with the building where research & development activity has been carried out. Thus same is eligible for weighted deduction under section 35(2AB) of the Act as this expense is similar to the building repair expenses which have been allowed by CIT(A) in A.Ys. 2003- 04 to 2004-05. As far as salary to Dr. C. Dutt is concern, the same is also allowable as he is in-charge of research & Development center and looking after the research activity.

44.2. With respect to the expenditure of Rs. 1351.45 Lacs incurred outside the approved in-house research facility, it was submitted that these expenses ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 are incurred in connection with clinical trial and their patient registration expenses in abroad which are incurred in connection with approved R&D activities and fulfills all the condition laid down under the provision of section 35(2AB) of the Act. On perusal of explanation to section

35(2AB)(1) of the Act, it is revealed that it is not necessary to incur the expenses within the approved facility indeed expenditure incurred in connection with approved research activity.

44.3. However, the AO rejected the submission of the assessee and held that weighted deduction under section 35(2AB) of the Act can only be allowed on the expenses which has been approved by DSIR as expenses incurred in connection with approved in-house R&D facility. Thus the AO disallowed the weighted deduction of Rs. 1,09,15,500/- claimed on expenses of Rs. 218.31 Lacs which was not approved by the DSIR.

44.4. Likewise, the expenditures of Rs. 1351.45 Lacs which has been held as incurred outside the approved in-house research facility cannot be allowed for deduction. Thus the AO disallowed the weighted deduction of Rs. 6,75,72,500/- and in aggregate disallowed the amount of Rs. 7,84,88,000/- (1,09,15,500/- + 6,75,72,500/-) only.

45. Aggrieved assessee preferred an appeal before the learned CIT(A) who deleted the disallowances made by the AO by observing as under:

> 8.2 I have carefully perused the assessment order and the submissions given by the appellant. The issue related to this addition are claim of different expenses which have not been accepted by the DSIR in its report. The DS1R has disallowed revenue expenditure on R & D including recurring expenses on building rates and taxes and salary to Dr. C. Dutt amounting to Rs.218.31 and revenue expenses incurred outside approved facility amounting to Rs. 1351.45 lakh.
>
> The issue has been decided in earlier years in favour of the appellant by CIT(A) for A.Ys. 2006-07. 2007-08 & 2008-09 where following the orders of ITAT for earlier years in the case of the appellant, the expenditure was held to ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 be allowable. Therefore, the appellant is entitled for weighted deduction on these items of expenditure.
>
> The appellant had also claimed expenses amounting to Rs. 1351.45 lakh incurred outside the approved in-house research and development centre and the same has been disallowed by the AO. According to him, the expenditure incurred outside the approved in-house research and development centre is not allowable. It is stated that when the prescribed authority has certified such expenditure as outside approved facility it cannot be allowed. Accordingly, he has worked out the disallowance on this account at Rs.6,75,72,500/-. The appellant has relied upon the submissions made by the A. O. in this regard. Before the A. 0. it was staled that the appellant's research activity is approved by DSIR. The appellant has'also maintained separate account for R & D Unit. The appellant had referred to the explanation of section 35(2AB) and stated that for the purpose of the said section, expenditure on scientific research would also include the expenditure incurred on clinical drug trail. Therefore, such expenditure is admissible. It is noted that the explanation to section 35(2AB) inserted by Finance Act, 2001 w.e.f, 01/04/2002 mentions that the expenditure on scientific

research in relation to drugs and pharmaceuticals includes expenditure incurred on clinical drug trials, obtaining approval from any regulatory authority under Central, Slate and Provincial Act and tiling an application for Patent Act. 1970. Accordingly, the expenditure incurred by the appellant which is outside the facility maintained by it and is not incurred in- house but the same has been incurred for clinical drug trial shall be considered as expenditure on scientific research for the purpose of section 35(2AB). The appellant would, therefore, be entitled to weighted deduction in respect of clinical drug trial, even though the same was not approved by DSIR.

Further, the AR of the appellant also relied on the judgment of Cadila Health Care vs. ACIT [(2013) 56 SOT 891 wherein the Hon'ble ITAT Ahmedabad held that for an expenditure on clinical drug trial to be eligible for deduction u/s 35(2AB) of the Act it is not required to he incurred inside an in-house research and development facility, if the same is incurred in relation to a drug developed in an in-house research and development facility, 'flic said decision has been further confirmed by the 1 lon'ble Gujarat! Ugh Court. [(2013) 31 taxmann.com 300]. The facts of the appellant company are similar to this case. Therefore, following the finding of CIT(A)and ITAT in earlier years and also the decision of Hon'ble Gujarat High Court in case of Cadila Health Care, the disallowance of Rs.7,84.88.0007- (Rs.1,09,15,500 + Rs.6,75,72,500) made by the AO u/s.35(2AB) is deleted. Accordingly, this ground of appeal is allowed.

46. Being aggrieved by the order of the learned CIT(A) the Revenue is in appeal before us.

47. Both the learned DR and AR before us vehemently supported the order of the authorities below as favourable to them.

48. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset, we find that the issue of rates and ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 taxes and salary to Dr. C Dutt is squarely covered in favour of the assessee by order of this tribunal in own case of the assessee in ITA 1869/AHD/2009 vide order dated 31-5-2012 pertaining to the AY 2005-06. The relevant extract of the order is reproduced as under:

"6. Another effective ground as raised by the Revenue is with regard to deleting the disallowance of weighted expenses on R & D of Rs.1,03,25,000/-. Ld. CIT-DR submitted that order passed by Ld. CIT(A) is erroneous. On the contrary, Ld. Authorized Representative for the assessee submitted that weighted deduction on Rs.33.33 expenses relating to repairing building expenses Rs.9.01 lakh municipal tax paid by the assessee and Rs.75.97 lakh, salary to Mr. C Dutta has been allowed in the earlier year. Ld. AR submitted that this issue is squarely covered in favour of assessee in ITA No.3569/Ahd/2004 A.Y. 2001-02.

7. We have heard the rival submissions, perused the materials available on record and judgment cited by the parties. So far the disallowance with regard to R&D, building, municipal tax and salary to Dr. C. Dutt are concerned this issue has been

> decided by the Hon'ble co-ordinate bench in ITA No.3569/Ahd/2004 (supra) in favouor of assessee. In view of the matter, we do not find any infirmity into the order passed by Ld. CIT(A). Hence, this ground of Revenue's appeal is dismissed .

49. In view of the above, we hold that the assessee is eligible for weighted deduction on expenditure of Rs. 218.31 Lacs incurred in connection with rates and taxes and salary to Dr. C. Dutt.

50. Coming to deduction with respect to expenses incurred on account of clinical trial and patient registration, we note this issue also covered in favour of the assessee by the order of special bench of the Tribunal in case of Cadila Healthcare Ltd. vs. ADIT reported in 29 taxmann.com 229 where the special bench held as under:

> For a clinical drug trial, the first stage is to enroll volunteers and/or patient into small pilot studies and subsequently large scale studies are carried out on patients and such clinical drug trial may be in one country or in multiple countries. Carrying out drug trial is essential for approval of the drug in question to be sold in the public and hence, clinical drug trial cannot be carried out inside an in-house research facility i.e. usually the laboratory.
>
> Hence, Explanation to section 35(2AB)(1) does not require that the expenses are essentially to be incurred inside an in-house research facility because it is not possible to incur these expenses inside in-house research facility. [Para 3.6] ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 Thus, all the three expenses included in the Explanation are not capable of being incurred inside the in-house research and development facility and, therefore, for all the expenditures included in the Explanation including the expenditure on clinical drug trial, it is not required that the same has to be incurred inside the in-house research and development facility and if the same are incurred in relation to drug developed in an in-house research and development facility, the same become eligible for deduction under section 35(2AB)(1). [Para 3.8] .

50.1 Respectfully following the above finding of special bench of Tribunal, we hold that the assessee is eligible for weighted deduction on expenses incurred on clinical trial and patent registration. Accordingly, we do not find any infirmity in the order of learned CIT(A) and directed the AO to allow weighted deduction. Hence the ground of appeal of the Revenue is hereby dismissed.

Ground No. 4:

51. The issue raised by the Revenue in ground no. 4 is that the learned CIT (A) erred in allowing the depreciation @ 60% on computer software instead of at 25% on the value of the assets.

52. The assessee in the books of account recorded computer software under intangible assets but in computation of income clubbed the same with the block of computer and claimed depreciation on the same @ 60%. On question by the AO, the assessee submitted that as per the requirement of

As-26 it disclosed the computer software separately as intangible assets. However as per the note 7 to depreciation schedule under the Act, the software is included in the computer. Thus, it claimed deprecation @ 60% on the same under the block of computer.

52.1. However, the AO disregarded the contention of the Assesse by observing that the word in note 7 to depreciation schedule under the Act, as ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 "computer and computer software" are only applicable to system software which are necessary and inbuilt in computer to perform basic function such as operating system. While the application software is different from system software which is not necessary for operation of basic computer function. Application software are the software which is used for specific task in computer which assessee have to acquire separately and these software should be classified as intangible assets under the provision of section 32 of the Act. As such the assessee itself classified these application software separately from computer in the books of account. Thus, the AO reduced the rate of the depreciation from 60% to 25% and disallowed the excess deprecation of Rs. 48,07,609/- by adding to the total income of the assessee.

53. Aggrieved assessee preferred an appeal before the learned CIT (A) who allowed the claim of the assessee by observing as under:

> I have considered the facts of the case as stated by the appellant as well as the AO in this assessment order. I have also considered the submission of the appellant and the case laws referred. It is noticed that Hon'ble ITAT, Ahmedabad in the case of ACIT v. Voltamp Transformer Ltd (ITA No.1676/Ahd/2012) has confirmed the decision taken by the CIT(A) which is as under:
>
> "After considering the explanation of the appellant, I am inclined to accept the view propounded by the appellant. The Income Tax Act does not make any difference between the system software and the application software. The schedule only provide, the depreciation @60% on the computer software and the term 'computer software ' has also been denied in the Appendix-]. The classification made by the Accounting Standards cannot overwrite the definition given in the Income Tax Act, Accordingly, the appellant is entitled to depreciation @60%. The grounds of appeal are accordingly allowed. "
>
> Moreover, Hon 'ble Mumbai special bench in its order of Data Craft India Ltd. (supra) highlighted the fact that term 'computer' has not been defined under the ITAct nor in the general clauses Act, 1987. the meaning of the term computer has to be understood by applying the principles of statutory interpretation i.e.. one has to give the meaning to the expression 'compute/-' not merely by going to the dictionary meaning but by applying common parlance or commercial parlance tests as well as hv analyzing the amendment of legislature in providing higher rate of depreciation.....
>
> The Hon 'ble special bench further went on to hold that 'though junctions of the computer ax one composite unit is for performing ITA.Nos.1285/Ahd/2017 & 7

> others A.Y.2009-10 logical, arithmetical or memory functions etc.. but it is not the only equipment which perform* such functions that can be called as 'computer'. All the input and output devices which in fact support in the receipt of input and outflow of the output are also part of the 'computer'. There/ore the ratio which can be culled out for the aforesaid decision for Hon 'ble special bench (specifically para 31.4 of the order) . it is to be seen that the Hon 'ble special bench has clearly held that when a particular hardware or software is used along with the computers and when their functions are integrated with a computer or in other words when a device is use as part of a computer or in other words when the device is use as part of the computer in its functions even though it may be have in user on standalone basis, bin still than such hardware or software would be termed as a 'computer'.
>
> In view of the detailed finding given by the Hon'ble ITAT Ahmedabad in case of Voltamp Transformer Ltd (supra) and Mumbai special bench in its order of Data Craft India Ltd. and discussion by the CIT(A) in appellant's own case for A.Y.2010-11, 2011-12 and 2012-13, the claim of depreciation @ 60% by the appellant is allowable. I do not Hud any reason to differ with findings o!' Hon'ble ITAT, Ahmedabad and Mumbai in above mentioned cases. Neither the Income Tax Act nor the judicial pronouncement differentiate between the computer and computer software and license to use the same. The list of tangible assets in the table of rate of depreciation at serial no.5 name of the asset is 'computers including computer software'. The meaning of computer software is also given in note no.7 given below the table of rate of depreciation. According to this note the 'computer software' means any computer programme recorded on any disk, tap, perforated media or other information storage device. Hence, by any interpretation the computer software cannot be treated outside the purview of the asset eligible for depreciation the rate of 60%. Accordingly, the AO is directed to allow the depreciation @ 60% as prescribed in the Income Tax Act. The appeal on this ground is allowed.

54. Being aggrieved by the order of the learned CIT(A), the Revenue is in appeal before us.

55. Both the learned DR and AR before us vehemently supported the order of the authorities below as favourable to them.

56. We have heard the rival contentions of both the parties and perused the materials available on record. The issue on hand confined to the extent whether the software purchased by the assessee is part of computer for purpose of depreciation or the same can be treated as intangible assets. At this juncture it is pertinent to refer the depreciation schedule as provided under Act. On perusal of the same we find that Part-A, block III sub block (5) ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 of the Depreciation Schedule contain the rate of depreciation for computer including computer software which reads as under:

> III. MACHINERY AND PLANT *** (5) Computers including computer software [See note 7 below the Table] Notes:

> 7. "Computer software" means any computer programme recorded on any disc, tape, perforated media or other information storage device.

56.1. From the reading of the above, it becomes clear that software is part of computer. Hence, the depreciation on the same is allowable at the rate applicable for computer. In this regard we also find support and guidance from the judgment of Hon'ble Madras High Court in case of CIT vs. Computer Age Management Services (P.) Ltd. reported in 109 taxmann.com 134 where in similar facts, Hon'ble court held as under:

> 8. The question would be as to whether the software application, which was acquired by the assessee would fall under Entry 5 of Part A of New Appendix I, which states that computers including computersoftware are entitled to depreciation at 60%. Note 7 of the Appendix defines the expression 'computersoftware' to mean any programs recorded on CD or disc, tape, perforated media or other information storage devices.
>
> 9. The case of the Revenue is that software are licences and that they are intangible assets and would fall under Part B of New Appendix I, which deals with knowhow, patents, copyrights, trademarks, licenses, francises or any other business or commercial rights of similar nature.

10. We find that Part B of New Appendix I is a general entry whereas Entry 5 of Part A of New Appendix I is a specific entry read with Note 7. In the instant case, the Tribunal, in our considered view, rightly held that the assessee is eligible to claim depreciation at 60 56.2. In view of the above discussion and the principle laid down by the Hon'ble Madras High court, we do not find any infirmity in the finding of the learned CIT (A). Hence the ground of the Revenue's appeal is dismissed.

57. Ground No.5: In this ground, the Revenue challenges action of the ld. CIT(A) in deleting addition of Rs. 3,54,21,20/- made by the AO on account of unutilized MODVAT/CENVAT credit under section 145A of the Income Tax Act.

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10

58. The case of the Revenue is that unutilized MODAVT/CENVAT was a kind of subsidy and incentives given by the Government, which could not be treated as advances, and therefore, stock should be valued in accordance with the provisions of section 145A of the Act. In other words, according to the AO, unutilized balances of taxes should be included in the value of closing stock, which the assessee failed to do so. Accordingly, the unutilized portion of taxes of Rs. 3,54,21,202/- was added by the AO to the total income of the assessee.

59. Dissatisfied with action of the AO, the assessee preferred appeal before the first appellate authority. The ld. CIT(A) after relying on the decision of ITAT, Ahmedabad Benches in the case of Alpanil Industries Vs. ACIT, ITA no.169/Ahd/2015 and 170/Ahd/2015 and the judgment of Hon'ble Supreme Court in the case of Indo Nippon Chemicals Ltd. reported in 261 ITR 275 deleted the

impugned addition, and allowed the claim of the assessee. Aggrieved Revenue is now before the Tribunal.

60. Before us, the ld. DR relied upon the order of the AO, while the ld. counsel for the assessee supported order of the ld. CIT(A).

61. Having heard both the parties, we have gone through orders of the authorities below and materials available on record. It is submitted by the ld. counsel for the assessee, that assessee is regularly following 'exclusive method', i.e. 'net method' of accounting, whereby cost of purchases are accounted for without taking into effect i.e. net of MODVAT including inventory i.e. opening stock and closing stock. He relied on the proposition of law laid down by the Hon'ble Supreme Court in the case of Indo Nippon Chemicals Co. Ltd. (supra), where it was held that the MODVAT being irreversible credit in the hands of the manufacturer, the same would not amount to income taxable under the Act. It is not in dispute that the assessee ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 is following exclusive method of accounting for the past several years. In other words, valuing purchase price minus MODVAT credit is permissible method of accounting. The ld. CIT(A) has rightly relied upon the judgment of Hon'ble Apex Court in the case of Indo Nippon Chemical Co. Ltd. (supra) wherein it was observed that merely because MODVAT credit was irreversible credit offered to manufacturers upon purchase of duty paid on raw-material, that would not amount to income which was liable to be taxed under the Act. It has further held that whichever method of accounting is adopted, the net result would be same. Considering the proposition of law laid down by the Hon'ble Apex Court on this issue, we do not find any justification for the AO to add unutilized MODVAT credit to the closing stock. The ld. CIT(A) has not committed any error in allowing claim of the assessee on this issue, which we uphold, and this ground of Revenue's appeal is dismissed.

Ground No. 6:

62. The issue raised by the Revenue in ground 6 is that the learned CIT (A) erred in deleting the disallowance of Rs. 4,50,000/- made on account of capital investment subsidy.

63. The assessee during the year received subsidy from central government for Rs. 30 Lacs under Capital Investment Scheme 2003 for its unit situated at Baddi Himachal Pradesh, which has been treated as capital receipt. The AO was of the view that the block assets should be reduced by the amount of the subsidy. Accordingly the AO show caused the assessee.

63.1. The assessee in response to SCN submitted that depreciation under section 32 of the Act is allowed on WDV and WDV is defined under section 43(6) of the Act as actual cost at which assessee has acquired the assets and as ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 increased or decrease by the amount as provided therein. However the subsidy received is not covered under the provision of section 43(6) or 43(1) of the Act.

63.2. However, the AO rejected the submission of the assessee by holding that the subsidy of Rs. 30 lacs has been received on account of capital investment which is directly linked with capital assets deployed by the assessee in Baddi Unit. Thus the cost of capital assets should be reduced by the

amount of the subsidy which has been provided to meet the cost of capital assets. Accordingly, the AO disallowed an amount of Rs. 4.5 lacs being 15% of subsidy amount as excess depreciation.

64. Aggrieved preferred an appeal before the learned CIT(A) who allowed the appeal of the assessee by observing as under:

> 12.4 The assessment order and the submission of the appellant has been carefully considered on this point. The appellant has relied on the decision of Hon'ble ITAT, Mumbai in case of ACIT Vs. M/s. Harinagar Sugar Mills Ltd. (ITA. No. 772/Mum/20l2) . in which it is held, that if the object of the subsidy scheme is to enable to assessee in ; setting of the new unit or to expend the existing unit, when the receipt of the subsidy is to be treated on capital account. Following the ratio of this decision the AO is directed to treat the capital investment subsidy of Rs. 30,00,000/- received from Government of India under the Central Capital investment Subsidy Scheme. 2003 as received towards cos! of capital asset and not to reduce the claim of depreciation. Accordingly, appeal on this ground is allowed.

65. Being aggrieved by the order of the learned CIT(A) the Revenue is in appeal before us.

66. Both the learned DR and AR before us vehemently supported the order of the authorities below as favourable to them.

67. We have heard the rival contentions of both the parties and perused the materials available on record. The dispute on hand is whether the WDV of block assets can be reduced by the amount of subsidy or not. At this juncture, ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 we note that the subsidy was provided on account of setting up of small scale industrial unit in backward area under Central Capital Investment Scheme 2003 and not for plant and machinery or any other fixed assets. Therefore, in in our considered opinion, we are inclined to agree with the contention of the learned AR that the same cannot be reduced from WDV of the block assets. Furthermore, the depreciation on assets are allowed on the concept of block assets/ WDV of block of assets which is defined under section 43(6) r.w.s 43(1) of the Act which reads as under:

43. In sections 28 to 41 and in this section, unless the context otherwise requires--

(6) "written down value" means--

> (a) in the case of assets acquired in the previous year, the actual cost to the assessee;
>
> (b) in the case of assets acquired before the previous year, the actual cost to the assessee less all depreciation actually allowed to him under this Act, or under the Indian Income-tax Act, 1922 (11 of 1922), or any Act repealed by that Act, or under any executive orders issued when the Indian Income-tax Act, 1886 (2 of 1886), was in force:

Provided **********

(c) in the case of any block of assets,--

(i) **********

(ii) in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 1989, the written down value of that block of assets in the immediately preceding previous year as reduced by the depreciation actually allowed in respect of that block of assets in relation to the said preceding previous year and as further adjusted by the increase or the reduction referred to in item (i).

43. In sections 28 to 41 and in this section, unless the context otherwise requires--

(1) "actual cost" means the actual cost of the assets to the assessee, reduced by that portion of the cost thereof, if any, as has been met directly or indirectly by any other person or authority:

67.1. On perusal of the above provision, we find that the WDV is to be actual cost of the assets at which the assessee acquired the same. There is no provision for reducing the value of WDV by any amount of incentive or subsidy. In this regard we also find support and guidance from the judgment ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 of Hon'ble supreme court in case of CIT vs. PJ Chemicals reported in 210 ITR 830, where in the similar facts and circumstances it was held as under:

> In the instant case, the reasoning underlying, and implicit in, the conclusion reached by the majority of the High Courts cannot be said to be an unreasonable view and on a preponderance of preferability that view commends itself particularly in the context of a taxing statute. The expression 'actual cost' needs to be interpreted liberally. The subsidy of the nature in the instant case did not partake of the incidents which attract the conditions for their deductibility from 'actual cost'.
>
> The Government subsidy, is an incentive not for the specific purpose of meeting a portion of the cost of the assets, though quantified as or geared to a percentage of such cost. If that be so, it does not partake of the character of a payment intended either directly or indirectly to meet the 'actual cost'.

67.2. In view of the above discussion and judgment of Hon'ble Supreme Court, we do not find any infirmity in the order of the learned CIT(A). Thus the ground of appeal of the Revenue is hereby dismissed.

68. Ground No. 7: In this ground, the revenue raised the issue that learned CIT(A) erred in deleting of disallowance made under section 80IC of the Act on account of allocation of R&D expenses of Rs. 36,16,40,065/-, notice pay of Rs. 9,00,504/- and sale of scrap Rs. 59,59,721/-.

69. At the outset we note that the issue of allocation of research and development expenses is covered in favour of the assessee by the order of this Tribunal in own case of the assessee in ITA no 938/Ahd/2012 for A.Y. 2007- 08 where the appeal filed by the revenue was dismissed. The relevant finding of the bench reads as under:

> 40. We have heard the rival contentions and perused the materials available on record. There is no dispute with regard to the facts of the case, therefore we are not inclined to repeat the same for the sake of brevity and convenience. The issue in the instant case relates whether the expenditure incurred by the assessee on research under the head discovery cost and capital cost is to be allocated to the unit eligible for deduction under section 80 IC of the Act.
>
> 40.1 The provisions of section 80IC of the Act mandates to claim the deduction in respect of eligible unit considering the income from such unit as only the source of income. The assessee in the case on hand has allocated the cost of research expenditure which was directly connected with its eligible unit. The assessee besides the direct cost, has also incurred the cost on scientific ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 research activity which did not materialize. Therefore the same was not allocated to the eligible unit as the same was not directly connected with the eligible unit. In our considered view the cost which is directly connected with the eligible unit is eligible for deduction while determining the deduction under section 80 IC of the Act.
>
> 40.2 We further note that, the Hon'ble ITAT in the own case of the assessee (supra) has not allocated the cost incurred on the scientific research activity while working out the deduction under section 80-HH/80-I of the Act. Though the decision of the tribunal was in relation to the deduction under section 80HH/80I of the Act, but in our considered view the principles laid down by the Tribunal are directly applicable to the facts of the case on hand. At this juncture we find important to refer the relevant extract of the order of this tribunal in the own case of the assessee (supra) which reads as under:
>
> 5. We have heard the rival submissions, perused the material available on record and the judgment cited by the parties. There is no dispute that the facts in the present case are identical with the facts of the case pertaining to A.Y. 2004-05. We have perused the order of the Hon'ble co-ordinate Bench in assessee's own case in ITA No.4356/Ahd/2007 (supra). The Hon'ble Tribunal following the decision of co-ordinate Bench in ITA No.1347/Ahd/2007 for A.Y. 2003-04 dismissed the ground of appeal raised by Revenue. In view of the fact that issue has already been decided by Hon'ble co-ordinate Bench in ITA No. 4356/Ahd/2007 for A.Y. 2004-05 and ITA No.1347/Ahd/2007 for A.Y. 2003-04 in assessee's own case. Respectfully following the order of the coordinate bench, this ground of Revenue's appeal is dismissed.

40.3 It is also important to note that, the AO in the subsequent assessment year 2008-09 has not allocated the cost on scientific research under the head discovery and capital cost to the eligible unit. Thus in our considered view the principle of consistency needs to be applied in the case on hand as held by the Hon'ble apex court in the case of Radhaswoami Satsang v/s CIT reported in 193 ITR 221 wherein it was held as under:

"13. We are aware of the fact that strictly speaking res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."

After considering the facts in totality as discussed above, we do not find any infirmity in the order of the learned CIT-A. Hence we decline to interfere in in his order. Thus the ground of appeal raised by the Revenue is dismissed.

69.1. Similarly, the issue of income on account of notice pay and sale of scrap is also covered in favour of the assessee and against the revenue by the order of this tribunal in own case of the assessee in ITA No 1634/Ahd/2012 for A.Y. 2008-09. The relevant finding reads as under:

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 73.1 It is undisputed fact that all the aforesaid income or arising from the activities carried out by the industrial undertaking eligible for deduction under section 80IC of the Act. Therefore we are of the considered view all the incomes are eligible for deduction under section 80A of the Act. Regarding this we find support and guidance from the judgment of Hon'ble High Court in the case of Metrochem Industries Ltd (supra) wherein the head note of the judgment reads as under:

"I Section 80-I of the Income-tax Act, 1961 - Deductions - Profits and gains from industrial undertakings, etc., after a certain date (Computation of deduction) - Assessment years 1994-95, 1996-97 and 1997-98 - Deduction under section 80-I is allowable in respect of Kasar, discount and sales-tax set off [In favour of assessee] I Deduction under section 80-I is allowable in respect of Kasar, discount and sales-tax set off.

II Section 80-IA of the Income-tax Act, 1961 - Deductions - Profits and gains from infrastructure undertakings (Computation of deduction) - Assessment years 1994-95, 1996-97 and 1997-98 - Foreign exchange fluctuation and duty drawback is an income derived from industrial undertaking, eligible for deduction under sections 80-I and 80-IA [In favour of assessee] II Foreign exchange fluctuation and duty drawback is an income derived from industrial undertaking, eligible for deduction under sections

80-I and 80-IA."

73.2 In view of the above, we hold that the assessee is eligible for deduction in respect of the income as discussed above under section 80 IC of the Act. Accordingly we direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed and the Revenue is dismissed.

69.3. Respectfully following the same, we do not find any reason to interfere in the order of the ld. CIT-A and thus direct the AO grant the deduction under section 80-IA of the Act on the items of income as discussed above. Hence, we hereby dismiss the ground of appeal of the Revenue.

70. Ground No. 8 : This ground relates to the deletion of disallowance of Rs. 30,21,416/- made under section 80G of the Act.

71. Brief facts of the case are that, during the assessment proceedings, the ld. AO noticed that the assessee has made donation of Rs. 1,17,20,000/-, but the same was not reflected in the return of income. According to the ld.AO, since the assessee has claimed deduction under section 80IC in respect of 100% profit of the Baddi unit, which was arrived at after the said ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 disallowance of donation, separate deduction in response of the donation was not allowable under section 80G of the Act to the assessee. On question by the AO, the assessee explained that since the payment in question relating to donation was not related to operation of Baddi Unit, therefore, the same was not allocated to Baddi unit. The explanation of the assessee was not accepted by the AO. He was of the view that income available with the assessee- company for giving the donation was also generated by way of profits of Baddi unit, which was exempted income under section 80IC of the Act. Therefore, the ld. AO allocated amount of donation to the extent of Rs. 60,42,832/- to baddi unit and deduction @50% was disallowed to the assessee-company under section 80G of the Act. However, in appeal before the first appellate authority, the ld.CIT(A) allowed the claim of the assessee by holding that profit eligible for deduction under section 80IC will have to be first computed, and thereafter donation has to be considered for working out the deduction. In other words, firstly deduction under chapter VIA are to be deducted, and thereafter deduction under section 80G of the Act is to be made. The ld. CIT(A) while allowing the claim of the assessee also relied upon the decision taken in the assessee's own case for the Asstt. Year 2007- 08 and 2008-09. Aggrieved by the decision of the ld. CIT(A), the Revenue is before the Tribunal.

72. We have heard both the parties, and perused material available on record. At the outset it is brought to our notice that this issue has been covered in favour of the assessee by the consolidated order of the Tribunal in ITA No. 907/Ahd/2012 (assessee's appeal for A.Y.2007-08) and 938/Ahd/2012 (departmental appeal) as also assessee's appeal in ITA No.163/Ahd/2012 and Department's appeal in ITA No.1725/Ahd/2012 for the Asstt. Year 2008-09. A copy of this order is available in the paper book filed before the Tribunal. At paragraph No. 41 to 45.2 of this order, Coordinate ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 Bench of this Tribunal dealt with similar issue and held that the donation paid by the assessee has no connection with the unit eligible for deduction under section 80IC of the Act. Coordinate Bench further observed that assessee is entitled to claim deduction under section 80G of the Act after claiming all the deduction provided

under chapter VIA of the Act. In other words, the assessee is entitled to claim money spent under section 80G while computing "Total Taxable Income" in accordance with the parameters provided therein. Therefore, since the order of ld.CIT(A) is based on the decision of the Tribunal on similar issue, we do not find any infirmity in his order allowing deduction under section 80G of the Act. We uphold his order, and this ground of Revenue's appeal stands rejected.

73. In the result, the appeal of the Revenue is dismissed Now we take up ITA No. 1286/Ahd/2017, an appeal by the Assessee for AY 2010-11

74. The assessee has raised the following ground of appeal:

> 1. On the facts and in the circumstances of the case, the learned CIT(A) erred in confirming disallowance of Doctors' Sponsorship Expenses of Rs. 14,32,80,540 out of the total disallowance of Rs.14,86,15,415 made by the Assessing Officer.
>
> 2. On the facts and in the circumstances of the case, the learned CIT(A) erred in confirming addition of Rs.98,71,013 made by the Assessing Officer on the basis of the order dated 8.1.2014 passed by the Transfer Pricing Officer u/s. 92CA of the Income-tax Act
>
> 3. On the facts and in the circumstances of the case, the learned CIT(A) erred in rejecting the relevant Ground of Appeal raised by the appellant company before him that while computing deduction u/s. 80-IC of the Income-tax Act the Assessing Officer wrongly reduced the quantum of the eligible income by reallocating administrative expenses of Rs.5,48,16,601 to Baddi unit.
>
> 4. On the facts and in the circumstances of the case, the learned CIT(A) erred in rejecting the relevant ground of appeal raised by the appellant company before him that while computing deduction u/s. 80-IC of the Income-tax Act the Assessing Officer wrongly reduced the quantum of eligible income to the following extent:
>
> (a) Other Income 76,774
>
> (b) Export Benefits 1,23,57,230
>
> (c) Insurance Income 2,69,386
>
>
>
> (d) Penalties Recovered from Suppliers 2,60,250
>
> 5. On the facts and in the circumstances of the case, the learned CIT(A) erred in not allowing deduction of a sum of Rs.79,58,97,799 being profit eligible u/s. 80HHC of the Income-tax Act, while computing book profit u/s. 115JB of the Income-tax Act.

6. On the facts and in the circumstances of the case, the learned CIT(A) erred in rejecting the Additional claim made by the assessee company in respect of provision for leave encashment.

7. On the facts and in the circumstances of the case, the learned CIT(A) erred in rejecting the Additional Ground raised by the assessee company that research and development expenses should not be allocated to Baddi unit on the basis of turnover.

8. Without prejudice to the above, on the facts and in the circumstances of the case, the learned CIT(A) erred in considering the appellant company's alternative ground of appeal that from out of the total development cost incurred by the appellant company for the products to be sold in domestic as well as international market, only the portion of development cost pertaining to the products to be sold in domestic market should be allocated to Baddi Unit for the purposes of Section 80-IC, as the said unit is solely engaged in the manufacturing products to be sold in the domestic market, in spite of the fact that the appellant company wrongly considered total development cost for allocating to Baddi unit while filing the return of income.

9. The appellant craves leave to add, alter, amend and/or withdraw any ground or grounds of appeal either before or during the course of hearing of the appeal.

75. The grievances of the assessee is that the learned CIT(A) erred in confirming the disallowance of doctor sponsorship expense in part for Rs. 14,32,80,540/- only.

76. The assessee during the year claimed selling and distribution expenses of Rs. 70.81 Crores which included expenses of Rs. 14,86,15,415/- on account of doctor sponsorship and business advancement of Rs. 25,29,92085/- only.

76.1. The AO in the assessment proceeding observed that the expenses incurred for the benefit of doctor is not allowable under the provision of section 37(1) of the Act as the same is incurred in violation of regulation issued by the Indian Medical Council in exercise of power conferred under section 33 of Indian Medical Council Act 1956. Further, the CBDT also issued circular number 05/2012 dated 01-08-2012 prohibiting the allowances ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 of such expenses. Thus the AO disallowed the expense amounting to Rs. 14,86,15,415/-.

76.1. Similarly, the AO observed that the assessee failed to establish that the expenditure on account of business advance does not include expenses incurred for benefit of the Doctors. Thus the AO made Ad-hoc disallowance of such expense for an amount of Rs. 2,52,99,208/- being 10% of the total business advancement expense of Rs. 25,29,92085/- only.

77. Aggrieved, assessee preferred an appeal before the learned CIT(A).

77.1 The assessee before the learned CIT(A) submitted that being in the field of pharmaceuticals industry, it has to incur certain expenditure in order to improve the growth of product. Such

expenses include on participation in conference, scientific grant for research activity, medical equipment given for free to increase the confidence about the products etc. Thus, the assessee contended that these expenses are incurred wholly and exclusively for the purpose of the business allowable under section 37 of the Act. The assessee further submitted that the regulation of the Indian Medical Council is only applicable for medical practitioners being member of medical council and not on the assessee which is engaged in industry of pharmaceuticals. Therefore, there is no violation of law on force.

77.2. The assessee alternatively submitted that Indian Medical Council amended its regulation vide amended as on 10th December 2009 and CBDT circular bearing No. 05/2012 was issued as on 01-08-2012. Thus same cannot be applicable before the date of issue of such notification and circular.

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 77.3. The assessee with respect to business advancement expense submitted that such expense was incurred for giving some gift to business associates and none of the expense exceed the sum of Rs. 1,000/-.

77.4. The learned CIT (A) after considering the facts in totality provided part relief to the assessee by observing as under:

> 6.2 I have considered the assessment order, facts of the case and the submissions made by / appellant. The A.O made the impugned disallowance under the head of Selling and distribution Expenses on account of doctor's sponsorship, holding that these expenses had been incurred on doctors which was in violation of the amended Notification of the Medical Council of lndia 10.12.2009 and the CBDT's Circular no 5 of 2012 dated 01.08,2012. It was held by the A.O that since such payments to doctors were not allowed under the said guidelines and regulations, the same were also, consequently not allowable u/s 37(1) since it was an 'offence' and 'prohibited by law'. The appellant on the other hand contended that these regulations were for doctors and not for pharmaceutical companies like the appellant.
>
> 6.2.1 It is seen from the submissions made by the appellant that the amount spent on doctor's sponsorship expenses includes the following-

Sr. No.	Particulars	Amount [Rs.
1.	Academic Grant/Scientific Grant	10,62,30,190
2.	Gift Card	3,26,69,010
3.	Travel Charges	43,81,340
4.	Organizing CME	17,24,750
5.	Medical Equipment	9,22,176
6.	Stationary Kit	7,39,014

7.	Conference Participation	5,18,565
8.	Book	5,00,334
9.	Advertisement	3,46,891
10.	IT Spares	1,33,792
11.	Stall charges	15,000
12.	Other	4,34,353

6.2.2 It has been submitted by the appellant that these expenses include payments made to people and institutes for carrying out research & development for new formulations, organizing seminars, giving medical ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 equipment's as samples to doctors to test the nature of the product, etc, and hence these are incurred for the promotion of the appellant's business. I am inclined to agree with the appellant when it states that some of these expenses are essential for the promotion and development of its business. However I am not in agreement with the appellant that travel expenses and gift cards for doctors are also essential and allowable. Similarly, in respect of academic grants and scientific grants amounting to Rs.10,62,30,190/-, no further break- up in respect of the nature of grants, who the recipients were, what was the study about, what was the outcome of the research, has been given. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

6.2.4 It is very clear from the above that to be able to give grants to doctors, there are certain guidelines to be followed and certain conditions to be fulfilled. No explanation has been given by the appellant to demonstrate whether these were, in fact, adhered to. Similarly, the nature of 'Gift card" amounting to Rs.3,26,69,010/- is not explained. In view of the MCI guidelines, I am of the view that while it is true that the same are guidelines for doctors, it is equally true that to voluntarily spend copious amounts on something which is prohibited by law (both by MCI and by virtue of the CBDT Circular] is not justified. Thus it is held that the expenditures at Serial Nos. 1, 2 and 3 ie Academic Grant/Scientific Grant - Rs.10,62,30,190/-; Gift Card - Us.3,26,69,010/- and Travel Charges -Rs.43,81,340/- (Total Rs.14,32,80,540/-] are correctly disallowed by the A.O. However as regards the expenditure at Sr. Nos. 4 to 12 , these are found to be in the nature of business promotion expenses, and in my view, do not violate the guidelines discussed in the .paras above. The same are(therefore allowed. Thus out of the total disallowance made by the AO out of Doctor's Sponsorship expenses, the disallowance of Rs.14,32,80,540/- is confirmed.

6,2.5 As regards the disallowance of Rs.2,52 99,20S/-on account of business advancement expenses, it is seen from the details filed that the expenditure has been

> incurved on the distribution of gift items of various kinds to various stakeholders, like distributors, stockiest, wholesalers, employees, pharmacies, etc. In view of various case laws in this regard, eg AC1T Vs M/s Dupen Laboratories Pvt Ltd, in !TA No 5195/Mum/2013 and ACIT Vs. M/s Liva Healthcare Lld in ITA No.847/Mum/2012 and the facts of the case, it. is held that these expenses are essential for the business of the appellant and pertain wholly and exclusively to its business. The addition of Rs.2,52,99,208/- Is deleted. Ground of appeal No 3 is partly allowed.

78. Being aggrieved by the order of the learned CIT(A) both the assessee and Revenue are in appeal before us. The assessee is in appeal against confirmation of disallowance of Rs. 14,32,80,540/- whereas the Revenue is in appeal against the deletion of addition of Rs. 53,34,875/- and Rs. 2,52,99,208/-. The relevant ground of the Revenue's appeal in ITA No. 1328/Ahd/2017 reads as under:

> "Where the Ld.CIT(A) is rightly in law and on facts in granting relief of Rs.53,34,875/- on account of distribution expenses under the head "Doctor Sponsership" and deleting the disallowance of rs.2,52,99,208/- made by the A.O on account of business advancement expenses."
>
> ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10
>
> 79. Both the learned DR and AR before us vehemently supported the order of the authorities below to the extent favourable to them.

80. We have heard the rival contentions of both the parties and perused the materials available on records. The fact of the case is not in dispute. Therefore, we are not inclined to repeat the same for the sake of brevity and convenience. We find the expenses incurred by the assessee as discussed above have been held in violation of the MCI regulations 2002. Therefore the same was disallowed by the AO after referring the CBDT Circular bearing No. 5/2012 dated 1-8-2012 under explanation 1 to section 37(1) of the Act. Now the following questions arise for our adjudication.

i. Whether the expenses incurred by the assessee by giving freebies to the doctors are prohibited by the Medical Council of India (MCI) and therefore, the said expenses are not eligible for deduction under the Explanation 1 to Section 37(1) of the Income-Tax Act.

ii. Whether the benefit being freebies given by the assessee to doctors are prohibited by virtue of the provisions of CBDT circular bearing No. 5/2012 issued on 1-8-2012 under explanation 1 to section 37(1) of the Act.

80.1. At this juncture, we refer the said CBDT Circular No. 5/2012 dated 01.08.2012 which is reproduced as under:

> Inadmissibility of expenses incurred in providing freebees to Medical Practitioner by pharmaceutical and allied health sector Industry Circular No. 5/2012 [F. No.

225/142/2012-ITA.II], dated 1-8-2012 It has been brought to the notice of the Board that some pharmaceutical and allied health sector Industries are providing freebees (freebies) to medical practitioners and their professional associations in violation of ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 the regulations issued by Medical Council of India (the 'Council') which is a regulatory body constituted under the Medical Council Act, 1956.

2. The council in exercise of its statutory powers amended the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the regulations) on 10-12-2009 imposing a prohibition on the medical practitioner and their professional associations from taking any Gift, Travel facility, Hospitality, Cash or monetary grant from the pharmaceutical and allied health sector Industries.

3. Section 37(1) of Income Tax Act provides for deduction of any revenue expenditure (other than those failing under sections 30 to 36) from the business Income if such expense is laid out/expended wholly or exclusively for the purpose of business or profession. However, the explanation appended to this sub-section denies claim of any such expense, if the same has been incurred for a purpose which is either an offence or prohibited by law.

Thus, the claim of any expense incurred in providing above mentioned or similar freebees in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 shall be inadmissible under section 37(1) of the Income Tax Act being an expense prohibited by the law. This disallowance shall be made in the hands of such pharmaceutical or allied health sector Industries or other assessee which has provided aforesaid freebees and claimed it as a deductable expense in its accounts against income.

4. It is also clarified that the sum equivalent to value of freebees enjoyed by the aforesaid medical practitioner or professional associations is also taxable as business income or income from other sources as the case may be depending on the facts of each case. The Assessing Officers of such medical practitioner or professional associations should examine the same and take an appropriate action.

80.2. A perusal of the above circular reveals that CBDT has issued the circular as discussed above after making a reference to the circulars issued by the medical Council of India known as "Indian Medical Council Professional Conduct, Etiquette and Ethics) Regulations, 2002". This circular of MCI regulates the conduct, etiquette and ethics of the registered medical practitioners. Likewise, the chapter 6 of the circular/ regulation/ notification prohibits the doctors to take any advantages directly or indirectly from the pharmaceutical companies and allied health sector industries. In case any medical practitioner is found guilty for carrying out any unethical practice, a disciplinary action can be taken against the doctor by the MCI.

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 80.3. We have also perused the guidelines/regulations /notifications of "Indian Medical Council Professional Conduct, Etiquette and Ethics Regulations, 2002". However, we find that there was no mention in the said regulation/ notification/ circular issued by the MCI covering pharmaceutical companies or allied health sector industries. At the time of hearing, the learned DR has also not brought anything on record suggesting that the regulations framed by the MCI were applicable to the pharmaceutical industries in any manner directly or indirectly. In other words, to our understanding, such regulations made by the MCI were meant for the doctors/medical practitioners and therefore the same cannot bound the pharmaceutical industries and allied health sector companies.

80.4 In this connection, we draw support and guidance from the order of Delhi tribunal in the case of DCIT Vs. PHL Pharma P Ltd. reported in 78 taxmann.com 36 wherein it was held that Indian Medical Council Regulation of 2002 has jurisdiction to take action only against the medical practitioners and not to health sector industry. The relevant extract of the order reads as under:

> 8. From a perusal of above amendment/notification in the MCI regulation, it is quite clear again that same is applicable for medical practitioners only and the censure/action which has been suggested by it is only on medical practitioners and not for pharmaceutical companies or allied health sector industries. The violation of the aforesaid regulation would not only ensure a removal of a doctor from the Indian Medical Register or State Medical Register for a certain period of time and it does not impinge upon the conduct of pharmaceutical companies. This important distinction has to be kept in mind that regulation issued by Medical Council of India is qua the doctors/medical practitioners and not for the pharmaceutical companies. As a logical corollary to it, if there is any violation or prohibition as per MCI regulation in terms of section 37(1) r.w. Explanation 1, then it is only meant for medical practitioners and not for pharmaceutical company (Assessee Company) for claiming the expenditure.

80.5. From the above order of Delhi tribunal, there remains no ambiguity that the Medical Council of India has no jurisdiction to pass any order or ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 regulation against any hospital or any health care sector under its 2002 regulation as discussed above. So once the Indian Medical Council Regulation does not have any jurisdiction nor has any authority under law upon the pharmaceutical company or any Allied health sector industry, then such a regulation cannot have any prohibitory effect on the pharmaceutical company like the assessee. If Medical Council regulation does not have any jurisdiction upon pharmaceutical companies and it is not applicable upon Pharma companies, then, in our considered view, there was no violation of the provisions of section 37(1) of the Act.

80.6 Without prejudice to the above we also note that the circular issued by CBDT as discussed above is applicable for the assessment year 2013-14 whereas the year under consideration pertains to the assessment year 2009-10. Therefore the circular issued by the CBDT cannot be applied for the year under consideration. In holding so we draw support and guidance from the order of this tribunal in the case of ITO Vs. Sunflower Pharmacy reported in 88 taxmann.com 326 wherein it was held that such circular was applicable from the AY 2013-14 by observing as under :

We find that the issue is no longer res Integra and has been examined by the Coordinate Bench of Tribunal in Syncom Formulations (I) Ltd. vs. DCIT in ITA Nos.6429 & 6428/Mum/2012 order dated 23/12/2015. The relevant operative para of the order of the Coordinate Bench is reproduced hereunder:-

"5. We have considered rival contentions and found that receiving of gifts by doctors was prohibited by MCI guidelines, giving of the same by manufacturer is not prohibited under any law for the time being in force. Giving small gifts bearing company logo to doctors does not tantamount to giving gifts to doctors but it is regarded as advertising expenses. As regards sponsoring doctors for conferences and extending hospitality, pharmaceuticals companies have been sponsoring practicing doctors to attend prestigious conferences so that they gather contemporary knowledge about management of certain illness/disease and learn about newer therapies. We found that the disallowance was made by the AO by relying on the CBDT Circular dated 01.08.2012 onwards. However, the Circular was not applicable because it was introduced w.e.f. 01.08.2012. i.e. assessment year 2013-2014. Whereas, the relevant assessment year under consideration is 2010-2011 and 2011-2012. Accordingly, we do not find any merit in the disallowance so made by the AO in both the assessment years under consideration."

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 80.7 In view of the above we hold that the circular issued by the CBDT as discussed above is not applicable for the year under consideration and consequently the disallowance cannot be made in the year under consideration on account of freebies given to the medical practitioners being the AY 2009-

10. Hence, the ground of appeal of the assessee is allowed.

81. The grievance of the assessee in this ground of appeal is that the learned CIT(A) erred in confirming the upward adjustment of TP for Rs. 98,71,013.00 only.

82. We find that the TPO/AO made upward adjustment of Rs. 91,90,770/- on account of loan and advances provided to AE and an amount of Rs. 6,80,243/- on account of liaising fee paid to AE.

83. As far as TP adjustment of Rs, 91,90,770/- on account of loan/advance is concern we note that the issue raised by the assessee in its grounds of appeal for the AY 2010-11 is identical to the issue raised by the assessee vide ground no. 1 in ITA No. 1285/AHD/2017 for the assessment year 2009-10. Therefore, the findings given in ITA No. 1285/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2010-11. The appeal of the assessee for the assessment 2009-10 has been decided by us vide paragraph Nos.18 of this order and allowed in favour of assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2010-

11. Hence, the grounds of appeal filed by the assessee to the extent of Rs. 91,90,770/- is allowed.

84. Coming to upward adjustment of Rs. 6,80,243/- on account liaison fee paid to AE. We note that the identical addition was made by the TPO/AO in ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 immediate preceding assessment year 2009-10 which has been deleted by the learned CIT(A) by observing as under:

> The order of the TPO and above submission given by the appellant has been considered carefully. It is noticed that the TPO has restricted the compensation to the AEs to 2% on the basis of Ahmedabad ITAT ruling in case of Cadila1 Health Care. The TPO has not denied the services provided by the AEs which include Registration of Dossier, Liaison support, Market information, Regulatory support and Logistic support. The assessee also provided the copy of agreement where the nature of services being received from AEs is mentioned. The appellant also provided the report of the independent review of the expert after considering the factuality and nature of services rendered where mark up of 10% to 16% over costs has been considered as appropriate so as to compensate for these services. The AR also argued that in earlier years also the appellant company had compensated AL's at 10% mark up which has already been accepted in the assessment proceedings, The facts and circumstances have not changed in this year, still the TPO has taken a different view.
>
> Looking at the submission of the appellant and details therein it seems that the compensation paid to AEs @ 10% is justifiable. The view is also supported by Calcutta High Court in the 'case ofCIT V. ITC. Infotech India Limited (2016) 66 taxmann.com 106/237 Taxman 476/384 ITR 380 (Cal.) A.Y.2006-07, where in respect of marketing and administrative services rendered by AEs assessee adopted a revenue sharing model whereby assessee kept 75 per cent of revenue and paid 25 per cent of revenue to AEs, since said model was duly supported by relevant documents, impugned addition made to assessee's ALP by adopting revenue sharing model of 1 5 per cent was to be set aside.
>
> In view of above discussion the adjustment of Rs. 1,51,247 /- on account of Liason Services by restricting it to 2% is not sustainable. The AO is directed lo delete the addition made on the basis of this adjustment.

84.1. We note that the above finding of the learned CIT (A) reached to finality as none of the party either Revenue or the assessee challenged the same. Therefore we are of the view principle of consistency should be followed in the given fact and circumstances as there is no change in the facts and law applicable for the time being in force. Thus we set aside the finding of the authority below, hence the ground of appeal the assessee is allowed.

85. Ground no.3: In this ground, the grievance of the assessee is that the ld. CIT(A) has erred in rejecting the claim of the assessee that while computing deduction under section 80IC of the Act that the eligible income ought not to be reduced by reallocating administrative expenses of Rs. 5,48,16,601/- to Baddi unit.

86. Though, at the outset, it has been stated by the ld. counsel for the assessee that this issue in question is covered in favour of the assessee by the decision of the Tribunal for the Asstt. year 2007-08 and 2009-10 in assessee's own case (copy of which is placed on record), for the sake of brevity, we take a short facts of the case, emerge out from the relevant orders.

87. During the assessment proceedings, it was noticed by the AO that the assessee has allocated common administration expenses on the basis of number employees of Indrad and Baddi unit. According to the AO, allocation should be based on the basis of the turnover of both the units, and not on the basis of number of employees. A show cause notice was issued to the assessee to this effect. It was explained by the assessee that administrative expenses has a direct nexus with the manpower, that is to say, even if the unit did not have turnover, the administrative expenses would be incurred and the same needed to be allocated to both the units. The ld. AO did not accept contentions of the assessee. He held that allocation of the administrative expense was based on the size and turnover of the company. Accordingly, he made impugned addition applying turnover as mode of allocation. Assessee challenged this action of the AO, before the first appellate authority, but did not succeed, hence, before the Tribunal in second appeal.

88. As stated above, the ld. counsel for the assessee submitted that similar issue arose in the assessment years 2007-08 and 2008-09 wherein the Tribunal in ITA No. 907 and 1634/Ahd/2012 allowed the claim of the assessee. We also find this ground is similar to ground no. 4 of assessee's appeal in ITA No.1285/Ahd/2017 for the Asstt.Year 2009-10, which we have dealt in paragraph No. 28 of this order, wherein we have allowed the claim of the assessee. Therefore, since facts and circumstances in the present year are similar with that of earlier years, following the order of Co-ordinate Bench of the Tribunal cited (supra) in the assessee's own case, and also for the reasons ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 stated hereinabove, we delete the impugned addition, and allow this ground of appeal of the assessee in this year as well.

89. Ground No.4 : By this ground, assessee challenges order of the ld. CIT(A), who has confirmed the action of the ld.AO in reducing the following income while computing deduction under section 80IC of the Income Tax Act, 1961.

(d) Other income	Rs. 76,774/-
(e) Export Benefits	Rs. 1,23,57,230/-
(f) Insurance Income	Rs. 2,69,386/-
(g) Penalties recovered from suppliers	Rs. 2,60,250/-

90. During the assessment proceedings, the ld.AO noticed that the assessee has included the above four income as eligible profit and claimed deduction under section 80IC thereon. To the show cause notice, it was explained by the assessee, all the above incomes are integral part of business of the assessee, and therefore, the same are eligible income for claiming deduction under section 80IC of

the Act. However, the ld.AO did not accept this submission of the assessee. He held that the impugned income earned by the assessee has no direct nexus and independent of its manufacturing activities, and therefore, does not qualify for inclusion of the same in the eligible profits for claiming deduction under section 80IC of the Act. He accordingly denied the claim of the assessee and reduced all four above incomes from the eligible profits.

91. Aggrieved, assessee preferred an appeal before the ld. CIT(A), however, assessee could not get any relief. Thus, assessee is before the Tribunal.

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10

92. Before us, the ld. counsel for the assessee while reiterating submissions made before the Revenue authorities further stated that similar issue arose in the earlier assessment years i.e. A.Y.2007-08 & 2008-09 also in ITA No. 907 and 1634/Ahd/2012, wherein the claim of the assessee was allowed. He also relied upon the decision of Hon'ble Gujarat High Court in the case of CIT Vs. Metrochem Industries Ltd. reported in 79 taxmann.com 440. Therefore, when the facts and circumstances in this year also are the same, the claim of the assessee for the Asstt. Year 2010-11 should also be allowed on similar line.

93. On the other hand, the ld. DR supported the orders of the Revenue authorities.

94. Heard both the sides. We have also gone through the impugned order, judgments cited before us and the materials available on record. We find that the question whether impugned incomes are to be excluded or included in the eligible profit for claiming deduction under section 80IC of the Act or not, was already answered by the co-ordinate bench of this Tribunal in assessee's own case cited (supra) for the earlier assessment years i.e. 2007-08 and 2008-

09. For the adjudication of this issue, it would be sufficient, if we reproduce relevant findings of the Coordinate Bench. It reads as under:

> "73. We have heard the rival contention and perused the material available on record. The issue in the instant case is whether the miscellaneous income such as Penalty Received from Supplier, Discount Received from Vendors and Export Benefits are eligible for the deduction u/s 80IC of the Act.
>
> 73.1 It is an undisputed fact that all the aforesaid income or arising from the activities carried out by the industrial undertaking eligible for deduction under section 80IC of the Act. Therefore we are of the considered view all the incomes are eligible for deduction under section 80A of the Act. Regarding this we find support and guidance from the judgment of Hon'ble High Court in the case of Metrochem Industries Ltd (supra) wherein the head note of the judgment reads as under:
>
> "I Section 80-I of the Income-tax Act, 1961 - Deductions - Profits and gains from industrial undertakings, etc., after a certain date (Computation of deduction) -

Assessment years 1994-95, 1996-97 and 1997-98 - Deduction under section 80-I is allowable in respect of Kasar, discount and sales-tax set off [In favour of assessee] ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 I Deduction under section 80-I is allowable in respect of Kasar, discount and sales-tax set off.

II Section 80-IA of the Income-tax Act, 1961 - Deductions - Profits and gains from infrastructure undertakings (Computation of deduction) - Assessment years 1994-95, 1996-97 and 1997-98 - Foreign exchange fluctuation and duty drawback is an income derived from industrial undertaking, eligible for deduction under sections 80-I and 80-IA [In favour of assessee] II Foreign exchange fluctuation and duty drawback is an income derived from industrial undertaking, eligible for deduction under sections 80-I and 80-IA."

73.2 In view of the above, we hold that the assessee is eligible for deduction in respect of the income as discussed above under section 80 IC of the Act. Accordingly, we direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed, and the Revenue is dismissed."

94.1. In view of the above order of the Tribunal, we do not find any disparity of facts and circumstances in the present year as that of earlier years. Therefore, we are unable to deviate from the view taken by the Co-ordinate Bench on this issue. We set aside orders of the Revenue authorities on this issue, and allow impugned claim of the assessee. This ground of appeal of the assessee is allowed.

95. Ground No. 5: The grievances raised by the assessee in this ground is that the learned CIT (A) erred not allowing the deduction of Rs. 79,58,97,799/- under the provision of MAT while calculating the book profit.

96. The assessee while calculating the book profit under the provisions of MAT under section 115JB of the Act has reduced the profit eligible for deduction under section 80HHC of the Act amounting to 79,58,97,799/- in pursuance to the clause (iv) of explanation 1 to section 115JB of the Act.

96.1. The assessee during the assessment proceedings further contended that the clause (iv) of explanation to section 115JB of the Act, authorizing the assessee to subtract the amount of profit eligible for deduction under section 80HHC of the Act while calculating the book profit, was omitted by the Finance Act 2011 with retrospective effect from 1-4-2005. As per the assessee this amendment was brought under the statute to nullify the effect of the ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 judgment of Hon'ble Supreme Court in the case of Ajanta Pharma reported in 327 ITR 305. According to the assessee the Parliament is authorized to bring any amendment with retrospective effect but it can't do so to nullify the effect of order of the Hon'ble Supreme Court. In other words, the Parliament to nullify the effect of the Supreme Court judgment can bring the amendment but with prospective date. Accordingly such amendment was unconstitutional. The assessee also contended that at the time of filing the return of income the clause (iv) of explanation 1 to section 115JB of the Act was very much in force. The provisions of section 294 of the Act provides

that the provisions specified under the statute as on 1st day of the assessment year shall be prevalent. As such, the clause (iv) of explanation 1 to section 115JB of the Act was very much in force as on the 1st day of the assessment year. Accordingly the assessee contended that it cannot be denied the benefit of the deduction provided under clause (iv) to section 115JB of the Act.

96.2. However, the AO disregarded the contention of the assessee by observing that the amendment by the Finance Act 2011 was brought under the statute with retrospective effect i.e. 1-4-2005 wherein the benefit given to the assessee under clause (iv) of explanation 1 of section 115JB of the Act was denied to the assessee. Accordingly, the AO did not allow the deduction of the amount of 79,58,97,799/- to the assessee while calculating the amount of profit under section 115JB of the Act.

97. Aggrieved assessee preferred an appeal to the learned CIT-A, who confirmed the order of the AO by observing as under:

> I have considered the assessment order, facts on the case and the submissions made by the appellant. The AO made the impugned addition since assessee has subtracted the profit eligible u/s.80HHC of Rs.79,58,97,799/- from its book profit. In view of the amendment brought into section 80HHC by the Finance Act, 2011 with effect from 1.4.2005, the said profit u/s.80HHC is not eligible for deduction from the book profit. In view of the same the AO's action is ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 disallowing the same was correct and the same is upheld. Ground of appeal no.11 is dismissed.

98. Being aggrieved by the order of the learned CIT-A, the assessee is in appeal before us.

99. The learned AR before us contended that the amendment brought under the statute with retrospective effect, denying the benefit to the assessee is unconstitutional, particularly, in the circumstances when such amendment was brought to nullify the judgment of the Hon'ble Supreme Court in the case of Ajanta Pharma reported in 327 ITR 305.

99.1 It was also contended by the learned AR that the assessee at the time of filing the return of income was very much entitled for the profit of the business eligible for deduction under section 80HHC of the Act to be reduced from the book profit. There was no possibility for the assessee to foresee at the time of filing the return of income that there will be some amendment with retrospective effect on a future date. Accordingly, the assessee contended that it cannot be deprived from the benefit which was available to it under the statute at the relevant point of time.

100. On the contrary, the learned DR vehemently supported the order of the authorities below.

101. We have heard the rival contentions of both the parties and perused the materials available on record. The controversy in the present case arises whether the assessee is entitled the benefit of reducing the profit of the business eligible for deduction under section 80HHC of the Act while computing the book profit under the provisions of section 115JB of the Act. Such benefit was available to the assessee in pursuance to the clause (iv) of ITA.Nos.1285/Ahd/2017 & 7 others

A.Y.2009-10 explanation 1 to section 115JB of the Act which, before omission, reads as under:

> (iv) the amount of profits eligible for deduction under section 80HHC , computed under clause (a) or clause (b) or clause (c) of sub-section (3) or sub-section (3A), as the case may be, of that section, and subject to the conditions specified in that section; or 101.1. The above benefit to the assessee was denied by the Finance Act 2011 with retrospective effect 01-04-2005. Admittedly, at the time of filing the return of income the assessee was entitled for the benefit as discussed above. But on a later date there was an amendment by the finance Act 2011 which denied the benefit to the assessee with retrospective effect. The Hon'ble Supreme Court in the case of Star India Pvt. Ltd vs. Commissioner of Central Excise reported in 280 ITR 321 has held that the benefit granted under the statute to the assessee cannot be withdrawn by way of retrospective amendment. The relevant extract of the Judgment reads as under:
>
> It was clear from the language of the validation clause of section 148 of the Finance Act, 2002, that the liability was extended not by way of clarification but by way of amendment to the Finance Act with retrospective effect. It is well-
>
> established that while it is permissible for the Legislature to retrospectively legislate, such retrospectivity is normally not permissible to create an offence retrospectively. There were clear judgments, decrees or order of courts and Tribunals or other authorities which were required to be neutralized by the validation clause. It could only be assumed that the judgments, decrees or orders, etc., had, in fact, held that persons situate like the appellants were not liable as service providers. This is also clear from the Explanation to the validation section which says that no act or acts on the part of any person shall be punishable as an offence which would not have been so punishable if the section had not come into force. [Para 7] The liability to pay interest would only arise on default and is really in the nature of a quasi-punishment. Such liability although created retrospectively could not entail the punishment of payment of interest with retrospective effect. [Para 8] 101.2. Undeniably, the Parliament is empowered to bring amendments under the statute that too retrospectively provided it is not detrimental to the assessee. In other words any amendment denying the benefit to the assessee cannot be brought under the statute with retrospective effect.

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 101.3. We also note that there will be certain classes of assessee who must have claimed the benefit of clause (iv) of explanation 1 to section 115 JB of the Act prior to the amendment by the Finance Act as discussed above. But, assuming their case have not been selected under scrutiny, then such benefit cannot be denied to them. On the contrary the assessees who were subject to scrutiny assessment, if they are denied the benefit, there will be discrimination to them. It is for the reason that there will not be allowed the benefit granted under the statute but withdrawn by way of retrospective amendment. Thus, the impugned amendment will create disharmony among different taxpayers. In view of the above and after considering the facts in

totality, we are of the view that the assessee cannot be deprived for the benefit granted to it under the statute by way of retrospective amendment in the given facts and circumstances. Hence, the ground of appeal of the assessee is allowed

102. Ground No. 6: The issue raised by the Assessee in this ground is that the learned CIT(A) erred in rejecting the additional claim made in respect of provision for leave encashment.

103. At the outset, we note the learned AR at the time of hearing submitted that he has been directed by the appellant not to press this issue. Thus the same is dismissed being not pressed.

104. Ground No.7 & 8: The grievance of the assessee is that the learned CIT(A) erred in rejecting the additional claim that research and development should not be allocated to Baddi unit.

105. At the outset we note that the issue raised by the assessee in its ground of appeal for the AY 2010-11 is identical to the issue raised by the assessee vide ground no. 3 in ITA No. 1285/AHD/2017 for the assessment year 2009-

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10

10. Therefore, the findings given in ITA No. 1285/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2010-11. The appeal of the assessee for the assessment 2009-10 has been decided by us vide paragraph Nos. 25 of this order and allowed in favour of assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2010-

11. Hence, the ground of appeal filed by the assessee is allowed.

106. In the result appeal of the assessee is partly allowed.

Coming to ITA No. 1328/AHD/2017, an appeal by the Revenue for the AY 2010-11

107. The revenue has raised following grounds of appeal:

> 1) "Whether the Id, C1T(A) is right in law and on facts in deleting the disallowance of Rs. 29,99,765/- made by the A.O. on account of garden expenses."
>
> 2) "Whether the Ld. C1T(A) is right in law and on facts in granting relief of J?s. 53,34,875/- on account of distribution expenses under the head "Doctor Sponsorship" and deleting the disallowance of Rs. 2,52,99,20s/- made by the A.O. on account of business advancement expenses."
>
> 3) "Whether the Ld. CIT(A) is jig lit in law and on fads in deleting the disallowance of Rs. 13,74,22,500/- made by the A.O. out of deduction claimed by the assessee u/.s 35(2AB) of the 1. T. Act in respect of research and development expenditure."

4) "Whether the Ld. CIT(A) is right in law and on facts in allowing depreciation @50% in place of 15% on the basis of Notification No. 10/2009 dated 19.01.2009 issued by CBDT."

5) "Whether the Ld. CIT(A) is right in law and on facts in allowing depreciation @60% in place of 25% on computer and computer software."

6) "Whether the Ld. CIT(A) is tight in law and on facts in deleting the disallowance of Rs.3,82,800/- made by the A.O, on account of capital investment subsidy."

7) "Whether the Id. CIT(A) is right in law and on facts deleting the disallowance made u/s. 80IC of the Act attributable to amount pertains to:

i) Allocation of R & D Expenses
ii) Deduction in respect of Notice Pay
in) Sale of scrap."

8) "Whether the Id. CIT(A) is right in law and on facts deleting the disallowan
1,24,03,51 9/- made u/s. 80G of the Act."

ITA.Nos.1285/Ahd/20

9) "Whether the Ld. C1T(A) is right in law and on facts in deleting the addit

3,31.95,542/- made by the A.O. on account of unutilized MODVA T/ CENVAT credit made it/.s 145A of the L T. Act."

108. In ground no. 1, the grievance of the Revenue is that the ld.CIT(A) has erred in deleting disallowance of Rs. 29,99,765/- made by the AO on account of garden expenses.

109. At the outset, we note that the issue raised by the Revenue in its ground of appeal for the AY 2010-11 is identical to the issue raised by the Revenue vide ground no. 1 in ITA No. 1327/AHD/2017 for the assessment year 2009-

10. Therefore, the findings given in ITA No. 1327/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2010-11. The ground of appeal of the Revenue for the assessment 2009-10 has been decided by us vide paragraph Nos. 39 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2010-

11. Hence, the ground of appeal filed by the Revenue is hereby dismissed.

110. In ground no. 2, the grievance of the Revenue is that the ld. CIT(A) has erred in deleting disallowance of Rs. 53,34,875 being distribution expenses under the doctor sponsorship and Rs. 2,52,99,208/- being business advancement expenses.

111. At the outset, we note that issue raised by the Revenue in this ground of appeal has been decided along with assessee ground no. 1 in ITA No. 1286/Ahd/2017 vide paragraph no. 80 of this order where ground of appeal of the Revenue has been dismissed. Hence the ground of appeal filed by the revenue is hereby dismissed.

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10

112. In ground no. 3, the grievance of the Revenue is that the ld. CIT(A) has erred in deleting the disallowance of Rs. 13,74,22,500/- made by the AO under section 35(2AB) of the Act.

113. At the outset, we note that the issue raised by the Revenue in its grounds of appeal for the AY 2010-11 is identical to the issue raised by the Revenue vide ground no. 3 in ITA No. 1327/AHD/2017 for the assessment year 2009-10. Therefore, the findings given in ITA No. 1327/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2010-11. The ground of appeal of the Revenue for the assessment 2009-10 has been decided by us vide paragraph Nos. 48 to 50 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2010-11. Hence, the ground of appeal filed by the Revenue is hereby dismissed.

114. In ground no. 4, the grievance of the Revenue is that the ld.CIT(A) has erred in allowing the depreciation @ 50% instead of 15% on the value of the assets.

115. At the outset, we note that the issue raised by the Revenue in its ground of appeal for the AY 2010-11 is identical to the issue raised by the Revenue vide ground no. 2 in ITA No. 1327/AHD/2017 for the assessment year 2009-

10. Therefore, the findings given in ITA No. 1327/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2010-11. The ground appeal of the Revenue for the assessment 2009-10 has been decided by us vide paragraph Nos. 42 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2010-

11. Hence, the ground of appeal filed by the Revenue is hereby dismissed.

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10

116. In ground no. 5, the grievance of the Revenue is that the ld. CIT(A) has erred in allowing the depreciation on software @ 60% instead of 25% being intangible assets.

117. At the outset, we note that the issue raised by the Revenue in its ground of appeal for the AY 2010-11 is identical to the issue raised by the Revenue vide ground no. 4 in ITA No. 1327/AHD/2017 for the assessment year 2009-

10. Therefore, the findings given in ITA No. 1327/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2010-11. The ground of appeal of the Revenue for the assessment 2009-10 has been decided by us vide paragraph No. 56 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2010-

11. Hence, the ground of appeal filed by the Revenue is hereby dismissed.

118. In ground no. 6, the grievance of the Revenue is that the ld. CIT(A) has erred in deleting the disallowance of Rs. 3,82,800/- on account of capital investment subsidy.

119. At the outset, we note that the issue raised by the Revenue in its ground of appeal for the AY 2010-11 is identical to the issue raised by the Revenue vide ground no. 6 in ITA No. 1327/AHD/2017 for the assessment year 2009-

10. Therefore, the findings given in ITA No. 1327/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2010-11. The ground of appeal of the Revenue for the assessment 2009-10 has been decided by us vide paragraph No. 67 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2010-

11. Hence, the ground of appeal filed by the Revenue is hereby dismissed.

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10

120. In ground no. 7, the issue raised by the revenue is that learned CIT(A) erred in deleting of disallowance made under section 80IC of the Act on account of allocation of R&D expenses, notice pay and sale of scrap.

121. At the outset, we note that the issues raised by the Revenue in its ground of appeal for the AY 2010-11 are identical to the issues raised by the Revenue vide ground no. 7 in ITA No. 1327/AHD/2017 for the assessment year 2009-10. Therefore, the findings given in ITA No. 1327/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2010-11. The ground of appeal of the Revenue for the assessment 2009-10 has been decided by us vide paragraph Nos. 69 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2010-11. Hence, the ground of appeal filed by the Revenue is hereby dismissed.

122. In ground no. 8, the grievance of the Revenue is that the ld. CIT(A) has erred in deleting the disallowance of Rs. 1,24,03,519/- made under section 80G of the Act.

123. At the outset, we note that the issue raised by the Revenue in its ground of appeal for the AY 2010-11 is identical to the issue raised by the Revenue vide ground no. 8 in ITA No. 1327/AHD/2017 for the assessment year 2009-

10. Therefore, the findings given in ITA No. 1327/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2010-11. The ground of appeal of the Revenue for the assessment 2009-10 has been decided by us vide paragraph Nos. 72 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2010-

11. Hence, the ground of appeal filed by the Revenue is hereby dismissed.

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10

124. In the result appeal of the Revenue is dismissed.

Coming to ITA No. 1396/AHD/2018, an appeal by the Assessee for the AY 2011-12

125. The assessee has raised following grounds of appeal

1. On the facts and in the circumstances of the case, the learned CIT(Appeals) erred in confirming the addition of Rs.14,00,40,000 made by the Assessing Officer on the ground that the loan of the aforesaid amount pertaining to the appellant's subsidiary viz., Zao Pharma, written off in the books of the appellant company during the financial year relevant to the assessment year under appeal, was not a deductible business loss.

2. On the facts and in the circumstances of the case, the learned CIT(Appeals) erred in confirming transfer pricing upward adjustment of Rs.9,57,520 in respect of Bank Guarantees given by the appellant company in respect of its subsidiary company.

3. On the facts and in the circumstances of the case, the learned CIT(Appeals) erred in confirming the reallocation of administrative expenses amounting to Rs.7,80,92,117 in respect of the Baddi Unit for the purposes of allowing deduction u/s. 80IC of the Income- tax Act.

4. On the facts and in the circumstances of the case, the learned CIT(Appeals) erred in confirming that the following items of income are required to be excluded from the income of the Baddi Unit for the purposes of allowing deduction u/s. 80-IC of the Income-tax Act:

(a) Other Income 1,91,553

(b) Export benefits 3,50,73,115

(c) Insurance income 23,88,005

(d) Penalties recovered from suppliers 4,79,471

5. On the facts and in the circumstances of the case, the learned CIT(Appeals) erred in rejecting the relevant Ground of Appeal No. 13 raised before him to the effect that even though the appellant

allocated R&D development cost to Baddi Unit on the basis of turnover while filing the return of income, there is no need for such allocation as profit u/s.80-IC is required to be computed assuming that the eligible business was the only source of income of the appellant company and during the year no services have been rendered by R&D unit of the appellant company to the Baddi Unit.

6. On the facts and in the circumstances of the case, the learned CIT(Appeals) erred in rejecting the relevant ground of appeal that the appellant is entitled to deduction of provision for leave encashment notwithstanding the provisions of Section 43B of the Income-tax Act.

7. The appellant craves leave to add, alter, amend and/or withdraw any ground or grounds of appeal either before or during the course of hearing of the appeal.

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10

126. In ground no.1, the grievance of the assessee is that the ld. CIT(A) has erred confirming the disallowance of Rs. 14,00,4000/- made on account loan given to AE which was written off during the year under consideration.

127. The assessee during the year has written off an amount of Rs. 14,00,40,000/- on account of short term loan given to AE namely ZAO Torrent Pharma Russia. The assessee in support submitted that in order to supply its medicine in Russia it established a wholly owned subsidiary being "ZAO Torrent Pharma" in the year 1997 through which it derived substantial business gain throughout the period. However due to rise of competition, its subsidiary lost major market share in Russia which resulted in decline of revenue. Thus in order to enable the subsidiary company to operate without any interruption, provided support by making working capital loan of USD 16.9 million in April 2008, out of which USD 11.89 million was received back by December 2009. But the remaining amount became doubtful due to worsen financial situation of subsidiary. Therefore in the year under consideration out of total outstanding an amount of 14.004 cr was written off.

127.1 However, the AO disregarded the contention of the assessee by observing that assessee is not in money lending business. Therefore the advances provided by the assessee to the associated enterprises represents capital account transaction. There is no provision under the statute for allowing the deduction to the assessee of such capital account transaction in the event the recovery of the same in doubt.

127.2. Likewise, the assessee cannot treat the impugned amount of advances provided to the associate enterprises as bad debts under the provision of section 36(1) (vii) of the Act. It is for the reason that, such amount of advances was never treated as income in the books of the assessee.

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 For claiming the bad debts, it is one of the precondition that the amount which has been offered to tax as income can only be written off in the event of non- recovery.

127.3. The contention of the assessee that it's AE was standing as debtors in the books of accounts against which the amount was due against the sale of the goods. As such the amount of loan was advanced to the AE in order to realize the outstanding amount against the sale of the goods. The AO rejected the contention of the assessee by holding that the character of the loan will not change merely on the reasoning that loan was advanced in order to realize the outstanding debtors. It is for the reason that such advance was not representing the trading advance which was supposed to be adjusted against the bills raised by the assessee. Likewise, the use of the loan by the AE provided by the assessee shall not also change the nature of the loan. Thus the impugned amount of loan cannot be treated as trading advances.

127.4. Similarly, the AO also found that subsidiary of the assessee was not liquidated. As such, the company was very much in operation. Therefore, it cannot be said that the amount advanced by the assessee to the AE has become irrecoverable. Accordingly, such amount cannot be allowed as deduction treating the same as business loss to the assessee. Thus the AO, disallowed impugned claim of the assessee and added the sum of 14,00,40,000.00 to the total income of the assessee.

128. Aggrieved assessee preferred an appeal to the learned CIT-A, who confirmed the order of the AO by observing as under:

> In the instant case, I am inclined to accept the contention of the AO for the reasons that the amount in question was advanced as a loan which was capital in nature. Merely because assessee had to infuse additional capital in the subsidiary company, the outstanding loan does not partake the character of revenue loss or justify the writing off of the outstanding loan or claim of bad debt u/s.36(2) of the Act. The loan advanced was clearly capital in nature and ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 also the business of subsidiary is distinct. If appellant's proposition is accepted than whole loans to the subsidiary become eligible for deduction u/s. 36(2) of the Act. In the case of Selam Magnetize (supra) Hon'ble Bombay High Court has agreed with concurrent findings of the ITAT and authorities below that assessee was not into business of lending money. The fact of the purpose of the loan to subsidiary was an additional finding in that case. Hence, the Hon'ble High Court did not find the ban granted to subsidiary as springing directly from the business of the assessee company. The Hon'ble High Court held," In the present case there are concurrent findings of three authorities that the assessee company was not in the business of lending money, There is a further concurrent finding of fact that the money was lent to its subsidiary company to enable the subsidiary company to construct a jetty which was clearly a capital asset of the subsidiary company. All authorities had concluded that the loan granted to the subsidiary company did not spring directly from the business of the assessee company or was incidental to it. On the facts of the case we find no reason to take a different view." Considering the decisions referred supra and facts of the case, it is held that disallowance made by AO for write off of loan of ZAO Pharma for Rs14,00,40,000/- does not suffer from any infirmity and accordingly action of AO is upheld . This ground of appeal is dismissed.

129. Being aggrieved by the order of the learned CIT(A) the assessee is in appeal before us.

130. The learned AR before us contended that the loss was incurred by the assessee in the course of the business and therefore the same should be allowed as deduction.

131. On the contrary learned DR before us vehemently supported the order of the authorities below.

132. We have heard the rival contentions of both the parties and perused the materials available on record. The controversy in the present case relates whether the assessee is entitled for the deduction of the working capital loan written off in the books of accounts on the reasoning that the same was not recoverable. Before, we touch the issue raised before us, it is imperative to make a note of certain facts as detailed under:

> i. Both the assessee and its subsidiary in Russia were engaged in the same business. The assessee has established its wholly owned subsidiary company namely ZAO Torrent Pharma in the year 1997 which was the extended arm of it (the assessee) for marketing the ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 product of the assessee company in Russia. The assessee is making the sales of its products in Russian market through its wholly-owned subsidiary. The necessary details of the sales made by the assessee to its wholly-owned subsidiary in the earlier years can be verified from the different financial statements which are available on record.

ii. The amount of loan advanced by the assessee to its subsidiary company was representing the working capital loan which is evident from the financial statement of the assessee viz a viz the financial statement of the subsidiary which are placed on pages 5 to 26 of the paper book. Similarly, there is also a board resolution available on page 4 of the paper book to justify that the amount of loan advanced by the assessee was in the nature of working capital loan. It is also significant to note that there was no addition in the block of fixed assets of the subsidiary company after receiving the working capital loan from the assessee. This fact can be verified from the financial statements of the subsidiary company which are available in the paper book. On the contrary we find that the subsidiary company has incurred losses from the operations as evident from the financial statements of the subsidiary company which are available in the paper book.

iii. The amount of loan advanced by the assessee is an international transaction which was written off in the year under consideration. However, the TPO has not made any adjustment qua to such loan written off by the assessee.

132.1 From the above, there remains no ambiguity to the fact that the amount of loan written off was representing the working capital loan. It is also a fact on record that there were losses from the operations in the subsidiary company. Accordingly it was claimed by the assessee that the amount of loan ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 is not recoverable and therefore it was written off in the books of accounts after taking approval from the Reserve Bank of India which is placed on page 1 to of the paper book. In this regard, we note that there are series of judgments suggesting that any loss incurred by the assessee in the course of the business is an allowable deduction. For holding

so, we draw support and guidance from the judgment of Hon'ble Karnataka High Court in the case of ACE Designers Ltd. Vs. ACIT reported in 120 taxman.com 321 wherein it was held as under:

> "8. Thus, from perusal of the aforesaid facts, it is evident that the issue involved in this appeal is covered by decision of Bombay High Court in Colgate Palm Olive (India) Ltd. (supra), which has been upheld by the Supreme Court. The ratio of aforesaid decision is where the assessee makes investment in its 100% subsidiary for business purpose, loss or sale of investment has to be treated as business loss of the assessee. In the instant case, the assessee made investment in the shares of WOS for the business purpose i.e., for the enhancement of business activity of the assessee in global market which primarily related to business operation of the assessee. The WOS suffered losses and therefore the assessee wrote off the assessment of Rs. 3,41,23,200/- as business loss. The investment was made for the purpose of extension of business activity and not with a view to creating capital asset in the form of holding shares. It is also pertinent to note that the assessee never acquired any capital asset or expenditure of enduring benefits to WOS and there is no relinquishment or transfer of capital asset to any third party."

132.2 From the above judgment, we note that even there was the loss incurred by the assessee i.e. ACE Designers Ltd. on account of the investments made in the share capital of the subsidiary company was held as allowable deduction. It was held so for the reason that both the assessee i.e. ACE Designers Ltd. and its subsidiary were in the same line of business. However, there is one distinguishable feature in the case on hand viz a viz in the case of ACE Designers Ltd. that the subsidiary of ACE Designers Ltd. was wound up whereas the subsidiary of the assessee was in existence. However, the case on hand is on a better footing as the amount of loan was representing the working capital loan and the ir-recoverability of the same was also not doubted by the Reserve Bank of India.

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 132.3 In addition to the above, we also note that there are other multiple factors which are strongly suggesting that the amount of loan was not recoverable, particularly, in the situations where the subsidiary company was incurring losses from the operations. At the time of hearing, it was also explained by the learned counsel for the assessee that the purpose of writing off the loan due from the subsidiary company was to make the net-worth of the subsidiary company positive. According to the learned counsel for the assessee, it was not possible to infuse the fund in the subsidiary company without making its net-worth positive as per the Russian Laws.

132.4 As regards the principles laid down by the Bombay High Court in the case of M/s Salem Mangnesite P Ltd. V CIT 180 taxman 545 as relied by the learned CIT-A, we note that the transaction in that case was representing the capital account transaction whereas the transaction in the present case relates to the working capital. Accordingly, we are reluctant to place the reliance on such judgment.

132.5 Likewise, the principles laid down by Hyderabad Tribunal in the case of VST Industries Ltd reported in 41 SOT 415 are distinguishable from the facts of the present case. In that case the line of activity of the assessee and the subsidiary was different. Thus, the loss claimed by the VST industries Ltd was denied. On the contrary, the assessee on hand and its subsidiary company are engaged in the same line of business. In other words the subsidiary company of the assessee is one of the extended arm of the assessee and the existence of the same depends upon the existence of the assessee company. Admittedly, the assessee has earned huge profit from the subsidiary company over a period of time which was brought to tax and therefore on the same reasoning if any loss is arising to the assessee relating to the same subsidiary company, a different treatment by denying the loss cannot be adopted by the revenue. In the light of the above stated discussion, we hold that the loss ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 claimed by the assessee is an allowable deduction. Thus, we set aside the finding of the learned CIT-A and direct the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed,

133. In ground no. 2, the grievance of the assessee is that the ld. CIT(A) has erred confirming the addition of Rs. 9,57,520/- made on corporate guarantee provided to AE.

134. At the outset we note that the issue raised by the assessee in its grounds of appeal for the AY 2011-12 is identical to the issue raised by the assessee vide ground no. 1 in ITA No. 1285/AHD/2017 for the assessment year 2009-

10. Therefore, the findings given in ITA No. 1285/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2011-12. The appeal of the assessee for the assessment 2009-10 has been decided by us vide paragraph Nos. 12 of this order partly in favour of assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2011-12. Hence, the ground of appeal filed by the assessee is partly allowed.

135. In ground no. 3, the grievance of the assessee is that the ld. CIT(A) has erred confirming the re-allocation of administrative expenses of Rs. 7,80,92,117/- to Baddi Unit for purpose of deduction under section 80IC.

136. At the outset we note that the issue raised by the assessee in its ground of appeal for the AY 2011-12 is identical to the issue raised by the assessee vide ground no. 4 in ITA No. 1285/AHD/2017 for the assessment year 2009-

10. Therefore, the findings given in ITA No. 1285/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2011-12. The appeal of the assessee for the assessment year 2009-10 has been decided by us vide paragraph Nos. 28 of this order in favour of assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 2009-10 shall also be applied for the year under consideration i.e. AY 2011-

12. Hence, the grounds of appeal filed by the assessee is allowed.

137. The issue raised in ground No. 4 by the assessee is that the ld. CIT(A) has confirmed the action of the ld. AO in reducing the following income while computing deduction under section 80IC of the Act.

(a) Other income	Rs.1,91,553/-
(b) Export Benefits	Rs. 3,50,73,115/-
(c) Insurance Income	Rs.23,88,005/-

(d) Penalties recovered from suppliers Rs. 4,79,471/-

138. At the outset we note that the issues raised by the assessee in its grounds of appeal for the AY 2011-12 are identical to the issues raised by the assessee vide ground no. 4 in ITA No. 1286/AHD/2017 for the assessment year 2010-11. Therefore, the findings given in ITA No. 1286/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2011-12. The appeal of the assessee for the assessment 2010-11 has been decided by us vide paragraph Nos. 94 of this order in its favour. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2010-11 shall also be applied for the year under consideration i.e. AY 2011-12. Hence, the ground of appeal filed by the assessee is allowed.

139. In ground no. 5, the grievance of the assessee is that the learned CIT(A) erred in rejecting the ground no. 13 that research and development expenses should not be allocated to Baddi unit.

140. At the outset we note that the issue raised by the assessee in its ground of appeal for the AY 2011-12 is identical to the issue raised by the assessee ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 vide ground no. 3 in ITA No. 1285/AHD/2017 for the assessment year 2009-

10. Therefore, the findings given in ITA No. 1285/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2011-12. The appeal of the assessee for the assessment 2009-10 has been decided by us vide paragraph Nos. 25 of this order in its favour. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2011-12. Hence, the ground of appeal filed by the assessee is allowed.

141. In ground no. 6, the grievance of the assessee is that the learned CIT(A) erred in not allowing the deduction with respect to provision for leave encashment.

142. Admittedly assessee before learned CIT(A) made additional claim for allowance of provision for leave encashment which has been rejected by the learned CIT-A by observing as under:

> The Twelfth ground of appeal relates to additional claim with of provision of leave encashment, which has been disallowed in return of income u/s Section 43B; as provision for leave encashment is neither a statutory liability nor a contingent

> liability The appellant has not made any specific submission in support of its claim and outstanding leave encashment is required to be disallowed as per provisions of section 43B of the Act hence this claim made by appellant is not entertained. This ground of appeal is dismissed.

143. Being aggrieved by the order of the learned CIT(A) the assessee is in appeal before us.

144. The learned AR before us submitted that a direction may be issued to allow the deduction of the leave encashment in the year in which it was paid in pursuance to the provisions of section 43B of the Act.

145. On the contrary the learned DR vehemently supported the order of the authorities below.

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146. We have heard the rival contentions of both the parties and perused the materials available on record. There are certain expenses which are allowed on payment basis in pursuance to the provisions of section 43B of the Act irrespective of the year of incurrence. One of such expenditure is leave encashment. Admittedly, the assessee has not made the payment of the leave encashment and therefore the same can't be allowed as deduction. However, the assessee is at liberty to claim the deduction of such expense in the year of payment. Thus the ground of appeal of the assessee is dismissed in terms of the above.

147. Ground no. 7 of the assessee's appeal is general in nature. Hence, the same is dismissed as infructuous.

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

Coming to ITA No.1414/AHD/2018, an appeal by the Revenue for the AY 2011-12

149. The revenue has raised following grounds of appeal:

> 1) "that the Ld. C1T(A) is right in law and on facts in deleting the disallowance of Rs. 31,65,799/- made by the A.O. on account of garden expenses."
>
> 2) "that the Ld. CIT(A) is right in law and on facts in granting relief of Rs. 13,35,93,41s/- on account of distribution expenses under the head "Doctor Sponsorship" and deleting the disallowance of Rs. 2,63,50,133/- made by the A.O. on account of business advancement expenses."
>
> 3) "that the Ld. CIT(A) is right in law and on facts in deleting the disallowance of Rs.26,44,63, OOO/- made by the A. O. out of deduction claimed by the assesses u/.s 35(2AB) of the I. T. Act in respect of research and development expenditure."

4) "that the Ld. CIT(A) is right in law and on facts in allowing depreciation @50% in place of 15% on the basis of Notification No, 10/2009 dated 19.01.2009 issued by CBDT."

5) "that the Ld. CIT(A) is right in law and on facts in allowing depreciation @60% in place of 25% on computer and computer software."

6) "that the Ld. CIT(A) is right in law and on facts in deleting the disallowance of Rs. 3,25,125/- made by the A.O. on account of capital investment subsidy."

7) "that the Id. CIT(A) is right in law and on facts deleting the disallowance made u/s. 80IC of the Act attributable to amount pertains to:

i) Allocation of R & D Expenses

ii) Donation u/s. 35of the I. T. Act, 1961
iii) Deduction in respect of Notice Pay
iv) Sale of scrap."
8) "that the Id, CIT(A) is right in law and on facts deleting the disallowanc
2,01,68,112/- made u/s. 80G of the Act."

9) "that the Ld. CJT(A) is right in law and on facts in deleting the addition

to Rs.24,86,820/- made on account of upward adjustment u/s. 92 CA(1) of the Income Tax Act, 1961."

150. In ground no. 1, the grievance of the Revenue is that the learned CIT(A) erred in deleting the disallowance made by the AO for garden expenses of Rs. 31,65,799/- only.

151. At the outset we note that the issue raised by the Revenue in its ground of appeal for the AY 2011-12 are identical to the issue raised by the Revenue vide ground no. 1 in ITA No. 1327/AHD/2017 for the assessment year 2009-

10. Therefore, the findings given in ITA No. 1327/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2011-12. The appeal of the Revenue for the assessment 2009-10 has been decided by us vide paragraph Nos. 39 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2011-12. Hence, the ground of appeal filed by the Revenue is hereby dismissed.

152. In ground no. 2, the grievance of the Revenue is that the learned CIT(A) erred in deleting the disallowances of doctors sponsorship expenses of Rs. 13,35,93,413/- and business advancement expenses of Rs. 2,63,50,133.

153. At the outset we note that the issues raised by the Revenue in its ground of appeal for the AY 2011-12 are identical to the issues raised by the assessee vide ground no. 1 in ITA No. 1286/AHD/2017 for the assessment year 2010-

11. Therefore, the findings given in ITA No. 1286/AHD/2017 shall also be ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 applicable for the year under consideration i.e. AY 2011-12. The appeal of the assessee for the assessment 2009-10 has been decided by us vide paragraph Nos. 80 of this order in favour of the assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2010-11 shall also be applied for the year under consideration i.e. AY 2011-12. Hence, the grounds of appeal filed by the Revenue is hereby dismissed.

154. In ground no. 3, the grievance of the Revenue is that the learned CIT(A) erred in deleting the disallowance made by the AO for the weighted deduction under section 35(2AB) of the Act for Rs. 26,44,63,000/- only.

155. At the outset, we note that the issue raised by the Revenue in its ground of appeal for the AY 2011-12 is identical to the issue raised by the Revenue vide ground no. 3 in ITA No. 1327/AHD/2017 for the assessment year 2009-

10. Therefore, the findings given in ITA No. 1327/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2011-12. The appeal of the Revenue for the assessment 2009-10 has been decided by us vide paragraph Nos. 48 to 50 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2011-12. Hence, the ground of appeal filed by the Revenue is hereby dismissed.

156. In ground no. 4, the grievance of the Revenue is that the learned CIT(A) erred in deleting the disallowance of depreciation on the basis of CBDT notification no. 10/2009 dated 19-01-2009

157. At the outset we note that the issue raised by the Revenue in its ground of appeal for the AY 2011-12 is identical to the issue raised by the Revenue vide ground no. 2 in ITA No. 1327/AHD/2017 for the assessment year 2009-

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10

10. Therefore, the findings given in ITA No. 1327/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2011-12. The appeal of the Revenue for the assessment 2009-10 has been decided by us vide paragraph Nos. 42 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2011-12. Hence, the ground of appeal filed by the Revenue is hereby dismissed.

158. In ground no. 5, the grievance of the Revenue is that the learned CIT(A) erred in deleting the disallowance made by the AO for the excess depreciation claimed by the assessee on computer

software.

159. At the outset, we note that the issue raised by the Revenue in its ground of appeal for the AY 2011-12 is identical to the issue raised by the Revenue vide ground no. 4 in ITA No. 1327/AHD/2017 for the assessment year 2009-

10. Therefore, the findings given in ITA No. 1327/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2011-12. The appeal of the Revenue for the assessment 2009-10 has been decided by us vide paragraph Nos. 56 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2011-12. Hence, the ground of appeal filed by the Revenue is hereby dismissed.

160. In ground no. 6, the grievance of the Revenue is that the learned CIT(A) erred in deleting the disallowance of depreciation of Rs. 3,25,125 on account of capital subsidy received.

161. At the outset we note that the issue raised by the Revenue in its ground of appeal for the AY 2011-12 is identical to the issue raised by the Revenue vide ground no. 6 in ITA No. 1327/AHD/2017 for the assessment year 2009-

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10

10. Therefore, the findings given in ITA No. 1327/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2011-12. The appeal of the Revenue for the assessment 2009-10 has been decided by us vide paragraph Nos. 67 of this order, against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2011-12. Hence, the grounds of appeal filed by the Revenue is hereby dismissed.

162. In ground no. 7, the issue raised by the revenue is that learned CIT(A) erred in deleting of disallowances made by the AO under section 80IC of the Act on account of allocation of R&D expenses, notice pay and sale of scrap.

163. At the outset, we note that the issue raised by the Revenue in its grounds of appeal for the AY 2011-12 is identical to the issue raised by the Revenue vide ground no. 7 in ITA No. 1327/AHD/2017 for the assessment year 2009-10. Therefore, the findings given in ITA No. 1327/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2011-12. The appeal of the Revenue for the assessment 2009-10 has been decided by us vide paragraph Nos. 69 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2011-

12. Hence, the ground of appeal filed by the Revenue is hereby dismissed.

164. In ground no. 8, the grievance of the Revenue is that the learned CIT(A) erred in deleting the disallowance of deduction under section 80G of the Act for Rs. 2,01,68,820/- only.

165. At the outset we note that the issue raised by the Revenue in its ground of appeal for the AY 2011-12 is identical to the issue raised by the Revenue vide ground no. 8 in ITA No. 1327/AHD/2017 for the assessment year 2009-

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10

10. Therefore, the findings given in ITA No. 1327/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2011-12. The appeal of the Revenue for the assessment 2009-10 has been decided by us vide paragraph Nos. 72 of this order against the Revenue. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2011-12. Hence, the ground of appeal filed by the Revenue is hereby dismissed.

166. In ground no. 9, the grievance of the Revenue is that the learned CIT(A) erred in deleting the upward adjustment on account of TP adjustment for Rs. 24,86,820 with respect to liaison services.

167 At the outset, we note that the issue raised by the Revenue in its ground of appeal for the AY 2011-12 is identical to the issue raised by the assessee vide ground no. 1 in ITA No. 1285/AHD/2017 for the assessment year 2009- 10 and ground no. 2 in ITA No. 1286/Ahd/2017 for A.Y. 2010-11 Therefore, the findings given in ITA No. 1285 and 1286/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2011-12. The appeal of the Assessee for the assessment 2009-10 and 2010-11 has been decided by us vide paragraph Nos. 12 and 84 of this order and has been decided in favour of the assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 and 2010-11 shall also be applied for the year under consideration i.e. AY 2011-12. Hence, the grounds of appeal filed by the Revenue is hereby dismissed.

168. In the result appeal of the Revenue is dismissed.

Coming to ITA No. 1397/AHD/2018, an appeal by the assessee for the AY 2012-13
ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10

169. The assessee has raised following grounds of appeal:

> 1. On the facts and in the circumstances of the case, the learned CIT(Appeals) erred in confirming disallowance of Rs.7,26,245 made by the Assessing Officer in respect of Employees Provident Fund and ESI contributions on the ground that these payments were made by the appellant company beyond the time limit prescribed under the relevant provisions of PF and ESIC Acts.

2. On the facts and in the circumstances of the case, the learned ClT(Appeals) erred in confirming transfer pricing adjustments as per TPO's order in respect of the following amounts:

(a) Capital infusion 89,935

(b) Bank Guarantees given by the appellant company in respect of subsidiaries 11,07,739

(c) Interest on loan to Associate Enterprises 1,45,206

3. On the facts and in the circumstances of the case, the learned CIT(Appeals) erred in confirming the reallocation of administrative expenses amounting to Rs.8,44,58,039 in respect of the Baddi Unit for the purposes of allowing deduction u/s. 80IC of the Income- tax Act.

4. On the facts and in the circumstances of the case, the learned CIT(Appeals) erred in confirming that the following items of income are required to be excluded from the income of the Baddi Unit for the purposes of allowing deduction u/s. 80-IC of the Income- tax Act:

(a) Export benefits 2,10,27,531

(b) Insurance income 44,60,577

5. On the facts and in the circumstances of the case, the learned CIT(Appeals) erred in confirming the weighted deduction in respect of Research and Development expenditure incurred on following heads:

(Rs.in lacs) Particulars Amount Revenue Expenses Interest on Loan 45.25 Labour and Jobwork charges 139.60 Capital Expenses Furniture and Fixtures 42.98 Electrical Equipment 47.30 ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10

6. On the facts and in the circumstances of the case, the learned CIT(Appeals) erred in rejecting the relevant Ground of Appeal No. 11.3 raised before him to the effect that even though the appellant allocated R&D development cost to Baddi Unit on the basis of turnover while filing the return of income, there is no need for such allocation as profit u/s.80-IC is required to be computed assuming that the eligible business was the only source of income of the appellant company and during the year no services have been rendered by R&D unit of the appellant company to the Baddi Unit.

7. On the facts and in the circumstances of the case, the learned CIT(Appeals) erred in rejecting the relevant ground of appeal that the appellant is entitled to deduction of provision for leave encashment for Rs.5,00,54,452/- under the provisions of Section 43B of the Income-tax Act.

8. The appellant craves to add, alter, amend and/or withdraw any ground or grounds of appeal either before or during the course of hearing of the appeal.

170. The issue raised in ground no. 1 by the assessee is that the ld. CIT(A) has erred in confirming the disallowance of Rs. 7,26,245/- on account of late deposit of employee contribution towards the EPF/ESI.

171. At the outset we note that the issue raised by the assessee in its ground of appeal for the AY 2012-13 is identical to the issues raised by the assessee vide ground no. 2 in ITA No. 1285/AHD/2017 for the assessment year 2009-

10. Therefore, the findings given in ITA No. 1285/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2012-13. The appeal of the assessee for the assessment 2009-10 has been decided by us vide paragraph Nos. 22 of this order against the assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2012-13. Hence, the grounds of appeal filed by the assessee is dismissed.

172. In ground no. 2, the grievance of the assessee is that the ld. CIT(A) has erred in confirming the upward adjustment of TP for Rs. 89,935/-, Rs. 11,07,739/- and Rs. 1,45,206 on account of capital infusion, corporate guarantee and loan and advances provided to AE.

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173. At the outset we note that the issues of TP adjustment on account of corporate guarantee and loan and advances provided to the AE are identical to the issues raised by the assessee vide ground no. 1 in ITA No. 1285/AHD/2017 for the assessment year 2009-10. Therefore, the findings given in ITA No. 1285/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2012-13. The appeal of the assessee for the assessment 2009-10 has been decided by us vide paragraph Nos. 12 & 18 of this order by allowing partly in favour of assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2012-13. Thus, the issue to the extent of commission on corporate guarantee and interest on loan to AE is partly allowed in the favour of the assessee

174. Now coming to the issue of upward adjustment on account capital infusion in AE.

175. The assessee as on 16th November 2011 made advance payment of Rs. 15.91 crores to its AE namely Zao Torrent Pharma (Zao) for acquisition of share which has been allotted to the assessee as on 18th May 2012.

175.1. The TPO found that as per circular No. 15/2014-15 dated 01-07-2004 of Reserve Bank of India that the shares should be allotted to the assessee within the period of 180 days whereas there was the delay in the allotment of the shares. Thus the TPO characterized the share application money as loan and advances. The TPO worked out the interest at Rs. 27.20 lacs on such amount and made upward adjustment by making addition to the total income of the assessee.

176. Aggrieved assessee preferred an appeal before learned CIT(A).

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 176.1 The assessee before the learned CIT(A) submitted that it has made payment of share application to different AEs and all of them have allotted shares within the period of 180 days except in case of Zao Torrent Pharma (Zao) where there is minor delay of 4 days. However if period of 180 days counted from the date of board meeting then there is no delay in the allotment of shares.

176.2 The assessee further submitted that transaction of acquisition of share is genuine transaction. Therefore, the TPO cannot re-characterized a genuine transaction of share acquisition into debt without proving the same a non- genuine or sham transaction. In support, the assessee placed reliance on various judgment which are incorporated in the order of learned CIT(A). It was further submitted that the TPO is only empowered to determine the arm length price but the TPO has exceeded his jurisdiction in re-characterizing the transaction.

176.3 The assessee alternatively submitted that there was delay of only 4 days, therefore, if interest is to benchmarked then it should be only done for 4 days.

177. The learned CIT(A) after considering the fact in totality admitted the alternative claim of the assessee and restricted the addition to the extent of Rs. 89,934/- by observing as under:

> 17.8 I have carefully considered the facts of the case and submissions made as well as chain of decisions relied upon by him to support his contention that the TPO does not have the power to re-characterize the transaction from equity to debt. On analysis of the facts, it is noticed that there is a delay on only 4 days in allotment of shares by the appellant. The appellant has also made an alternative argument that if the contention of re- characterization is not accepted the adjustment should be confined only to 4 days i.e. The inordinate delay caused by Zao Torrent Pharma, Russia to allot the shares against the money contributed. Since in this case there is a delay of only 4 days in allotment of shares which is in contravention to the RBI guidelines, there is merit in the alternate argument of ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 the appellant that if interest is to be charged it can be charged only for the period of delay. Accordingly, the interest is charged only for 4 days i.e. the delay beyond the permissible limit of 180 days which comes to Rs.89,934/-\ (Rs.27,20,516/- / 121 x 4) . Hence, the addition on this account is restricted to Rs.89,934/- This ground of appeal is accordingly partly allowe.

178. Being aggrieved by the order of the learned CIT(A) both the assessee and Revenue are in appeal before us. The assessee is in appeal against the confirmation of Rs. 89,934/- whereas the revenue is in appeal against deletion of the addition of Rs. 26,30,582/- made by the ld. CIT-A.

179. Both the ld. AR and DR before us vehemently relied on the order of authorities below as favorable to them.

180. We have heard the rival contentions of both the parties and perused the materials available on record. There is no dispute to the fact that the assessee has advanced money to its AE for acquiring the shares which is a capital account transaction. Therefore, there cannot be any adjustment under the provisions of transfer pricing on account of capital account transaction being the acquisition of shares. Merely, there was a delay in the allotment of shares by the AE to the assessee, such delay cannot change the character of the transaction as loan. We note that the Delhi bench of ITAT in the case of Bharti Airtel Limited vs. ACIT reported in 43 taxmann.com 150 has held as under:

> 47. We find that in the present case the TPO has not disputed that the impugned transactions were in the nature of payments for share application money, and thus, of capital contributions. The TPO has not made any adjustment with regard to the ALP of the capital contribution. He has, however, treated these transactions partly as of an interest free loan, for the period between the dates of payment till the date on which shares were actually allotted, and partly as capital contribution, i.e. after the subscribed shares were allotted by the subsidiaries in which capital contributions were made. No doubt, if these transactions are treated as in the nature of lending or borrowing, the transactions can be subjected to ALP adjustments, and the ALP so computed can be the basis of computing taxable business profits of the assessee, but the core issue before us is whether such a deeming fiction is envisaged under the scheme of the transfer pricing legislation or on the facts of this case. We donot find so. We donot find any provision in law enabling such deeming fiction. What ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 is before us is a transaction of capital subscription, its character as such is not in dispute and yet it has been treated as partly of the nature of interest free loan on the ground that there has been a delay in allotment of shares. On facts of this case also, there is no finding about what is the reasonable and permissible time period for allotment of shares, and even if one was to assume that there was an unreasonable delay in allotment of shares, the capital contribution could have, at best, been treated as an interest free loan for such a period of ' inordinate delay' and not the entire period between the date of making the payment and date of allotment of shares. Even if ALP determination was to be done in respect of such deemed interest free loan on allotment of shares under the CUP method, as has been claimed to have been done in this case, it was to be done on the basis as to what would have been interest payable to an unrelated share applicant if, despite having made the payment of share application money, the applicant is not allotted the shares. That aspect of the matter is determined by the relevant statute. This situation is not in pari materia with an interest free loan on commercial basis between the share applicant and the company to which capital contribution is being

made. On these facts, it was unreasonable and inappropriate to treat the transaction as partly in the nature of interest free loan to the AE. Since the TPO has not brought on record anything to show that an unrelated share applicant was to be paid any interest for the period between making the share application payment and allotment of shares, the very foundation of impugned ALP adjustment is devoid of legally sustainable merits.

180.1 In view of the above, we hold that there cannot be any adjustment under the provisions of transfer pricing in the given facts and circumstances. Accordingly, we set aside the finding of the learned CIT-A and direct the AO to delete the addition made by him.

180.2. In view of the, the ground of appeal of the assessee is partly allowed and the ground of appeal of the Revenue is hereby dismissed.

181. In ground no. 3, the grievance of the assessee is that the ld. CIT(A) has erred in confirming the re-allocation of administrative expenses of Rs. 8,44,58,039/- to Baddi Unit for purpose of deduction under section 80IC of the Act.

182. At the outset we note that the issue raised by the assessee in its ground of appeal for the AY 2012-13 is identical to the issue raised by the assessee vide ground no. 4 in ITA No. 1285/AHD/2017 for the assessment year 2009-

10. Therefore, the findings given in ITA No. 1285/AHD/2017 shall also be ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 applicable for the year under consideration i.e. AY 2012-13. The appeal of the assessee for the assessment 2009-10 has been decided by us vide paragraph Nos. 28 of this order in favour of assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2012-13. Hence, the grounds of appeal filed by the assessee is allowed.

183. The issue raised in ground No. 4 by the assessee is that the ld.CIT(A) has confirmed action of the ld.AO in reducing the following income while computing deduction under section 80IC of the Income Tax Act, 1961.

(a) Export Benefits	Rs. 2,10,27,531/-
(b) Insurance Income	Rs. 44,60,577/-

184. At the outset we note that the issues raised by the assessee in its grounds of appeal for the AY 2012-13 are identical to the issues raised by the assessee vide ground no. 4 in ITA No. 1286/AHD/2017 for the assessment year 2010-11. Therefore, the findings given in ITA No. 1286/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2012-13. The appeal of the assessee for the assessment 2010-11 has been decided by us vide paragraph Nos. 94 of this order in favour of assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2010-11 shall also be applied for the year under consideration i.e.

AY 2012-

13. Hence, the ground of appeal filed by the assessee is allowed.

185. Ground no. 5 In this ground of appeal, the grievance of the assessee is that the learned CIT(A) erred in confirming the disallowance of the weighted deduction under section 35(2AB) of the Act.

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10

186. The assessee during the year under claimed deduction of Rs. 246,31,22,480/- under section 35(2AB) which is detailed as under:

From the perusal of the statement of total income, it is noticed that the assessee has claimed deduction on account of R & D expenses u/s.35(2AB) of the I.T. Act, 1961 as under (as per the Tax Audit Report):-

Particulars	Total R &D Expenses	Claimed as per return (Rs.)	Section und deduction i in Return
Revenue expenses	114,95,84,033/-	229,91,68,066/-	Section 35(
Capital Expenses			
Building	46,49,281/-	46,49,281/-	Section 35(
Other than building	7,96,52,567/-	15,93,05,133/-	Section 35(
Total	123,38,85,881/-	246,31,22,480/-	

On the basis of the above, the assessee has claimed total deduction of Rs.246,31,22,480/- in respect of expenditure on approved Research & Development facility.

186.1. The assessee on question by the AO submitted that its research center has been approved by the DSIR for in-house research activity. Therefore it is eligible to claim the weighted deduction on the expenditure incurred being revenue as well capital in nature in-house research as per the provision of section 35(2AB) of the Act. The form 3CL for the year under consideration, being DSIR approval of the expenses incurred was not received yet.

186.2. However, the AO held that the assessee company has not received the approval of the expenses in form 3CL from DSIR which is prerequisite for claiming the deduction under section 35(2AB) of the Act. Thus, the AO disallowed 100% of the weighted deduction claimed on revenue expenses and capital expenses other than building which was worked out at Rs. 122,92,36,600/- only.

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 186.3. The AO further, without prejudice to the above held that expenditure such as recurring expenses relating to building rates and taxes, Salary to Dr. C. Dutt and expenditure incurred outside approved facility like clinical trial, patent registration and professional expenses which are not approved by the DSIR over the year is not allowable for deduction. In other words, the weighted deduction of the expenditure to the extent of approval given by the DSIR should only be allowed.

187. Aggrieved assesse preferred an before the learned CIT(A).

187.1. The assessee before learned CIT(A) furnished the form 3CL which was forwarded to the AO for remand report. The AO in remand report submitted that there are certain expenditures which were not approved by the DSIR as detailed below:

Particulars	Amount Incurred (at	Allowed by DSIR (b)	Difference (a-b)
R&D Building	46.50	46.50	
R&D Capital Expenses (Other than Building)	796.52	706.25	90.27
R&D Revenue Expenses	11495.84	8588.28	2907.56
Total	12338,85	9341-03	2997 82

The break-up of Rs.2997.82 lakhs is as under:

Particulars	Amount (Rs. In lakhs)
Revenue Expenses	
Salary to Dr. C Dutt	234.42
Building repair expenses	92.49
Municipal Taxes	15.51
Clinical Research Expenses	1363.04
Professional fee outside India	576.61

Professional fee inside India	87.08
Interest on loan	45.25
Labour & Job work charges	139.60

Other studies expenses	353.60
Total (A)	2907.61
Capital Expenses	
Furniture & Fixtures	42.98
Electrical equipment	47.30
Total (B)	90.28
Total (A+B)	2997.89

187.2. The assessee submitted that its unit has been approved by DSIR for in-house research activity and it also fulfills all the condition laid down under section 35(2AB) of the Act. Therefore, the weighted deduction under section 35(2AB) should be allowed for all expenditures incurred in connection with the research activity without restricting the same to the extent of amount approved by the DSIR in form 3CL. The requirement of getting the approval in form 3CL from DSIR is a procedural requirement only. The assessee further explained by stating that each item of expenditure which has been disapproved by the DSIR are directly connected with the activity of research and therefore the weighted deduction on the same should be allowed.

188. The learned CIT(A) after considering the facts in totality deleted the disallowance of the weighted deduction made by the AO except disallowances on account of interest on loan, labour & Job work charges, furniture and fixture and electrical equipment by observing as under:

> ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 With regard to weighted deduction for interest on loan for Rs.42.25 lakhs, Appellant has claimed that such funds were granted for specific project and same has been used for research activities. However, such expenditure is not approved by DSIR and Appellant has not proved that how such expenditure is covered by norms prescribed in Form No.3CL for claiming weighted deduction hence such claim of Appellant is not accepted.

189. Being aggrieved by the order of the learned CIT(A) the assessee is in appeal before us.

190. The learned AR for the assessee before us besides reiterating the submission made before the lower authorities submitted that the issue on hand is covered by the judgment of Hon'ble Gujarat High court in the own case of the assessee reported in 88 taxmann.com 530.

191. On the other hand the learned DR vehemently supported the order of the authorities below.

192. We have heard the rival contentions of both the parties and perused the materials available on records. At the outset, we note that issue of allowance of weighted deduction on account of expenditure incurred in connection with research and development activity is covered in favour of the assessee by the order of the Hon'ble Gujarat High Court in the own case of the assessee (supra) wherein the Hon'ble court held as under:

> 13. As regards Question No.(A), we find that the Tribunal has followed its earlier decision passed in respect of this very assessee in ITA No.446/Ahd/2002. In our opinion, the Tribunal rightly held that the assessee is entitled to weighted deduction in respect of the entire expenditure incurred for the development of in-house "R&D" facility in terms of Section 35(2AB) of the Act. Consequently, we answer Question No. (A) in favour of the assessee and against the Revenue.

191.1. Respectfully following the above order of the Hon'ble High court in own case of the assessee, we set aside the finding of the learned CIT(A) and direct the AO to allow the deduction to the assessee. Hence, the ground of appeal of the assessee is allowed.

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10

192. In ground no.6, The grievances of the assessee is that the learned CIT(A) erred in rejecting the ground no. 11.3 that research and development should not be allocated to Baddi unit.

193. At the outset we note that the issue raised by the assessee in its grounds of appeal for the AY 2012-13 is identical to the issue raised by the assessee vide ground no. 3 in ITA No. 1285/AHD/2017 for the assessment year 2009-

10. Therefore, the findings given in ITA No. 1285/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2012-13. The appeal of the assessee for the assessment 2009-10 has been decided by us vide paragraph Nos. 25 of this order in favour of assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2012-13. Hence, the ground of appeal filed by the assessee is allowed.

194. In ground no. 7, the grievance of the assessee is that the learned CIT(A) erred in not allowing the deduction with respect to provision for leave encashment.

195. At the outset we note that the issue raised by the assessee in its ground of appeal for the AY 2012-13 is identical to the issue raised by the assessee vide ground no. 6 in ITA No. 1396/AHD/2018 for the assessment year 2011-

12. Therefore, the findings given in ITA No. 1396/AHD/2018 shall also be applicable for the year under consideration i.e. AY 2012-13. The appeal of the assessee for the assessment 2011-12 has been decided by us vide paragraph Nos. 146 of this order against the assessee with the liberty to claim the deduction of the same on payment basis. The learned AR and the DR also agreed that whatever will

be the findings for the assessment year 2011-12 shall also be applied for the year under consideration i.e. AY 2012-13. Hence, ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 the grounds of appeal filed by the assessee is allowed for the statistical purposes.

196. Ground no. 8 of the assessee is general in nature, hence the same does not require any separate adjudication. Accordingly, we dismiss the same as infructuous.

197. In the result appeal of the assessee is partly allowed.

Coming to ITA No. 1415/AHD/2018, an appeal by the Revenue for the AY 2012-13

198. The Revenue has raised the following grounds of appeal:

> 1) "that the Ld. CIT(A) is right in law and on facts in deleting the disallowance of Rs. 36,67,88l/- made by the A.O. on account of garden expenses."
>
> 2) "that the Ld. CIT(A) is right in law and on facts in granting relief of Rs. 21,41,80,000/- on account of distribution expenses under the head "Doctor Sponsorship" and deleting the disallowance of Rs. 4,4 7,60,553/ - made by the A.O. on account of business advancement expenses and sales promotion expenses of Rs.40,78,113."
>
> 3) "that the Ld. CIT(A) is right in law and on facts in deleting the disallowance of Rs. 1,20,17,23,600/- made by the A.O. out of deduction claimed by the assesses u/s. 35(2AB) of the I. T. Act in respect of research and development expenditure."
>
> 4) "that the Ld. CIT(A) is right in law and on facts in allowing depreciation @50% in place of 15% on the basis of Notification No. 10/2009 dated 19.01.2009 issued by CBDT,"
>
> 5) "that the Ld. CIT(A) is right in law and on facts in allowing depreciation @60% in place of 25% on computer and computer software."
>
> 6) "that the Ld. CIT(A) is right in law and on facts in deleting the disallowance of Rs. 2,76,356/- made by the A.O. on account of capital investment subsidy."
>
> 7) "that the Ld. CIT(A) is right in law and on facts deleting the disallowance made u/s. 801C of the Act attributable to amount pertains to:
>
> i) Allocation of R & D Expenses
> ii) Development cost of Torrent Research Centre(TRC)
> Hi) Deduction in respect of Notice Pay
> iv) Sale of scrap.
> v) Miscellaneous income
> vi) Foreign Exchange Gain
> vii) Cash discount."

8) "that the Ld. CIT(A) is right in law and on facts deleting the disallow

additional depreciation on Pallets, trolley and Mobile racks of Rs.32,02,273/."

9) "that the Ld. CIT(A) is light in law and on facts deleting the disallowance of Rs. 1,62,56,000/-made u/s. 80G of the Act."

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10

10) "that the Ld. CIT(A) is right in law and on facts in deleting the addition amounting to Rs.6,65,91,946/- made on account of upward adjustment u/s. 92 CA(1) of the Income Tax Act, 1961."

11) "that the Ld. CIT(A) is right in law and on facts in deleting the disallowance amounting to Rs.91,72,392/- made by the A.O. u/s. 14A in book profit u/s. 115JB of the Income Tax Act, 1961."

199. The first issue raised by the Revenue is that the learned CIT(A) erred in deleting the disallowance of garden expenses of Rs. 31,67,881/- only.

200. At the outset we note that the issue raised by the Revenue in its grounds of appeal for the AY 2012-13 is identical to the issues raised by the Revenue vide ground No. 1 in ITA No. 1327/AHD/2017 for the assessment year 2009-

10. Therefore, the findings given in ITA No. 1327/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2012-13. The ground of appeal of the Revenue for the assessment 2009-10 has been dismissed by us vide paragraph Nos. 39 of this order. The learned AR and the DR before us also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2012-13. Hence, the grounds of appeal filed by the Revenue is hereby dismissed.

201. The issue raised in ground no. 2 by the Revenue is that the learned CIT(A) erred in deleting the disallowances of doctor sponsorship expenses of Rs. 21,41,60,553/- and business advancement expenses of Rs. 4,47,60,113 and sales promotion expenses of Rs. 40,78,113/-.

202. At the outset we note that the issues raised by the Revenue in its grounds of appeal for the AY 2012-13 are identical to the issues raised by the assessee vide ground no. 1 in ITA No. 1286/AHD/2017 for the assessment year 2010-11. Therefore, the findings given in ITA No. 1286/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2012-13. The ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 appeal of the assessee for the assessment 2010-11 has been decided by us in favour of the assessee vide paragraph Nos. 80. Please refer the relevant paragraph for the detailed discussion. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2010-11 shall also be applied for the year under consideration i.e. AY 2012-13. Hence, the ground of appeal filed by the Revenue is hereby dismissed.

203. The issue raised in ground no. 3 by the Revenue is that the learned CIT(A) erred in deleting the disallowance of weighted deduction under section 35(2AB) of the Act for Rs. 1,20,17,23,600/- only.

204. At the outset we note that the issue raised by the Revenue in its grounds of appeal for the AY 2012-13 is identical to the issue raised by the Revenue vide ground no. 3 in ITA No. 1327/AHD/2017 for the assessment year 2009-

10. Therefore, the findings given in ITA No. 1327/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2012-13. The appeal of the Revenue for the assessment 2009-10 has been dismissed by us vide paragraph Nos.48 to 50 of this order. Please refer the relevant paragraph for the detailed discussion. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2012-13. Hence, the ground of appeal filed by the Revenue is hereby dismissed.

205. The issue raised in ground no. 4 by the Revenue is that the learned CIT(A) erred in deleting the disallowances of depreciation on basis of CBDT notification no. 10/2009 dated 19-01-2009

206. At the outset we note that the issues raised by the Revenue in its grounds of appeal for the AY 2012-13 is identical to the issue raised by the Revenue vide ground no. 2 in ITA No. 1327/AHD/2017 for the assessment ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 year 2009-10. Therefore, the findings given in ITA No. 1327/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2012-13. The appeal of the Revenue for the assessment 2009-10 has been dismissed by us vide paragraph Nos. 42 of this order. Please refer the relevant paragraph for the detailed discussion. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2012-13. Hence, the ground of appeal filed by the Revenue is hereby dismissed.

207. The issue raised in ground no. 5 by the Revenue is that the learned CIT(A) erred in deleting the disallowance of excess depreciation claimed by the assessee on computer software.

208. At the outset we note that the issue raised by the Revenue in its ground of appeal for the AY 2012-13 is identical to the issue raised by the Revenue vide ground No. 4 in ITA No. 1327/AHD/2017 for the assessment year 2009-

10. Therefore, the findings given in ITA No. 1327/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2012-13. The appeal of the Revenue for the assessment 2009-10 has been dismissed by us vide paragraph Nos. 56 of this order. Please refer the relevant paragraph for the detailed discussion. The learned DR and the AR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2012-13. Hence, the grounds of appeal filed by the Revenue is hereby dismissed.

209. The issue raised in ground no. 6 by the Revenue is that the learned CIT(A) erred in deleting the disallowance of depreciation of Rs. 2,76,356/- on account of capital subsidy received.

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10

210. At the outset we note that the issue raised by the Revenue in its ground of appeal for the AY 2012-13 is identical to the issue raised by the Revenue vide ground no. 6 in ITA No. 1327/AHD/2017 for the assessment year 2009-

10. Therefore, the findings given in ITA No. 1327/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2012-13. The appeal of the Revenue for the assessment 2009-10 has been dismissed by us vide paragraph Nos. 67 of this order. Please refer the relevant paragraph for the detailed discussion. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2012-13. Hence, the grounds of appeal filed by the Revenue is hereby dismissed.

211. The issue raised in ground no. 7 by the Revenue is that learned CIT(A) erred in deleting the disallowance made under section 80IC on account of allocation of R&D expenses and Development cost torrent research center , notice pay and sale of scrap, cash discount, miscellaneous income, foreign exchange gain.

212. At the outset, we note that the issue with R&D expenses and Development cost torrent research center, notice pay and sale of scrap raised by the Revenue in its ground of appeal for the AY 2012-13 is identical to the issue raised by the Revenue vide ground no. 7 in ITA No. 1327/AHD/2017 for the assessment year 2009-10. Therefore, the findings given in ITA No. 1327/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2012-13. The appeal of the Revenue for the assessment 2009-10 has been dismissed by us vide paragraph Nos. 69 of this order. Please refer the relevant paragraph for the detailed discussion. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2012-13. Hence, the ground of appeal filed by the Revenue to this extent is hereby dismissed.

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10

213. Coming to the issue of cash discount and miscellaneous income:

214. It was found that the amount of eligible profit for deduction under section 80IC of the Act includes cash discount of Rs. 2,00,147/- and miscellaneous income of Rs. 3713,939/-.

214.1. The assessee submitted that cash discount represent discount received from venders for making prompt payment against purchases which has been shown separately under the head other income instead of directly reducing the purchase cost. Thus it has direct nexus with manufacturing activity and eligible for deduction under section 80IC of the Act.

214.2. The assessee with respect to miscellaneous income of Rs. 37,13,939/- submitted that it includes an amount of Rs. 8,73,445 received from various suppliers being penalty on account of short or late supply of materials and deficiencies in services etc. Similarly it includes an amount of

Rs. 26,48,271/- being cost recovered against inter unit transfer of stock which does not have any element of profit. It also includes an amount 1,553/- being cost of making duplicate keys recovered from employee and remaining amounts represent receipt such as amount recovered on account of material mishandling for Rs. 1,90,000/- & other for Rs. 670/-. Thus the assessee argued that same is either directly related with manufacturing activity or not having any profit element as same amount also claimed as expenses.

214.3. However the AO held the discount received from vender on purchases which is not arising from eligible manufacturing activity. Thus the same is not eligible for deduction under section 80IC of the Act. Likewise, the miscellaneous income also not arising from manufacturing activity. Thus the AO disallowed the amount of cash discount and miscellaneous income from eligible profit under section 80IC of the Act.

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10

215. Aggrieved assessee preferred an appeal to the learned CIT(A), who allowed the appeal of the assessee by observing as under:

Cash Discount:

> With respect to other income of Rs. 2,00,147/-, it is observed that my predecessor CIT(A) has confirmed the said disallowance stating that such income cannot be considered as profit derived from industrial undertaking. Facts of the case continue to be same, hence following the findings of my Predecessor CIT(A), Hence, the reduction made by Assessing Officer on account of cash discount amounting to Rs.2,00,147/- is not sustained. This item of income is held to be eligible for deduction u/s.80IC of the Act.

Miscellaneous Income Another reduction made from eligible profits by the Assessing Officer is on account of following items of Miscellaneous Income and Rounding off Rs. 37,16,408/-;

Particulars	Rs.
Reimbursement of expenses from employees	1,553
Penalty against purchase order	8,73,445
Cost recovered from other unit	26,48,271
Amount recovered from material mishandling	1,90,000

So far as reimbursement of expenses from employees is concerned, it is observed that expenditure is already debited in unit eligible for deduction and when any recovery is made such recovery reduces the expenditure. The Appellant has shown such recovery as 'other income' which does not mean that such income is not eligible for deduction as such income is required to be reduced from expenditure incurred by Appellant which will in turn lead to increase in profit of eligible- unit. Similarly, when unit eligible for deduction under Section 80-IC is purchasing any material, related cost is debited in such unit and when Assessee recovers any amount for material mishandling or penalty for delay in supply of material or providing for inferior quality by supplier, it recovers such amount from concerned supplier/persons which reduces cost of eligible unit. Merely showing all such amounts as income separately does not lead to conclusion that such income is not eligible for deduction rather such income reduces cost of eligible unit hence it is held that Appellant is entitled for deduction under Section 80-IC for Rs. 37,16,408/- on the impugned miscellaneous income.

216. Being aggrieved by the order of learned CIT (A) the Revenue is in appeal before us

217. Both the learned DR and learned AR vehemently supported the order of the authority as favorable to them.

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10

218. We have heard the rival contentions of both the parties and perused the materials available on record. As regards income shown by the assessee under the head cash discount amounting to Rs. 2,00,147/- , we note that such cash discount is against the purchases on account of prompt payment made by the assessee. In other words, the purchases were recorded by the assessee at the higher value without adjusting the amount of cash discount. Had the assessee been adjusted such cash discount against the purchases, the gross value the purchases would have come down by the amount of cash discount which would have resulted in the greater amount of income and the same would have been eligible for deduction under section 80IC of the Act. Thus, we are of the view that amount of income by way of cash discount cannot be denied for the benefit of the deduction under section 80IC of the Act merely on account of the different presentation shown by the assessee.

218.1 Without prejudice to the above, if the cash discount shown by the assessee as income is excluded from the deduction provided under section 80IC of the Act, then the corresponding expenses should also be excluded while calculating the deduction under section 80IC of the Act. In such a scenario as well, there will not be any impact on the amount of deduction claimed by the assessee. In other words, the amount of net income should only be considered while excluding from the amount of deduction available under section 80IC of the Act. Thus the contention of the assessee with respect to income under the head cash discount is allowed.

218.2. Regarding the income shown by the assessee on account of penalty and amount recovered on account of material mishandling under the head miscellaneous income against the purchase orders, we note that it is at Par with the cash discount which we have elaborately discussed in the preceding ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 paragraph. Thus we hold that such income are eligible for deduction under section 80IC of the Act.

218.3. Regarding the income shown on account of transfer of goods to other units, we find that it does not contain any element of profit. As such the assessee on one hand claimed an expense and the other hand it has shown income by way of transfer to the other units. This is an internal transaction, having no element of income. Therefore, if we see such transaction on net basis, there will not be any impact as far as deduction under section 80IC is concerned. Accordingly, we hold that such income are eligible for deduction under section 80IC of the Act.

218.4 Coming to the other income i.e. recovery of the cost from the employee of Rs. 1,553/- and other Rs 670/-, we direct the AO take net income embedded in the impugned transaction. Thus the ground of appeal of the revenue to this extent is dismissed

219. Coming to the issue of Gain on Foreign Exchange.

219.1 The assessee submitted that gain/loss on foreign exchange is arising on account of difference in rate of foreign currency as on the date of transaction and on date of settlement or closing date of accounts. These transaction includes import of materials, purchase of equipment and supply of natural gas for generation of electricity as well as export of goods. Accordingly, the assessee claimed that all these transaction are ordinary business transaction. Hence, any gain arising from ordinary business transaction is allowable for deduction under section 80IC of the Act. The assessee in support has furnished the details of exchange gain/loss and placed reliance on various judgments.

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 219.2 The AO, however held that the gain on foreign currency exchange has nothing to do with sale or export of goods. As such it is arising due to prevailing conditions of forex market and the assessee also has not treated the same as part of sale. Further Accounting Standard 11 issued by the ICAI also requires to disclose any gain or loss arising due to fluctuation in foreign currency rate separately from sale or purchases and this principles is also approved by the Hon'ble Supreme court in case of CIT vs. Woodward Governor India (P) Ltd reported in 312 ITR 254. Therefore in the light of AS-11 and Judgment of Hon'ble Supreme court such gain on foreign currency exchange cannot be treated as ordinary business profit. Accordingly the AO disallowed the amount of foreign exchange gain of Rs. 7,16,31,391/- from eligible profit under section 80IC of the Act by holding that same is not derived from the industrial undertaking.

220. However the learned CIT(A) on appeal by the assessee deleted the disallowances made by the AO by observing as under:

> With respect to addition on account of net foreign exchange gain of Rs.7,16,31,391/-, I find merit in the argument of appellant that such gains are earned on export sales of the eligible unit and it is eligible for deduction u/s 80IC of the Act The following decisions relied by the appellant are duly applicable in its case :
>
> (i) Decision of HorVble Gujarat High Court in the case of CIT ys Deversons Industries Ltd. IT2Q15T 55 taxmann.com 189] dated 18.12.2014: "Section 80-IA of the Income-tax Act, 1961 - Deductions - Profits and gains from infrastructure undertakings (Computation of deduction) -• Assessment years 1995-96 to 2000-01 -

Appellant firm was engaged in business of manufacturing and sale of dyes - Whether while computing deduction under section 80-IA, exchange rate difference should be treated to be derived from industrial undertaking whereas duty drawback should not be treated as derived from Industrial Undertaking - Held, yes [Para 7] [Partly in favour of appellant]"

(ii) Decision of Hon'ble Gujarat High Court in jhe case of CIT vs Metrochem Industries Ltd [[20171 79 taxmann.com 4401 dated 19.07.2016: "II Section 80-IA of the Income-tax Act, 1961 - Deductions - Profits and gains from infrastructure undertakings (Computation of deduction) -Assessment years 1994-95, 1996- 97 and 1997-98 - Foreign exchange fluctuation and duty drawback is an income derived from industrial undertaking, eligible for deduction under sections 80-1 and 80-IA [In favour of appellant]"

(ijj) Decision of HoiVble Guiarat High CourLJn the case of CIT vs ALPS Chemicals f P.I Ltd [[20151 55 taxmann.com 3881 dated 26.03.2014:

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 "Section SO-IA of the Income-tax Act, 1961 - Deductions - Profit and gains from infrastructure undertakings - Amount received on account of fluctuation in rate of foreign exchange was entitled to special deduction under section 80-IA [In favour of appellant]"

The fact that gain is from export of goods pertaining to eligible unit is not disputed hence ratio of above judgments of Jurisdictional High court is squarely applicable on facts of case at hand. Therefore, disallowance made by Assessing Officer for Rs. 7,16,13,391/- is deleted.

221. Being aggrieved by the by the order of the learned CIT(A) the Revenue is in appeal before us.

222. Before us both the learned DR and AR vehemently supported the order of the authorities below as favorable to them.

223. We have heard the rival contentions of both the parties and perused the material available on records. With respect to the foreign exchange income, we note that this issue has already been allowed in favour of the assessee in the series of judgments which have been reproduced in the order of the learned CIT-A. At the time of hearing, the learned DR has not brought anything on record contrary to the finding of the learned CIT.

224. In view of the above and after considering the facts in totality, we do not find any infirmity in the order of the learned CIT-A. Hence the ground of appeal of the revenue is hereby dismissed.

225. The issue raised in ground No. 8 by the Revenue is that the learned CIT(A) erred in deleting the disallowance of the additional depreciation of Rs. 32,02,273/- on trolley, mobile racket and pallets.

226. The assessee during the year under consideration has purchased Trolleys, Mobile Rackets and pallets. The assessee treated the same as part of plant and machinery. Thus, the assessee claimed depreciation and additional ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 depreciation at the rate applicable on the plant and machinery. The assessee in support of its contention submitted that the trolley are used for movement of goods, mobile racket are used as storage units fitted with wheel and wooden pallets is used to transport structure of goods in stable condition. It was also submitted by the assessee that all these assets were used in the production plant. Therefore, as per the assesse these are part and parcel of plant and machineries. The assessee in support of its contention also placed reliance on the order of Pune ITAT in case of Serum Institute of India Ltd. reported in [2012] 47 ITJ 594 (Pune) and other judgment as incorporated in assessment order.

226.1. However the AO held that on perusal of use and description of assets being Trolley, Mobile Rackets and Wooden Pallets can be classified as furniture only and not as plant and machinery. Further, the claim of the assessee that these assets were used in production plant, hence should be treated as part and parcel of plant and machinery is devoid of any merits. As such none of these assets are used in manufacturing process except being used for movement and storage of good produced. Therefore, the AO treated the same as furniture and fixture and disallowed the additional depreciation and also restricted the depreciation allowable to the extent of 10% only. Accordingly the AO disallowed the excess amount of depreciation of Rs. 32,02,273/- and added to the total income of the assessee.

227. Aggrieved assesse preferred an appeal before the learned CIT(A) and reiterated its submission as made before the AO during the assessment proceedings.

227.1 The learned CIT (A) after considering the fact in totality deleted the disallowance of the depreciation made by the AO by observing as under:

> ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 In the present case, items like trolley, mobile racks, pallets are used directly/indirectly for manufacturing process of equipment. Hon'ble Pune Tribunal in case of Serum Institute of India Ltd. (2012) 47 TTJ 594 (pune) wherein has held as under:
>
> "Section 32 of the Income-tax Act, 1961 - Depreciation - Allowability/rate of ^ Assessment year 2001-02 - Assessee was engaged in manufacture of chemical and vaccines and for this purpose had laboratories - It purchased stools, tables, stainless steel racks, trolley, etc., as part of plant and machinery and claimed depreciation accordingly - Assessing Officer held that said assets were not 'plant and machinery' but 'furniture' and, accordingly, allowed depreciation - Whether Assessing Officer should have adopted functional test to decide whether said items constituted plant and machinery - Held, yes - Whether since said stools, tables, stainless steel racks, etc., were required for laboratory purpose, i.e.. for purpose of production or processing of chemical tests, in laboratory premises leading to production of stocks, they must .be categorized as plant and machinery - Held, yes"

Further, Hon'ble Pune Tribunal in case of Varroc Engineering P.Ltd vide ITA No: 827/PN/2013dated 25/08/2014 held as under:

"13. We find that the Hon'ble Bombay High Court in the case of CIT vs. Parke Davis (India) Ltd. (1995) 214 ITR 587 (Bom) has held that the assessee company claimed depreciation u/s.32 in respect of the fans, which were installed in its administrative office. The Tribunal held that the fans installed in the administrative office of the assessee constituted plant and machinery for the purpose of granting depreciation u/s.32 of the Act. On reference, the Hon'ble High Court held that the expression plant has been given an extended meaning even to include vehicles, books, scientific apparatus, etc. used for the purpose of business or profession, ltdoes not define plant as such. It has to be construed in thepopular sense. So construed, plant will mean and include apparatus used by a businessman for carrying on his business. It is not confined to apparatus used for mechanical operations or processes or industrial business, Applying the tests laid down by the Hon'ble Supreme Court in Scientific Engineering House Pvt. Ltd.vs. CIT (1986) 157 ITR 86 (SC) to the facts in the instant case, it could be said that the fans installed in the administrative office of the assessee constituted plan and machinery for the purpose of granting depreciation u/s.32 of the Act, We also find that the Hon'ble Delhi High Court in the case of CIT vs. Delhi Air Port Service (2002) 255 ITR 91 (Del) has held that air conditioner fixedin a bus is an integral part of the bus and therefore depreciation on such air conditioner is allowable at the rate applicable to the bus. In the case of CIT V/s Nathubhai H. Patel (2006) 285 ITR 67 (Guj).the Hon'ble Gujarat High Court has held that air conditioner and fans in the clinic are entitled to additional depreciation.

14. In view of above discussion, the CIT(A) rightly allowed depreciation o Rs.3,61,191/- and additional depreciation of Rs.18,05,951/-. This reasoned finding o CIT(A) needs no interference from our side. We uphold the same. In the result, th(appeal filed by the Revenue is dismissed." From the above facts it is clear that the trollys etc. are integral part of the manufacturing process and the fulfills the conditions for 'functional test1 as stipulated by the Hon'ble ITAT, Pune. Considering the fact tha the trollys, mobile racks, pallets are used in manufacturing process the same are held to be plant and machinery. Accordingly, the disallowance made by the Assessing officer for Rs.32,02,273/- is deleted. The related ground of appeal is allowed.

228. Being aggrieved by the order of the learned CIT(A) the Revenue is in appeal before us.

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10

229. Both the learned DR and AR before us vehemently supported the order of the authorities below as favourable to them.

230. We have heard the rival contentions of both the parties and perused the materials available on record. Admittedly, the assessee during the year under consideration purchased certain Trolleys, Mobile Rackets and Pallets and treated the same as part and parcel of the plant and machinery and claimed depreciation accordingly whereas the AO treated the same as furniture and fixture and disallowed the excess deprecation which has been reversed by the learned CIT (A).

230.1. Now the question arises before us whether the assets being Trolleys, Mobile Rackets and pallets used in manufacturing plant for movement and safe storage of goods can be described as plant and machinery or furniture. At this juncture, we note that the coordinate of bench Pune Tribunal in case of Serum Institute of India (supra) in similar facts and circumstances observed that nature of the assets used in the business is to be decided on the basis of functional test of the assets and accordingly held that tables, stools, rackets etc. used in laboratories are part and parcel of plant and machinery. We also find that the learned CIT(A) in his order followed the order cited above i.e. order of the Pune Tribunal i.e. Serum Institute of India (supra). The relevant extract of the order has already been reproduced in the order of the ld. CIT-A. Therefore, respectfully, following the same, we do not find any infirmity in the order of the learned CIT(A). Hence the ground of appeal of the Revenue is hereby dismissed.

231. The issue raised in ground no. 9 by the Revenue is that the learned CIT(A) erred in deleting the disallowance made by the AO for the deduction ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 claimed by the assessee under section 80G of the Act for Rs. 32,02,273/- only.

232. At the outset we note that the issue raised by the Revenue in its ground of appeal for the AY 2012-13 is identical to the issue raised by the Revenue vide ground No. 8 in ITA No. 1327/AHD/2017 for the assessment year 2009-

10. Therefore, the findings given in ITA No. 1327/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2012-13. The appeal of the Revenue for the assessment 2009-10 has been dismissed by us vide paragraph Nos. 72 of this order. Please refer the relevant paragraph for the detailed discussion. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2009-10 shall also be applied for the year under consideration i.e. AY 2012-13. Hence, the ground of appeal filed by the Revenue is hereby dismissed.

233. The issue raised in ground no. 10 by the Revenue is that the learned CIT(A) erred in deleting the upward adjustment of TP for Rs. 6,65,91,946/-.

234. At the outset we note that the issues raised by the Revenue in its grounds of appeal involved 3 different amount which are under:

1. Deletion of upward adjustment of Rs. 26,30,582/- on Capital infusion.

2. Deletion of upward adjustment of Rs. 50,95,310/- on Liaison service.

3. Deletion of upward adjustment of Rs. 5,88,66,054/- on Dossier Licensing Fee.

235. As far as issue of deletion of upward adjustment on account of capital infusion is concern, we note that the same has been adjudicated along with assessee appeal vide ground no. 2 in ITA No. 1397/Ahd/2018 for the AY 2012-12 where the issue has been has been decided against the revenue vide ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 paragraph no. 180 of this order. Hence, the ground of the Revenue's appeal to this extent is dismissed.

236. Now coming the issue of deletion of upward adjustment on account of liaison service, we note that identical issues was raised by the assessee vide ground no. 2 in ITA No. 1286/Ahd/2017 for A.Y. 2010-11 Therefore, the findings given in ITA No. 1286/AHD/2017 shall also be applicable for the year under consideration i.e. AY 2012-13. The appeal of the Assessee for the assessment 2010-11 has been decided by us vide paragraph Nos. 84 of this order against the revenue. Please refer the relevant paragraph for the detailed discussion. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2010-11 shall also be applied for the year under consideration i.e. AY 2012-13. Hence, the grounds of appeal filed by the Revenue to the extent of upward adjustment on account of liaison services is hereby dismissed.

237. Coming to deletion of upward adjustment of Rs. 5,88,66,054 on account of dossier licensing fee.

237.1. The assessee in the year under consideration has shown an income of 2,68,25,090/- from its associated enterprises based in Germany on account of Dossier licensing fees. It was explained that there is an agreement between the assessee and Torrent Pharmaceuticals Gmbh Germany. As per the agreement the AE has to get registration of the product developed by the assessee and subsequently market the same. In return, the AE has to share the income with the assessee in the ratio of 75: 25. In other words, share in the income from the impugned activity of the AE is 75% whereas the share of the assessee is 25%. The assessee to benchmark the transaction has adopted profit split method. As per the assessee the sharing of income with the AE was at the arm length price. However, the AO found that the major work i.e. the ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 development of the product was to be carried out by the assessee. Likewise the ownership of the IPR of the product was also with the assessee. Accordingly the AO held that the major risk was born by the assessee.

237.2. Similarly, the AO found that role of the AE was limited to provide support services in the registration of the product and perform marketing functions. Accordingly, the AO was of the view that the profit sharing between the AE and the assessee in the ratio of 75:25 is not at arm length price. As per the AO the correct ratio for distribution of income should be 25:75 i.e. 25% of the income should be of the associated enterprise whereas 75% of the income should be of the assessee. Hence the AO worked out the profit attributable to the assessee at 8,56,91,344/- and made the upward adjustment of 5,88,66,054/- being the difference of the amount shown by the assessee.

238. Aggrieved assessee preferred an appeal to the learned CIT-A who deleted the addition made by the AO by observing as under:

17.6.3 It is noticed that dossier licensing 'fees is not the main revenue generating stream for the appellant company. As per clause 6 of the said agreement it has been agreed upon that the A.E. is obligated to source all the requirements of pharmaceutical product and bulk drugs from the appellant company only. Meaning thereby all the customers/ clients of the associated enterprise would have to get pharmaceutical products manufactured exclusively from the appellant company. It is further noticed that the Appellant company had earned more substantial margins from sale of pharmaceutical products to its A.E. On perusal of the workings submitted by the appellant it is noticed that it has earned margins (computed on cost plus basis) of 265.71% on the sales made to A.E. who inturn supplies the same to the licensees. As per Form 3CEB the appellant is a manufacturer of pharmaceutical products generating revenues and profit from manufacturing of pharmaceutical products was the key area. The appellant has followed cost plus method as the most appropriate method to benchmark sale of pharmaceutical products to its A.E. Appellant company has earned substantial margins on sa e of pharmaceutical products. Detailed working has also been provided by the appellant. It is noted that appellant has earned a profit of Rs.3,80,83,078/- during the year on sales emanating from the dossier licensing. Further the TPO has also accepted that the transaction of sale of pharmaceutical products to A.E. TPO has not controverted this vital fact pointed out at length by the Ld. AR in response to the Show Cause Notice issued. This fact has been ignored for the purpose of making Transfer Pricing adjustment. What is pertinent to be noted is that the TPO did not note that pursuant to the Dossier License Agreement there also emanates an intangible right in the form of 'exclusive manufacturing rights1 for the appellant company. All profits attributable to manufacturing have been allocated to the appellant is a matter of ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 fact. The TPO did not appreciate the entire agreement in totality. He analyzed only a limited portion of the agreement i.e. pertaining to Dossier Licensing Fees. But for the registration the appellant would not have been in a position to exploit the German market. Considering the above factual position that substantially majority of the profits are accruing from the right of manufacturing which is vested with the appellant company the allocation of profits made by the TPO is not justifiable.

17.6.4 Further, it has noticed that A.E. has incurred losses on a year to year basis. The financial accounts audited financial statements off Torrent Pharma GmbH have been compiled by the appellant in the Paper Book. Further the Ld. AR also pointed out to the critical fact the loss incurred by Torrent Pharma GmbH was not taken into consideration while computing attributable profits/ losses to the appellant company. \ Detailed working of the losses to be attributed has been submitted by I the appellant vide submission dated 14 February 2018. On analysis of the financial statements of Torrent Pharma Gmbh it is seen that the A.E. has incurred a loss of 6.77 lakh Euros during the relevant period. The aforesaid losses have been computed after allocating 25% of dossier licensing fees to the appellant company. Accordingly, if PSM is applied in the correct perspective, loss of 5.07 lacs Euros (computed in the

ratio adopted by TPO i.e. 75:25 to the appellant & A.E.) shall have to be allocated to the appellant company. This would result into lowering of taxable profits of the appellant company since losses of the Associated Enterprise would be allocated to India. Detailed working of the same is i provided by the appellant. This factual issue has not been dealt with by | i TPO, On analysis of the above facts it is noticed that if the losses are attributed applying the PSM as per the prescribed Rules the appellant would be entitled to allocation of losses incurred by the AE. In that scenario the allocation of 25% of revenues of Dossier Licensing Fees would also fail.

17.6.5 Transfer Pricing Order further states that Torrent Pharrna Gmbh has incurred registration expenses of Rs.12.70 crores for more than 40 drugs whereas the dossier licensing fee has been received only for two drugs namely Lamotrigin and Sertraline, On registration of these two drugs the expense incurred by the A.E. is only Rs.17.41 lacs. Hence, as per TPO the profits of the combined entity should not be the parameter for computing the profits under the PSM. In this regard appellant contended that mere registration of products does not result into getting the Dossier Licensing Fees. It is after the products are registered the AE undertakes the function of marketing the said "I registrations and explores multiple opportunities in the jurisdiction and when they find the clients who intend to license their dossier the dossier licensing fees is received. The revenue from the Dossier Licensing may or may not be generated in the year of product registration. It may take several years for registered product being accepted in a foreign market and there are also possibilities that no Dossier Licensing Fees may be generated from certain registrations. Therefore, the reasoning of TPO that the profits of the AE is considered at entity level and includes income and expenses to activities other than sale of Dossier Licensing cannot be a ground for rejecting the ratio of allocation of Dossier Licensing Fees adopted by the Appellant on year to year basis.

In view of the above discussion the upward adjustment made by TPO amounting to Rs.5,88,66,054 is deleted. This ground of appeal is allowed.

239. Being aggrieved by the order of the learned CIT(A) the revenue is in appeal before us.

ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10

240. The learned DR before us vehemently supported the order of the AO. On the contrary the learned AR submitted that the profit sharing ratio has already been accepted by the revenue in the earlier years. Likewise, if the profit split method is applied in the correct perspective, then there is a loss to the AE of €5.04 lacs. The assessee also contended that AE has to perform many more functions such as compliance of regulation of particular territory, check and change in marketing authorization etc. However, the TPO/AO has not read out the contents of the agreement in entirety. The learned AR vehemently supported the order of the learned CIT (A).

241. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset we note that the profit sharing ratio has already been accepted by the revenue in the earlier years. There is no change in the facts and circumstances for the year under consideration viz a viz the earlier years. It is the same agreement based on which the income has been shared between the assessee and the AE in the year under consideration. As such the agreement was entered dated 18-02-2003 which was still in force in the year under consideration without any modification. Therefore we are of the view that, the principles of consistency should be adopted. At the time of hearing, the learned DR has also not brought anything on record contrary to the finding of the learned CIT-A. Thus the order of the learned CIT(A) is well reasoned and does not require any interference. Hence the ground of appeal of the revenue to the extent of TP adjustment on account of Dossier licensing fee is hereby dismissed.

242. Thus in view of the above ground of appeal of the revenue is hereby dismissed.

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243. The issue raised in ground no. 11 by the Revenue is that the learned CIT(A) erred in deleting the addition made by the AO in book profit under section 115JB of the Act by the amount of disallowance made under section 14A of the Act under normal computation of income.

244. The AO while determining the book profit under the provisions of section 115JB of the Act has made the adjustment of the expenses for Rs. 91,72,392/- which was disallowed by the assessee under section 14A under normal computation of income.

245. Aggrieved assessee preferred an appeal to the learned CIT-A, who deleted the adjustments made by the AO while determining the book profit under the provision of section 115JB of the Act by observing as under:

> 15.3 I have carefully considered the facts of the case, Assessment Order and submissions made by the appellant. The Assessing Officer has made addition of Rs.91,72,392/- on account of disallowance u/s 14A of the Act while computing book profits u/s 115JB of the Act. It is observed that identical issue came up for consideration before Hon'ble Ahmedabad ITAT in the case of Adani Agro Pvt. Limited in ITA No. 2539/Ahd/2013, dated 2nd February, 2018 wherein, relying upon decision of Vireet Investments (ITAT, Delhi Special Bench), adjustment made under Section 14A while computing book profit under Section 115JB is deleted. The relevant finding is as under:
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> "15 As far as applicability of section 115JB upon the assessee is concerned, there is no dispute. Book profit of the assessee has to be computed. Only question before us is, (a) whether three amounts viz. a sum of Rs.6.60 crores worked out by the AO with the help of Rule 8D r.w.s. 14A of the Act is to be added in the book profit by making an adjustment, (b) whether share of profit from partnership firm received by the assessee is to be added in the book profit, and the amount of Rs.9,00,825/-calculated

by the assessee for the purpose of disallowance in its regular accounts is to be added back in the book profit. As far as first issue is concerned, i.e. exclusion or inclusion of Rs.G 69 crores computed by the Assessing Officer under Rule 8D is concerned, this issue is squarely covered in favour of the assessee by the order of Special Bench of 1TAT. Special Bench has held that amount computed by resorting to procedure contemplated in Rule 8D is not to be adopted for the purpose of adjustment in the book profit.

Special Bench of the 1TAT has formulated following question for adjudication:-

"Whether the expenditure incurred to earn exempt income computed u/s.14A could not be while computing book profit u/s.115JB of the Act."

16. Special Bench answered this question in favour of the assessee and held that computation for the purpose of clause (f) of Explanation-1 to Section- 115JB(2) is to be made without resorting to the computation as contemplated ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 under section 14A r.w.r. 8D. The Id. CIT (A) has made reference to order of the ITAT in the case of Goetze (India) vs. CIT and Cadila Healthcare Ltd. vs. ACIT etc. These orders are in the line of conclusion drawn by the Special Bench. A perusal of the assessee's explanation would indicate that the assessee had disallowed expenditure of Rs.6,08,05,084/- representing interest expenditure, but this amount was towards interest to financial institutions and other processing charges. This expenditure according to the Id. CIT (A) pertains to the borrowing made during the current year, and it was added back in the computation of income, since it was felt not to be admissible under section 36(1)(iii). Therefore, this expenditure cannot be said to be falling under clause (f) of Explanation 1 to Section 115JB(2). According to the Id, CIT (A) investments were made in the earlier years and the alleged financial charges could not be considered with reference to any investments relatable to earlier years Interest expenditure and processing charges which have been worked out by the assessee and added back represent borrowings for the current year. This fact is discernible from the submissions made by the assessee and reproduced by the Id. CiT (A). The Special trench has also observed that while computing disallowance u/s.14A r.w.r. 8D those investment should be taken for considering average value of investment which have yield exempt income during this year. This finding is qua the computation for 14A r.w.r. 8D. As far as adjustment in the book profit is concerned, Special Bench has held that such adjustment cannot be made by adopting the procedure provided in section 14A r.w.r. 8D. Thus, this issue is squarely covered by the decision of Special Bench. On due consideration of the above facts and circumstances, we are of the view that the Id. CIT (A) has appreciated the controversy in right perspective. The Id. CIT (A) has rightly excluded the amount of Rs.6.06 crores from book profit."

As issue is covered in favour of Appellant, by the decision of Hon'ble Ahmedabad ITAT cited (supra), disallowance under Section 14A made by AO while computing

book profit for Rs.91,72,392 is deleted.

246. Being aggrieved by the order of the learned CIT-A, the Revenue is in appeal before us.

247. Both the learned DR and the AR before us vehemently supported the order of the authorities below as favourable to them.

248. We have heard the rival contentions of both the parties and perused the materials available on record. The Assessee in the instant case has made suo moto disallowance u/s 14A r.w.r. 8D of the Income Tax Rules for Rs. 91,72,392/- while determining the income under normal computation of income without making any adjustment in book profit under section 115JB of the Act. The AO in assessment proceeding while determining the income ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 under Minimum Alternate Tax (MAT) as per the provisions of section 115JB of the Act, has added the amount disallowed under the normal computation of Income under section 14A r.w.r. 8D of Income Tax Rule for Rs. 91,72,392/- in pursuance to the clause (f) of explanation 1 to section 115JB of the Act.

248.1. However, we note that in the recent judgment of Special Bench of Hon'ble Delhi Tribunal in the case of ACIT vs. Vireet Investment Pvt. Ltd. reported in 82 Taxmann.com 415, it has been held that the disallowance made u/s 14A r.w.r. 8D cannot be the subject matter of disallowances while determining the book profit u/s 115JB of the Act. The relevant portion of the said order is reproduced below:

> "In view of above discussion, the computation under clause (f) of Explanation 1 to section 115JB(2), is to be made without resorting to the computation as contemplated under section 14A, read with rule 8D of the Income-tax Rules, 1962."

248.2. The ratio laid down by the Hon'ble Tribunal is squarely applicable to the facts of the case on hand. Thus it can be concluded that the disallowance made under section 14A r.w.r. 8D cannot be resorted while determining the book profit as mentioned under clause (f) to explanation 1 to section 115JB of the Act.

248.3. However, it is also clear that the disallowance needs to be made with respect to the exempted income in terms of the provisions of clause (f) to section 115JB of the Act while determining the book profit. In holding so, we draw support from the judgment of Hon'ble Calcutta High Court in the case of CIT Vs. Jayshree Tea Industries Ltd. in GO No.1501 of 2014 (ITAT No.47 of 2014) dated 19.11.14 wherein it was held that the disallowance regarding the exempted income needs to be made as per the clause (f) to Explanation-1 of Sec. 115JB of the Act independently. The relevant extract of the judgment is reproduced below:-

> ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 "We find computation of the amount of expenditure relatable to exempted income of the assessee must be made since the assessee has not claimed such expenditure to be Nil. Such computation must be made by applying clause (f) of Explanation 1 under section 115JB of the Act.

We remand the matter for such computation to be made by the learned Tribunal.

We accept the submission of Mr. Khaitan, learned Senior Advocate that the provision of section 115JB in the matter of computation is a complete code in itself and resort need not and cannot be made to section 14A of the Act."

248.4. Given above, we hold that the disallowances made under the provisions of Sec. 14A r.w.r. 8D of the IT Rules, cannot be applied to the provision of Sec. 115JB of the Act as per the direction of the Hon'ble Calcutta High Court in the case of CIT Vs. Jayshree Tea Industries Ltd. (Supra).

248.5. Now the question arises how to determine the disallowance as per the clause (f) to Explanation-1 of Sec. 115JB of the Act independently. In this regard, we note that there is no mechanism/ manner given under the clause (f) to Explanation-1 of Sec. 115JB of the Act to workout/ determine the expenses with respect to the exempted income. Therefore in the given facts & circumstances, we feel that ad-hoc disallowance will serve the justice to the Revenue and assessee to avoid the multiplicity of the proceedings and unnecessary litigation. Thus we direct the AO to make the disallowance of 1% of the exempted income as discussed above under clause (f) to Explanation-1 of Sec. 115JB of the Act. We also feel to bring this fact on record that we have restored other cases involving identical issues to the file of AO for making the disallowance as per the clause (f) to Explanation-1 of Sec. 115JB of the Act independently. But now we note that there is no mechanism provided under the clause (f) to Explanation-1 of Sec. 115JB of the Act to make the disallowance independently. Therefore our action for restoring back the issue to the file of AO would unnecessarily cause further litigation. Thus we limit the disallowance on an ad-hoc basis @ 1 % of the exempted income as per the clause (f) to Explanation-1 of Sec. 115JB of the ITA.Nos.1285/Ahd/2017 & 7 others A.Y.2009-10 Act subject to the maximum adjustment made by the AO. Thus the ground of appeal of the Revenue is partly allowed.

249. In the result appeal of the Revenue is partly allowed.

250. The combined results of the appeals are as follows:

Sr.No.	ITA No.	A.Y	Appeal By	Result
1-2	1285-1286/Ahd/2017	2009-10 2010-11	& Assessee	Partly allowed
3-4	1396-1397/Ahd/2018	2011-12 2012-13	& Assessee	Partly allowed
5-6	1327-1328/Ahd/2017	2009-10 2010-11	& Revenue	Dismissed
7.	1414/Ahd/2018	2011-12	Revenue	Dismissed
8.	1415/Ahd/2018	2012-13	Revenue	Partly allowed

Order pronounced in the Court on 22/02/2022 at Ahmedabad.

Sd/-
(WASEEM AHMED)

Sd/-
(MADHUMITA ROY)

ACCOUNTANT MEMBER JUDICIAL MEMBER

(True Copy)

(True Copy)

Ahmedabad; Dated 22/02/2022

Manish