IN THE INCOME TAX APPELLATE TRIBUNAL : COCHIN BENCH : COCHIN
BEFORE SHRI B.P. JAIN, HON'BLE ACCOUNTANT MEMBER AND
SHRI GEORGE GEORGE K., HON'BLE JUDICIAL MEMBER

ITA No. 223/Coch/2015 (A.Y. 2010-11)
IT(TP)A No. 189/Coch/2016 (A.Y. 2011-12

Apollo Tyres Ltd., 6th Floor, Cherupushpam Building, Shanmugham Road, Ernakulam – 682 031.	vs	A.C.I.T., Circle-1(1), Kochi.

ITA No. 222/Coch/2016 (A.Y. 2010-11)

M/s. Apollo Tyres Limited, 3rd Floor, Areekal Mansion, Near Manorma Junction, Panampilly Nagar, Kochi – 682036.	vs	Pr. CIT-1, Kochi.

ITA No. 257/Coch/2015 (A.Y. 2010-11)
IT(TP)A No. 130/Coch/2016 (A.Y. 2011-12)

A.C.I.T., Circle-1(1), Kochi.	vs	Apollo Tyres Ltd., Cherupushpam Building, Shanmugham Road, Kochi – 682 031.
(Appellant)		(Respondent)

Date of hearing	:	10/11/2016
Date of pronouncement	:	10/01/2017.
Assessee by	:	Sh. Gautam Jain.
Department by	:	Sh. Shantanu Bose, CIT-DR.

ORDER

PER B.P. JAIN, A.M. :

The following batch of appeals disposed of way of this common order as the issues involved are similar and the appeals were heard together:

S No.	A.Y.	ITA No.	Appellant
1.	2010-11	223/C/2015	Assessee
2.	2010-11	257/C/2015	Department
3.	2011-12	189/Coch/2016	Assessee
4.	2011-12	130/C/2016	Department
5.	2010-11	222/C/2016 u/s 263)	Assessee

2. We shall first take up the appeal of the assessee in ITA No. 223/C/2015 for A.Y. 2010-11.

3. The appellant is a public limited company engaged in the business of manufacture and sale of tyres, tubes and flaps. The return of income for A.Y. 2010-11 was filed on 01.10.2010 declaring a total income of Rs. 404,17,32,067/-. By way of notice under section 143(2) of the Act, the case of the appellant was selected for scrutiny assessment. The case was thereafter, referred to the Transfer Pricing Officer under section 92CA of the Act. The draft assessment order was passed on 28.03.2014 under section 144C of the Act. The said order was challenged by the appellant before DRP and vide order dated 26.12.2014, the DRP gave its directions. Consequently, the impugned assessment order dated 18.02.2015 was passed.

4. Grounds Nos. 2 and 2.1 pertain to the disallowance of the appellant's claim of expenditure amounting to Rs. 1,29,71,451/- under section 35D of the Act. The case of the appellant during the course of assessment proceedings was that the appellant company had incurred a total sum of Rs. 6,36,07,257/- as

issue expenses in respect of equity shares issued to qualified institutional buyers. Further, an amount of Rs. 12,50,000/- was paid for increase in the authorized capital of the appellant company. According to the appellant, the expenditure was incurred under section 35D of the Act for the purpose of extension of the existing business of the company. The present assessment year is the 4th year of claim of the said expenditure. The A.O in the impugned order while relying upon the judgment passed in the case of Punjab State Industrial Development Corporation Limited Vs. CIT, 225 ITR 792 and CIT Vs. Hindustan Insecticide Limited, 250 ITR 338 held that the amounts spent on increase in share capital in the present facts and circumstances does not qualify the appellant for deduction under section 35D of the Act. It was further held that there is nothing to indicate that any new industrial unit was being set up.

5. It has been pointed out before us that an identical issue was discussed in the case of the appellant itself in A.Y. 2007-08 and the ITAT in its order No. 616/C/2011 dated 20.12.2013 has set aside the issue to the A.O for fresh consideration. Since the issue raised in the aforesaid ground of appeal is identical to the one raised in A.Y. 2007-08 in ITA No. 616/C/2011, we follow the same and set aside the disallowance and remand the issue to the file of A.O. for fresh consideration. The aforesaid ground is allowed for statistical purposes.

6. Grounds Nos. 3 and 3.1 relate to the disallowance of revenue expenditure of Rs. 26,97,79,538/- incurred by the appellant for expansion of its existing business of manufacturing tyres as being preoperative in nature. The

expenditure incurred are as under:-

Particulars	***Amount (Rs/Million)***
Raw material consumed	33.86
Salaries, wages and bonus	114.98
Contribution to Provident and Other Funds	5.97
Welfare Expenses	26.12
Rent	4.10
Travelling, conveyance and vehicle expenses	17.27
Postage, Telex Telephone and Stationery	1.57
Power and Fuel	38.21
Insurance	8.69
Miscellaneous Expenses	19.01
Total	***269.78***

7. The Ld. AR submitted that the aforesaid expenses were incurred by the appellant for the purpose of exploratory work done by the project division of the head office of the appellant in connection with the setting up of the Chennai Plant of the appellant. According to the Ld. AR, the expenses are administrative expenses of revenue nature and are directly connected with the conduct of the business of the appellant company. It was further argued that the expenses have not resulted in acquisition of any capital asset by the appellant company during the year. While referring to section 37(1) of the Act, the Ld. AR averred

that the appellant had only expanded its running business by making additional investment and there was no setting up of any new business. Reliance was placed by the Ld. AR on CIT Vs. Sakthi Sugars Ltd., 339 ITR 400, CIT Vs. Prithvi Insurance Co, (1967) 63 ITR 632, Jay Engineering Works Ltd. Vs. CIT, 311 ITR 405, CIT Vs. Modi Industries, 200 ITR 341 and CIT Vs. Priya Village Roadshows Ltd, 332 ITR 594. The Ld. DR on the other hand relied upon the orders passed by the DRP and the AO.

8. It is brought to our notice that for A.Y. 2009-10, the ITAT in its order No. 02/C/2014 dated 07.03.2014 has set aside a similar ground in the case of the appellant itself to the A.O. for fresh adjudication so as to ascertain whether the expenditure was incurred for purchase and erection of plant of machinery or it is only administrative expenditure. In the order giving effect for A.Y. 2009- 10, the A.O. has disallowed the revenue expenditure. In the impugned assessment year also, while holding that the expenditure relates to the erection and construction of plant and machinery of building, the A.O. has disallowed the entire expenditure.

9. We have heard the rival submissions and perused the record. In the present assessment year, the facts reveal that no plant or machinery has been acquired by the appellant company for the unit under consideration and there was no construction work carried out at the plant. The expenses disallowed in the impugned order have not resulted in the acquisition of a capital asset. The appellant has averred that the business organization, the administration and the funds of both the existing as well as the new plant in Chennai are the same

and controlled by common management of the appellant company. It was further submitted that common books of accounts are maintained and also the existing as well as the new unit is engaged in the manufacturing of tyres. The said factual scenario has not been disputed by the A.O. or the DRP. This clearly shows that the expenditure incurred was for expansion of an already existing business and not for setting up a new business. Section 37 provides for deduction of expenditure incurred wholly and exclusively for the purpose of business of an assessee provided that the expenditure should not be in the nature of a capital expenditure. In the present case, the expenses by its very nature are revenue expenses like salary, traveling, conveyance, provident fund, postage etc.

10. In the case of CIT Vs. Sakthi Sugars Ltd. (339 ITR 400), the Hon'ble Madras High Court held as under:-

> "34. From the above decisions the test for identifying an expenditure as to whether it is a revenue expenditure or capital expenditure can be stated as under
>
> *(1)* If the amount spent was for the purpose of bringing into existence a new asset or obtaining a new advantage, it would be a capital expenditure.
>
> *(2)* If on the other hand, it is not made for the purpose of bringing into existence any such asset or advantage but for running the business or

working it with o view to produce the profits, it is o revenue

expenditure.

(3) For instance if the interest paid was in respect of the asset, which was acquired on an outright basis than it was intimately linked with the value of the asset. That determines the character of the expenditure and it was capital in nature.

Keeping the about tests in mind, when we examine the case on hand, the various kinds of expenditures relating to the sum of 6,84,78,570/-, the details of which have been mentioned in paragraphs 19 and 20, disclose that all those expenditures were incurred in the relevant years for the purpose of manufacture of sugar in the respective factories with a view to earn profits and therefore they are nothing but revenue expenditure only.

In other words, all expenses which were incurred by way of salaries, wages, bonus, provident fund contribution, workmen welfare expenses, power, fuel and water, manufacturing expenses, rent for office building etc., were all expenses which were incurred for the purpose of running of the business and it cannot be held to be by way of investment. In fact there was no dispute that whatever investments made for Baramba unit and Dhenkanal unit were capitalised and were never claimed by way of revenue expenditure."

11. The Hon'ble Delhi High Court in the case of CIT Vs. Priya Village Roadshows, 332 ITR 594 observed as under:-

> "10. A harmonious reading of the aforesaid two judgments of this Court, namely, Triveni Engg. Works Ltd. (supra) on the one hand and Modi Industries (supra) on the other, would clearly

> demonstrate that one has to keep in mind the essential purpose for which such an expenditure is incurred. If the expenditure is incurred for starting new business which was not carried out by the assessee earlier, then such expenditure is held to be of capital nature. In that event it would be irrelevant as to whether project really materialised or not. However, if the expenditure incurred is in respect of the same business 'which is already carried on by the assessee, even if it is for the expansion of the business, namely, to start new unit which is same as earlier business and there is unity of control and a common fund, then such an expense is to be treated as business expenditure "

12. In view of the aforesaid position of law the aforesaid expenses are treated as revenue in nature and deduction is permissible under section 37 of the Act. Ground No. 3 and 3.1 are allowed.

13. The Grounds Nos. 4 and 4.1 pertain to the disallowance of revenue expenditure of Rs. 4,70,07,847/- incurred by the appellant for expansion of its existing business of manufacturing tyres as being preoperative in nature. The said amount was incurred by the appellant towards loan processing fee and bank charges for the purpose of setting up the new manufacturing plant at Chennai.

14. We have heard the rival submissions. The said ground relates to Ground No. 3 raised in the present appeal as the said expense is borne out of the same transaction of setting up the new plant in Chennai. Since we have allowed

ground no. 3, the loan processing fee for expansion of the plant is treated as revenue in nature in the present assessment year. Ground No. 4 and 4.1 are allowed.

15. Ground No. 5 relates to the disallowance of Rs. 9,532/- under section 14A made in the impugned assessment order. In the draft assessment order, the A.O. had disallowed an amount of Rs. 2,16,706/- under section 14A. The DRP has restricted the disallowance to Rs. 9,532/-. The Ld. AR at the outset submits that the said amount has been disallowed twice as the appellant itself had disallowed the expenditure in the return of income filed for the relevant A.Y. The said facts need verification by the A.O. and we accordingly, set aside the addition and remand the matter to the file of A.O. for determining as to whether it is a case of double disallowance. The addition is set aside and Ground No. 5 is allowed for statistical purposes.

16. Ground No. 6 pertains to the disallowance of Rs. 9,00,479/- out of the depreciation being the proportionate amount relating to the let out building of the appellant company. The facts are that the appellant company is the owner of a corporate office at Gurgaon, Haryana. During the relevant A.Y., the appellant had let out a part of the aforesaid premises to its business associates for which it received an amount of Rs. 10,01,281/-. According to the appellant, the said income was the business income of the assessee. Reliance was placed upon section 38(2) of the Act. The department has however, treated the receipt as income from house property.

17. An identical issue in the case of the appellant itself for A.Y. 2009-10 came

before this bench in ITA No. 2/C/2014 dated 21.11.2014 wherein the ground raised by the appellant was dismissed. By following the aforesaid tribunal order, this ground of the appellant is dismissed.

18. Ground No. 7 pertains to the disallowance of weighted deduction of Rs. 94,98,220/- claimed by the appellant under section 35(2AB) of the Act in respect of expenditure of Rs. 1.89 crores incurred by the company on its R & D Facility. It is the case of the appellant that the expenses of Rs. 1.89 crores were incurred for testing the new tyres developed by the company at its R & D Facility at Baroda. In the absence of proper technology in India, the said tyres were sent to test tracks facilities in Germany for testing and certification. The A.O was of the view that the expenditure can only be allowed under section 35(2AB) if it is incurred on in-house research and development facility and since the expenditure in the present case was made towards trial activities outside the approved facility, the deduction was not permissible. The DRP affirmed the view taken in the draft assessment order by holding that deduction for testing of tyres outside India is not permissible and the explanation to section 35(2AB) is limited to the drug trial only.

19. The Ld. AR submits that the AO and DRP have misunderstood the scope of section 35(2AB) and the law only requires that the expenditure should have been incurred on in-house R & D Facility. He further submits that the clinical trial of tyres is related to tyres produced as a result of R & D activities in the in-house facility of assessee at Baroda and therefore, the deduction u/s 35(2AB) is permissible. The Ld. DR has relied upon the orders passed by the DRP and the

AO.

20. We have heard the submissions and perused the records and the judgments relied upon. Section 35(2AB) provides for weighted deduction of expenditure on scientific research by a company in the business of manufacture or production of any article or thing provided that the expenditure incurred is on in-house research and development facility of the assessee, which is approved by the prescribed authority. The only question that is to be determined is whether the expenditure incurred was on in-house R & D facility. The approved R& D facility of the appellant company is in Baroda. The tyres produced as a result of R & D activities in the said facility are tested in Germany. The said fact is not disputed by the AO that the tyres which are tested in Germany upon which the expenditure'is incurred by the appellant company relate to the tyres produced by the R & D facility of the appellant company in India. The intention of legislature is not to oust such expenditures made by an assessee and the same is evident from the explanation to section 35(2AB) which provides that expenditure on scientific research in relation to drugs shall include expenditure incurred on clinical drug trial. In the case of CIT Vs. Cadila Healthcare Ltd. (2013) 31 taxmann.com 300, the Hon'ble Gujarat High Court held as under:-

> *"D.* Whether the Appellate Tribunal has substantially erred in holding that the expenses incurred outside the approved R&D facility would also get weighted deduction based on the word under "on the house" interpreting contradictorily to the finding of coordinate bench in Concept Pharmaceuticals Ltd. *Vs.* ACIT(ITAT, Mum) reported at 43

"16. The whole idea thus appears to be to give encouragement to scientific research. By the very nature of things, clinical trials may not

always be possible to be conducted in closed laboratory or in similar in-house facility provided by the assessee and approved by the prescribed authority. Before a pharmaceutical drug could be put in the market, the regulatory authorities would insist on strict tests and research on all possible aspects, such as possible reactions, effect of the drug and so on. Extensive clinical trials, therefore, would be an intrinsic part of development of any such new pharmaceutical drug. It cannot be imagined that such clinical trial can be carried out only in the laboratory of the pharmaceutical company. If we give such restricted meaning to the term expenditure incurred on in-house research and development facility, we would on one hand be completely diluting the deduction envisaged under sub-section (2AB(of section 35 and on the other, making the explanation noted above quite meaningless. We have noticed that for the purpose of the said clause in relation to drug and pharmaceuticals, the expenditure on scientific research has to include the expenditure incurred on clinical trials in obtaining approvals from any regulatory authority or in filing an application for grant of patent. The activities of obtaining approval of the authority and filing of an application for patent necessarily shall have to be outside the in-house research facility. Thus the restricted meaning suggested by the Revenue would completely make the explanation quite meaningless. For the scientific research in relation to drugs and pharmaceuticals made for its own peculiar requirements, the Legislature appears to have added such an explanation."

21. It is pertinent to mention here that section 35(2AB) was introduced as an incentive for encouraging research and development in the industrial sector and therefore, has to be liberally construed in view of the decision of Hon'ble Supreme Court in Bajaj Tempo Ltd. Vs. CIT, 62 Taxman 480. The AO and the DRP have misdirected themselves in not appreciating the true intent and purport of section 35(2AB) of the Act. Having not disputed the fact that these tests are part of R & D activities conducted by the appellant in Baroda, the disallowance in the present facts is not permissible. We therefore, hold that the appellant is entitled for deduction under section 35(2AB) of the Act. Ground No.

7 and 7.1 are allowed.

22. Grounds Nos. 8 and 8.1 pertain to the disallowance of business loss of Rs. 4,07,24,151/- incurred by the assessee on the sale of its wholly own subsidiary. In the year under consideration, the appellant company has shown a loss of Rs. 4,07,24,151/- on the sale its 100% share holding in Apollo Tyres A.G., Switzerland (ATAG) to Apollo Tyres Cyprus Pvt. Ltd. (ATC). The said loss has been claimed as business expenditure. During the course of assessment, the appellant submitted that the ATAG was set up in 2007 as 100% subsidiary of the appellant company with an objective of undertaking sales and marketing of the products of the brand of the appellant company and the investment was made in the subsidiary company as a measure of commercial expediency. The AO in the draft assessment order was of the view that the said investment in shares cannot be held as business activity as the appellant was itself showing the said shares under the head investment. The DRP confirmed the draft assessment order in this regard.

23. The Ld. AR submits that the investment by the appellant in the shares of ATAG and the subsequent sale thereof was for the business purpose of the appellant company i.e. refinement of overall structure of the appellant company with a view of obtaining synergies of operations. The said investment was not for the purpose of enhancement of the value of shares nor for earning dividends and therefore, the business loss should be allowed as expenditure to the appellant company. The Ld. DR has relied upon the order passed by the DRP and the AO in this regard.

24. We have heard the rival submissions. The appellant has submitted during the course of assessment proceedings, that the objective of ATAG was undertaking sales and marketing related activities for the brand of the appellant in Singapore. The said factual assertion has not been rebutted by the AO in the impugned assessment order. There is nothing on record to show that the said subsidiary company was doing any activity completely independent and unrelated to the activities carried out by the appellant company. Thus, the claim of the appellant that the investment was made for commercial purposes and not for purpose of accretion of investment cannot be rejected. The only thing that was required to be examine in the present case was whether the expenditure was made as a prudent businessman for the purpose of business. In the case of S.A. Builders Vs. CIT, 288 ITR 1, the Hon'ble Supreme Court held as under:-

"The expression 'commercial expediency' is an expression of wide import and include such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, yet it is allowable as a business expenditure if it was incurred on grounds of commercial expediency."

25. The unity of objectives of the appellant company and the subsidiary company clearly shows that the investment was in the nature of a trade investment only. The decision to invest in the subsidiary was not such that a prudent business man would not have made it. In a similar case of DCIT Vs. Gujarat Small Industries Corporation (4 SOT 239), the ITAT Ahmedabad Bench held as under:-

"As per the memorandum of association of the assessee, the main object of the assessee was to promote the interest of SSI units in the State. The main object of the assessee was to help industrial concerns in various ways and help industrial growth of the State. Obviously, the company G was floated for the same purpose as a subsidiary and later on sold off when the loss started mounting. In view of that fact, it was found that investment in shares of company by the assessee was in the nature of trade investment. The commissioner (Appeals) had correctly followed the judgment of the Supreme Court in the case of Brooke Bond India Ltd. \/s. CIT [1986] 162 ITR 373. The Commissioner (Appeals) had also followed the judgment of the Rajasthan High Court in the case of Rajasthan Financial Corpn. *Vs.* CIT [1967] wherein it was held that if the investment in shares and sale thereof is closely linked with the business of the assessee, the loss suffered on account of such sale would be a trading loss."

26. We therefore, hold that the business loss claimed by the appellant is in accordance with law. Grounds Nos. 8 and 8.1 are allowed.

27. Ground No. 9 relates to the addition of foreign exchange gain of Rs. 4,72,34,591/-. In the relevant A.Y., the appellant had incurred a foreign exchange fluctuation gain on capital account (unrealized) amounting to Rs. 4,72,34,591/- relating to acquisition of capital assets. The appellant did not offer the said sum to tax by relying upon the section 43A of the Act. It is the case of the Ld. AR that the said amount of unrealized gain is on account of decrease in the liability of the appellant in respect of foreign currency loan borrowed by it for acquiring capital asset and the gain is therefore, on capital account. The Ld. DR on the other hand has relied upon the order passed by the authorities below.

28. Admittedly, the amount added to the total income for the relevant A.Y. 2010- 11 has been offered to tax in the subsequent A.Y. 2011-12. The taxability of this income is also a subject matter of dispute in the subsequent A.Y. 2011-12. We therefore, without dealing with the merits of the addition in A.Y. 2010-11 delete the same on account of the same being taxed in the subsequent A.Y. Ground No. 9 is allowed.

29. Ground No. 10 is regarding the disallowance of loss of Rs. 98,10,765/- incurred by the appellant on account of reinstatement of forward exchange contract entered into by it for purchase of raw materials from outside of India. The appellant had availed forward contracts from Barclays Bank, Standard Chartered Bank and YES Bank for the purchase of raw material from foreign suppliers. The purpose of entering into such contracts with the banks was to avoid any loss as may be incurred due to foreign exchange fluctuation. The AO disallowed the loss claimed on such forward exchange contracts as being notional and contingent in nature by relying upon the CBDT instruction no. 3 of 2010.

30. The Ld. AR submits that these foreign currency forward contracts are initially booked by the appellant in its books of accounts at the exchange rate prevailing on the date of purchase of forward contracts. Subsequently, these contracts are reinstated at hedged exchange rate in accordance with the Accounting Standard-11 issued by the Institute of Chartered Accountants of India. Resultant gain or loss on reinstatement of these forward exchange

contracts are carried to profit and loss account of the company. Accordingly, it is the claim of the appellant that the loss arising on reinstatement of such foreign exchange contract is essentially a business loss. The Ld. DR on the other hand has relied upon the order passed by the AO and the DRP.

31. We have heard the rival submissions and perused the record. The reliance placed by the AO on the CBDT instruction no. 3 of 2010 is completely misplaced as the same was applicable to derivative transaction only. The AO as well as the DRP has dismissed the claim of the appellant on the ground that the said loss is notional loss. We are in agreement with the submissions put forth by the Ld. AR as the moment a contract, be it a forward exchange contract, is entered into by the parties, a binding agreement comes into existence and the liability of the parties are crystallized in terms of the consideration mentioned in the contract. The fluctuation in the foreign currency has already taken place in relevant A.Y. and therefore, the loss or gain cannot be called notional or contingent. The said loss, according to us, is permissible for deduction. The appellant is consistently following the same
practice for previous years also. The Delhi Special Bench of this Tribunal in a similar case of ONGC Ltd. 83 ITD 151, held as under:-

> **"Before concluding, we would like to point out that the ossessee's claim for loss arising as a result of fluctuation in foreign exchange rates on the closing day of the year has been disallowed by the AO, inter alia, on the ground that this liability was a contingent liability and the loss was a notional one. The main ingredient of a contingent liability is that it depends upon happening of a certain event. We are of the considered opinion that in the case of the assessee, the "event", i.e. the change in the value of foreign currency in relation to Indian currency has already**

taken place in the current year. Therefore, the loss incurred by the assessee is a fait accompli and not a notional one."

Also in the case of DCIT, Vs. Bank of Bahrain & Kuwait (41 SOT 290), the Special Bench of Mumbai Tribunal allowed the loss incurred by the assessee on reinstatement of forward exchange contract and observed as under:-

"58. **In view of the above discussion, we allow the assessee's appeal for the following reasons:-**

(i) **A binding obligation accrued against the assessee the minute it entered into forward foreign exchange contracts.**

(ii) **A consistent method of accounting followed by assessee cannot be disregarded only on the ground that a better method could be adopted.**

(Hi) The assessee has consistently followed the same method of accounting in regard to recognition of profit or loss both, in respect of

forward foreign exchange contract as per the rate or prevailing on March 31.

(iv) **A liability is said to have crystalised when a pending obligation on the balance sheet date is determinable with reasonable certainty. The considerations for accounting the income are entirely on different footing.**

(v) **As per AS-11, when the transaction is not settled in the same accounting period as that in which it accrued, the exchange difference between arises over more than one accounting period.**

(vi) **The forward foreign exchange contracts have all the trappings of**

stock-in-trade.

(vii) **In view of the decision of Hon'ble Supreme Court in the case of Woodward Governor India (I) P. Ltd. the assessee's claim is allowable.**

(viii) **In the ultimate analysis, there is no revenue effect andit is only the timing of taxation of loss/profit."**

31. The aforesaid judgments are applicable in the present case of the appellant and we respectfully follow the same. We therefore, delete the disallowance of loss incurred by the appellant and allow ground no. 10.

32. Ground No. 11 relates to the addition of Rs. 27,96,245/- to the total income of the appellant on the basis of amount reflected in Form 26AS. It was submitted during the course of assessment proceedings that an amount of Rs. 19,75,315/- out of the aforesaid amount of Rs. 27,96,245/- has been offered to tax in the subsequent A.Y. 2011-12. Rejecting the said submission of the appellant, the A.O and the DRP were of the view that the income is to be taxed in A.Y. 2010-11 only.

33. We have heard the rival submissions and perused the record of the case. Admittedly, the amount of Rs. 19,75,315/- is offered to tax in A.Y. 2011-12. Taxing the same amount in the relevant A.Y. 2010-11 would lead to double addition and incorrect determination of tax liability. In view thereof, we delete the addition to the extent of Rs. 19,75,315/- from A.Y. 2010-11. Ground No. 11 is partly allowed.

34. Ground No. 12 relates to the disallowance of prepaid expenses of Rs. 5,15,34,726/-. During the relevant A.Y. the appellant had claimed prepaid expenses amount to Rs. 5,15,34,726/- which included insurance expense of Rs. 96,12,402/-, interest expenses of Rs. 1,54,19,700/-, rent expenses of Rs. 1,83,501/- and general expenses of Rs. 2,63,19,123/- in the nature of employee mediclaim and other expenses. According to the A.O. the said expenses were not related to the income earned during the year under consideration and were therefore, disallowed. The DRP concurred with the findings of the Draft Assessment Order and held that the claim of deduction which does not pertain to the relevant accounting year distorts the income of that year.

35. The Ld. AR submitted that the expenses included under the head prepaid expenses are revenue in nature. He further submitted that the said expenditure has not resulted in acquisition of a capital asset to the appellant company and therefore, is an allowable deduction. The Ld. DR on the other hand has supported the order passed by the DRP.

36. We have heard the rival submissions and perused the record and judgments relied upon by the counsel. We agree with the submissions made by the Ld. AR. Even if an expenditure incurred in a particular year gives a benefit which accrues over a period exceeding that financial year, such expenditure is deductible from the business income of the assessee. The said expenditure does not in any way create any new asset on the capital side. The Delhi Tribunal in the case of Modi Olivetti Ltd. Vs. JCIT (4 SOT 859) held as under:- **"there is**

nothing to indicate that the concerned expenditure has to be of capital nature for the purpose of treating the same as deferred revenue expenditure. On the contrary, although the said expenditure results into a benefit which accrues to the assessee over a period exceeding the accounting year, such benefit does not accrue to the assessee in the capital filed but the same accrues only in the revenue filed. When any expenditure is treated as a 'deferred revenue expenditure', it presupposes that the concerned expenditure, creating benefit in the revenue field, is a revenue expenditure but considering its enduring benefits as well as the fact that it does not result in the creation of any ne asset or advantage of enduring nature in the capital field, the same is required to be treated distinctly from capital expenditure."

37. In the case of Tirupati Microtech (P) Ltd. Vs. ACIT (112 ITD 328), the Jodhpur Tribunal held as under:-

> **"The Assessing Officer had not disputed the nature of mill lining but made the disallowance only on the ground that the assessee was suppose to claim deduction only for mill lining expenses claimed in the profit and loss account and unamortized amount could not have been claimed as revenue expenditure. Thus, mill lining expenses has been established to be of recurring nature, which fell upon the assessee from time to time and, hence, could not be treated as a capital expenditure. Once this conclusion was**

reached, there was no justification for making disallowance for the expenditure incurred in the year notwithstanding the fact that in the books of account a different treatment had been given. If the expenditure is of revenue nature, the same would call for deduction in the year in which it is incurred."

38. The ratio laid down in the aforesaid judgments is applicable to the present case. In view thereof, we delete the addition. Ground No. 12 is allowed.

39. In Ground No. 13, the facts are that the A.O. has disallowed the commission of Rs. 15,68,344/-. During the year under consideration, the appellant company has made an expense of Rs. 50,55,270/- towards commission payment to its agents in respect of sales made through them. According to the appellant, the said sum includes an amount of Rs. 15,68,344/-, which is a provision made by the company in respect of commission payable it to its agents in respect of sales made. However, the quantification of the actual commission payable to the agents was not done as the same was in negotiation phase. The A.O. in the draft assessment order was of the view that the liability is unascertained and therefore, disallowed the amount of Rs. 15,68,344/-. The DRP confirmed the action of the A.O.

40. It is brought to our notice that an identical ground of appeal was raised by the appellant before this Tribunal in ITA No. 02/C/2014 for A.Y. 2009-10 and the said issue was held against the assessee by the tribunal. We have perused the order of this Tribunal in the aforesaid case passed on 21.11.2014. Following the findings recorded in para 26 and 27, we dismiss the ground raised by the appellant. Ground No. 13 is dismissed.

41. Ground No. 14 pertains to the transfer pricing issue in determining the arm length price of transactions pertaining to the sale of investment. The transfer pricing addition made was Rs. 5,36,33,701/-. The appellant in the present appeal has limited his challenge to the addition relating to the exchange rate adopted by the A.O. at Rs. 44.57 as against Rs. 42.88. The rest of the additions are not pressed in view of the order passed by the DRP under section 154 of the Act.

42. The appellant had sold its equity holding in its wholly owned subsidiary Apollo Tyres AG to its associate enterprise namely Apollo Tyres (Cyprus) Pvt. Ltd for a consideration of CHF 2.26 million. In the order giving effect to the DRP directions dated 26.12.2014, the TPO determined the conversion rate of CHF to INR in F.Y. 2009-10 at INR 44.57/CHF. The Ld. AR contends that the DRP in the order passed under section 154 of the Act dated 15.06.2015 has determined the conversion rate at Rs. 42.88/CHF.

43. We have heard the rival submissions. The order dated 15.06.2015 passed by DRP under section 154 r.w.s 144C(5) of the Act clearly shows that the DRP has held that the valuation should be made at Rs. 42.88/CHF as against Rs. 42.68/CHF claimed by the appellant in the application under section 154. The TPO ought to have given effect to the directions of the DRP in the order dated 15.06.2015. The addition on account of the difference between the conversion rate of Rs. 44.57/CHF and Rs. 42.88/CHF is deleted. Ground No. 14 is partly allowed.

44. Ground No. 15 to 20 are not pressed.

45. The appellant has raised an additional ground claiming deduction under section 80IA of the Act in respect of the profit derived from the windmill undertaking. The said claim was not made by the appellant in its income tax return, assessment proceedings or before the CIT(A). The appellant has submitted the copy of declaration and audited accounts of the power generation windmill undertaking to make out a case under section 80IA of the Act. Though the claim is made for first time before this Tribunal, we feel it appropriate to direct the AO to determine the issue on merits as it is necessary to determine the correct tax liability of an assessee. The said view is clearly expressed in the judgment passed by the Hon'ble Supreme Court in NTPC Ltd. Vs. CIT, 229 ITR 383. The observations made by the Hon'ble Bombay High Court in the case of CIT Vs. Pruthvi Brokers & Shareholders, 349 ITR 336 are relevant at the stage and the same are extracted herein below:-

> **"13..... The appellate authorities, therefore, have jurisdiction to deal not**
>
> **merely with additional grounds, which became available on account of change of circumstances or law, but with additional grounds which were available when the return was filed. The first part viz. "if the ground so raised could not have been raised at that particular stage when the return was filed or when the assessment order was made..." clearly relate to cases where the ground was available when the return was filed and the assessment order was made but "were not in existence". Grounds which were not in existence when the return was filed or when the assessment order was made fall within the second category viz. where "the ground became available on account of change of circumstances or law."**

46. In the aforesaid judgment it is clearly expressed that an assessee apart from raising an additional ground can raise an additional claim before the appellate forum. In view thereof, the AO is directed to examine the matter

on merits after considering the evidence produced by the appellant with regard to the claim of deduction under section 80IA. The additional ground is allowed for statistical purposes. These appeals of the assessee in ITA No. 223/Coch/2015 is partly allowed for statistical purposes.

ITA No. 257/Coch/2015 AY 2010-11

47. This is an appeal by the Department against the order of the DRP dated 26.12.2014 in the case of the assessee for A.Y. 2010-11.

48. Ground No. 1 is general in nature.

49. Ground No. 2 pertains to the deletion of addition on account of additional depreciation of Rs. 11,95,54,527/-. The assessee has claimed the aforesaid amount with respect to new plant and machinery acquired after 31.03.2005 in terms of the provisions of section 32(I)(iia) of the Act. The additional depreciation claimed by the assessee amounting to Rs. 81,34,38,818/- included a sum of Rs. 11,95,54,727/- being the balance of 10% additional depreciation on eligible plant and machinery acquired during the period 1st October 2008 to 31st March 2009, which was not claimed during A.Y. 2009-10.The A.O. in the draft assessmentorder rejected the plea of the assessee under section 32(1) of the Act and made disallowance of Rs.11,95,54,527/-. The DRP deleted the aforesaid addition as in A.Y. 2007-08 in assessee's own case, this tribunal vide order dated 20.12.2013 in ITA No. 616/C/2011 deleted the addition on similar facts and held in favour of the assessee.

50. We have heard the rival submissions and gone through the order

dated 20.12.2013 in ITA No. 616/C/2011. In view of the addition being deleted in the said order, we follow the same and dismiss the ground raised by the department. Ground No. 2 is dismissed.

51. Ground No. 3 relates to the deletion of disallowance of Rs. 3,89,04,976/- being the salary paid by the assessee to its employee working for Apollo
Tyres, Germany under section 35(2AB). The assessee company in the relevant A.Y. has claimed deduction under section 35(2AB) in respect of the following expenses:

i. Amount of Rs. 3.89 crores paid to Apollo Tyres, Germany representing R & D expenditure incurred by them
ii. Amount of Rs. 1.89 crore towards clinical trial activities incurred for testing of tyres outside the approved facility.

52. In the present appeal we are concerned with the amount of Rs. 3.89 crores. The assessee submitted during the course of assessment proceedings that the said amount represents reimbursement of salary and other costs as incurred towards employees. It was further submitted that one of the employee, Mr. Peter Becker is employed on the rolls of Apollo Tyres, Germany, a subsidiary of Apollo Tyre Limited but he is overall in-charge of the R & D activities of the company in India and devotes substantial time to the R & D activities carried out by the company at is R & D Unit at Limda, Baroda. It was argued that the salary paid to Mr. Peter Becker in respect of the services rendered by him in respect of company's R & D Unit at Limda, Baroda, is reimbursed by Apollo Tyres Ltd to its subsidiary Apollo Gmbh, Germany and debited in the books of the assessee

company and as such is an allowable expenditure u/s 35(2AB) of the Income Tax Act. The A.O. was of the view that deduction under section 35(2AB) is limited to the expenditure on scientific research on in house research and development facility and therefore the amount paid to the employee in Germany would not attract the benefit of the extra weighted deducted of 50% claimed under that provision. The DRP, however, deleted the addition and held that the salary paid to Sh. Peter Becker was entitled for deduction under section 35(2AB) of the Act.

53. The Ld. DR has relied upon the draft assessment order to canvas his submissions that the deletion of disallowance was not in accordance with law. The Ld. AR on the other hand has reiterated the submissions made by the assessee before the DRP. We have heard the rival submissions. We are not in agreement with the view of the department. Admittedly, in the present case the nature of the expenditure for R & D is not disputed by the department. The Department has further not disputed the fact that the said employee of the assessee company is overall in-charge of the R & D activities at Baroda. The mere fact that the said employee was paid by Apollo Tyres Germany and thereafter, reimbursed by the assessee company would not ipso facto lead to a conclusion that the expense on R & D is made outside India. The deduction is therefore within the parameters of Section 35(2AB) of the Act. In view thereof, ground no. 3 raised by the department is dismissed.

54. Ground No. 5 relates to the deletion of addition made by the A.O. for deduction claimed under section 80IA of the Act. The assessee, in the relevant A.Y. has earned profits of Rs. 11,59,92,308/- from its power generation unit- Gas Turbine. The A.O. was of the view that since in A.Y. 2005-06 it was held that power generation unit does not have a separate

existence, it is not an undertaking capable of having profits deductible under section 80IA of the Act. The DRP deleted the addition on account of the decision of this tribunal in favour of the assessee in A.Y. 2005-06 i.e. ITA NO.429/C/2006.

55. We have gone through the order passed by this tribunal in A.Y. 2005-06, ITA No. 429/C/2006. The said issue is squarely covered in favour of the assessee in its own case. Accordingly, ground no. 4 raised by the department is dismissed.

56. Ground No. 5 relates to the deletion of disallowance of Rs. 28,03,099/- under section 36(i)(va) of the Act.

57. In the year under assessment, the assessee company has deducted Rs. 3,27,60,113/- as employee's contribution to provident fund. Out of the said amount, Rs. 28,03,099/ has been deposited by the assessee after the due date of filing of return of income under section 139(1) of the Act. The A.O. in the draft assessment order made the disallowance of aforesaid amount as the amount was deposited after the due date prescribed as per the PF Act. The DRP deleted the addition by the relying upon the decision of the Tribunal in assessee's own case reported in 35 taxmann.com 593.

58. The Ld. DR has relied upon the draft assessment order. The Ld. AR on the other hand has relied upon the submissions made before the DRP. We have heard the rival submissions and perused the record. In the present case the contribution has been made after the due date prescribed under the PF Act but before the due date of filing of return under section

139(1) of the Act. The PF Act itself permits employer to make deposit with some delay subject to certain penalties. Since the payments have been made before the due date of filing of return, the deduction under the provisions contained in section 36(l)(va) is permissible. In the case of CIT Vs. AIMIL India Ltd. 321 ITR 508, the Hon'ble Delhi High Court held as under:-

It is clear from the above that as soon as employees

contribution towards provident fund or ESI is received by the assessee by way of deduction or otherwise from the salary/wages of the employees, it will be treated as „income" at the hands of the assessee. It clearly follows therefrom that if the assessee does not deposit this contribution with provident fund/ESI authorities, it will be taxed as income at the hands of the assessee. However, on making deposit with the concerned authorities, the assessee becomes entitled to deduction under the provisions of *Section 36(l)(va)* of the Act. *Section 43B(b),* however, stipulates that such deduction would be permissible only on actual payment

If the employees" contribution is not deposited by the due date

prescribed under the relevant Acts and is deposited late, the employer not only pays interest on delayed payment but can incur penalties also, for which specific provisions are made in the *Provident Fund Act* as well as the ESI Act. Therefore, the Act permits the employer to make the deposit with some delays, subject to the aforesaid consequences. Insofar as the *Income Tax Act* is concerned, the assessee can get the benefit if the actual payment is made before the return is filed, as per the principle laid down by the Supreme Court in Vinay Cement Ltd. [2007] 213 CTR (SC) 268.

Therefore, the Tribunal was correct, in law, in deleting the addition made by the Assessing Officer under section 36(l)(va) relating to employees' contribution towards provident fund and ESI."The aforesaid judgment is applicable to the present facts as well. In view thereof, ground no. 5 raised by the department is dismissed.

59. Thus appeal of the revenue in ITA No. 257/Coch/2015 is dismissed.

ITA No. 189/Coch/2015 AY 2011-12

60. This is an appeal by the assessee challenging the order dated 23.02.2016 passed by the ACIT under section 143(3) r.w.s. 144C of the Act for A.Y. 2011-12. The objections before the DRP were issued on 23.12.2015.

61. Ground No. 2 and 2.1 relate to the appellant's claim of expenditure of Rs. 1,29,71,451/- under section 35D of the Act. In the identical ground raised by the appellant in A.Y. 2010-11, we have remitted the issue for fresh consideration by the AO. Therefore, we follow the same and set aside the disallowance and remand the issue to the file of A.O. for fresh consideration. The said grounds are allowed for statistical purposes.

62. Ground No. 3, 3.1 and 3.2 pertain to the disallowance of pre-operative expenditure of Rs. 25,96,83,876/- claimed by the assessee. In ITA No. 223/C/2015, A.Y. 2010-11, we have allowed the identical ground raised by the appellant. In view of the aforesaid order, we allow the aforesaid grounds raised by the appellant.

63. Ground No. 4, 4.1 and 4.2 are not pressed by the appellant. The said grounds are disposed of as not pressed and, therefore, dismissed.

64. Ground No. 5 and 5.1 pertain to the disallowance of weighted deduction of Rs. 4,90,41,754/- claimed by the appellant under section 35(2AB) of the Act. In ITA No. 223/C/2015, A.Y. 2010-11, we have allowed the identical grounds raised by the appellant. We therefore, allow the aforesaid grounds raised by the appellant.

65. Ground No. 6 relates to the taxing of Rs. 71,59,329/- on account of unrealized foreign exchange fluctuation gain on capital account as business income. The Ld. AR at the outset submits that the said income has been suo moto added by the appellant in the subsequent year. In view thereof, without expressing any opinion on merits of the addition, we set aside the same and direct the AO to verify as to whether the aforesaid amount has been offered to tax or not. Ground No. 6 is allowed for statistical purposes.

66. Ground No. 6.1 pertains to the deletion made by the AO of Rs. 4,72,34,591/- being unrealized foreign exchange fluctuation gain on capital account. The DRP deleted the deletion made by the AO of the aforesaid amount. The appellant is aggrieved by the deletion. The facts are that the assessee had incurred a foreign exchange fluctuation gain on capital account amounting to Rs.4,72,34,591/-. The said sum was not offered to tax as according to the appellant the same would be adjusted against the cost of assets as and when the said gain was realized in accordance with the provisions of section 43A of the Act. The DRP while following its order in A.Y. 2009-10 and relying upon the decision of the Hon'ble Supreme Court in the case of CIT Vs. Woodward Governor India (P) Ltd. (312 ITR 254),held that the claim of the assessee for deduction of Rs. 4,72,34,591/- is not in order.

67. The Ld. AR submits that unrealized gain is not covered by the provisions of section 43A of the Act and as and when the gain was realized, the cost of the assets would be adjusted in terms of the said section. He further submits that the case of Woodward Governor (supra) is not

applicable to the facts of the present case. The Ld. DR on the other hand has relied upon the order of DRP to support his submissions.

68. Section 43A contemplates adjustment in the actual cost of the asset at the time of payment. The said position of law is evident from the perusal of section itself as indicated by the phrase 'at the time of making payment' appearing in the provision. This section can be invoked in case of a realized foreign exchange gain on capital account. We agree with the submissions made by the Ld. AR that invoking section 43A for taxing unrealized foreign exchange gain as revenue receipts in the hands of the appellant is not permissible. It is pertinent to note here that no payment for purchase of asset has been made during the year under consideration. The reliance placed on the case of Woodward Governor (supra) by the Department is misplaced as the same is not applicable in the facts of the present case as the appellant has earned unrealized foreign exchange gain on capital account. In the case of Sutlej Cotton Mills Ltd. Vs. CIT, 116 ITR *1,* the Hon'ble Supreme Court held as under:-

> ***"... It is, of course, not easy to define precisely whot is the line of demarcation between fixed capital and circulating capital, but there is a well-recognised distinction between the two concepts. Adam Smith in his Wealth of Nations describes "fixed capital" as what the owner turns to profit by keeping it in his own possession and "circulating capital" as what he makes profit of by parting with it and letting it change masters. "Circulating capital" means capital employed in the trading operations of the business and the dealings with it comprise trading receipts and trading disbursements, while "fixed capital" means capital not so employed n the business, though it may be used for the purposes of a manufacturing business, but***

does not constitute capital employed in the trading operations of the

business."

if the amount in foreign currency is utilized or intended to be utilized in the course of business or for a trading purpose or for effecting a transaction on revenue account, loss arising from depreciation in its valuation on account of alteration in the rate of exchange would be a trading loss, but if the amount is held as a capital asset; loss arising from depreciation would be a capital loss. This is clearly borne out by the decide cases which shall presently discuss."

The law may, therefore, now be taken to be well settled that where profit or loss arises to an assessee on account of appreciation or depreciation in the valuation of foreign currency held by it, on conversion into another currency, such profit or loss would ordinarily be trading profit or loss if the foreign currency is held by the assessee on revenue account or as a trading asset or as part of circulating capital embarked in the business. But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or loss would be of capital nature." The aforesaid ratio is applicable in the present case. In view thereof, ground no. 6.1 raised by the assessee is allowed. Ground No. 6.2 does not require any adjudication.

70. Ground No. 7 relates to addition of Rs. 7,73,142/- in the income of the assessee on the basis of the amount reflected in form 26AS of the company. The Ld. AR at the outset submits that the said income has been offered to tax in the immediately next assessment year and cannot be taxed twice in the relevant year. In view of the submissions made by the Ld. AR, we direct the AO to verify as to whether the aforesaid amount has been offered to tax in the subsequent year and if the same is offered to tax, it

cannot be taxed again in the present A.Y. Ground No. 7 is allowed for statistical purposes.

71. Ground No. 7.1 is regarding addition of Rs. 19,75,385/- on the basis of amount reflected in the Form 26AS of the appellant company. The Ld. AR submits that the amount is already included the total income of this year. The AO is directed to verify the same and if the aforesaid amount is not included, the necessary addition is required to be made in accordance with law. Ground No. 7.1 is allowed for statistical purposes.

72. Ground No. 8 and 8.1 relate to the transfer pricing addition of Rs. 12,76,50,000/- and Rs. 1,68,19,459/- made by the AO by re-determining the arms length price of the transaction pertaining to the sale of investment. In the relevant A.Y. the appellant had assigned certain trademarks namely Accelere, Aspire, Hawkz and EnduRace to Apollo Tyres, Switzerland vide agreement dated 14.07.2010. For the assignment of three of these trademarks (Accelere, Aspire and Hawkz), the appellant obtained a valuation certificate from an independent consultant for ascertaining their arm's length value. The fourth trademark (EnduRace) was transferred for a nominal value stating that the same was not exported outside India and therefore, did not have a market outside India.

73. The appellant has raised a number of objections both factual and legal pertaining to the aforesaid addition proposed in the draft assessment order. The said objections were not dealt with by the DRP in its order dated 23.12.2015. The appellant then moved an application seeking rectification of the order dated 23.12.2015. The rectification order was thereafter

passed on 20.06.2016 and the objections were rejected by a short non speaking order extracted herein below:

> **"8.2 The submissions of the ossessee hove been considered carefully and ofund to be in the sane lines as was done before the TPO, in the TP order detailed discussion has been made at page 4 to 33 as regards the arguments of the assssee and the reasons for the decision of the TPO. The arguments before this Panel is largely the reiteration of the same before TPO. After due consideration this Panel is of the view that there doesn't appear to be any reason to differ with the approach of the TPO. So the objections of the assessee are not accepted."**

74. The objections raised by the appellant have been dealt by the DRP in a causal manner without affording any reasons whatsoever. None of the objections raised by the appellant or the judgments relied upon have been referred to by the DRP while rejecting the objection of the appellant. The order is non-speaking and unreasonable. In view thereof, the matter is remanded to the DRP to dispose of all the objections raised by the appellant by a speaking order in accordance with law. Ground No. 8 and 8.1 are allowed for statistical purposes.

75. Ground No. 8.2 pertain to the transfer pricing addition of Rs. 66,79,712/- in respect of the corporate guarantee provided by the appellant on behalf of its AEs. The appellant in the relevant A.Y has given a corporate guarantee to its AE in respect of a five year term loan obtained by the AE from Standard Chartered Bank. The total quantum of loan is 19,01,480,000/-. The TPO made an addition of a corporate guarantee fee at the rate of 0.75% and made the adjustment of Rs. 42,60,896/-. The TPO was of the view that an economic benefit has been provided as a corporate guarantee by the appellant. It rejected the submissions of the appellant that

the AE was not benefited by the guarantee.

76. The Ld. AR submits that no real benefit had transpired to the AE as the overall debt position of the AE remained the same. He further submitted that after the corporate guarantee was extended, the interest rate liability for the AE had increased. The Ld. DR on the other hand has relied upon the order passed by the TPO and DRP to advance his submissions.

77. The perusal of the order passed by the TPO as well as the DRP shows that the matter has not been examined in a proper perspective. The DRP while disposing of the objections of the Ld. AR did not deal with the effect of the increased interest rates and the overall debt position of the AE after the corporate guarantee was given. The said issue is required to be examined afresh in terms of the aforesaid objections raised by the appellant. The issue is restored to the file of AO with the above directions. The ground no. 8.2 is allowed for statistical purposes.

78. Ground No. 8.3 pertains to the transfer pricing addition of Rs. 12,50,380/- to the income of the appellant by holding that international transactions pertaining to provision of corporate IT service do not satisfy the ALP principle. During the year under consideration, the appellant had rendered software development services to its AEs namely AVBV and ATSA. The appellant adopted the TNMM method to bench mark its transactions with AE. The TPO substituted his own comparables and determined the adjustment at Rs. 12,50,380/-. The DRP rejected the objections raised by the appellant in the rectification order.

79. The Ld. AR submits that the comparable companies rejected by the TPO are without any reason and though the companies are functionally comparable, the comparables have been excluded. It is seen from the chart prepared by the AR and the functional profile produced thereof of the comparable companies, the companies which are functionally similar to that of the appellant have been excluded. For example in the case of Mindtree Ltd., the said company has been excluded only because it has under gone merger. Similarly in the case of R Systems International Ltd. and Helios & Metheson Information Technology Ltd., though the companies are functionally comparable, the same have been excluded only for the reason that they follow different accounting year ending in December. The exclusion made on this basis is not permissible and is not accordance with law. Similarly, while choosing his own comparables, the TPO has ticked up companies having functions of high end IT services, IT consulting, product companies, business intelligence companies etc. The companies which are functionally dissimilar to that of the assessee have to be excluded from the comparable list.

80. As the issue requires reconsideration, we remit the same to the file of AO to properly apply the comparables in accordance with the objections raised by the appellant in the present appeal. Ground No. 8.3 is allowed for statistical purposes.

81. Ground No. 9 relate to the disallowance of commission payable of Rs. 50,20,000/- considering the same as contingent in nature. In the case of the appellant for A.Y. 2010-11, identical ground no. 13 raised therein has been dismissed by us in ITA No. 223/C/2015. In view thereof, ground no. 9

raised by the appellant is dismissed.

82. Ground No. 10 and 12 relate to the denial of claim under section 80IA of the Act claimed by the appellant. The appellant had not claimed the said deduction in its original return of income. In A.Y. 2010-11, the appellant has raised an additional ground of appeal in which case, we have directed AO to examine the issue on merits of the deduction under section 80IA of the Act. Resultantly, in terms of the order passed in ITA NO. 223/C/2015, we direct the AO to examine the issue on merits in terms of the evidence adduced by the appellant for claiming deduction under section 80IA of the Act. Ground No. 10 and 12 are allowed for statistical purposes.

83. Ground No. 11 pertains to the disallowance of prepaid expenses of Rs. 5,15,34,726/- claimed by the appellant. In ITA No. 223/C/2015, A.Y. 2010-11, we have allowed an identical ground no. 12 raised by the appellant therein. In terms of the aforesaid order, we allow ground no. 11.

84. The appeal of the assessee in ITA No. 189/Coch/2015 is partly allowed for statistical purposes.

ITA No. 130/Coch/2015 AY 2011-12

85. This is an appeal by the Department against the order dated 23.12.2015 passed by the DRP for A.Y. 2011-12.

86. The facts pertaining to grounds no. 2 to 4 are not repeated herein as the same are identical to the appeal of the department for ITA No. 257/C/2015.

87. Ground No. 2 relates to the deletion of addition on account of additional depreciation. The Department in A.Y. 2010-11 has raised an identical ground and we have dismissed the same. Therefore, in terms of the order in ITA No. 257/C/2015, we dismiss ground no. 2.

88. Ground No. 3 relates to the weighted deduction of Rs. 4.44 crores claimed by the appellant under section 35(2AB) of the Act. In ITA No. 257/C/2015, we have dismissed identical ground raised by the revenue. In terms of the order in ITA No. 257/C/2015, we dismiss ground no. 2.

89. Ground No. 4 relates to the deletion of addition for deduction under section 80IA made in the case of the assessee. The revenue has raised an identical ground no. 4 in A.Y. 2010-11. The same was dismissed by order in ITA No. 257/C/2015. In terms of the aforesaid order, we dismiss ground no. 4.

90. Thus appeal of the revenue in ITA No. 130/Coch/2015 is dismissed.

ITA No. 222/Coch/2015.

91. This is an appeal by the appellant/assessee against the order dated 23.09.2016 passed by the Pr. CIT under section 263 of the Act. The Pr. CIT in the proceedings initiated under section 263 of the Act sought to revise order dated 28.03.2014 passed by the AO under section 143(3) r.w.s. 144C of the Act for A.Y. 2010-11.

92. The appellant has challenged the jurisdiction of the Pr. CIT in revising the order dated 28.03.2014.

93. The facts of the present case reveal that the draft assessment order was passed on 28.03.2014. Thereafter, the same was challenged by the Appellant/assessee before the DRP, which, after considering the objections raised by the appellant passed directions under section 144C(5) of the Act. Pursuant to the said directions of the DRP, the AO framed the assessment under section 143(3) r.w.s 144C of the Act vide order dated 18.02.2015. The order dated 18.02.2015 was challenged by the assessee before this Tribunal.

94. The Ld. AR in his submissions has argued that Pr. CIT did not have the jurisdiction to revise order dated 28.03.2014. He further argued without prejudice to the ground of jurisdiction, the proceedings under section 263 of the Act cannot be invoked to make deeper inquiry in a case. He submitted that the AO as well as the DRP has applied its mind on the issue of deduction under section 35(2AB) of the Act and the revision was unwarranted and not in accordance with law. The Ld. DR on the other hand has relied upon the order passed by the Pr. CIT.

95. We have heard the rival submissions. The factual timeline presented goes to show that what was sought to be revised in the impugned order before us is a draft assessment order dated 28.03.2014 passed in the case of the assessee for A.Y. 2010-11. The same is further evident from the notice dated 11.03.2016 under section 263 issued to the appellant wherein the Pr. CIT has stated as under:-

> *"Having called for and examined the assessment records in your case, it appears to me prat the draft order dated 18.02.2014 passed under section 144C r.w.s. 143(3) of the IT Act fos'ihe assessment*

year 2010- 11 passerby the Add. CIT, Range-1,J(6chi in erroneous in so far as it is prejudicial to the interest of/revenue for the reasons mentioned below……"

96. Even in the last para of the impugned order under section 263 it is observed that the order dated 28.03.2014 is erroneous in so far as it is prejudicial to the interest of revenue. As is clear from the scheme of the Act, the draft assessment order is only a proposed order and there is no demand notice attached to the said order. It is only after an assessment order is passed, pursuant to such draft assessment order or in compliance of the directions of the DRP, the assessment order comes into picture. The draft assessment order cannot levy demand on the assessee and therefore there is no question of any loss of revenue having been done because of the passing of the draft assessment order.

97. Section 263 of the Act also does not contemplate revision of a draft assessment order passed under section 144C(1) of the Act. The Pr. CIT had no jurisdiction to revise the order dated 18.03.2014. The impugned order dated 23.03.2016, therefore, is liable to be quashed.

98. Since, we have held that the order dated 23.03.2016 was passed without jurisdiction under the Act, we do not wish to express opinion on the merits of the matter.

99. Thus appeal of the assessee in ITA No. 222/Coch/2015 is allowed.

100. In the result the appeals of the (i) assessee in ITA No.

223/Coch/2015 is partly allowed for statistical purposes, (ii) appeal of the revenue in ITA No. 257/Coch/2015 is dismissed, (iii) appeal of the assessee in ITA No. 189/Coch/2016 is partly allowed for statistical purposes, (iv) appeal of the revenue in ITA No. 130/Coch/2016 is dismissed and appeal of the assessee in ITA No. 222/Coch/2016 is allowed.

Order pronounced in the open court on 10/01/2017.

Sd/-	Sd/-
(GEORGE GEORGE K.)	(B.P. JAIN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated : 10/01/2017

A/N
Copy to :-

1- Appellant
2- Respondent
3- CIT(A)
4- CIT
5- D/R, ITAT, Cochin.

Assistant Registrar