The Acit,(Osd)Circle-8,, Ahmedabad vs The Torrent Pharmaceuticals Ltd.,, ... on 15 May, 2019

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

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
Ms. MADHUMITA ROY, JUDICIAL MEMBER

Sl. No(s)	ITA No(s)	Asset. Year(s)	Appeal(s) by Appellant	vs. Respondent Respondent
1.	907/Ahd/2012	2007-08	M/s. Torrent Pharmaceuticals Ltd., Torrent House, Off. Ashram Road, Ahmedabad. PAN No. AAACT 5456 A	Add. CIT, Range - 8, Ahmedabad.
2.	938/Ahd/2012	2007-08	The ACIT, Ahmedabad.	M/s. Torrent Pharmaceuticals Ltd. Ahmedabad.
3.	1634/Ahd/2012	2008-09	M/s. Torrent Pharmaceuticals Ltd. Ahmedabad.	The ACIT, Ahmedabad
4.	1725/Ahd/2012	2008-09	The ACIT Ahmedabad.	M/s. Torrent Pharmaceuticals Ltd., Ahmedabad.

Assessee by : Shri S. N. Soparkar & Parin Shah, A.R.
Revenue by : Shri Ramesh Chandra Panday, CIT-D.R.
with Shri Nilam Das Gupta, Sr. D.R.

/Date of Hearing : 19.02.2019
/Date of Pronounceme nt : 15.05.2019

/O R D E R

PER WASEEM AHMED ACCOUNTANT MEMBER:

These four appeals have been filed at the instance of the Assessee and Revenue against the appellate orders of the Learned Commissioner of Income- Tax (Appeals)-XIV, Ahmedabad ["Ld.CIT(A)" in short] dated 28.02.2012 relevant to Assessment Year 2007-08 and dated 14.05.2012 relevant to Assessment Year 2008-09.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 First, we take up assessee's appeal in ITA No.907/Ahd/2012 for Asst. Year 2007-08. The assessee has raised the following

grounds of appeal:-

> "1. On the facts and in the circumstances of the case, the learned CIT(A) erred in confirming addition of Rs.60,16,500/- made by the Assessing Officer on the basis of the order u/s.92CA(3) of the IT. Act passed by the Transfer Pricing Officer.
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> 2. On the facts and in the circumstances of the case, the learned CIT(A) erred in confirming disallowance of deduction of Rs.10.02 lacs claimed by the assessee u/s.35(2AB) of the IT. Act @ 150% in respect of expenditure of Rs.6.68 lacs incurred by the assessee company on purchase of motor vehicles.
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> 3. On the facts and in the circumstances of the case, the learned CIT(A) erred in confirming disallowance of deduction u/s.80-IC of the IT. Act to the extent of Rs. 2,55,341/- made by the Assessing Officer by changing the method of allocation of administrative expenses to the Indrad unit and Baddi unit.
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> 4. The appellant craves leave to add, alter, amend and/or without any ground or grounds of appeal either before or during the course of hearing of the appeal."

The first ground of appeal raised by the assessee is on account of confirmation of the addition by the ld. CIT (A) made by TPO/AO for guarantee fees of Rs. 60,16,500/- for providing a guarantee by the assessee on loan taken by its AEs during the year under consideration.

3. Briefly stated facts are that the assessee in the present case is a limited company and engaged in the manufacturing and marketing business of pharmaceuticals business. The TPO during the proceedings found that assessee has provided guarantee on loan taken by its Associated Enterprises. The details of the AEs and the amount of corporate guarantee furnished to them stand as under:

> "2. During the year as per 3CEB, following corporate guarantees were given on behalf of AEs.
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> 1. Zao Torrent Pharma, Russia $ 3 million
>
> 2. Torrent Pharma Gmbh, Germany $ 5 million
>
> 3. Torrent Do Brazil Ltd., Brazil $ 6 million"

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 3.1 The assessee has not charged any guarantee fees from any of its AEs and not computed any ALP of guarantee provided to them. Therefore, the TPO issued SCN to the assessee for computing ALP by using CUP method.

3.2 In response assessee submitted that AE situated in Russia had not taken any loan and AE in Germany has availed loan of only of US$ 3,00,000/-. Therefore, the question of charging any fees does not arise in case of guarantee provided and loan not taken.

3.3 The assessee also submitted that these guarantees were not provided in the form of primary securities; rather it was additional security as per international banking practice.

3.4 The assessee also submitted that all the AEs are subsidiary of the assessee, therefore, if guarantee had not been given then assessee would have to infuse funds in the form of equity then there would not have been any question of any guarantee fees.

3.5 The assessee further submitted that it is not engaged in the business of banking. Thus it cannot charge the guarantee fee from its AE. The assessee also contended that the notional value of guarantee was not a transaction to shift the profits from India.

3.6 Assessee also contended that guarantee was not given to earn income and also no contractual understanding/ obligation was there between assessee and AEs.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 However, the TPO disregarded the contention of the assessee and held that there is no need to compute ALP to the extent loans not taken by the AEs.

3.7 In case of other guarantees provided by the assessee, TPO held that guarantee benefit to the group company is a simpler and less expensive transaction and provides the guarantor with more flexibility in moving cash and other assets within the group.

Moreover, the assessee did not submit that creditors were ready to provide the loan without any formal guarantee which suggests that the group company was not able to secure the loan on a standalone basis.

3.8 The TPO also observed that by giving guarantees, the assessee makes its fund costlier as assessee's assets get used for guarantee and raising capital would be costlier as the same assets are already in use. Therefore, the contention of the assessee is not tenable that no cost has been incurred. Further, in case of failure of AEs in repayment the assessee will have to pay the whole of the amount.

3.9 The TPO also relied on the judgment of General electric tax case in Canada dated 4th December 2009, wherein Canadian subsidiary had paid the guarantee fee which was disallowed by the tax authority of Canada. Subsequently, the Canadian court held that Canadian subsidiary benefitted from the better financing conditions of the parent company due to explicit guarantee. The court also held in the same case even in the absence of a formal guarantee subsidiary would have benefitted from the implicit group support. Accordingly, TPO held since the case on hand is reverse but that was against the ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 tax authority; hence the guarantee fee has been assessed in the hands of the assessee being the parent company.

3.10 TPO also observed that in the same case it was settled that company issuing guarantee need to recover its cost such as administrative cost, cost of maintaining an appropriate level of cash, capital, standby credit lines, etc. In view of the above, the TPO held that charging of guarantee fee is the

same as charging notional interest and it has to be benchmarked according to the transaction between independent parties. The contention of the assessee that benchmarking is not possible in the absence of no internal CUP available is not tenable as where no internal CUP is available external CUP should be used for benchmarking. Accordingly, the TPO took the data from the websites of Indian banks and found that in the financial year 2006-07 the guarantee fee rates were ranging between 3% to 3.4% per annum according to their credit ratings. Since the assessee has not provided any pre and post credit rating of subsidiaries TPO applied an average rate of 2% and calculated the ALP as under:

> Total loans availed on which guarantee provided $ 6.3 million Guarantee fees @ 2% $ 1,26,000 @ Rs. 45 per dollar (A) Rs. 56,70,000 Guarantee providing expenses on $ 3 million + 4.7 million Expenses @ 0.1% $ 7700 @ Rs. 45 per dollar (B) Rs.3,46,500 Total (A+B) Rs.60,16,500 (Total Upward Adjustment Rs.60,16,500/-) 3.11 Accordingly, TPO made the upward adjustment of Rs. 60,16,500/- in respect of guarantee fees.
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> 4. The aggrieved assessee preferred an appeal to ld. CIT (A) where it submitted that transaction of corporate guarantee given is not an international transaction.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 4.1 Assessee also submitted that loan was given to establish the commercial expediency as all the AEs were engaged in exclusively distributing the products manufactured by the assessee. Therefore, it was in favor of the assessee as the level of production of Assessee Company has also increased. TPO fully ignored the fact that assessee is the sole shareholder of the AEs and assessee derived the following benefits:

> a. The obligation of arranging capital is discharged. b. The business and turnover of parent assessee are increased. c. The overall cost of the subsidiary is reduced, and the parent company is the only beneficiary.
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> In view of the above assessee submitted that if these advantages are evaluated, then the adjustments made are only negligible adjustments.
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> 4.2 Assessee also submitted that no financial involvement was there and no assets were pledged; therefore, there was no loss or transfer of profit from the assessee to subsidiary, and hence upward adjustment made was not justified.

This fact is also evident from the letter of guarantee issued by the ABN Amro Bank and Banko Ita USA to the German Brazilian company respectively.

4.3 Assessee also submitted that assessee is not in the business of providing corporate guarantee; therefore; TPO wrongly compared the transaction of bank guarantee. Bank rate is not the correct method to determine the ALP looking to the nature of the business of the assessee.

4.4 Assessee also relied on the judgment of General electric tax case in Canada dated 4th December 2009 and contended that while computing ALP the implicit parent support and the relation of the assessee with subsidiaries should also be kept in mind.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 4.5 Assessee also relied on ITAT Hyderabad in case of Four soft Ltd (ITA No. 1495/HYD/2010) and contended that in similar case it was held that corporate guarantee does not fall within the definition of the international transaction. Therefore, no upward adjustment is warranted.

4.6 Apart from abovementioned submission assessee also reiterated its most of the submission made before TPO.

5. However, the ld. CIT (A) disregarded the contention of the assessee and held as under:

> (i) Banks have sanctioned the loan only after taking the guarantee into account which is also mentioned in the loan agreement.
>
> (ii) The basic principle of determining the ALP is that what would be the consideration if the same nature of transaction had been entered with an independent party. There is no doubt that if the similar transaction had been carried out with independent parties, then some fee would have been charged. Therefore, the contention of the assessee that guarantee is given to the subsidiary only to promote the business of the assessee is not tenable.
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> (iii) The assessee has entered into the similar transaction of providing a bank guarantee to its AEs. Therefore, the risk of assessee and bank is almost similar.
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> (iv) The assessee has given guarantee in writing. Therefore, it is clear that the implicit parent support of assessee was not sufficient and it is a case of explicit parent support. Further, the assessee has not given any factual data or information related to implicit support and parent-

subsidiary relationship. Thus, assessee wrongly placed its reliance on the judgment of General electric tax case in Canada dated 4th December 2009.

(v) Even if the word guarantee is not specifically defined but it is covered in the definition given u/s 92B r.w.s. 92F(v) of the Act. Thus providing a guarantee is an international transaction as it is having a bearing on ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 profits, income, losses or assets of the assessee as defined u/s 92B r.w.s. 92F(v) of the Act.

5.1 In view of the above the ld. CIT (A) dismissed the appeal of the assessee and confirmed the addition made by TPO/AO.

Being aggrieved by order of TPO/AO, the assessee is in appeal before us.

6. Ld. AR before us filed a paper book-running form pages 1 to 253 and submitted that there could not be any adjustment in corporate guarantee fees because of the order of this Tribunal in the case of Micro Ink Ltd vs. ACIT (63 taxmann.com 353). Therefore there cannot be any adjustment in assessee's profit for such corporate guarantee furnished to the bank.

7. On the other hand the Ld. DR before us submitted as under:

Ground No. 1:

On the facts and in the circumstances of the case, the learned CIT(A) erred in confirming audition of Rs. 60, 16, 500 made by the Assessing Officer on the basis of the order u/s.92CA(3) of the I.T. Act passed by the Transfer Pricing Officer.

TPO's Comment:

2.1 This is general ground of appeal, however the facts of the case are as under:-

In this case, a TP adjustment of Rs. 60. 16 lacks was made on account of non charging of corporate guarantees fees on the corporate guarantee given on behalf of the AEs as detailed below: -

(1) Zao Torrent Pharma, Russia $ 3 million
(2) Torrent Pharma Gmbh, Germany $ 5 million
(3) Torrent Do Brazil Ltd., Brazil $ 6 million

The adjustment computation of guarantee was made on the basis of actual loans availed by the AEs i.e. $ 6.3 million. TPO found that during F.Y.2006-07 guarantee fees window rates were ranging from 3% to 3.4 % per annum and banks were reducing these rates to \% for AAA+ credit rating companies. However, the assessee did not submit anyaetailsof pre and post credit ratings of its subsidiaries. In view of same average rate of 2% was applied as guarantee ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 fees. Further adjustment of Rs.3,46,500/- was made on account of recovery of expenses. The computation of adjustment is as under : -

Total loans availed on which guarantee provided $ 6.3 million Guarantee fees @ 2% $ 1,26,000 @ Rs. 45 per dollar (A) Rs. 56,70,000 Guarantee providing expenses on $ 3 million + 4.7million Expenses @ 0.1% $7700 @ Rs. 45 per dollar (B) Rs. 3,46,500 Total (A+B) Rs. 60,16,500 2.2 The Ld. CIT(A) confirmed the action of AO/TPO on the ground that appellant did not provide any details related to the act of providing the guarantee and also above pre and post credit rating of its subsidiary, therefore the appellant's submission that Yield Curb Approach Method is best method was not accepted by the Ld CIT(A). Further it was observed by the Ld CIT(A) that appellant had not raised this issue before TPO in response to the show cause notice and

appellant had not objected for adoption of CUP method by the TPO. The Ld CIT(A) further concluded that the corporate guarantee fee rate of 2% applied by the TPO was correct considering the rates of corporate guarantee fees charged by banks in India.

2.3 The issue of corporate guarantee fee has been examined by ITAT Mumbai. In the case of Everest Kanto Cylinders Limited, 34 Taxmann.com 19 (Mumbai Trib), the Hon'ble ITAT went into this issue and has held that;

21. So far as the learned Senior Counsel's contention that guarantee commission is not an international transaction and there could not be any method for evaluating the ALP for the guarantee commission, we do not find any merit in the said contention in view of the amendment brought by the Finance Act, 2012 with retrospective effect from 1-4-2002 by way of Explanation added in Section 92B. Payment of guarantee fee is included in the expression 'international transaction' in view of the Explanation i(c) of Section 92B. Once the guarantee fee falls within the meaning of 'international transaction', then the methodology provided in the rules also becomes applicable.

The above decision of the ITAT has been sustained by Bombay High Court in [2015] 58 taxmann.com 254 (Bombay) wherein the High Court has not questioned the ITAT's decision with respect to the transaction being an international transaction but has held that the comparables used by the TPO with respect to this transaction are not proper.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 2.4 The amendment made to section 92B through finance Act 2012 is reproduced as under:-

In section 92B of the Income-tax Act, after sub-section (2), the following Explanation shall be inserted and shall be deemed to have been inserted with effect from the 1st day of April, 2002, namely:--

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

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

(a) The purchase, sale, transfer, lease or use of tangible property including building, transportation vehicle, machinery, equipment, tools, plant, furniture, commodity or any other article, product or thing;

(b) the purchase, sale, transfer, lease or use of intangible property, including the transfer of ownership or the provision of use of rights regarding land use, copyrights, patents, trademarks, licenses, franchises, customer list, marketing channel, brand, commercial secret, know-how, industrial property right, exterior design or practical and new design or any other business or commercial rights of similar nature;

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

(d) Provision of services, including provision of market research, market development, marketing management, administration, technical service, repairs, design, consultation, agency, scientific research, legal or accounting service;

(e) a transaction of business restructuring or re-organization, entered into by an enterprise with an associated enterprise, irrespective of the fact that it has bearing on the profit, income, losses or assets of such enterprises at the time of the transaction or at any future date;

(ii) The expression "intangible property" shall include--

(a) Marketing related intangible assets, such as, trademarks, trade names, brand names, logos;

(b) Technology related intangible assets, such as, process patents, patent applications, technical documentation such as laboratory notebooks, technical know-how;

(c) Artistic related intangible assets, such as, literary works and copyrights, musical compositions, copyrights, maps, engravings;

(d) Data processing related intangible assets, such as, proprietary computer software, software copyrights, automated databases, and integrated circuit masks and masters;

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09

(e) engineering related intangible assets, such as, industrial design, product patents, trade secrets, engineering drawing and schematics, blueprints, proprietary documentation;

(f) customer related intangible assets, such as, customer lists, customer contracts, customer relationship, open purchase orders;

(g) contract related intangible assets, such as, favorable supplier, contracts, license agreements, franchise agreements, non-compete agreements;

(h) human capital related intangible assets, such as, trained and organized workforce, employment agreements, union contracts;

(i) location related intangible assets, such as, leasehold interest, mineral exploitation rights, easements, air rights, water rights;

(j) goodwill related intangible assets, such as, institutional goodwill, professional practice goodwill, personal goodwill of professional, celebrity goodwill, general business going concern value;

(k) methods, programmes, systems, procedures, campaigns, surveys, studies, forecasts, estimates, customer lists, or technical data;

(I) any other similar item that derives its value from its intellectual content rather than its physical attributes.

2.5 The memorandum to the Finance Act, 2012 goes on to explain that;

Section 92B of the Act, provides an exclusive definition of International Transaction. Although, the definition is worded broadly, the current definition of International Transaction leaves scope for its misinterpretation.

The definition by its concise nature does not mention all the nature and details of transactions, taking benefit of which large number of International Transactions are not being reported by taxpayers in transfer pricing audit report. In the definition, the term "intangible property" is included. Still, due to lack of clarity in respect of scope of intangible property, the taxpayer have not reported several such transactions.

Certain judicial authorities have taken a view that in cases of transactions of business restructuring etc. where even if there is an international transaction Transfer Pricing provisions would not be applicable if it does not have bearing on profits or loss of current year or impact on profit and loss account is not determinable under normal computation provisions other than transfer pricing regulations. The present scheme of Transfer pricing provisions does not require that international transaction should have bearing on profits or income of current year. Therefore, there is a need to amend the definition of international transaction in order to clarify the true scope of the meaning of the term, "international transaction" and to clarify the term "intangible property" used in the definition.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 It is, therefore, proposed to amend section 92B of the Act, to provide for the explanation to clarify meaning of international transaction and to clarify the term intangible property used in the definition of international transaction and to clarify that the 'international transaction' shall include a transaction of business restructuring or re-organization, entered into by an enterprise with an associated enterprise, irrespective of the fact that it has bearing on the profit, income, losses or assets or such enterprises at the time of the transaction or at any future date. This amendment will take effect retrospectively from 1 st April, 2002 and will, accordingly, apply in relation to the assessment year 2002-03 and subsequent assessment years.(Emphasis supplied) 2.6 It is seen that the amendment was introduced because;

a. it was felt that the definition of 'international transaction' was cryptic and needed elaboration, b. the current definition left scope for mis-interpretation and c. there was a need to clarify the true scope of the term 'international transaction'.

2.7 It is an established law that a clarificatory amendment can be retrospective in nature.

2.8 It is also well established that unless the vires of the statutory provision are challenged in form of a writ before High Court or Supreme Court, the law needs to be followed in letter and spirit by the authorities implementing the law. It is a general principle that in a taxing statute, the law is to be interpreted as appearing in the statute. While debating the applicability of the retrospective amendments introduced by Finance Act 2012, the Bombay High Court has held that once the amended provisions are on the statute, they cannot be ignored and have to be taken into account. The Hon'ble Bombay High court, in the case of Vodafone India Service (P.) Ltd. Union of India, Ministry of Finance, New Delhif 2013 1 37 taxmann.com 250 (Bombay) held that the effect of the amendment would have to be considered. It cannot be brushed aside. The relevant portion of the above judgment is reproduced as under:-

> "213. The amendment to section 2(47) raises several important questions of fact and of law. Whether or not it affects the proceedings which were the subject matter before the Supreme Court is not relevant for the purpose of this Writ Petition. But, whether it is relevant or not for the purpose of the assessment proceedings in respect of the petitioner which are the subject matter of this Writ Petition, is relevant. The effect of the amendment would have to be considered. It cannot be brushed aside.
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> 214. Section 2(47), as amended, even on a cursory glance raises various issues. It is necessary to note four preliminary aspects of Explanation 2 to section 2(47). Firstly, as the opening words, "For the removal of doubts it is hereby clarified that ……", indicate it is a clariflcatory ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 amendment. Secondly, it is an inclusive definition as is evident from the words " "transfer" includes …… ". Thirdly, the amendment is with retrospective effect from 1st April, 1962.
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> Fourthly, the Finance Act 2012 which introduced, inter-alia, the amendment to section 2(47) and section 92CA(2B) is a validating act in view of section 119 thereof. "

2.9 It is respectfully submitted that the constitutional validity of the retrospective amendment to section 92B has not been challenged before any of the competent court and considering the judgment of Hon'ble Bombay High Court, in the case of Vodafone referred above, the effect of retrospective amendment cannot be ignored.

2.10 The coordinate bench of the Delhi IT AT in the case of Mahindra and Mahindra (2013) 40 taxmann.com 522 (Mumbai - Trib.) upheld levy of guarantee commission of 3% in line with the earlier year while holding that;

"44. After carefully considering the rival submissions and also the relevant findings of the TPO as well as the earlier years' orders of the Tribunal, we find that insofar as the application of rate of 4.66% by the TPO on account of guarantee fee is concerned, the same cannot be upheld as in the earlier year, it has been held that the rate of 3% should be applied for the guarantee fee. In fact, there are many cases of the co-ordinate bench of the Tribunal where guarantee fee commission between 0.20 to .5% have been upheld. Thus, under the facts and circumstances wherein 3% has been upheld in the earlier year in case of the assessee, the same rate should be applied in this year also as a matter of consistency without there being any change in the facts and the circumstances. "

2.11 In its decision in the case of Foursoft Ltd. ITA No.l903/Hyd/ll decision dated 28/03/2014. The Tribunal held as under:

24. It is noted by the TPO, during the F. Y. 2005-06 the assessee has provided bank guarantees on behalf of its Overseas subsidiary, Foursoft BV, Netherlands for an amount of Rs. 69,81,16, OOO/- which is continuing for the year under consideration also. The TPO following the order passed for A.Y.2006-07, treated the commission charged by ICICI Bank at 3.75% arms length price for the corporate guarantee provided by the assessee to its AE worked out the TP adjustment of Rs.2,61,79,350/-. The DRP also rejected assessee's objection on the issue.

25. We have heard the parties and perused the material on record. The sum and substance of the submissions made by the learned AR is, the corporate guarantee provided by the assessee cannot be equated to bank guarantee and resultantly the commission rate for bank guarantee cannot be applied to the corporate guarantee. It was submitted that the corporate guarantee is nothing but an additional guarantee provided by the parent company and it does not involve any cost or risk to the shareholders. It was submitted that since the corporate guarantee was given keeping in view paramount ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 business interest of the parent company it has to be allowed as business expenditure. It is the further submissions of the learned AR that the retrospective amendment effected to section 92B of the Act, by Finance Act, 2012 by insertion of Explanation (i)(c) to section 92B also has not enlarged the scope of the 'international transaction' to include the corporate guarantee in the nature provided by the assessee. The learned AR further contended that the issue is covered in favour of the assessee by virtue of the order passed by the Tribunal in assessee's own case for AY 2006-07 (supra). 25.1 The learned DR, on the other hand, submitted that by virtue of the amendment made to section 92B of the Act with retrospective effect from 01/04/2002, the corporate guarantee provided by the assessee is to be considered as an international transaction, and, therefore, the Assessing Officer was justified in determining arm's length price of such transaction.

> 25.2 Having considered the submissions of the parties, we are unable to accept the contention of the learned AR that corporate guarantee of the nature provided by the assessee will not come within the meaning of international transaction in terms with section 92B of the Act. It is not disputed that section 92B of the Act has been amended by the Finance Act, 2012 with the insertion of Explanation I (c) with retrospective effect from 01/04/2002. Explanation (i)(c) to section 92B, reads as under:
>
> " capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business. "

25.3 A reading of the aforesaid clause from the Explanation would make it clear that the corporate guarantee provided by the assessee comes within the scope and ambit of 'international transaction' as per the aforesaid clause. Therefore, the contention of the learned AR that the issue is covered in favour of the assessee by virtue of the order passed in assessee's own case for AY 2006-07 no longer holds good since the order passed by the coordinate bench is prior to the amendment made to provision of section 92B of the Act. It will be pertinent to mention here that this issue was also considered by the IT AT Mumbai Bench in case of Mahindra & Mahindra Vs. DCIT in ITA No. 8597'/Mum/2010, 54 SOT (UR) 146. The coordinate bench of this Tribunal while considering similar argument advanced on behalf of the assessee by placing reliance on the decision of the Four Soft Ltd. (supra), held as under:

> "15.2 After hearing the rival submissions we feel that Assessing Officer will have to follow the decision of the IT AT Hyderabad or the amended provision of the Act in this regard. If the Finance Bill of 2012 is passed by the Parliament amending the provisions of section 92B, with effect from 1st April, 2002, he will have to ignore the decision of the IT AT Hyderabad. In case section 92 B is not amended with retrospective effect, he should grant relief to the appellant. "

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 25.4 In the aforesaid view of the matter, we agree with the TPO that ALP of the corporate guarantee has to be determined as it falls within the scope and ambit of an international transaction after the retrospective amendment to section 92B. However, it appears that the TPO has applied the rate of 3.75%, which is applicable to bank guarantee issued by the bank. As the corporate guarantee is not in the nature of bank guarantee, the rate applicable to bank guarantee provided by the bank cannot be applied to corporate guarantee which is provided by a group company. In case of Glenmark f Pharmaceutical Vs. ACIT in ITA No. 5031/Mum/2012, dated 13/11/2013, the Mumbai Bench of the Tribunal after analyzing the facts in that case had held that 0.53% corporate guarantee rate in that case was appropriate. The IT AT Hyderabad Bench in case of Infotech Enterprises Ltd. in ITA No.ll5/Hyd/2011 and in ITA No. 2184/Hyd/2011, dated 16/01/2014 while considering identical issue of determining ALP of corporate guarantee provided by the assessee to its AE followed the ratio laid down in case of Glenmark Pharmaceuticals Vs. ACIT (supra) and remitted the issue back

to the TPO to decide the quantum of corporate guarantee rate by following the method adopted in case of Glenmark Pharmaceuticals (supra).

26. Since the issue in the present case is identical to the issue decided by the IT AT, Hyderabad Bench in case of Infotech Enterprises (supra), following the same, we also remit this issue to the file of the TPO to decide the quantum of corporate guarantee rates accordingly. If the assessee is able to bring on record any comparables with regard to corporate guarantee, the TPO may also consider the same while determining ALP of corporate guarantee. The TPO must provide a reasonable opportunity of being heard to the assessee before deciding the issue. This ground is allowed for statistical purposes.

2.12 Similarly we have various cases such as Mahindra and Mahindra (Delhi ITAT); Glenmark Pharma, Nimbus Communications, Everest Kanto etc where guarantee commission has been treated as international transaction and the Tribunal decided on the issue of arms length rate of the same.

2.13 Reference is also drawn to the recent decision delivered by the Hyderabad ITAT in the case of Prolifics Corporation Ltd. vs. DCIT[TS-1-ITAT-2015(HYD)- TP], wherein on the issue of Corporate Guarantee, the Tribunal after considering the decision of Bharti Airtel ltd. Vs. Additional Commissioner of Income Tax(I.T.A. no. 5816/Del/2012) and the International Guidance of the Australian Tax Office- 2008, relied upon by the assessee, stated as under:

> "Guarantee Commission:
>
> With respect to reliance placed by the assessee on the views expressed by Australian Tax Officer which were issued in 2008, ITAT observed that laws and Income tax provisions have been changed subsequently. ITAT also observed that there were no specific guidelines issued by OECD regarding addressing and resolving the use of money in transfer pricing matters. ITAT observed that guarantees involve express guarantee or implied guarantee which increases credit worthiness of AEs and that in case of default guarantor has to fulfill the liability. Therefore ITAT held that provision of ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 guarantee always involved risk and there was a service provided to AE in increasing its creditworthiness in obtaining loans in market, be from financial institutions or from others. Accordingly, ITAT held that TP provisions were invoked in this case, since there was a service rendered to AE by providing guarantees."

2.14 Further the honorable Delhi ITAT was not requested by the contesting parties to decide the issue as to whether provision of guarantee is a service or not. As I have already mentioned various Tribunal decisions have already held that provision of bank guarantee is a service and as such needs to be benchmarked. Whether the service has caused any extra cost to the assessee should not be the deciding factor to determine whether it is an international transaction. We know that allowing some body the use of a brand does not necessarily cause additional costs to the brand owner, still brand royalty is charged and has been held by various Tribunal and other decisions to be a legitimate charge. I do not think that any judicious person would hold that charge of brand royalty from a third

party user of the brand is totally unjustified as the brand owner does not have to bear any additional costs for use of brand by the third party. If we accept the assesee's argument that any service which does not involve any direct additional cost to the service provider, cannot be charged, it would lead to unintended consequences like disallowances of all brand royalty, license fee, know how fee and so on. Apparently the assessee has put forth an unsustainable and unsound proposition and cannot be accepted merely because it this particular case it suits the assessee. 2.15 The Hon'ble ITAT Ahmedabad in the case of Micro Inc Ltd v/s ACIT (2015) 63 Taxmann.com 353 has held that "We have also held, taking note of the insertion of explanation to section 92B of the Act, that the issuance of corporate guarantees is covered by the residuary clause of the definition under section 92B of the Act but since such issuance of corporate guarantees, on the fact of the present case did not have bearing on profits, income, losses or assets, it did not constitute an international transaction, under section 92B, in respect of which an arm's length price adjustment can be made". However, the decision of Hon'ble ITAT, Ahmedabad is in contradiction with the decision of Hon'ble Bombay High Court in the case of Everest Kanto Cylinders Limited (2015) 58 taxmann.com 254 (Bombay).

2.16 In the case of Everest Kanto Cylinders Limited, 34 Taxmann.com 19 (Mumbai Trib), the Hon'ble ITAT went into this issue and has held that;

21. So far as the learned Senior Counsel's contention that guarantee commission is not an international transaction and there could not be any method for evaluating the ALP for the guarantee commission, we do not find any merit in the said contention in view of the amendment brought by the Finance Act, 2012 with retrospective effect from 1-4-2002 by way of Explanation added in Section 92B. Payment of guarantee fee is included in the expression 'international transaction' in view of the Explanation i(c) of Section 92 B. Once the guarantee fee falls within the meaning of 'international transaction', then the methodology provided in the rules also becomes applicable.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 The above decision of the ITAT has been sustained by Bombay High Court in [2015] 58 taxmann.com 254 (Bombay) wherein the High Court has not questioned the ITAT's decision with respect to the transaction being an international transaction.

2.17 From the above discussion it is clear that the corporate guarantee transaction is approved as international transaction covered by the provisions of section 92B by the Hon'ble Bombay High Court.

2.18 In view of the above facts, the ground of appeal raised by the appellant against adjustment on account of charging of guarantee commission fee deserves to be rejected.

8. We have heard the rival contention and perused the materials on record. The first contention raised by the ld. AR that corporate guarantee are not covered by the definition of international transaction given u/s 92B. In this regard, we note that the issue whether the corporate guarantee is covered by the definition of international transaction u/s 92B is settled by order of this Tribunal in case of Micro Ink Ltd vs. ACIT (63 taxmann.com 353). In the said order it was decided by the

Hon'ble bench that guarantees is included in the definition by way of insertion of Explanation to Section 92B of the Act which is for the residuary clause of the definition under section 92B of the Act. As such it will be only hit by the explanation when the guarantee has "bearing on profits, income, losses or assets". The relevant extract of the case (supra) is as under:

> "That is, in our considered view, purely fallacious logic. In our considered view, under Section 92B, corporate guarantees can be covered only under the residuary head i.e. "any other transaction having a bearing on the profits, income, losses or assets of such enterprise". It is for this reason that Section 92B, in a way, expands the scope of international transaction in the sense that even when guarantees are issued as a shareholder activity but costs are incurred for the same or, as a measure of abundant caution, recoveries are made for this non-chargeable activity, these guarantees will fall in the residuary clause of definition of international transactions under section 92B. As for the learned Departmental Representative's argument that "whether the service has caused any extra cost to the assessee should not be the deciding factor to determine whether it is an international and then gives an example of brand royalty to make his point. What, in the process, he overlooks is that Section 92B(1) specifically covers sale or ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 lease of tangible or intangible property". The expression "bearing on the profits, income, losses or assets of such enterprises" is relevant only for residuary clause i.e. any other services not specifically covered by Section 92B. It was also contended that, while rendering Bharti Airtel decision, the Delhi Tribunal did go overboard in deciding something which was not even raised before us. In the written submission, it was stated that "Hon'ble Delhi ITAT was not requested by the contesting parties to decide the issue as to whether the provision of guarantee was a service or not". That's not factually correct. We are unable to see any merits in learned Departmental Representative's contention, particularly as decision categorically noted that not only before the Tribunal, but this issue was also raised before the DRP- as evident from the text of DRP decision. We now take up the issue with respect to specific mention of the words in Explanation to Section 92B which states that "For the removal of doubts, it is hereby clarified that (i) the expression "international transaction" shall include..... (c) capital financing, including any type of long -term or short -term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business." There is no dispute that this Explanation states that it is merely clarificatory in nature inasmuch as it is 'for the removal of doubts', and, therefore, one has to proceed on the basis that it does not alter the basic character of definition of 'international transaction' under Section 92B. Accordingly, this Explanation is to be read in conjunction with the main provisions, and in harmony with the scheme of the provisions, under Section 92B. Under this Explanation, five categories of transactions have been clarified to have been included in the definition of 'international transactions'. The first two categories of transactions, which are stated to be included in the scope of expression 'international transactions' by virtue of clause (a) and (b) of Explanation to Section

92B, are transactions with regard to purchase, sale, transfer, lease or use of tangible and intangible properties. These transactions were anyway covered by transactions 'in the nature of purchase, sale or lease of tangible or intangible property'. The only additional expression in the clarification is 'use' as also illustrative and inclusive descriptions of tangible and intangible assets. Similarly, clause (d) deals with the " provision of services, including provision of market research, market development, marketing management, administration, technical service, repairs, design, consultation, agency, scientific research, legal or accounting service" which are anyway covered in "provision for services" and "mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to anyone or more of such enterprises ". That leaves us with two clauses in the Explanation to Sect ion 92B which are not covered by any of the three categories discussed above or by other specific segments covered by Section 92B, namely borrowing or lending money. The remaining two items in the Explanation to Section 92B are set out in clause (c) and (e) thereto, dealing with (a) capital financing and (b) business restructuring or reorganization. These ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 items can only be covered in the residual clause of definition in international transactions, as in Section 92B (1), which covers "any other transaction having a bearing on profits, incomes, losses, or assets of such enterprises". It is, therefore, essential that in order to be covered by clause (c) and (e) of Explanation to Section 92B, the transactions should be such as to have bearing on profits, incomes, losses or assets of such enterprise. In other words, in a situation in which a transaction has no bearing on profits, incomes, losses or assets of such enterprise, the transaction will be outside the ambit of expression 'international transaction'. This aspect of the matter is further highlighted in clause (e) of the Explanation dealing with restructuring and reorganization, wherein it is acknowledged that such an impact could be immediate or in future as evident from the words "irrespective of the fact that it (i.e. restructuring or reorganization) has bearing on the profit, income, losses or assets of such enterprise at the time of transaction or on a future date". What is implicit in this statutory provision is that while impact on " profit, income, losses or assets"

is sine qua non, the mere fact that impact is not immediate, but on a future date, would not take the transaction outside the ambit of 'international transaction'. It is also important to bear in mind that, as it appears on a plain reading of the provision, this exclusion clause is not for "contingent" impact on profit, income, losses or assets but on "future" impact on profit, income, losses or assets of the enterprise. The important distinction between these two categories is that while latter is a certainty, and only its crystallization may take place on a future date, there is no such certainty in the former case. In the case before us, it is an undisputed position that corporate guarantees issued by the assessee to the various banks and crystallization of liability under these guarantees, though a possibility, is not a certainty. In view of the discussions above, the scope of the capital financing transactions, as could be covered under Explanation to Section 92B read with Section 92B(1), is

restricted to such capital financing transactions, including inter alia any guarantee, deferred payment or receivable or any other debt during the course of business, as will have "a bearing on the profits, income, losses or assets or such enterprise". This precondition about impact on profits, income, losses or assets of such enterprises is a precondition embedded in Section 92B(1) and the only relaxation from this condition precedent is set out in clause

(e) of the Explanation which provides that the bearing on profits, income, losses or assets could be immediate or on a future date. These guarantees do not have any impact on income, profits, losses or assets of the assessee. There can be a hypothetical situation in which a guarantee default takes place and, therefore, the enterprise may have to pay the guarantee amounts but such a situation, even if that be so, is only a hypothetical situation, which are, as discussed above, excluded. When an assessee extends an assistance to the associated enterprise, which does not cost anything to the assessee and particularly for which the assessee could not have realized money by giving it to someone else during the course of its normal business, such an assistance or accommodation does not have any bearing on its profits, income, losses or assets, and, therefore, it is outside the ambit of international transaction under section 92B (1) of the Act."

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 Since in the case on hand, the Guarantee is not having "bearing on profits, income, losses or assets," therefore, respectfully following the same we are also of the opinion that such guarantee issued by the assessee is not covered under the definition of section 92B of the Act. Accordingly, we direct the TPO/AO to delete the addition made by him. Thus the ground of appeal of the assessee is allowed.

The 2nd issue raised by the assessee is that the ld. CIT-A erred in confirming the disallowance of deduction under section 35 (2AB) of the Act for Rs. 6.68 lakhs made by the AO.

9. Assessee in its ROI claimed certain deduction on account of R&D expenses u/s 35(2AB) of the Income Tax Act, 1961 as under:

"A.	Building : Rs.14,95,59,812		
(i)	Deduction claimed @ 100%	Rs.	14,95,59,812
B.	Capital Expenditure (other than building)	Rs.	19,97,69,593
(ii)	Deduction claimed @ 150%	Rs.	29,96,54,390
C.	Revenue: Rs. 73,95,76,745		
(iii)	Deduction claimed @ 50%	Rs.	36,97,88,373
	Total (i)+(ii)+(iii)	Rs.	81,90,02,575"

9.1 AO to verify such expenditure required the assessee to furnish a certificate of prescribed authority in Form No. 3CL as required u/s 35(2AB) of the Act. However, the assessee submitted that during the year it had not received Form No. 3CL from DSIR. Accordingly the AO issued SCN to disallow the weighted deduction claimed by the assessee on R&D expenses.

9.2 The assessee in response to the show cause notice submitted its reply as under:

1. The prescribed authority (i.e., DSIR) has approved the Torrent Research Centre (in short TRC), vide form 3CM issued by it. Accordingly, one of the pre-requisite conditions to claim the deduction has complied.

2. To claim the weighted deduction, all the other procedural requirement as laid down u/s 35(2AB) read with Rule 6 of the Act has also complied.

3. As per the provision of clause (b) to sub-rule (7A) of Rule 6, DSIR must submit its report in Form No. 3CL within the prescribed time to Director General (Income Tax Exemption), and accordingly, DSIR has responsibility to issue Form No. 3CL to the assessee.

4. Form No. 3CL has been continuously received from DSIR in the preceding year. Therefore it had no reason to doubt that DSIR will not issue this form during this year.

5. Without prejudice to the above, the assessee also submitted that in case the report is not received from DSIR in form 3CL, then the deduction can be allowed considering the DSIR report of the earlier year and the expenses disallowed in the earlier year can also be disallowed for the year under consideration.

9.3 The AO after considering the reply of the assessee disallowed the weighted deduction claimed by the assessee amounting to Rs. 46,96,73,170/-

only. The AO also rejected the alternative claim made by the assessee before him.

10. The aggrieved assessee preferred an appeal before the Ld. CIT (A). The assessee before the Ld. CIT (A) files Form No. 3CL dated 31-12-2010 and the details of various expenditures claimed by it. Accordingly the ld. CIT-A accepted the claim approved by the DSIR as under:

(Rs. in lakhs) Sr. Claimed Granted Disallowed No. (1) Capital Expenditure Land 107.22 107.22 -

	Building	1,495.60	1,495.60
(2)	Capital Expenditure (other than land & building)	1,997.77	1986.25
(3)	Recurring Expenditure (Building related)	36.47	36.47

(4)	Recurring Expenditure (other than Building)	6,102.21	6,024.35	7
(5)	Total cost of in-house research facility (including land & Building : (1) + (2) + (3) + (4)	9,739.27	9,649.89	8
(6)	Expenses outside approved facility (Clinical trials, overseas patents filing etc.)	1,257.09	1,257.09	
	Break up of disallowed expenditure is as under:			
(a)	Recurring expenditure (other than Building)			7
	- Salary to Dr. C. Dutt - Director		73.27	
	-Municipal Tax		4.59	
(b)	Capital Expenditure			1
	- Vehicles		6.68	
	- Civil Work		4.84	

10.1 As such the assessee submitted that receipt of the certificate was not in the control of the assessee, and therefore it failed to file the same during the assessment proceedings.

10.2 The Ld. CIT (A) after considering the submission of the assessee observed certain facts as detailed under:

1. The delay in issuance of Form No. 3CL was at the end of the DSIR, and it was beyond the control of the assessee.

2. The Hon'ble ITAT had allowed the deduction u/s 35(2AB) to the assessee on the same facts of the case in the earlier assessment year.

3. Accordingly, the weighted deduction cannot be disallowed to the assessee merely non-receipt of Form No. 3CL from the DSIR.

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4. The recurring expenditure of Rs. 77.86 Lacs comprising of salary Rs. 73.27 Lacs and municipal taxes Rs. 4.59 Lacs disallowed by the DSIR has been allowed. As such the same issue has been decided in favor of the assessee in the immediately preceding year by the Ld. CIT (A) and also by the Hon'ble ITAT.

5. In respect of capital expenditure of Rs. 11.52 Lacs comprising of the motor car and civil work, the expenditure on the motor car would not be allowed as weighted deduction. However, it would be allowed as depreciation on the motor car and expenditure on civil work would be eligible for weighted deduction as decided in the immediately preceding A.Y. by the Ld. CIT (A).

In view of the above, the ld. CIT-A allowed the ground of appeal of the assessee in part.

10.3 Being aggrieved by the ld. CIT-A, both the assessee and the Revenue are in appeal before us. The assessee is in an appeal against the confirmation of the disallowance of the deduction in respect of motor car Rs. 6.68 lakhs.

11. On the other hand, the Revenue is in an appeal against the deletion of the disallowance of the deduction under section 35(2AB) of the Act by the learned CIT (A) for Rs. 46,93,39,170.00.

12. The Revenue has raised the following grounds of appeal in ITA No.938/Ahd/2012:

> "4. (a) The Ld CIT(A)-XIV, Ahmedabad has erred in law and on facts in admitting additional evidence in violation of Rule 46A of the I.T. Rules.
>
> (b) The Ld CIT(A)-XIV, Ahmedabad has erred in law and on facts in allowing part relief on the disallowance made u/s 35 (2AB) of the Act."

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13. Both the learned AR and the learned DR before us relied on the order of the authorities below as favorable to them.

14. We have heard the rival contentions and perused the materials available on record. At the outset, we note that the issue raised by the assessee is covered against it by order of this tribunal in its case in ITA No. 1881/AHD/2009 vide order dated 31-05-2012 pertaining to the A.Y. 2005-06. The relevant extract of the order is reproduced as under:

> "14.1 In the light of these facts as has been noted by Ld. CIT(A) in the above para, we examine the applicability of various contentions raised by Ld. AR of the assessee. First contention of Ld. AR of the assessee is this that since the salary to employee is eligible for deduction u/s 35(2AB) of the Act, acquisition of motor car for those employees should also be considered as eligible for this benefit. We do not find any merit in this contention of Ld. AR of the assessee. Simply because of this reason that motor cars are purchased for providing to the employees of research & development wing of the assessee, it cannot be accepted that the expenditure is incurred on in-house scientific research & development. In our considered opinion, the primary condition to the satisfied by the assessee for being eligible for this weighted deduction is this that the expenditure was incurred on in-house research & development and then only, it can be accepted that, expenditure on motor car is also

eligible for such deduction. We would like to observe that the perquisite value of the car being expenditure incurred by the assessee-company on running and maintenance of car etc can be equated with salary payment to the employees but not the cost of car provided to the employees for traveling. Expenditure on purpose of car cannot be accepted as expenditure whether capital or revenue incurred on in-house research & development. In our considered opinion, capital expenditure for equipments to be used for in-house research is eligible for this benefit but not the motor car because whether the employees came into car provided by the employer or by public transport or hired car has no bearing on in-house research & development.

14.2 Now, we examine the applicability of the judgment of Hon'ble Apex Court cited by the Ld. AR of the assessee reported in 209 CTR (Statute) 89 case, the issue involved was regarding deduction u/s 35 (1)(iv) of the Act. When we examine the provisions of Section 35(1)(iv) of the Act, we find that these are materially different from the provisions of u/s. 35(2AB) of the Act because in Section 35(1), there is no condition that the expenditure on scientific research has to be incurred on in-house research & development facilities and there, all expenditures incurred on scientific research related to the business is eligible for deduction u/s. 35(1) and in clause (iv) of Section 35(1) is covered the expenditure of capital nature on scientific research related to the business carried on by the assessee and hence, in this clause also, there is no condition that such cost has been incurred on in-house scientific research facilities as in Section 35(2AB) of the Act and because of this reason, this judgment is not applicable in the present case.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 14.3 In view of above discussion, we find that the capital expenditure incurred by the assessee on purchase of motor cars cannot be considered as expenditure incurred by the assessee on in-house research & development and therefore, the same is not eligible for weighted deduction u/s. 35(2AB) of the Act. Similarly, capitalized interest on purchase of car is also not eligible for this benefit for same reasons because it is equal or similar to cost of car. Hence, this ground is rejected."

In view of the above, respectfully following the above order in the own case of the assessee, the ground of appeal of the assessee is dismissed.

15. Regarding the appeal of the Revenue, we note that the impugned issue is covered against it by order of this tribunal in its case 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.
>
> 8. In the result, Revenue's appeal is dismissed."

In view of the above, respectfully following the above order in the own case of the assessee, the ground of appeal of the Revenue is dismissed.

16. In view of the above, the ground of appeal of the assessee is dismissed and the ground of appeal of the Revenue is also dismissed.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 The 3rd issue raised by the assessee is that the ld. CIT-A erred in allocating the administrative expenses between the eligible and non-eligible unit based on the turnover.

17. The assessee in the year under consideration has allocated common administrative expenses based on the number of employees between Indrad Unit and Baddi Unit. However, the AO was of the view the basis adopted by the assessee for the location of the admin expenses is not proper. As per the AO, the administrative expenses required to be allocated based on the turnover of Indrad and Baddi unit. Accordingly, the AO allocated an additional sum of Rs. 2,55,341.00 to Baddi Unit which resulted in a reduction in the deduction under section 80IC of the Act by Rs. 2,55,341.00 only.

18. The aggrieved assessee preferred an appeal to the learned CIT (A). The assessee before the ld. CIT-A submitted that the administrative expenses mainly cover the salary, allowances and the perquisites given to the employees. Therefore the location of common administrative expenses based on the number of employees is just and proper.

However, the learned CIT (A) disregarded the contention of the assessee and confirmed the order of the AO by observing as under:

> 14.1 In the light of these facts as has been noted by Ld. CIT(A) in the above para, we examine the applicability of various contentions raised by Ld. AR of the assessee. First contention of Ld. AR of the assessee is this that since the salary to employee is eligible for deduction u/s 35(2AB) of the Act, acquisition of motor car for those employees should also be considered as eligible for this benefit. We do not find any

> merit in this contention of Ld. AR of the assessee. Simply because of this reason that motor cars are purchased or providing the employees of research & development wing of the assessee, it cannot be accepted that the expenditure is incurred on in-house scientific research development. In our considered opinion, the primary condition to the satisfied by the assessee for being eligible for this weighted deduction is this that the expenditure was incurred on in-house research & development and then only, it can be accepted that, expenditure on motor car is also ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 eligible for such deduction. We would like to observe that the perquisite value of the car being expenditure incurred by the assessee-company on running and maintenance of car etc can be equated with salary payment to the employees but not the cost of car provided to the employees for traveling. Expenditure on purpose of car cannot be accepted as expenditure whether capital or revenue incurred on in-

house research & ^development. In our considered opinion, capital expenditure for equipments to be used for in-house research is eligible for this benefit but not the motor car because whether the employees came into car provided by the employer or by public transport or hired car has no bearing on in-house research & development.

14.2 Now, we examine the applicability of the judgment of Hon'ble Apex Court cited by the Ld. AR of the assessee reported in 209 CTR (Statute) 89 case, the issue involved was regarding deduction u/s 35 (1)(iv) of the Act. When we examine the provisions of Section 35(1)(iv) of the Act, we find that these are materially different from the provisions of u/s. 35(2AB) of the Act because in Section 35(1), there is no condition that the expenditure on scientific research has to be incurred on in-house research & development facilities and there, all expenditures incurred on scientific research related to the business is eligible for deduction u/s. 35(1) and in clause (iv) of Section 35(1) is covered the expenditure of capital nature on scientific research related to the business carried on by the assessee and hence, in this clause also, there is no condition that such cost has been incurred on in-house scientific research facilities as in Section 35(2AB) of the Act and because of this reason, this judgment is not applicable in the present case.

14.3 In view of above discussion, we find that the capital expenditure incurred by the assessee on purchase of motor cars cannot be considered as expenditure incurred by the assessee on in-house research & development and therefore, the same is not eligible for weighted deduction u/s. 35(2AB) of the Act. Similarly, capitalized interest on purchase of car is also not eligible for this benefit for same reasons because it is equal or similar to cost of car. Hence, this ground is rejected.

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

19. The learned AR before us submitted that the assessment year 2008-09, the Revenue has accepted the basis of allocation based on number of employees. The learned AR before us further reiterated the submissions as made before the learned CIT (A).

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20. The learned DR before us submitted that the impugned issue is not covered favour of the assessee by the order of the Revenue in the subsequent assessment year 2008-09. The learned DR vehemently supported the order of the authorities below.

21. We have heard the rival contentions and perused the materials available on record. The issue in the instant case relates to the allocation of the said expenses between Indrad and Baddi unit. As per the assessee, the administrative expenses need to be allocated based on the number of employees working whereas the AO allocated the expenses based 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 the administrative expenses. At the outset, we note that the impugned issue of the allocation of the administrative expenses was also there in the assessment year 2008-09. Therefore, the argument of the learned AR for the assessee is not correct. As such the AO has also disputed the basis of allocation of the administrative expenses in the year 2008-09 as well.

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

· Rent · Utilities · Insurance ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 · Executives wages and benefits · The depreciation on office fixtures and equipment · Legal counsel and accounting staff 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 expenses either are fixed or semi-fixed, and there is a limited scope to reduce them. The companies that have a centralized management system tend to have higher general and administrative expenses. On the contrary in the case of decentralizing system, certain functions are delegated to subsidiaries.

21.4 Similarly these expenses cannot be linked to any particular undertaking of the company in a case the assessee has more than one undertaking. Thus the dispute arises for the allocation of such expenses among the different unit/ undertaking of the assessee. Regarding the allocation, we are of the view that these expenses cannot be allocated based on the turnover. It is because the turnover of any undertaking is very much volatile 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 very high in a particular year but in the subsequent year the turnover may go done or vice versa which will affect the pattern and consistency in the allocation of the administrative expenses and distort the presentation of the financial statements for different years. Therefore we are of the considered view that the basis of the allocation of administrative expenses based on the turnover is not

advisable.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 21.5 The next controversy arises what should be the basis of the allocation of the said expenses in the given facts and circumstances. Generally, the human resources working in any of the undertakings of the assessee does not frequently change as the market forces do not regulate it, unlike the sales. Therefore in the given facts and circumstances, we are of the view that the allocation of the administrative expenses should be done based on the 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 the AO to delete the addition made by him. Hence the ground of appeal of the assessee is allowed.

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

22. Now we take up Revenue's appeal in ITA No.938/Ahd/2012 for Asst. Year 2007-08. The Revenue has raised the following grounds of appeal:-

> "1). The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in deleting the disallowance of Rs. 17,22,481/- made by the Assessing Officer on account of garden expenses.
>
> 2). The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in deleting the addition made on account of disallowance amounting to Rs.30,41,061/- made by the Assessing Officer out of provision of Rs.73,05,713/- for Employee Long-term Compensation Plan (ELTCP).
>
> 3). The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in directing to allow depreciation @60% on the equipments connected to V-SAT (i.e. Transformer, UPS etc.).
>
> 4) (a) The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in admitting additional evidence in violation of Rule 46A of the I.T. Rules.
>
> (b) The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in allowing part relief on the disallowance made u/s. 35(2AB)of the Act.
>
> 5). The Ld. Commissioner of Income-tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in directing the Assessing Officer not to reduce the claim of deduction u/s.80IC of the Act amounting to Rs.29,82,93,291/-.
>
> 6). The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in deleting the disallowance made by the Assessing Officer u/s.80G

of the Act.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09

7). On the facts and in the circumstances of the case, the Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad ought to have upheld the order of the Assessing Officer.

8). It is therefore, prayed that the order of the Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad may be set-aside and that of the order of the Assessing Officer be restored."

The first issue raised by the Revenue is that the ld. CIT-A erred in deleting the addition made by the AO for Rs. 17,22,481.00 on account of gardening expenses.

23. Assessee incurred garden expenses of Rs. 17,22,481/- for maintaining a good atmosphere within the factory premises as well as to comply with the direction of Gujarat pollution control board to avoid the pollution arises on account of the chemical process.

23.1 However, AO disallowed the said expenditure on the ground that it was disallowed in the preceding year and by incurring the substantial expenditure assessee has derived the enduring benefit. Therefore, the same should be treated as capital expenditure. Accordingly, the AO disallowed Rs. 17,22,481/- and added to the total income of the assessee.

24. The aggrieved assessee preferred an appeal to ld. CIT (A) and submitted that the AO made that same disallowance in Assessment Years 2003-04 to 2005-06 where ld. CIT (A) deleted the addition. Also for Assessment year 2005- 06, Hon'ble ITAT dismissed the ground raised by the department.

Considering the assessee's submission ld. CIT (A) deleted the addition made by the AO.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09

25. Aggrieved by the order of ld. CIT (A) Revenue is in appeal before us. Both the ld. DR and ld. AR relied on the order of authorities below as favorable to them.

26. We have heard the rival contentions and perused the material on records. In the instant case we note that the co-ordinate bench decided the identical issue in favor of assessee in ITA No. 1869/Ahd/2009 pertaining to the AY 2005-06 by observing as under:

> "4. Ground No.1 is against deletion of disallowance of garden expenses of Rs.27,06,563/-. Ld. CIT-DR strongly supported the order passed by Assessing Officer and submitted that Ld. CIT(A) has wrongly deleted the disallowance made by Assessing Officer. On the contrary, Ld. Authorized Representative for the assessee pointed out that this issue is squarely covered in favour of assessee in ITA No.4356/Ahd/2007 order dated 31-01-2011 by the co- ordinate Bench. Ld. AR submitted Hon'ble ITAT has followed the decision rendered in respect of A.Y.

2004-05."

As the facts are identical to the facts of the case as discussed above, therefore respectfully following the same, we do not find a reason to interfere in the order of the ld. CIT-A. Hence, the ground of appeal raised by Revenue is dismissed.

The second issue raised by the Revenue is that the ld. CIT-A erred in confirming the order of the AO by sustaining the addition of Rs. 30,41,061.00 on account of the expenses for Employee long term compensation plan (for short ELTCP).

27. The assessee in the year under consideration has claimed an expense of Rs. 73,05,713/- as provision for ELTCP. The assessee for such expenses claimed that it was incurred to retain and motivate the employee. Therefore the company came up with an employee loyalty scheme and the provision is made ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 for the same as in modern era the human resources of any organization plays the most vital role for the success of the organization.

27.1 Assessee also submitted that it had made the provision in accordance with AS-15 issued by ICAI and against the provision of Rs. 73,05,713/- payment of Rs.42,64,632/- has been made during the year under consideration.

27.2 Assessee in support of his contention also relied on the judgment of Supreme Court in case of Bharat Earthmovers reported in 112 taxman 61 and contended that provision for leave encashment was allowed in that case.

27.3 Accordingly, the assessee claimed that the provision for ELTCP should be allowed.

27.4 However, the AO after considering the contention of the assessee allowed the amount of Rs. 42,64,632/- which was paid during the year under consideration and disallowed the balance provision of Rs. 30,41,081/- only. Accordingly the same was added to the total income of the assessee.

28. The aggrieved assessee preferred an appeal to ld. CIT (A) where the ld. CIT (A) deleted the addition made by the AO by following the order of AY 2006-

07. Aggrieved by the order of ld. CIT (A) Revenue is in appeal before us.

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

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09

30. We have heard the rival contentions and perused the materials available on records. In the instant case we note that the identical issue was decided by the co-ordinate bench in favor of

assessee in its case in ITA No. 238 & 259/Ahd/2012 pertaining to the AY 2006-07 vide order dated 15-01-2019 by observing as under:

> "17. During the year under consideration, assessee has claimed Rs. 39,08,141/- in respect of provision made for Employee Long-term Compensation Plan and same provision was made in assessment year 2007-08 in respect of assessment year 2006-07 for the said amount relating to 2005-06. When lower authorities issued the notice to the assessee in reply, assessee stated that as the scheme of providing compensation to the employees was framed in the F.Y. 2006-11" w.e.f. F.Y. 2005-06, the provision for such expense was not made in the books of accounts. However, as the said provision pertained to the services rendered by the employees for the F.Y. 2005-06, therefore, assessee had claimed such expenses while computing taxable income under Income Tax Act.
>
> 18. As we can see, Id. A.O. had disallowed the provision for leave encashment as no payment has been made against the said provision during the year. In the case of Bharat Earth Movers Hon'ble Supreme Court has held if a liability has been ascertained with a reasonable certainty and the actual quantification is not material to claim the expenditure.
>
> 19. Therefore, respectfully following the aforesaid Hon'ble Supreme Court judgment and in our considered opinion, the Id. CIT(A) has rightly granted relief to the assessee. Therefore, this ground of appeal is dismissed."

As the facts of the case are identical to the facts of the case as discussed above, therefore respectfully following the same, we do not find a reason to interfere in the order of the ld. CIT-A. Hence, the ground of appeal raised by Revenue is dismissed.

The third issue raised by the Revenue is that the learned CIT (A) erred in allowing the depreciation at the rate of 60% on the items connected with the VSAT.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09

31. The assessee in the year under consideration has claimed depreciation at the rate of 60% on the transformer on the premise that it was connected with the VSAT which is eligible for depreciation at the rate of 60%. Accordingly, the assessee claimed depreciation at the rate of 60% on the equipment mentioned above.

31.1 However, the AO being dissatisfied with the claim of the assessee held that the item described above is an electronic item and eligible for depreciation at the rate of 15% only. Accordingly, the AO worked out the excessive depreciation claimed by the assessee for Rs. 1,06,886.00 and added to the total income of the assessee.

32. The aggrieved assessee preferred an appeal to the learned CIT (A) who has allowed the appeal of the assessee by allowing depreciation at the rate of 60% on the transformer.

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

33. Both the parties before us relied on the order of the authorities below as favorable to them.

34. We have heard the rival contentions and perused the materials available on record. At the outset we note that the issue has already been decided by the tribunal in the case of the assessee in its favor in ITA No. 238/Ahd/2012 pertaining to the AY 2006-07 vide order dated 15-01-2019 by observing as under:

> ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 "5. First we would like to discuss the ground related to depreciation @ 60% on equipments connected to V-SAT.
>
> 6. Ld. A.O. has discussed this issue at page no. 2 & 3 in Para 6 and Id.
>
> CIT(A) has discussed at page no. 3 to 9 in Para no. 4.
>
> 7. The assessee's contention for claim of depreciation @ 60% in respect of V-SAT is that the functioning of a V-sat. Very small aperture terminal consists of two parts namely a transceiver that is placed out doors in a direct line of site to a Satellite and a device that is place indoors to interface the transceiver with the end users connection device, such as a computer. The transceiver receives or sends the signals from ground station computer that acts as a hub for the system. Each and user is inter-connected with the hub station viz. Satellite forming a star apology and stated that same is entitled for depreciation @ 60%.
>
> 8. In support of its contention, assessee also cited an order of the Delhi High Court [2013] 358 ITR 47 (Del.) where in it is held that computer accessories and peripherals such as printers, scanners and server form an integral part of the computer system. In fact, the computer accessories and peripherals cannot be used without the computer. Consequently, as they are part of the computer system, they are entitled to depreciation at the higher rate of 60%.
>
> 9. As we can see, V-SAT cannot function in isolation without the help of computer. Therefore, as per aforesaid Delhi High Court judgment and in our considered opinion, assessee is entitled for 60% depreciation. Thus, this ground of revenue is dismissed."

As the facts are identical to the facts of the case as discussed above, therefore respectfully following the same, we do not find a reason to interfere in the order of the ld. CIT-A. Hence, the ground of appeal raised by Revenue is dismissed.

The fourth issue raised by the Revenue is that the learned CIT (A) erred in admitting the additional evidence in contravention to the provision of Rule 46A and allowing the deduction under section 35(2AB) of the Act in part.

35. At the outset, we note that the issue raised by the Revenue has already been adjudicated by us along with the ground no. 2 of the appeal of the assessee ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 in ITA No. 907/AHD/2012 vide paragraph number 15 of this order wherein the appeal filed by the Revenue is dismissed. For detailed discussion, please refer the aforesaid Para of this order. Accordingly, we dismiss the ground of appeal raised by the Revenue.

The fifth issue raised by the Revenue is that the learned CIT (A) erred in deleting the addition made by the AO for Rs. 29,82,93,291.00 on account of the deduction under section 80-IC of the Act.

36. The assessee in its ROI claimed a deduction of Rs. 110,63,63,648/- u/s 80-IC of the Act in respect of its unit located at Baddi.

36.1 However, the AO on perusal of record noted that assessee had incurred expenditure on R&D during the year as detailed under:

> "3.1 In this regards, it may be noted that the assessee company has incurred following expenses on R & D:
>
> | Particulars | Total | Baddi | Indrad | TRC |
> |---|---|---|---|---|
> | Revenue Expenses | | | | |
> | Discovery Cost | 250375644 | 0 | 0 | 2503 |
> | Development Cost | 489201101 | 243342098 | 245859004 | |
> | | 739576745 | 243342098 | 245859004 | 2503 |
> | Capital Expenses | | | | |
> | Building | 149559812 | | | 1495 |
> | Other than building | 199769593 | | | 1997 |
> | | 349329405 | | 349329405 | |
> | TOTAL | 1088906150 | 243342098 | 245859004 | 599705049 |
>
> 36.2 The AO further noted that the assessee did not allocate the discovery expenses and capital expenses on R&D to its Buddi Unit in the computation of ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 income. Accordingly, AO sought an explanation from the assessee regarding the same.
>
> 36.3 In response, the assessee submitted that as per the provision of sub- section 5 of section 80-IA of the Act the profit of the eligible unit has to be computed as if it was the only source of income of the assessee. Therefore, the expenditure not incurred by the eligible unit cannot be allocated to it. Accordingly, the assessee has allocated the development cost based on turnover which comes to Rs. 24,33,42,098/- only to the unit eligible u/s 80-IC of the Act. The assessee further explained that in the case of

discovery research expenditure there was no guarantee of success and once discovery research has passed the requisite pre-trials only after that it enters into the development phase. However, on some occasions, the discovery research phase may fail, and it becomes a sunk cost.

36.4 Accordingly the expenditure on discovery research cannot be said to have benefitted. Accordingly, there was no need to allocate such expenditure to Baddi unit.

36.5 The assessee subsequently follows the same logic to the Capital Expenditure on R&D and accordingly the same was not allocated to the unit eligible for deduction u/s 80-IC of the Act.

36.6 Without prejudice to the above, the assessee also submitted that if the entire R & D expenditure needs to be allocated, then it should be allocated in the manner as detailed below:

"3.5 Without prejudice to the above contentions, it is submitted that even if as per your good selves 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	250375644	124536845	125838799	
Development Cost	489201101	243342098	245859004	
Capital Expenses				
Other than building	199769593	99365396	100404197	0

Even following the stand taken by your honour, the Weighted deduction in respect of Baddi unit and Indrad Unit works out as under:

Particulars	Total	Baddi	Indrad	TRC
Revenue Expenses				
Discovery cost	375563466	186805268	188758198	
Development Cost	733801653	365013147	368788506	
Capital Expenses				

Other than building	299654390	149048093	150606296	0

36.7 The AO disagreed with the reply of the assessee by observing that it is not possible to enter into the development phase without completing the discovery phase. Therefore the assessee should also allocate the discovery research expenses as well as capital expenses to the Buddi unit.

The AO further observed that if the assessee had only one eligible unit, then entire R&D expenditure would have allocated to such unit. But in the instant case assessee has charged the major part of the R&D expenditure to its non-eligible unit.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 36.8 Hence AO allocated the R&D expenditure related to Discovery and capital expenditure while computing the income of the unit eligible for deduction u/s 80-IC, i.e. Buddi unit as detailed hereunder:

Nature	Amount allocated
Discovery cost	Rs. 12,45,36,845
Capital expenditure (Building)	Rs. 7,43,91,050
Capital Expenditure (Other than building)	Rs. 9,93,65,396
Total	Rs. 29,82,93,291

36.9 The AO further observed that the assessee has not submitted the DSIR report in form no. 3CL. Hence the said amounts are not eligible for weighted deduction.

36.10 Accordingly, the AO after considering the above facts reduced the deduction of eligible unit u/s 80-IC by a sum of Rs. 29,82,93,291/- which was added to the total income of the assessee.

37. The aggrieved assessee preferred an appeal before the Ld. CIT (A). The assessee before the learned CIT (A) submitted that the deduction on account of research activity is governed by the specific provisions of the Income Tax Act. As such the Government of India is promoting the research activity within the country. Therefore the assessee was entitled to a higher rate of deduction from the taxable profit including capital expenditures which are eligible for deduction the research activity.

37.1 The deduction was provided under section 80-IC of the Act in respect of those industries established in the backward areas. Thus in case, the assessee is denied the deduction in respect of the expenditure incurred on the research by allocating the expenses to the eligible unit, the purpose of providing the benefit to the assessee will be defeated.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 37.2 Moreover, the provisions under section 80 IC of the Act and 35(2AB) of the Act are beneficial provisions. Therefore the same should be read liberally. Accordingly, the assessee claimed that the expenditure incurred by it under the head discovery cost and capital expenditure should not be allocated to the unit eligible for deduction under section 80-IC of the Act.

37.3 The assessee further submitted that the tribunal in the own case of the assessee in ITA No. 856/AHD/99 and 1141/AHD/99 pertaining to the assessment year 1994-95 and 1995-96 had decided the issue in its favor involving similar kind of facts and circumstances.

38. The learned CIT (A) after considering the submission of the assessee has decided the issue in its favor by observing as under:

> "8.3 Decision:
>
> I have carefully perused the assessment order and the submissions given by the appellant. The appellant has claimed deduction u/s. 80IC in respect of income at Baddi Unit. The A. O. did not accept the allocation of research and development expenses made by the A. O. between the Ahmedabad Unit and Baddi Unit. He held that in addition to development expenditure, the discovery cost should also be proportionately allocated to Baddi Unit. Further, the capital expenditure related to building and other than building which has been incurred for R & D Unit should also be allocated to Baddi Unit.
>
> The appellant has submitted that the discovery and capital expenditure is allowed as deduction in terms of specific provisions of section 35(2AB) which is meant for promoting development of research work within the country. The same is to be allowed even if is a capital expenditure. Further, the discovery cost cannot be allocated as it had no benefit to the Baddi Unit production. The other expenses which relates to the development of the goods being produced at Baddi Unit have already been allocated by i the appellant himself in the accounts. The appellant has further drawn my attention to the decision of ITAT 'C' Bench in the appellant's own case in A. Ys. 1994-95 & 1995-96 [ITA No. 856/ Ahd/99 & 1141/And/99]. In those appeals, the similar issue with reference to the allocation of capital expenditure and revenue expenditure admissible u/s. 35(1)(i) and u/s. 35(1)(iv) on scientific / research to eligible profit u/s. 80HH and u/s. 801, was decided by / the Hon'ble Bench and it was held that for the purpose of those sections, the deduction only in respect of profit and gain which was derived from the eligible undertaking should be allowed. Section 35 allow capital expenditure on scientific research while computing business income of the assessee (not of eligible undertaking). The bench has further held that while determining the profit of eligible industrial undertaking, the income and expenditure which has direct nexus with the industrial ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 undertaking must be taken into account. The research centre was an independent centre and the main purpose of the research is to conduct

research for the business carried on or to be carried on by the assessee and is, therefore, not directly linked with the eligible undertaking.

I am inclined to agree with the submission given by the appellant. The facts and the issue are also covered by the decision of ITAT, Ahmedabad in the case of the appellant, though the claim of deduction was under different section but the principle of allocation decided by the Hon'ble Bench squarely applies to the present section also. The appellant has himself allocated the expenses which have been incurred for development and improvement of process. The other expenses have rightly not been allocated by it as it is not directly linked with the eligible undertaking. The A. O. has also not brought any specific evidence to show that the other expenses which have not been allocated by the appellant are related to manufacturing activity carried on by the eligible industrial undertaking. Further, a capital expenditure cannot be allocated to work out the profit of any undertaking. The provisions of section 35 allow deduction on capital expenditure in a special circumstances.

In view of above facts and circumstances, the allocation of expenditure made by the A. O. is directed to be set aside and the addition is directed to be deleted. The ground of appeal is, therefore, allowed."

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

39. The learned DR before us submitted that the expenses discovery expenses and the development expenses are interlinked. Therefore the same should be allocated to both the units. The ld. DR vehemently supported the order of the AO.

The learned AR before us reiterated the submission made before the authorities below. The ld. DR supported the order of the ld. CIT-A.

40. We have heard the rival contentions and perused the materials available on record. There is no dispute about 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 ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 research under the head discovery cost and capital cost is to be allocated to the unit eligible for deduction under section 80IC 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 of scientific 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 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 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 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 ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 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 RadhaswoamiSatsang 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 his order. Thus the ground of appeal raised by the Revenue is dismissed.

The next issue raised by the Revenue in the ground no. 6 is that the ld. CIT-A erred in deleting the disallowance made by the AO on account of the donation under section 80G of the Act.

41. The assessee in the year under consideration has made donation amounting to Rs. 80,00,000/- and accordingly claimed a deduction for Rs.40,00,000/- being the eligible amount at the rate of 50% u/s 80G of the Act against the gross total income. However, the AO was of the view that the donation paid by the assessee is also to be allocated to the eligible unit as the HO paid such the

donation. The AO accordingly allocated the amount donation ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 of Rs 80,00,000/- on the basis of turnover which comes out to Rs. 34,42,400/- only.

41.1 The AO further observed that the assessee has no income in respect of the baddi unit as it claimed 100% deduction of its profit u/s 80IC of the Act whereas the deduction u/s 80G will be allowed on the profit of the eligible unit which is NIL. Therefore the AO did not allow the deduction u/s 80G of the Act to the assessee as it had no taxable profit after claiming the deduction under section 80IC of the Act.

41.2 The AO accordingly worked out the deduction of Rs. 17,21,200/- pertaining to the eligible unit and disallowed the same.

42. The aggrieved assessee preferred an appeal before the Ld. CIT (A). The assessee before the Ld. CIT (A) submitted that the object and purpose of the provision of section 80IC and 80G are different. The eligible profit is computed as per the provision of section 80IC of the Act, and accordingly the same was allowed as deduction u/s 80IC of the Act. Similarly the deduction u/s 80G is allowed from the Gross Total Income. There is no provision under the law which permits disallowance of claim u/s 80G of the Act only just because of the fact that the gross total income includes the profit of the eligible unit.

42.1 The assessee further submitted that the nature of donation is only for application of income for charitable or other philanthropic purposes. Hence the disallowance made by the AO should be deleted.

42.3 However the Ld. CIT (A) after considering the submissions and facts observed that the donation should not be allocated to the buddi unit as the ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 profit eligible for deduction u/s 80IC has to be first computed then after that the donation will be considered for working out the deduction under section 80G of the Act.

42.4 The Ld. CIT (A) further observed that the deduction u/s 80G will be allowed after allowing all other deduction of chapter VIA. The Ld. CIT (A) accordingly deleted the addition made by the AO.

Being aggrieve by the order of the Ld. CIT (A), Revenue is in appeal before us.

43. The Ld. DR before us submitted that the amount of donation needs to be allocated to the Baddi Unit.

44. On the other hand, The Ld. AR submitted that the donation has no connection with the baddi unit eligible for the deduction under section 80-IC of the Act.

Both the parties before us relied on the order of authorities below as favorable to them.

45. We have heard the rival contentions of both the parties and perused the materials available on record. The controversy in the case on hand relates whether the donation paid by the assessee under section 80G of the Act needs to be allocated to the unit eligible for deduction under section 80-IC of the Act. Regarding this, we note that the donation paid by the assessee has no connection with the unit eligible for deduction under section 80 IC of the Act.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 45.1 The scheme of the Act provides to claim the deduction under section 80G of the Act after claiming all the deduction provided under chapter VI-A of the Income Tax Act. Therefore the assessee can claim the deduction on account of such donation only against the Gross Total Income after claiming all other deduction.

45.2 We further note that the donation paid by the assessee cannot be claimed as an expense in the profit and loss account as the same has not been incurred wholly and exclusively for the purpose of the business as provided under section 37(1) of the Act. Thus even if the assessee claimed the donation as an expense in the profit and loss account, then it has to be disallowed while computing the income under the head business and profession. Thus the only option available to the assessee to claim the deduction on account of such donation is only under the provisions specified under section 80G of the Act which can be claimed in the manner as discussed above.

In view of the above, we do not find any infirmity in the order of the learned CIT (A). Accordingly, we decline to interfere in his order. Hence the ground of appeal of the Revenue is dismissed.

The next issues raised by the Revenue in the ground no. 7 & 8 are general, and therefore no separate adjudication is required. Accordingly, we dismiss the same.

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

46. Now we take up assessee's appeal in ITA No.1634/Ahd/2012 for Asst. Year 2008-09. The Assessee has raised the following grounds of appeal:-

> ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09
>
> 1. On the facts and in the circumstances of the case, the learned CIT(A) erred in confirming addition of Rs. 34,14,934/-, comprising of interest on loan to Associated Enterprises for Rs 5,25,146 and guarantee fee charges for Rs28,89,788/- for providing corporate guarantees to Associated Enterprises, made by the Assessing Officer on the basis of the order u/s.92CA(3) of the IT. Act 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 deduction of Rs.32.74 lacs claimed by the assessee u/s. 35(2AB) of the IT. Act @ 150% in respect of expenditure of Rs.21.83lacs incurred by the assessee company on purchase of motor vehicles used by the personnel of the Research Department. 3 On the facts and in the circumstances of the case, the

learned CIT(A) erred in confirming disallowance of deduction of Rs.1.84 lacs claimed by the assessee u/s.35(2AB) of the IT. Act @ 50% in respect of entertainment expenditure of Rs. 3.68 lacs incurred by the assessee company for various professional visit at the research centre of it for supporting and guiding research activity.

4. On the facts and in the circumstances of the case, the learned CIT(A) erred in confirming disallowance of deduction u/s.80-IC of the IT. Act to the extent of Rs 1,93,24,629/- made by the Assessing Officer by changing the method of avocation of administrative expenses to the Indrad unit and Baddi unit.

5 On the facts and in the circumstances of the case, the learned CIT(A) erred in confirming disallowance of deduction u/s.80-IC of the IT. Act on income of Rs 21,60,380 being penalty received from suppliers, Rs 1,33,426 being cash discount received from vendors on account of purchase and Rs 35,97,000 being export benefits. The Id CIT(A) ought to have appreciated that such income has direct nexus with income earned by appellant from the eligible unit.

6. On the facts and in the circumstances of the case, the learned CIT(A) has grossly erred in dismissing Ground No. 10 of the appellant's appeal before him on the ground that levy of interest u/s. 234B, 234C & 234D was mandatory.

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."

The first ground of appeal raised by the assessee is on account of confirming the addition by the Ld. CIT (A) made by TPO/AO comprising of interest on the loan to AE of Rs. 5,25,146/- and guarantee fees of Rs. 28,89,788/- on the guarantee provided by the assessee on loan taken by its AEs during the year under consideration.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09

47. At the outset, we note that the similar ground related to guarantee fees has already been decided by us in ITA No. 907/AHD/2012 vide Para No. 7 of this order in favor of assessee. Therefore, respectfully following the same, we allow the ground of appeal of the assessee concerning the issue of corporate guarantee provided to the AE's.

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.

48. The assessee has given loan to its AE's as detailed under:

5. Benchmarking of Loans advanced to AEs: The Assessee has reported loans advanced to its AEs. The details of the loans as provided by the assessee as per its

letter dated 19.08.2011 are as given below:

Subsidiary Currency Opening Addition Deletion Closing Date of Name value Value charge Zao Torrent USD 3,000,000 - - 3,000,000 Pharma, Russia Torrent Euro 5,000,000 2,500,000 - 7,500,000 31.12.2007 Pharma GmbH, Germany Torrent Do USD 6,000,000 - 1,000,000 5,000,000 31.05.2007 Brazil Ltd, Brazil Torrent USD - 100,000 - 100,000 09.05.2007 Pharma Inc. USA

49.1 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 basis points p.a whereas it has taken the foreign currency term loan from BNP Paribas 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.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 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%) 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. xi. The loan documents related to the loan drawn by Torrent Pharmaceuticals Ltd, the parent company at its own financial creditworthiness and rating."

In view of the above, the TPO rejected the comparable considered by the assessee and proposed to compute the ALP at his own by using the CUP method considering that what rate assessee would have charged if such loans were given to unrelated party having the similar weak financial as of the AE of the assessee.

49.2 For calculation of interest rate at ALP, the TPO proposed to take the 6 Month average Libor rate as the assessee has given all the loans in dollars currency. TPO also added 0.5% for margin. Apart from this TPO also proposed ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 to add further 3.5% for the risk undertaken by the assessee as the parent company.

49.3 To quantify the risk undertaken by the assessee TPO placed his reliance on the data obtained by the ACIT-TP, New Delhi from rating agency CRISIL u/s 133(6) containing the information of different rates for having different credit ratings. The information of different rates for having different category rating provided by the CRISIL stand as under:

Addl. Commissioner of Income Tax (Transfer Pricing)-1(3) Room No. 303 Drum shaped Building, IP Estate, New Delhi.

Sir, Re: Crosil Ltd. (PAN : AAACT 3151 E) Sub: Information u/s 133(6) of the Act We have received letter F. No. Addl. CIT/TPO1(3)/2010-11/362 dated 17.01.2011 on 18.01.2011 asking us to furnish certain information. In this regards we submit the available information as under:

Annualized Average Yield 2007-08				Annualized Average Yield 2008-09			
Rating	1-2 yr.	2-3 yr.	5 yr	Ratings	1-2 yr	2-3 yr.	5 yr.
AAA	9.32%	9.38%	9.44%	AAA	9.98%	10.02%	10.05%
AA+	9.56%	9.66%	9.73%	AA+	10.28%	10.34%	10.38%
AA-	10.10%	10.12%	10.21%	AA-	10.83%	10.81%	10.87%
AA	9.71%	9.81%	9.88%	AA	10.42%	10.51%	10.55%
BBB+	13.04%	13.24%	13.31%	BBB+	13.27%	13.42%	13.47%
BBB-	15.68%	15.83%	15.89%	BBB-	15.41%	15.52%	15.55%
BBB	14.18%	14.33%	14.39%	BBB	14.21%	14.32%	14.35%
A+	10.68%	10.68%	10.77%	A+	11.41%	11.37%	11.43%
A-	12.22%	12.37%	12.42%	A-	12.95%	13.05%	13.08%
A	11.24%	11.29%	11.42%	A	11.96%	11.97%	12.08%

Note: A simple average of the yields for the whole financial year has been taken to arrive at the yields in the table above for the respective ratings.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 We hope above meets your requirement Thanking you, Yours faithfully, For Crisil Ltd., Sd/-

(Pramendra Mehta) Manager Taxation 49.4 TPO considering the financial of AEs provided the rating of BBB to them.

Considering the above-mentioned rates, TPO took into account the difference of rate charged by the lenders based upon the difference in BBB rating and AAA rating which comes to 3.72. However, TPO took a slightly lower rate of 3.5% than calculated rate ALP considering the lower rate and margin charged in the international market.

49.5 Accordingly, TPO made the upward adjustment of Rs. 5,25,146/- by taking the rate of Libor 6 Months plus 0.5% margin plus 3.5% risk i.e. Libor plus 4%.

50. The aggrieved assessee preferred an appeal to Ld. CIT (A) where it submitted that factors considered by the TPO apply to only those entities whose main source of earning is the only interest which is not the case of the assessee. The assessee has also received a certain indirect benefit such as foreign market and increase in the brand name of "Torrent" etc. as they are solely engaged in the business of distributing the product of the assessee.

50.1 Assessee also submitted that during the year under consideration assessee has supplied to AEs good of worth Rs. 424 lacs at a margin of Rs. 288 lacs. Therefore the assessee got other benefits by supplying the goods to the AE's in the form of high margin, i.e. 68%. Therefore, the rate applicable to ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 money lending entities cannot be compared with the assessee in the given facts & circumstances.

50.2 In addition to the above, the assessee also submitted that it had given the entire loan in USD and during the year under consideration earned huge gain on account of Forex fluctuation. As such the assessee earned an additional income of 6-9 % over the loan tenure. Thus if such interest income is considered, then the actual rate would be even higher than the rate of interest in Indian currency. Therefore, on this account, the benchmarking done by TPO is not justified and need to be deleted.

50.3 However, the Ld. CIT (A) disregarded the contention of the assessee by observing that the intention of the assessee was not to earn the interest income as it is not its business. Had the intention of the assessee been to promote its business, then it would have invested as share capital and not a loan. The basic principle of determining ALP what would have been the consideration if the same transaction were there between unrelated parties. Accordingly, the Ld. CIT (A) concurred with the finding of the TPO and dismissed the appeal of the assessee.

Being aggrieved by order of TPO/AO, the assessee is in appeal before us.

51. The Ld. AR before us submitted that it had charged interest on the loan given to AE's at the rate exceeding the interest cost incurred by it.

51.1 Moreover, the loan was given foreign currency which was returnable in the same currency. Therefore, there cannot be any loss to it on account of currency fluctuation.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09

52. On the other hand, the Ld. DR before us submitted as under:

> Benchmarking of Loans advanced to AEs The assessee has reported loans advanced to its AEs. The details of the loans as provided by the assessee as per its letter dated 19/8/2011 are as given below:
>
> Subsidiary Currency Opening Addition Decision Closing Date of Name value Value change Zao USD 3,000,000 - - 3,000,000 Torrent Pharma, Russia Torrent Euro 5,000,000 2,500,000 7,500,000 31/12/07 Pharma GmbH, Germany Torrent Do USD 6,000,000 1,000,000 5,000,000 31/5/07 Brazil Ltda, Brazil Torrent USD - 100,000 - 100,000 9/5/07 Pharma Inc, USA In its submission, the assessee has provided an internal CUP wherein it has obtained foreign currency loan at LIBOR plus 62.5 bps per annum. Accordingly, the assessee has represented that it needs to charge interest at this rate only. The loan agreement which has been used by the company as a CUP has been perused and it is seen that it contains following clauses which are worth consideration:
>
> 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%) 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.
>
> ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 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.

It is clear from the above conditions that the concessional rate of interest has been charged from TPL on account of the high net worth of the company and sound financial health enjoyed by the company. Even then, the company is required to maintain a fixed asset cover of 1.1 times the loan availed. The assessee has failed to appreciate that the credit rating of Torrent Pharmaceuticals Ltd is much higher than the credit rating of the AEs who have taken loans. Further, the bank has charged a 25 bps annual charge on non-utilized amount as commitment charge as well as a 50 bps arrangement fees which is not factored in by the company. The bank has charged the loan on collaterals which include the fixed assets of the company including the manufacturing facilities, research facilities and the head office. The required collateral is 1.1 times the loan availed by the assessee company. It is clear that the assessee has not factored this additional guarantee/collateral required by the bank. In addition, the bank has further stipulated that the net worth of the company should not be less than Rs 3.4 billion at any time during the loan tenure. None of the AEs of the assessee company meet these criteria and hence interest rate chargeable in the hands of the assessee company cannot be applied in the hands of its AEs. The CUP adopted by the assessee company is, therefore, rejected as a proper comparable. If at all, this represents a floor level interest rate for the AEs and not the ceiling rate. The interest rate, in the case of the assessee company is low on account of the high credit rating of the company and availability of sound assets to be kept as collateral security. In respect of a loan to the AE, such corporate guaranty is required generally from the parent failing which additional margins are placed on the loan being granted. The document submitted by the assessee merely serves as a bottom line document for benchmarking the loan given to its AEs. The AEs, with their own financial conditions and much lower net worth, could not have received loans at above rates and conditions. In view of the discussion above, the action of the assessee in charging an interest rate of L1BOR plus 100 bps per annum is not found to be at arm's length in tune with CUP available internationally and hence rejected.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 Determination of arm's length interest rate:

In light of the fact that the transfer pricing study conducted by the assessee company is rejected, the arm's length price of these transactions is determined as below. The arm's length interest is determined by following the CUP method, wherein the interest rate is determined under the circumstances in which the tax payer and its subsidiaries are operating i.e. what is the interest that would have been earned if such loans were given to unrelated parties in similar situation as that of subsidiaries. Since the loan has been taken by the associate enterprise, the reasonable rate of interest at

which the other party, with its financial health and no collateral guarantee, could have obtained such a loan from an unrelated party with the same weak financial health as that of the tax payer's AE is considered.

As mentioned above, under the CUP method, the interest that is charged between unrelated parties under similar circumstances would be the arm's length interest. The main issue is to decide the interest rate at which the tax payer have earned in advancing loan of above amounts to unrelated third parties with the similar financial strength as that of the AE. The fact that the there is no security provided by the AE's subsidiaries against the loans advanced by the tax payer is also a material consideration while deciding the rate of interest as substantial risk is transferred from the AE to the tax payer when the loan is granted without any collateral guarantee.

Since the loans have been taken outside, it is proposed to benchmark the interest rate with a reference rate. In this case, since all the loans given by the assessee company are in dollars, a dollar dominated annualized six month average UBOR rate is considered to be the basis for deciding the interest rates. Since this represents the borrowing rate in the hands of the banks/financial institutions, they add a reasonable spread over and above the Libor rate while lending to a corporate entity. While a portion of the spread represents the bank margin/fee, the remaining portion would represent the cost of risk being carried by the bank while lending the amount to the corporate entity.

The lending rates vary as per the financial ratings of the corporate. Further, risk analysis of credit being advanced is similar across the banking fraternity and barring a small variation, risk costs are generally similar over the globe. Since financial analytical data is available for the financial markets locally, an indication of the financial risk carried by corporate and impact of such risk on the interest rate is given by study of different kind of bonds issued by Indian corporate and the interest paid on such papers. It is also understood that the high PLR in India would take care of the currency forward margins.

To an AAA rated corporate, the banks would normally lend at a risk free premium which is generally in the range of LIBOR plus 0.5% spread. (Similar to the level also submitted by the assessee) Inquiries made with CRISIL reveal that as the ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 ratings fall, there is a risk adjustment of at least 20% with each notch of credit rating fall.

Although the AEs of the assessee company are not rated, the financial capacity of these corporate has been seen. The net worth of these companies has been submitted by the assessee. For the sake of deciding the risk rate, these entities are pegged conservatively at average rating of BBB although as per their fmancials, some of the AEs would fall much below this level. At this rating, the difference in interest rates

between a triple A rated corporate would be 3.72% which would represent the risk margin charged by the bank while lending to the AE. This risk study with reference to the local bond markets would be effective in other markets also as we are not benchmarking the interest rates per se. For the purpose of interest rate, the Libor of the referred area is to be adopted which will be indicative of the local inter-bank interest rates. What has been quantified here is the 'risk factor' or 'risk spread' which would normally be charged by a third party. Such risk spread would be similar world over in respect of similarly placed corporate. Since the rate of interest as well as margins in the international markets are slightly lower than the Indian rates, a risk rate of 3.5% was rightly adopted for computing the arm's length interest.

In light of the above discussion, LIBOR plus 0.5% margin plus 3.5% risk rate is adopted as the arm's length interest rate which should have been charged from the AE. The annual average of six month UBOR is to be adopted as a reasonable yard stick with reference to the nature of loans given by the assessee to the AE, which is 4.7% in respect of dollar dominated and 4.48% in respect of Euro dominated loans.

The total interest required to be charged from the AEs by the assessee company comes to Rs. 2,63 >13j084/- which is computed as under:

Currency Amount Libor Plus Date USD/ Average Amount 4.7%! Euro Exchange 4.48% Rate of March 08 A B C D E F (ExF) USD 3000000 8.7 -@ 261000 43.79 11429190 Euro 7500000 8.48 31.12.2007 158564 63.317 10039797 (91 days) USD 5000000 8.7 31.05.2007 108452 43.79 4749115 (305 days) USD 100000 8.7 09.05.2007 2169 43.79 94982 (327 days) 26313084 @ No date given; hence interest for whole year is taken (Upward adjustment of Rs. 2,63,13.084/-) ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 The ld. DR vehemently supported the order of the authorities below.

53. We have heard the rival contentions and perused the materials available on record. The issue in the instant case relates to the determination of ALP of the interest amount on loan given by the assessee to its AE's. The first contention of ld. AR of the assessee before us is that in the given facts, it would be appropriate to accept internal CUP method, i.e., the rate at which the assessee had obtained foreign exchange borrowings at arm's length price under CUP method.

53.1 Regarding the contention of the assessee, we are of the view that the transaction of obtaining the loan is a different transaction from the lending even if both the loan transactions are in foreign currency. It is because the loan was accepted from the bank 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 has worked out the ALP taking 6 month average LIBOR rate which has not been disputed. But the TPO has added the credit risk at 3.50% and the margin @ .50% to determine the ALP 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 from the AE. Regarding the addition of 3.5% for credit Risk in 6 Month Libor rates we note that it represents the difference in the credit rating of AAA Indian companies which was obtained from the CRISIL in response to the notice issued ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 under section 133(6) of the Act viz a viz 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 infirmities as detailed under:

i. Once the AE has taken as a tested party, then the comparables of AE should be 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 as well as margins in the international markets are slightly lower than the Indian rates. 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 vs. 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) is 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 Officer has made addition of 300 basis points on account of ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 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. Contesting this adjustment the learned authorised representative has relied upon the decision of the coordinate

bench in case of Bharti Airtel Ltd. (supra) wherein it has been held 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 rational for adjustment on account of higher risk. Apparently, in this case the assessee, lender 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 decision of 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 by the learned Dispute Resolution Panel. Accordingly we direct the learned Transfer 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 points cannot be sustained."

53.7 Accordingly, we are also of the view that addition in the rate of interest on account 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 immediate 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 AE 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 ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 .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. Thus the ground of appeal of the assessee is partly allowed.

The next issue raised by the assessee is that the learned CIT (A) erred in confirming the disallowance made by the AO in respect of the expenditure incurred on the purchase of a motor car which was claimed as deduction under section 35(2AB) of the Act.

60. At the outset, we note that the identical issue has already been decided by this tribunal in ITA 907/AHD/2012 against the assessee vide Paragraph No. 14 of this order. Respectfully following the same, we do not find any reason to disturb the finding of the lower authorities. Hence the ground of appeal of the assessee is dismissed.

The next issue raised by the assessee ground No. 3 is that the learned CIT (A) erred in not allowing the deduction under section 35(2AB) of the Act at the rate of 150% in respect of the expenditure incurred on the persons visited the research center.

61. The assessee during the year under consideration claimed entertainment expenditure for a sum of Rs. 3,67,540/- under the head of Research & Development Expenditure. As per the assessee, various professionals visit at the research center of the company for supporting and guiding the research activity which helps in the smooth functioning of research activity.

61.1 In view of the above facts the assessee accordingly claimed weighted deduction u/s 35(2AB) in respect of the said expenditure.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 61.2 However, the AO observed that only the expenditures approved by the DSIR are eligible for weighted deduction u/s 35(2AB) of the Act.

61.3 Therefore, the AO disallowed the entertainment expenditure to the extent of the weighted portion of Rs. 1,83,770/- being 50% of Rs. 3,67,540/- and added to the total income of the assessee.

62. Aggrieved assessee preferred an appeal before the Ld. CIT (A). The assessee before the Ld. CIT (A) reiterated the same as before the AO.

63. However the Ld. CIT (A) observed that the entertainment expenditure of Rs. 3,67,540/- does no relate to the activity of research and development. Hence the Ld. CIT (A) accordingly confirmed the order of the AO.

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

64. The Ld. AR before us reiterated the submissions as made before the authorities below. On the other hand the Ld. DR vehemently supported the order of the authorities below.

65. We have heard the rival contention and perused the material available on the record. The issue in the instant case relates to the deduction claimed by the assessee under section 35(2AB) of the Act in respect of entertainment expenses. In this regard, we note that the provisions of section 35(2AB) of the Act provided that the expenditure incurred in connection with the scientific research other than the cost of land or building will be allowed the weighted deduction.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 65.1 However, we note that the learned CIT (A) has held that entertainment expenses claimed by the assessee were not incurred in connection with the scientific research activity without adducing any reason thereon. As such the submission of the assessee filed before the learned CIT (A) stating that the entertainment expenditures were incurred in respect of the professionals who visited the research center, has not been challenged based on any reasoning.

65.2 Moreover, we also note that the AO has allowed 100% deduction in respect of such expenditure which proves that the expenditure incurred in connection with the business activities of the assessee. Such claim of the assessee was allowed under section 35(2AB) of the Act but at the rate of 100% instead of 150% i.e. weighted deduction.

65.3 Therefore we are not inclined to uphold the finding of the authorities below. Hence we reverse the order 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.

The next issue raised by the assessee in ground No. 4 is that the learned CIT (A) erred in confirming the addition made by the AO by allocating the administrative expenses between the eligible and non-eligible unit on the basis of turnover.

66. At the outset, we note that the identical issue has already been decided by this tribunal in ITA No. 907/AHD/2012 against the assessee vide Paragraph No. 22 & 22.1 of this order. Respectfully following the same, we do not find any ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 reason to disturb the finding of the lower authorities. Hence the ground of appeal of the assessee is dismissed.

The next issue raised by the assessee in ground No. 5 is that the learned CIT (A) erred in confirming the disallowance of the deduction under section 80- IC of the Act on certain income having direct nexuses with the business of the assessee.

67. The assessee during the year under consideration has claimed the deduction u/s 80IC of the Act in respect of certain miscellaneous income as detailed under:

A.	Notice Pay	-	Rs. 8,71,267/-
B.	Sale of Scrap	-	Rs. 44,56,656/-
C.	Penalty received from supplier	-	Rs. 21,60,380/-
D.	Discount received from vendor	-	Rs. 1,33,426/-
E.	Export Benefits	-	Rs. 35,97,000/-

67.1 The assessee has also not allocated the following expenditure to the unit eligible for deduction under section 80IC of the Act.

i. Discovery and capital expenditure cost Rs. 46,18,84,935/-

ii. Administrative cost Rs. 1,93,24,629 i. Regarding the issue of Discovery and capital expenditure of Rs.46,18,84,935/- :

> At the outset we note that the identical issue has already been decided by this tribunal in ITA 938/AHD/2012 in favour of the assessee vide Paragraph No. 47 of this order wherein the appeal filed by the Revenue is dismissed. For detailed discussion please refer the aforesaid Para of this order. Accordingly we dismiss the ground of appeal raised by the Revenue.
>
> ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 ii. Regarding the issue of Administrative cost of Rs. 1,93,24,629/- :

At the outset we note that the identical issue has already been decided by this tribunal in ITA 907/AHD/2012 in against of the assessee vide Paragraph No. 22 of this order wherein the appeal filed by the assessee is dismissed. For detailed discussion please refer the aforesaid Para of this order. Accordingly we allowed the ground of appeal raised by the Revenue.

67.2 Notice Pay - Rs. 8,71,267/-

The assessee in support of the deduction claimed u/s 80IC in respect of Notice pay submitted that it was recovered from the employees who left the organization without giving notice. Therefore such amount recovered from the employee should be treated as business income on the ground that the salary paid to the employee was business expenditure.

However the AO disagreed with the contention of the assessee as the said amount is recovered from the employee and it has no connection with manufacturing activity of the pharmaceutical product. Thus the AO accordingly excluded the said sum from the eligible profit u/s 80IC of the Act 67.3 Sale of scrap - Rs. 44,55,656/-

The assessee in support of the deduction claimed u/s 80IC in respect of sale of scrap submitted that it was generated from the manufacturing of products in the eligible unit. It consists the sale of corrugated boxes, polythene bags, drums and other materials, therefore such amount should be treated as business income as it has direct nexus.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 However, the AO disagreed with the contention of the assessee as the said income is not arising from the manufacturing activity of the pharmaceutical product. Thus the AO accordingly excluded the said sum from the eligible profit u/s 80IC of the Act.

67.4 Penalty Received From Supplier:-

The assessee in support of the deduction claimed u/s 80IC in respect of penalty received from supplier submitted that levying of penalty for late delivery against the contract is under the normal course of business. As such it was levied to ensure the timely deliveries and improved the efficiencies. Therefore the penalty received from the supplier has a close connection with the business activity and the said income has been derived from the eligible unit.

However, the AO disagreed with the contentions of the assessee as the said amount is recovered from the supplier instead of manufacturing activity of the pharmaceutical product. Thus the AO accordingly excluded the said sum from the eligible profit u/s 80IC of the Act 67.5 Discount Received From Vendor:-

The assessee in support of the deduction claimed u/s 80IC in respect of discount received from vendor submitted that discount received from the vendor is on account

of purchase made from them and thereby discount on purchase reduces the cost of purchase. Therefore discount from the vendor is eligible for deduction u/s 80IC.

However, the AO disagreed with the contentions of the assessee as the said amount is received on account of purchase from the vendors instead of ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 manufacturing activity of the pharmaceutical product. Thus the AO accordingly excluded the said sum from the eligible profit u/s 80IC.

67.6 Export Benefits:-

The assessee to justify the claim made u/s 80IC of the export benefits submitted that the DEPB income is against export sales made from the Baddi unit. As such DEPB can be utilized against the payments of custom duty or it can be sold in the market. Therefore export benefits for a sum of Rs. 35,97,000/- has been utilized for the import of materials. Accordingly, the assessee claimed that the utilization of DEPB licenses reduces the custom duty on such imports and ultimately it is utilized for manufacturing activity.

The assessee also submitted that it has accounted the said sum on gross basis for the income and the expenditure. Thus the assessee claimed that the DEPB credit is directly linked with business activity. Therefore the same needs to be considered for eligible profit to work-out the deduction u/s 80-IC of the Act.

67.7 However the AO disagreed with the submission of the assessee by observing that the same is not derived from the activity of manufacturing. As such it is directly related to the exports of the Baddi unit, and the said income is liable to tax under the head of PGBP. Thus the AO observed that there is no direct nexus between the manufacturing activity and the income on account of export benefits.

67.8 The AO accordingly reduces the sum of Rs. 35,97,000/- from the eligible profit to deny the deduction claimed by the assessee u/s 80IC of the Act.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09

68. The aggrieved assessee preferred an appeal before the Ld. CIT (A) in respect of the said items of income. The assessee before the Ld. CIT (A) reiterated the same as before the AO.

68.1 However the Ld. CIT (A) observed that certain miscellaneous income claimed by the assessee has no direct nexus with the activity of manufacturing. Therefore such income cannot be the part of the profit derived from the industrial undertaking.

68.2 The Ld. CIT (A) accordingly confirmed the action of the AO for not allowing the deduction u/s 80IC of the Act on such income as detailed under:

A. Penalty received from supplier - Rs. 21,60,380/-

B. Discount received from vendor - Rs. 1,33,426/-
C. Export Benefits - Rs. 35,97,000/-

68.3 The Ld. CIT (A) further allowed the deduction u/s 80IC of the Act in respect of the following income:

A. Notice Pay - Rs. 8,71,267/-
B. Sale of Scrap - Rs. 44,56,656/-

69. Being aggrieved by the order of the Ld. CIT (A), both the assessee and Revenue are in appeal before us. The Revenue has raised the following ground No. 4 in ITA 1725/AHD/2012 reproduced as under:

"4. The Ld. Commissioner of Income Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in partly allowing the relief on disallowance made u/s 80IC of the Act."

70. The Ld. AR before us submitted that all the income as discussed above are arising in the course of the business of the industrial undertaking eligible for deduction under section 80 IC of the Act. Therefore all the incomes are ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 eligible for deduction under section 80 IC of the Act in view of the judgment of this jurisdictional High Court in the case of CIT Vs. Metrochem Industries Ltd reported in 79 taxman.com 440.

71. On the other hand, the Ld. DR submitted that the income not arising from the manufacturing activity is not eligible for deduction under section 80-IC of the Act.

72. Both the ld. AR & the DR relied on the order of authorities below as favourable to them.

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] I Deduction under section 80-I is allowable in respect of Kasar, discount and sales-tax set off.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 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.

74. The issues raised by the assessee in ground No. 6, 7 and 8 are either general or consequential nature. Therefore no separate adjudication is required. Therefore the grounds raised by the assessee are dismissed.

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

Now coming to ITA No. 1725/AHD/2012 pertaining to the A.Y. 2008-09:

The Revenue has raised the following grounds of appeal in his appeal:

1). "The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in deleting the disallowance of Rs. 40,65,794/-

made by the Assessing Officer on account of garden expenses.

2). The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in deleting the disallowance amounting to Rs.16,34,173/-made by the Assessing Officer on account of payment made in respect of provision for Employee Long-term Compensation Plan (ELTCP).

3). The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in partly allowing the relief on disallowance made u/s.35(2AB) of the Act.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09

4). The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in partly allowing the relief on disallowance made u/s.80IC of the Act.

5). The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts in deleting the disallowance of Rs. 27,86,287/- made u/s. 80G of the Act.

6). The Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad has erred in law and on facts to set-aside the matter & directing the Assessing Officer to examine the matter which is not permitted under provision of Section 251(1)(a) of the Act as amended w.e.f. 01/10/1998, regarding reducing income computed u/s. 115JB of the Act which is not permitted under provision of Section 251(1)(a) of the Act as amended w.e.f. 01/10/1998

7). On the facts and in the circumstances of the case, the Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad ought to have upheld the order of the Assessing Officer.

8). It is therefore, prayed that the order of the Ld. Commissioner of Income-

Tax (Appeals)-XIV, Ahmedabad may be set-aside and that of the order of the Assessing Officer be restored."

The 1st issue raised by the Revenue is that the Ld. CIT (A) erred in deleting the addition of Rs. 40,65,794/- on account of garden expenses.

75. At the outset, we note that the issue raised by the Revenue has already been adjudicated by us along with the ground no. 1 of appeal of the Revenue in appeal filed by the Revenue is dismissed. For detailed discussion please refer the aforesaid Para of this order. Accordingly we dismiss the ground of appeal raised by the Revenue.

The 2nd issue raised by the Revenue is that the Ld. CIT (A) erred in deleting the disallowance amounting to Rs. 16,34,173/- on account of provision for Employee Long Term Compensation Plan.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09

76. At the outset, we note that the issue raised by the Revenue has already been adjudicated by us along with the ground no. 2 of appeal of the Revenue in appeal filed by the Revenue is dismissed. For detailed discussion please refer the aforesaid Para of this order. Accordingly we dismiss the ground of appeal raised by the Revenue.

The 3rd Issue raised by the Revenue is that the Ld. CIT (A) erred in allowing relief on disallowance made u/s 35(2AB) of the Act in part.

77. At the outset, we note that the issue raised by the revenue has already been adjudicated by us along with the ground no. 2 of appeal of the assessee in the appeal filed by the Revenue is dismissed. For detailed discussion please refer the aforesaid Para of this order. Accordingly we dismiss the

ground of appeal raised by the Revenue.

The 4th Issue raised by the Revenue is that the Ld. CIT (A) erred in allowing relief on disallowance made u/s 80IC of the Act on part.

78. At the outset, we note that the issue raised by the revenue has already been adjudicated by us along with the ground no. 5 of appeal of the assessee in appeal filed by the assessee is allowed. For detailed discussion please refer the aforesaid Para of this order. Accordingly we dismiss the ground of appeal raised by the Revenue.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 The 5th issue raised by the revenue is that the Ld. CIT (A) erred in deleting the disallowance of Rs. 27,86,287/- on account of donation made u/s 80G.

79. At the outset, we note that the issue raised by the revenue has already been adjudicated by us along with the ground no. 6 of appeal of the Revenue in appeal filed by the Revenue is dismissed. For detailed discussion please refer the aforesaid Para of this order. Accordingly we dismiss the ground of appeal raised by the Revenue.

The 7th issue raised by the Revenue is that the Ld. CIT (A) erred in setting aside the matter and directing to the AO as such it is not permitted u/s 251(1)(a) in respect of reducing the income computed u/s 115JB.

80. The assessee during the year under consideration has written-off bad debts amounting to Rs. 3,65,65,634/- against the provision for doubtful debts created in the F.Y. 2006-07 corresponding to the A.Y.2008-09.

80.1 The assessee further submitted that it has complied with all the condition as specified u/s 36(2) of the Act to claim the bad debts.

80.2 The assessee also submitted that the provision for doubtful debts which was created in the F.Y.2006-07 has been written back during the year. As such the same was added back to the book profit in the assessment order framed by the AO u/s 143(3) to compute the book profit as per the retrospective amendment of explanation to section 115JB of the Act.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 80.3 Thus the amount of provision for bad debts written back during the year has been deducted to compute the book profit u/s 115JB of the Act as given in the first clause of the second of explanation 1 to section 115JB of the Act.

80.4 The AO after considering the submission made by the assessee was of the view that as per the amendment made by the Finance Act, the provision for doubtful debts written back during the year amounting to Rs. 3,65,65,634/- shall be reduced while computing book profit.

80.5 However the AO further observed that the assessee did not claim the amount of written back of the provision for doubtful debts by filing the revised return of income. As such it claimed during the assessment proceedings only by way of a letter.

80.6 The AO accordingly after having reliance placed on the judgment of Hon'ble SC in the case of Goetze (India) Ltd. v/s CIT reported in (2006) 264- ITR-323 (SC) disallowed the claim of the assessee for a sum of Rs. 3,65,65,634/- on account of bad debts written back.

81. The aggrieved assessee preferred an appeal before the Ld. CIT (A). The assessee before the Ld. CIT (A) reiterated the same as before the AO.

82. However the Ld. CIT (A) observed that the assessee was not aware about the amendment. As such amendment came into effect after the return filed by it. Therefore it has a genuine reason for not making the claim in the return of income.

82.1 The Ld. CIT (A) accordingly direct to the AO to examine the matter in accordance with the law and records.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09 Being aggrieved by the order of the Ld. CIT (A), the Revenue is in appeal before us.

83. The Ld. DR before us submitted that the ld. CIT-A has no power to restore the issue to the file of the AO. Therefore he has contravened the provisions of section 251 of the Act. The ld. DR vehemently supported the order of the AO.

84. On the other hand, the Ld. AR before us submitted that there was specific direction given by the AO. Therefore there is no contravention of the provisions of the Act as alleged by the Revenue. The ld. AR vehemently supported the order of the ld. CIT-A.

85. We have heard the rival contentions of both the parties and perused the materials available on record. It is not in doubt that the ld. CIT-A has no power to restore the issue to the file of the AO. Therefore he cannot set aside the issue to the file of the AO. Rather the ld. CIT-A has the power to call the remand report from the AO on the points as prescribed under the provisions of the law.

85.1 However, in the case before us we note that the ld. CIT-A has not restored the issue to the file of the AO for fresh or de-novo assessment, but it was set aside with the unambiguous direction to adjudicate the issue after examination of the related/certain facts. Thus in our considered view, there is no contravention of the provisions as alleged by the Revenue. Hence we do not find any reason to disturb the finding of the ld. CIT-A. Accordingly, we dismiss the ground of appeal raised by the Revenue.

ITA Nos. 907, 938, 1634 & 1725/Ahd/2012 AYs :2007-08 & 2008-09

86. The issues raised by the Revenue in ground No. 7 and 8 are either general or consequential in nature. Therefore no separate adjudication is required. Therefore the grounds raised by the Revenue are dismissed.

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

87. In the Results appeals of the Assessee bearing ITA No.907/Ahd/2012 for A.Y. 2007-08 is allowed while ITA No.1634/Ahd/2012 for A.Y. 2008-09 is partly allowed whereas Revenue's appeals bearing ITA No.938/Ahd/2012 for A.Y. 2007-08 and ITA No.1725/Ahd/2012 for A.Y. 2008-09 are dismissed.

Order pronounced in the Court on 15 May , 2019 at Ahmedabad.

Sd/-	Sd/-
-Sd-	-Sd-
(MADHUMITA ROY)	(WASEEM AHMED)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

(True Copy)

Ahmedabad; Dated 15/05/2019
Manish