IN THE INCOME TAX APPELLATE TRIBUNAL
"J" BENCH, MUMBAI

BEFORE SHRI AMIT SHUKLA, HON'BLE JUDICIAL MEMBER AND SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER

ITA No. 7644/MUM/2012 (A.Y. 2008-09)

M/s. Novartis India Limited Sandoz House, Dr. Annie Besant Road Worli, Mumbai - 400018 **PAN: AAACH2914F**	*v.*	Addl. CIT, Range 7(1) Aayakar Bhavan, M.K. Road Mumbai
Appellant		**Respondent**

Assessee Represented by	**:**	**Shri Rajan Vora & Shri Pranay Gandhi**
Revenue Represented by	**:**	**Shri Rajneesh Yadav**
Date of Hearing	**:**	**19 July 2022**
Date of pronouncement	**:**	**28.09.2022**

ORDER

PER S. RIFAUR RAHMAN (AM)

1. This appeal is filed by the assessee against direction of the Dispute Resolution Panel –II, Mumbai [hereinafter in short "Ld. DRP"] passed u/s.144C(5) of Income-tax Act, 1961 (in short "Act") dated 03.09.2012 for the A.Y. 2008-09.

2. Assessee has raised following grounds in its appeal: -

"GROUND NO 1

Based on the facts and circumstances of the case, the learned Assessing Officer ('AO') / Additional Commissioner of Income-tax Transfer Pricing - 11(2) (hereinafter referred to as the learned TPO') have erred in law and in fact:

(a) Disregarding the economic analysis undertaken by the Appellant in accordance with the provisions of the Act read with the Income-tax Rules, 1962 and conducting a fresh economic analysis for the determination of the arm's length price in connection with the international transaction of Provision of Security support services.

(b) Not providing the detailed search process undertaken for identifying comparable companies

(c) Considering those companies as comparable that are functionally different from the Appellant for the international transaction of provision of Security support services

(d) by erroneously computing the margins of some of the comparable companies identified by the learned TPO

(e) By not adding the comparable companies identified by the Appellants with comparable companies identified by the learned TPO

(f) By not considering the +/- 5% variation from the arm's length price permitted to the Appellant under the proviso to section 92C(2) of the Act.

(g) By ignoring the provisions of Rule 10B(3) of the Income-tax Rules, 1962, which envisage usage of multiple year data of comparable companies for the purpose of determination of the arm's length price and using single year data for computing arms length price.

GROUND NO. 2

(a) The learned AO erred in holding that the appellant would not be eligible for depreciation on assets that stood vested in Ciba

Specialty Chemicals (India) Ltd., (CSCIL) pursuant to the scheme of demerger.

(b) The learned AO erred in holding that a consideration had flowed to the appellant for the transfer of the assets to CSCIL

(c) Without Prejudice to above, in the event it is held that adjustment for assets transferred on demerger is required to be made, the learned AO erred in considering opening Block of WDV after adjustment of Book WDV of assets transferred instead of Income tax WDV of assets transferred for the purpose of calculating depreciation allowable to the appellants for AY 2008-09

GROUND NO. 3

The learned AO erred in disallowing the expenditure of Rs. 86,77,930 incurred on production of advertisement films on the ground that the same are capital expenditure

GROUND NO. 4

(a) The learned AO erred in disallowing the expenditure on computer software/licence fees of Rs 46.92.440 on the ground that the same is capital expenditure of an enduring nature.

(b) The learned AO further erred in disallowing depreciation on software expenses disallowed in earlier years relating to the demerged unit.

GROUND NO. 5

(a) The learned AO erred in making an addition of Rs. 42,32,548 to the valuation of closing stock of the appellants as at 31.03.2008 on account of estimated pro-rata secondary freight on stocks lying at various locations

(b) Without prejudice to the above, the learned AO ought to have held that the value of opening stock of the subsequent assessment year should be increased by Rs 42,32,548 on account of the addition made to the closing stock for the assessment year 2008-09

GROUND NO. 6

The learned AO erred in disallowing Rs 51,61,020/- on an ad-hoc basis of 25% of total foreign traveling expenses on the ground that these expenses were for non-business purpose

GROUND NO. 7

The learned AO erred in disallowing an amount of Rs.3.91.564/- towards hotel expenses and air face of foreign visitors from Group Company and others coming to India on the ground that these expenses were for non-business purpose.

GROUND NO.8

(a) The learned AO erred in not allowing deduction of Rs 22,17,950/- being the incremental liability on account of pension payable under the erstwhile Voluntary Retirement Scheme of F.Y. 1992-93 (hereinafter referred to as pension) in respect of the workers of the appellants of their erstwhile Bhandup unit in computing the appellants total income.

The learned AO erred in invoking the provisions of section 35DDA in disallowing the above amount.

(b) Without prejudice the learned AO erred in not allowing deduction for Rs 2,92,95,739/ being the amount of actual payment on account of Pension as consistently done in the past

(c) Without prejudice to the above, the appellants submit that the learned AO be directed to allow actual payment out of Rs. 2,92,95,739/- to the extent it relates to the provision created during the year ended 31 March, 1993, but disallowed in assessment as per assessment order for A.Y 1993-94.

GROUND NO. 9

(a) The learned AO erred in disallowing amount of Rs. 1,94,42,427/- on the ground that year end estimates of expenses are excess provision.

(b) Without prejudice to the above, the appellants submit that consistent with the department's stand, the AO ought to have held that the deduction be allowed in assessment year 2009-10 being the year in which the same were written back and credited to Profit and Loss account in that assessment year and offered to tax

GROUND NO. 10

The Learned AO erred in making a further disallowance of an amount of Rs 6,43.513 under section 14A read with rule 8D of the Act, holding the same as expenditure incurred on earning tax free interest/dividend income without appreciating the fact that the appellants had already offered to tax Rs 1,21,445 being expenses directly incurred towards earning tax free income in Return of Income (ROI)

GROUND NO. 11

(a) The AO erred in adding Rs. 1,16,67,603 to the value of closing stock on account of unutilised CENVAT credit under section 145A of the Act

(b) The learned AO erred in not appreciating that since the appellants were following the treatment with respect to cenvat credit as per the recommendations of the Institute of Chartered Accountant (ICAI), no adjustment was required to be made on this account.

(c) Without prejudice, the AO ought to have given the impact of unutilized CENVAT credit to the opening stock of AY 2008-09 as well, and only the net resultant figure should have been added.

GROUND NO. 12

The learned AO erred in not granting TDS credit amounting to Rs.1,55,05,715/- without giving any reasons for the same.

GROUND NO. 13

The learned AO erred in charging interest under section 234C of Rs.12,51,546/- as against Rs. 617,293/- per ROI

GROUND NO. 14

The learned AO erred in charging interest under section 234B of Rs. 1,16,38,177/

GROUND NO. 15

The learned AO erred in initiating penalty proceedings under section 271(1)(c) of the Act for concealment of income and furnishing of inaccurate particulars of income.

3. Assessee has raised following additional ground in its appeal, which is reproduced below: -

"The following Grounds of Appeal are independent of, and without prejudice to each other and to the grounds of appeal filed earlier:

Sr no 12 *On the facts and in the circumstances of the case, the Appellant prays that the liability of Education Cess and Secondary and Higher Education Cess determined on Income-tax paid for the current year ought to have been granted by the AO as business expenditure under section 37(1) of the Income-tax Act, 1961 while computing the business income.*

4. Assessee has further raised modified and additional ground of appeal which are reproduced below: -

"On the facts and in the circumstances of the case, the Appellant wishes to raise the following additional ground of appeal which is independent of the other grounds of appeal:

Modified Ground No. 1(c) in relation to transfer pricing adjustment in relation to provision of security support services:

(c) The learned TPO/ learned AO have erred in law and in facts by including the following additional companies which are not comparable to the Appellant:

- *Tamil Nadu Ex-Servicemen's Corpn. Ltd;*
- *Apitco Ltd.,*
- *Rites Ltd.,*
- *Vapi Waste & Effluent Mgmt. Co. Ltd.*
- *WAPCOS Ltd., (Seg)*

Additional Ground No 16 - Deduction of Education Cess paid on Income-tax:

16. The Appellant prays that the liability for education cess on Income-tax paid for the current year ought to be allowed as business expenditure under Section 37(1) of the Act while computing the business income.

5. Ld. Counsel for the assessee submitted that the above additional grounds and modified grounds of appeal are purely legal grounds and do not require any fresh examination of facts. Therefore, Ld. Counsel for the assessee prayed it may be admitted.

6. Ld. DR objected for admission of the additional grounds as they were never raised before lower authorities and therefore cannot be admitted.

7. Considered the rival submissions and material placed on record, we observe that as the said additional grounds are legal grounds, wherein, the facts are on record and facts do not require fresh investigation, following the

decision of Hon'ble Supreme Court in the case of National Thermal Power Co., Limited *v.* CIT 229 ITR 383 (SC), we admit the said additional grounds and modified grounds of appeal.

8. Coming to Ground No. 1 which is in respect of Transfer pricing adjustment in relation to security support services provided to AE ₹.191,754/. Ld. AR submitted that during the year under consideration, the Assessee has provided security support services to its AES wherein the members of the safety team undertake measures to avoid infringements and duplication of Novartis products. In the Transfer pricing study undertaken by the Assessee, the Transactional Net Margin Method (TNMM') was considered to be the most appropriate method in the case of the transaction involving provision for security support services. Based on the search criteria/filters adopted by the Assessee, a total of 13 companies were considered as comparable with the Assessee. The Assessee had used Operating Profits/Operating Cost as the profit level indicator ('PLI'). The arithmetic mean of unadjusted net margins of the 13 comparable companies was determined at 10.05 percent on operating costs, as compared to the Assessee's operating margin using the same PLI of 15% percent on operating costs. During the course of TP

proceedings, the Assessee submitted updated margins, whereby 6 Companies were considered comparable to Assessee and their unadjusted net margin was determined at 9.15% on operating cost. The TPO rejected the economic analysis undertaken by the Assessee and adopted companies which are substantially different from that of the Assessee and determined the ALP of the transaction at 22.49% as under: -

Sl. No.	Particulars	PO/ DRP Single year Margins
1	Tamilnadu Ex-Servicemen's Corpn Ltd	9.29%
2	Apitco Ltd	49.35%
3	Best Mulakayan Consultants Ltd	12.84%
4	Choksi Laboratories Ltd	29.18%
5	Genins India T P A Ltd	9.11%
6	ICRA Management Consulting Services Ltd	4.18%
7	ICRA Online Limited	26.78%
8	IDC India Limited	15.31%
9	India Cements Capital Ltd	42.46%
10	Indus Technical & Financial Consultants	14.05%
11	Mecon Ltd	11.80%
12	NIS Sparta Ltd	1.84%
13	Informatics Ltd	6.54%
14	Rites Ltd	31 52%
15	Sanco Trans Ltd	20.62%
16	Technicom-Chemie (India) Ltd	13.43%
17	Vapi Waste & Effluent Management Co. Ltd	47.53%
18	WAPCOS Ltd	58.98%
Arithmetic mean		22.49%

9. TPO proposed an adjustment of ₹.1,91,754 based on difference between ALP @ 22.49% and entity level margin of the Assessee at 15%. The

DRP confirmed the addition proposed by the TPO. Against the final order passed pursuant to DRP directions, the assessee preferred an appeal before the Tribunal.

10. In regard to modified Ground No. 1(c) Ld. AR submitted as under: -

"Government Companies accepted by the TPO (to be excluded from the comparable list) as they cannot be compared to entrepreneurial entity like Appellant:

Name of the company	***Business Description***
Tamil Nadu Ex-Serviceman Corporation Ltd (Operating margin as per TPO- 9.29%) (Refer page no. 94 to 103 of the Factual Paper-book)	***Functionally different*** *- Tamil Nadu Ex-Servicemen's Corporation Limited is a Government of Tamil Nadu company and is primarily engaged in provision of industrial security and related services.*
Apitco Ltd (Operating margin as per TPO - 49.35%) (Refer page 104-105 of the Factual Paper-book)	***Functionally different:*** *Based on the information available on the website of the company, www.apitco.org. it can be seen that Apitco Limited is promoted jointly by all-India financial institutions (IDBI, IFCI, ICICI), Industry development corporations in Andhra Pradesh (APIDC, APSFC) and Commercial Banks (Andhra Bank, Indian Bank, State Bank of India, Syndicate Bank).*
Rites Limited ('Rites') (Operating margin as per TPO- 31.52%)	***Functionally different*** *-Rites Limited is a government company established under the aegis of Indian Railways*

Name of the company	***Business Description***
(Refer page 106-118 of the Factual Paper-book)	*and is providing services such as architecture and planning, bridge and tunnel engineering, construction projects, electrical engineering, etc to various governmental organisation and public sector undertaking. Thus, this company is engaged in undertaking non-comparable functions and activities.*
Vapi Waste & Effluent Mgmt. Co. Ltd ('Vapi Waste') *(Operating margin as per TPO - 47.53%)* *(Refer page 119-129 of the Factual Paper-book)*	***Functionally different*** *-The company is a non-equity company and a company which is limited by guarantee. The capital of the company is contributed by its members (in the form of membership fees, capital contribution and instalments received from its members) and the Government of India. The company receives major portion of the income as receipts from its members and is hence not comparable to the Assessee.* *From the Schedule G of the audited financial statements, it can be seen that the company operates an effluent treatment plant in Vapi.* *Further schedule G also states that the company has been approved as a special purpose vehicle by the Government for the upgradation project under the Infrastructure Upgradation scheme*
WAPCOS limited *(Operating margin as per TPO - 58.98%)*	***Functionally different-*** *WAPCOS provides consulting in the domestic and international water and power*

Name of the company	***Business Description***
(Refer page 130-143 of the Factual Paper-book)	*sectors. From the perusal of the website of the company, www.wapcos.gov.in. it can be seen that Wapcos Ltd is a government company with a Mini-Ratna I status. Further the vision statement of the company reads as 'to be a premier consultancy organisation recognized as a brand in water, power and infrastructure development for total project solutions in India and abroad.*

11. In this regard, reliance is placed on following decisions, in which it held that Government companies cannot be considered as comparable to entrepreneurial companies like Assessee.

- *Novartis Healthcare Pvt. Ltd (ITA 7643/M/2012) dated 30 April 2015 (Page no. 566 to 592 of Legal Paper-book dated 2 December 2021)*
- *Thyssen Krupp Industries India (P) Ltd (385 ITR 612) (Bombay HC) [Page no. 593 to 597 of Legal Paper-book dated 2 December 2021)*
- *Jacobs Engineering India (P.) Ltd (109 taxmann.com 298 (Mumbai)) (Page no. 598 to 601 of Legal Paper-book dated 2 December 2021)*
- *International SOS Services India Pvt Ltd (ITA No. 1631/Del/2014) dated 8 December 2015 affirmed b Delhi High Court in ITA 454/2016 dated 30 May 2017. SLP dismissed by Supreme Court vide order dated 3 July 2018 (Page no. 602 to 625 of Legal Paper-book dated 2 December 2021)*
- *NGC Network (India) Pvt. Ltd vs ACIT dated 26 February 2020 in ITA 2103/Mum/2014 (Mumbai Tribunal) (Page no. 626-650 of Legal Paper-book dated 2 December 2021)*

12. Ld. AR of the assessee submitted that if Rites Ltd, Vapi Waste and Wapcos are excluded from list of comparable in view of decision of Coordinate bench for AY 2008-09 in case of Novartis Healthcare Pvt Ltd (Supra) (Assessee's group company), the margin of comparable set would come to 17.92% as against Appellants Margin of 15%, then entire TP addition in respect of provision for security support will be deleted as the same falls within $\pm$ 5% benefit.

13. Further, Ld. AR submitted that if all Government companies being Tamil Nadu Ex-serviceman Corp.Ltd, Apitco Ltd, Rites Ltd, Vapi Waste and WAPCOS, are excluded from list of comparables following decision of Hon'ble Bombay HC in case of Thyssen Krupp Industries (Supra), the margin of comparable set would come to 16.16% as against assessee Margin of 15%, then entire TP addition in respect of provision for security support will be deleted as the same falls within 5% margin.

14. Ld. AR submitted that if the above ground is adjudicated, other grounds 1.1, 1.2, 1.4 and 1.5 becomes infructuous and hence be considered as academic in nature.

15. Ld. DR relied on the orders of the Authorities below.

16. Considered the rival submissions and material placed on record, we observe that the comparables selected by the TPO i.e., Rites Ltd, Vapi Waste and Wapcos are government owned entities and the companies are held to be functionally different to the assessee by the Coordinate Bench in the group concern of the assessee in Novartis Healthcare Pvt. Ltd., (supra). The relevant findings are as under: -

> *"8. It is settled proposition that while testing the international transaction of the assessee with the comparable uncontrol price, the margin of the transactions with the AE has to be taken into consideration and not the entity level margin of the assessee. The margin of the assessee from the international transaction is undisputedly 15% as charged by the assessee as cost + 15% marker from the AE. Accordingly, we direct the AO/TPO to compare the assessee's margin at segmental level and not at entity level. The assessee claimed that the segmental level margin is at 15.50%. The assessee has disputed only three comparables selected by the TPO and seeking exclusion of these three from the set of comparables of the TPO. We will discuss these three comparables as under:*
>
> *i)* ***Rites Ltd.*** *The Revenue has not disputed that Rites Ltd. is a government company established under the Ministry of Indian Railways and is providing the services in the field of architecture and planning, bridge and tunnel engineering, construction project, electrical engineering etc. to the government organizations and public section undertakings. The functions performed and carried out by Rites Ltd. are entirely different from the functions and services provided by the assessee to its AE. The assessee is providing the support service in the field of pharmaceutical and medical support service, therefore on the face of it, this company cannot be a*

functionally comparable with the assessee. An identical issue has come up before Delhi Benches of this Tribunal in the case of "Nortel Networks India Pvt. Ltd." (supra) wherein the Tribunal has observed in para 11 and 11.1 as under:

> *"11. We have heard the rival contentions and perused the material available on record. Apropos the issue of comparability and the exclusion of Choksi, Rites and WAPCOS, Delhi Tribunal in the cases of M/s MCI Com India P. Ltd. and M/s Verizon India P. Ltd. has held that companies like EIL, Rites, Wapsos and TCE are engineering companies which provide end to end solutions and therefore they cannot be compared with assessees who provide marketing support services to the parent company. They were held to be functionally not comparable with thee engineering companies.*
>
> *11.1. Following the orders of coordinate benches of ITAT in the cases of M/s MCI Com India P. Ltd.; M/s Verizon India P. Ltd. (supra); Estel in ITA no.584/Banglore/06 and our own decision in case of Actis Advisers Pvt. Ltd. ITA No. 6390/Del/2012, we hold that Choksi, Rites and WAPCOS being functionally different cannot be applied as appropriate comparable to the assessee. Therefore, they are to be excluded from TP adjustment while determining the ALP."*

A similar finding has been given by the Tribunal regarding the comparability of this company in the case of MCI Com India Pvt. Ltd. as well as M/s. Chemtex Global Engineers Pvt. Ltd. Thus, having regard to the nature of functions and activities performed by the Rites Ltd., we find that this company cannot be regarded as a good comparable for determining the arms length price in respect of the services rendered by the assessee to its AE.

ii) Vapi Waste & Effluent Mgmt. Co. Ltd.

This company is undisputedly is a non equity company as the capital is contributed by its members and Government of India. The major portion of the income of this comes from its members, therefore the price of this company cannot be treated as an

independent and uncontrol price when the majority of the Revenue is earned from the members who have contributed to the capital of the company. Even otherwise the business profile of the company is entirely different from the assessee as this company has been approved as special purpose vehicle by the government for road upgradation project under the infrastructure upgradation scheme. Apart from this, the company is providing a comprehensive environment and management programme for Vapi Industrial Estate. In case of "Actis Advisors Pvt. Ltd." (supra) Delhi Benches of this Tribunal have considered the functional comparability of this company in para 6.1 as under:

> *"6.1. Coming back to the issue of comparability the inclusion/ exclusion of Vapi and WAPCOS, the ITAT in the cases of M/s MCI Com India P. Ltd. and M/s Verizon India P. Ltd. (supra) has held that companies like EIL, Rites, Wapsos and TCE are engineering companies and provide end to end solutions and therefore they cannot be compared with those assessee who were into providing marketing support services to the parent company. They were held to be functionally not comparable with thee engineering companies. The case of Vapi also falls on the same footing. Therefore, respectfully following the order of the ITAT in the cases of M/s MCI Com India P. Ltd. and M/s Verizon India P. Ltd. (supra) and Estel in ITA no.584/Banglore/06 we are of the view that Vapi and WAPCOS are functionally not comparable to the assessee. Therefore, they are to be excluded. The issue of turn over does not arise in this case. In view of these facts, the matter will go back to the file of AO /TPO who will determine the T.P. adjustments by excluding Vapi and WAPCOS comparables. This ground of the assessee is accordingly allowed."*

Apart from the finding of Delhi Benches of this Tribunal in the case of "Actis Advisors Pvt. Ltd." (supra) the comparability of this company was also considered by the Tribunal in the case of "CISCO Systems (India) Pvt. Ltd." (supra) and found that this company cannot be considered as a good comparable. In view of the findings of this Tribunal as well as the nature of functions performed by this

company, we find that this company cannot be considered as a good comparable of the assessee. Accordingly, we direct the AO/TPO to exclude this company from the set of the comparables.

iii) WAPCOS Limited

We find from the record that this company provides consultancy in the domestic and international water and power sector. WAPCOS Limited is a government company with a Mini Ratna-I status and the primary function of the company is to provide consultancy in the field of water, power and infrastructure development for a total project solution. The comparability of this company was considered by Delhi benches of this Tribunal in the case of "Actis Advisors Pvt. Ltd." (supra) in para 6.1 already reproduced in the foregoing part of this order. Similarly, in case of "MCI Com India Pvt. Ltd." (supra) as well as in the case of "M/s. Chemtex Global Engineers Pvt. Ltd." (supra) the Tribunal found that this company is not functionally comparable with the service providing companies in the other fields. As it is apparent from the nature of functions and activities performed by this company that the functions of the company are not comparable with the services provided by the assessee to its AE. Accordingly, we direct the AO/TPO to exclude this company from the list of comparables for determination of the ALP.

As regards the objections of the Ld. D.R. that all other companies should also be rejected on the same criteria, it is pertinent to note that the DRP has not issued any direction of exclusion of the comparables selected by the TPO on the ground of functional non comparability, therefore we cannot go into the issue which has not been raised before us either by the assessee or by the department. Even otherwise the comparable selected by the TPO and confirmed by the DRP cannot be disputed by the department at this stage, therefore we do not propose to go into the issue of a functional comparability of the other companies which are not disputed by the assessee before us.

9. In view of the above observations and findings, we direct the TPO/AO to recompute/determine the arms length price after

exclusion of three companies as discussed above. The assessee has claimed that after the exclusion of these three companies the mean margin of the remaining comparables comes to 18.03% in comparison to the segmental level margin of the assessee at 15.50% which is in the tolerance range of + 5%, therefore it is claimed that no adjustment is called for. The TPO/AO is directed to consider this aspect at the time of recomputation of the arms length price.

17. Respectfully following the above said decision, we direct the TPO/Assessing Officer to recompute/determine the arms length price after exclusion of three companies as discussed in the above decision. The assessee has claimed that after the exclusion of these three companies the mean margin of the remaining comparables comes to 17.92% in comparison to the segmental level margin of the assessee at 15% which is in the tolerance range of $\pm$ 5%, therefore it is claimed that no adjustment is called for. The TPO/Assessing Officer is directed to consider this aspect at the time of recomputation of the arms length price. Accordingly, ground raised by the assessee is allowed for statistical purpose.

18. Coming to Ground No. 2 which is in respect of disallowance of depreciation claimed on assets vested to CIBA Specialty Chemicals (India) Ltd pursuant to Demerger for an amount of ₹.7,82,474. Ld. AR submitted that assessee had demerged its chemical division from itself and formed Ciba

Speciality Chemicals Limited ('Ciba') with effect from 1 April 1996 pursuant to the order of the Hon'ble Bombay High Court. The assets of the chemical division were transferred at book value to Ciba which issued shares to the shareholders of the assessee to preserve their wealth. The assets were retained in the block of assets under section 43(6)(c) of the Act, which provides for reduction of 'money's payable' in respect of sale, discardment or destruction only. The term 'money's payable' has been defined under section 41(4) to mean insurance, salvage, compensation monies and sale price in the event of sale. Ld. AR submitted that since in a scheme of demerger there is no sale transaction, there is an absence of 'money's payable' and therefore the assets were not reduced from the respective blocks. Further, in a scheme of demerger there is no insurance, salvage, compensation monies. Further, neither section 43 nor section 41 of the Act provide for inclusion of issue of shares on demerger as 'money's payable'. The Assessing Officer rejected the contentions of the Assessee on the grounds that issue of shares by Ciba to the Assessee’s shareholders are consideration for the transferred assets and proceeded to reduce the book value of the assets instead of written down value under the Act from the respective blocks.

19. In support of the above contention that Novartis India is eligible to claim depreciation on asset vested to CIBA Specialty pursuant to Demerger, Ld. AR relied on following case laws: -

- *ITAT order in Appellant's own case for AYS 1997-00 dated 25 January 2016.*
- *ITAT Order in own case for AY 2000-01 dated 7 July 2017 read with Third member ruling dated 27 September 2019.*
- *ITAT Order in own case for AY 2001-02 dated 30 April 2021.*

20. Ld.DR relied on the orders of the Authorities below.

21. Considered the rival submissions and material placed on record, we observed that similar issue was considered and adjudicated by the Coordinate Bench in assessee's own case for the Assessment Years 1997-98 to 2001-02. The Coordinate Bench in ITA.No. 3379/Mum/2009 dated 30.04.2021 for the A.Y. 2001-02 decided the issue in favour of the assessee, while holding so the Coordinate Bench held as under: -

> *"3.7 We find that this issue has been adjudicated in Tribunal's order for AY 2000-01, para nos. 22 to 24. In para-24, the bench observed that newly inserted explanation 2A by Finance Act, 1999 w.e.f. 01/04/2000 to Sec. 43(6) was not considered by the lower authorities and therefore the matter was restored to the file of Ld. AO for de-novo adjudication. However, the assessee sought rectification of the directions vide MA No.43/Mum/2018. The Ld. Judicial Member concurred with the submissions that Explanation 2A to Sec. 43(6) would not have any application to assessee's case for the year under consideration since demerger happened in previous year relevant to AY 1997-98 and in the current year, depreciation was to be allowed*

automatically on the opening written down value of the block as held by Tribunal in AYs 1997-98, 1998-99 & 1999-2000. However, the Learned Accountant Member, vide separate order, opined that the directions given in the order would not require any interference by the bench. Keeping in view the contrary views, reference was made u/s 255(4) to Hon'ble Vice President (third member) who vide para-13 of his order dated 09/08/2019, held that there exist mistake apparent from record which was to be rectified. Finally, following majority view, confirmatory order was passed by the bench on 27/09/2019. Thus, this issue has attained finality in assessee's favor in AY 2000-01 wherein it have been held that the assessee would be eligible to claim depreciation on opening WDV of block of assets and the explanation 2A to Sec.43(6) would have no application. The Ld. DR has submitted that the revenue has preferred further appeal in earlier years before Hon'ble Bombay High Court and the same is pending for adjudication. However, we find that, as of now, the issue is covered by earlier decisions of the Tribunal. Hence, respectfully following the consistent view of the Tribunal, we direct Ld. AO to allow depreciation on same methodology as given in AY 2000-01 pursuant to the directions of the Tribunal. Ground No.5 of assessee's appeal stand allowed whereas Ground No.1 of revenue's appeal stand dismissed.

22. We intended to follow the same, however, we considered reading the section 43(6) of the Act and observe that as per provisions contained in section 43(6)(c) with regard to block of assets, it says that in respect of any previous year relevant to the assessment year, the aggregate of the written down values of all assets falling within that block of assets at the beginning of the previous year and adjusted, --

(A) by the increase of the actual cost of assets falling within that block, acquired during the year.

(B) by the reduction of the moneys payable in respect of any asset falling within that block, which is sold or discarded or demolished or destroyed during that previous year together with the amount of the scrap value, if any, so, however, that the amount of such reduction does not exceed the written down value as so increased; and

(C) ……..

From the above provision, it is clear that every year the block of assets has to be adjusted in case if there are any changes in the composition of the assets within the block. This exercise has to be done every assessment year. In the given case, it is fact on record that the impugned assets are not in existence with the organization. The ITAT has come to the conclusion in A.Y.2000-01 interpreting the provisions as applicable at that point of time. In our view the assets in the block has to be evaluated every assessment year and as per provision 43(6)(C)(B), it clearly indicates that the value has to be reduced of the moneys payable in respective of any assets falling within that block which is sold/discarded/demolished or destroyed. In the given case, the block does not consist the assets, which are transferred in the demerger in the A.Y. 1997-98. However, these particular assets are not in existence in the beginning of the year and it can be considered as discarded in the provisions with "NIL" value. This issue needs to end some point of time. In that case, the value of the assets has to be written off this year and to be claimed as loss in the statement of income (instead of depreciation). Therefore, we are inclined to direct the Assessing Officer to treat the opening balance of the assets to the extent of assets, which was already transferred

to the demerged company as loss of assets or discarded. Accordingly, this ground of appeal filed by the assessee is partly allowed.

23. Coming to Ground No. 3 which is in respect of disallowance of expenditure on incurred on production of advertisement films ₹.86,77,930/-. Ld. AR submitted that assessee has incurred said expense on account of film making charges for transmission in electronic media and theaters for advertisement/ information of the company's products. Average life of a film print as certified by Adlabs Films Pvt. Ltd. is 1,500 screenings. Considering an average of 4 screenings per day of a film, the total number of screening in a year amounts to 1,460 screenings which nearly covers the print's entire life. Accordingly, the expense on production of advertisement films in not enduring in nature an allowable in the year in which it is incurred. The Assessing Officer rejected the Assessee's contentions and proceeded to disallow the claim by treating said expense as capital in nature on the premise that the Assessee receives enduring benefits and instead allowed depreciation @25% amounting to ₹.21,69,483/-.

24. Ld. AR relied on following case laws in support of his contention that expenditure incurred on production of advertisement film is to be allowed as revenue expenses: -

a) *Decision of Hon'ble Bombay High Court and ITAT in Assessee's own case for AY 1996-97.*

b) *ITAT orders in Appellant's own case for AYS 1991-1992 to 1996-97.*

c) *ITAT order in Appellant's own case for AYS 1997-00 to 1999-00 dated 25 January 2016.*

d) *ITAT Order in own case for AY 2000-01 dated 7 July 2017 read with Third member ruling dated 27 September 2019.*

e) *ITAT Order in own case for AY 2001-02 dated 30 April 2021;*

f) *Geoffrey Manners & Co Ltd (315 ITR 0134) (Bombay High Court); and*

g) *Proctor & Gamble Home Products Ltd (377 ITR 0066) (Bombay High Court)*

25. Ld. DR vehemently supported orders of the authorities below.

26. Considered the rival submissions and material placed on record, we have perused the Hon'ble Bombay High Court ruling in the case of Geoffrey manners & Co. (supra). We further observe that on identical issue Coordinate Bench decided the issue in favour of the assessee in assessee's own case for

the A.Y. 2001-02 in ITA.No. 3379/Mum/2009 dated 30.04.2021. For the sake of clarity, relevant ratio is reproduced below: -

> *"4.3 We find that this issue has been adjudicated in paras 26 & 27 of Tribunal's order for AY 2000-2001 order dated 07/07/2017. The bench, noting the decision of Hon'ble Bombay High Court in assessee's own case for AY 1997-98, decided this issue in assessee's favor. Facts being identical, respectfully following the consistent stand of Tribunal, we dismiss ground no.2 of revenue's appeal which makes ground no.1 of assessee's cross-objection as infructuous."*

27. On a careful reading of the above order of the Tribunal, we observe that Coordinate Bench decided the issue in favour of the assessee by following the decision of the Hon'ble Bombay High Court in the case of Geoffrey Manners & Co. Ltd. (supra). Since the issue is exactly similar and grounds as well as the facts are also identical, respectfully following the above decision in assessee's own case for the A.Y. 2001-02, we allow the ground raised by the assessee.

28. Coming to Ground No. 4 which is in respect of disallowance of expenditure incurred on computer software/license fees for an amount of ₹.46,92,440/-. Ld. AR submitted that the assessee incurs computer software packages/license fees on application software packages, implementation charges and upgradation of existing softwares. The softwares are frequently

outdated and are therefore frequently replaced. Ld. AR further submitted that the assessee has a policy of capitalizing expenses incurred on softwares related to hardwares whilst charging the costs incurred on application software to the Statement of Profit & Loss since they get frequently outdated and needs to be replaced. However, the Assessing Officer has rejected the treatment adopted by the Assessee and has assessed the expenditure incurred on computer software/ license fee to be capital in nature citing enduring benefits. Consequently, claim for expense has been disallowed whilst providing relief for depreciation on the same @60% is allowed at ₹.28,15,464/-.

29. In support of the contention that expenses incurred on Computer software and license fees is revenue expenses, Ld. AR relied on following case laws: -

(i). ITAT orders in Appellant's own case for AY 1991-1992;
(ii). ITAT orders in Appellant's own case for AYS 1995-97;
(i). ITAT order in Appellant's own case for AYS 1997-98 to 1999-00 dated 25 January 2016
(ii). ITAT Order in own case for AY 2000-01 dated 7 July 2017 read with Third member ruling dated 27 September 2019;
(iii). ITAT Order in own case for AY 2001-02 dated 30 April 2021;
(iv). CIT vs. Raychem RPG Ltd [2021] 21 taxmann.com 507 (Bombay)

(v). Amway India Enterprises (114 TTJ 476) (SB) affirmed by Hon'ble Delhi HC (ITA Nos. 1344 & 1363/09) dated 15 February 2008; and

(vi). Asashi India Safety Glass Limited (ITA Nos. 1110 & 1111/2006) dated 04 November 2011 (Delhi HC)

30. Ld. AR submitted that in view of the various orders of ITAT in assessee's own case, expenditure on incurred on computer software/ license fees ought to be allowed as revenue expenses.

31. Ld.DR vehemently supported the orders of the authorities below.

32. Considered the rival submissions and material placed on record, we have perused the various case laws relied on by the assessee. We further observe that on identical issue Coordinate Bench decided the issue in favour of the assessee in assessee's own case for the A.Y. 2001-02 in ITA.No. 3379/Mum/2009 dated 30.04.2021. For the sake of clarity, relevant ratio is reproduced below: -

"8.1 The assessee incurred an amount of Rs.27.31 Lacs towards purchase of various computer software packages as detailed in the assessment order. Majority of the expenses consisted of license fee or use of Microsoft packages (excel sheet, word document, power point presentation etc.) and Oracle software for developing accounting software at C & F locations. The assessee submitted that software expenses were for software packages which get frequently outdated and have to be replaced and therefore, the expenditure was revenue in nature. The assessee further stated that operating

software is treated as capital expenditure whereas application software which gets outdated early, is revenue in nature. However, following the stand taken in AYs 1995-96 to 2000-01, the expenditure was said to be enduring in nature and thus capital expenditure. Accordingly, depreciation of 25% was allowed against the same. The action of Ld. AO resulted into an addition of Rs.20.48 Lacs. Consequently, similar depreciation of earlier years for Rs.18.98 Lacs was allowed to the assessee disregarding the depreciation on assets pertaining to demerged division.

8.2 The Ld. CIT(A) noted that the payments were in the nature of license fees or for right to use certain packages which have normally longer periods of life, usage and validity and therefore, the benefits would be enduring in nature. Accordingly, the action of Ld. AO was upheld. Aggrieved, the assessee is in further appeal before us.

8.3. We find that this issue has been adjudicated in Tribunal's order for AY 2000-01, para nos.2 to 5. The bench, following earlier years, held that the expenditure was revenue in nature. Upon perusal, we find that this ground is covered in assessee's favor in several earlier years and the department has accepted the ruling of the Tribunal in those years and has not preferred further appeal, on this issue. This being the case, we direct Ld. AO to allow the expenditure fully and reverse the depreciation adjustment thus made in the assessment order. Ground No.1(a) of assessee's appeal stands allowed whereas Ground No.1(b) has been rendered infructuous."

33. On a careful reading of the above order of the Tribunal, we observe that Coordinate Bench decided the issue in favour of the assessee by following earlier orders of the Tribunal in assessee's own case. Since the issue is exactly similar and grounds as well as the facts are also identical, respectfully following the above decision in assessee's own case for the A.Y. 2001-02 and

also following consistent stand of the Tribunal, we allow the ground raised by the assessee.

34. Coming to Ground No. 5 which is in respect of addition of secondary freight to the closing stock for an amount of ₹.4,36,772/-. Ld. AR submitted that the assessee consistently values the closing inventories of its finished goods without secondary freight which is in the nature of distribution expenses and charged-off in the year in which it is incurred. Secondary freight on the closing stock of Financial Year (FY) 2007-08 is ₹.42,32,548. However, the Assessing Officer has taken a contrary position for previous years and added the expense to the closing stock. Ld. AR submitted that the same position has been followed for the captioned AY wherein the Assessing Officer has made additions net of secondary freight on opening stock of ₹.37,95,776/-. In support of the assessee's contention that freight expenses should be allowed as revenue expenses and not form part of valuation of closing stock, Ld. AR relied on various orders of ITAT in assessee's own case for the Assessment Years 1997-98 to 2001-02.

35. Ld.DR vehemently supported the orders of the authorities below.

36. Considered the rival submissions and material placed on record, we have perused various orders of the Coordinate Bench in assessee's own case for the Assessment Years 1992-93 to 2001-02. We further observe that on identical issue Coordinate Bench decided the issue in favour of the assessee in assessee's own case for the A.Y. 2001-02 in ITA.No. 3379/Mum/2009 dated 30.04.2021. For the sake of clarity, relevant ratio is reproduced below: -

> *"5.3 We find that this issue is squarely covered in assessee's favor by the various decisions of Tribunal right from AYs 1992-93 to AY 2000-01. The Ld. CIT(A) has also followed the appellate orders of earlier years. Therefore, this adjudication in the impugned order, on this issue, would not require any interference on our part. Ground No.3 of revenue's appeal stand dismissed which render ground no.2 of assessee's cross objections infructuous."*

37. On a careful reading of the above order of the Tribunal, we observe that Coordinate Bench decided the issue in favour of the assessee by following various orders of the Tribunal in assessee's own case from the A.Ys. 1992-93 to 2000-01. Since the issue is exactly similar and grounds as well as the facts are also identical, respectfully following the above decision in assessee's own case for the A.Y. 2001-02 and also following consistent stand of the Tribunal, we allow the ground raised by the assessee.

38. Coming to Ground No. 6 of grounds of appeal which is in respect of Adhoc disallowance of 25% of foreign travel expenses for an amount of ₹.51,61,020/-. Ld. AR submitted that foreign travel expenses incurred inter-alia include air fare and lodging/ boarding expenses in relation to foreign visits by the Assessee's employees in course of its business. However, since AY 1993-94 and onwards, 25% of said expenses have been disallowed by the Assessing Officer during the assessment proceedings on the ground that the assessee is unable to prove that the time and energy spent by the directors and employees was devoted wholly and exclusively to its business and not in connection with the business of the parent company or the foreign shareholders. The same position has been followed for the captioned AY wherein the Assessing Officer has disallowed 25% of the foreign travel expenses.

39. In support of the assessee's contention that foreign travel expenses incurred for purpose of business and hence, allowed as revenue expenses, Ld. AR relied on various orders of ITAT in assessee's own case for the Assessment Years 1997-98 to 2001-02.

40. Ld.DR vehemently supported the orders of the authorities below.

41. Considered the rival submissions and material placed on record, we have perused various orders of the Coordinate Bench in assessee's own case for the Assessment Years 1996-97 to 2001-02. We further observe that on identical issue Coordinate Bench decided the issue in favour of the assessee in assessee's own case for the A.Y. 2000-01 in ITA.No. 6226/Mum/2004 dated 07.07.2017. For the sake of clarity, relevant ratio is reproduced below: -

> *"6. The next issue in this appeal of assessee in ITA No. 6226/Mum/2014 for AY 2000-01 is as regards to the order of CIT(A) confirming the action of the AO and disallowing the expenses of foreign travel. For this assessee has raised following ground No. 2: -*
>
> > *"Ground No. 2*
> >
> > *a. The CIT(A) erred in disallowing Rs.41,14,400/- being 20% of total foreign traveling expenses.*
> >
> > *b. Without prejudice to above, the appellants submit that in case foreign travel expenses are held as capital in nature, depreciation should be allowed on such expenditure."*
>
> *7. At the outset, the learned Counsel for the assessee took us through the Para 9 of the assessment order which reads as under: -*
>
> > *"9. The assessee has claimed foreign travelling expenses as part of its total travelling expenditure. In the assessment orders for A.Y 93-94 onwards, 25% of foreign Travelling expenses incurred by the assessee have been disallowed on the ground that the assessee has not proved that the time and energy spent by the Directors and executives on the foreign tour was devoted wholly and exclusively for assessee's business and not in connection with the business of the parent foreign company or the foreign shareholders. In A.Y 91-92, 94-95 & 95-96 addition on the above issue was also confirmed by the CIT(A) at 20% of the total foreign tour expenses. Considering the above, and on the facts for this year. 25% of foreign travel expense claimed at*

Rs.2,05,72,000/- as per assessee's letter dated 17.1202 being Rs.51,43,000/- is disallowed."

8. In view of the above, the learned Counsel for the assessee stated that first of all foreign travelling expenses were disallowed on adhoc basis at 25% of the expenses and secondly this being a historic issue, the Revenue is disallowing it from 1991-92 to 1999-2000 as admitted by the AO and Tribunal consistently allowed this issue in favour of assessee in all the yeas and Revenue has not preferred the appeal before Hon'ble High Court against the same. This fact was admitted by the learned Sr. DR. The assessee has also filed details of foreign travelling expenses. In one of the year, the Tribunal in AY 1995-96 in ITA No. 498/Mum/2003 allowed the claim of the assessee by Para 37 of its order which reads as under: -

"37. Ground no. 7 relates to disallowance of Rs.23,18,653/- being 20% of foreign travelling expenses. Both parties agreed that identical issue has been decided by the Tribunal in assessee's own case in A.Y. 1991-92, 1992-93 & 1993-94. We have carefully considered the order of the Tribunal for A.Y. 1993- 94 in ITA No. 334/Mum/1997. We find that a similar issue has been decided by the Tribunal while deciding ground no. 5 of that appeal at para 26 of its order. We find that the Tribunal has given finding at para 31 on page 10 of its order, wherein it has followed the decision of the Tribunal in assessee's own case for A.Y. 1991-92 and 1992- 93 and deleted the additions sustained by the CIT(A) the facts being identical. We have no hesitation in following the findings of the Tribunal in assessee's own case (Supra) disallowance sustained by the CIT(A) are deleted. This ground is accordingly allowed. Alternative plea raised by the assessee is dismissed."

9. After hearing both the sides and going through the facts of the case, we are of the view that the issue is fully covered up in favour of assessee and against the Revenue. Respectfully following the Tribunal's decision in assessee's own case in earlier years, we allow the claim of the assessee."

42. On a careful reading of the above order of the Tribunal, we find that this issue is squarely covered in assessee's favor by the various decisions of

Tribunal right from AYs 1996-97 to AY 2000-01. Since the issue is exactly similar and grounds as well as the facts are also identical, respectfully following the above decision in assessee's own case for the A.Y. 2000-01, we allow the ground raised by the assessee.

43. Coming to Ground No. 7 which is in respect of disallowance of hotel and air fare expenses of foreign visitors for an amount of ₹.3,91,564/-. Ld. AR submitted that the assessee receives foreign visitors coming to India for attending board meetings, management specialists, etc. These personnel are either from group companies or are third parties who come to India in order to conduct discussions on the company's business, finance, technical matters, etc. However, since AY 1995-96 and onwards, said expenses have been disallowed by the Assessing Officer during the assessment proceedings on the grounds that such visits are in connection to the business of the parent company and not the Assessee's. The same position has been followed for the captioned assessment year wherein the Assessing Officer has disallowed the hotel and air fare expenses of foreign visitors.

44. In support of the assessee contention that expenses on Foreign visitors is incurred for purpose of business and hence, allowed as revenue expenses,

Ld. AR relied on various orders of ITAT in assessee's own case for the Assessment Years 1997-98 to 2001-02.

45. Ld. DR vehemently supported the orders of the authorities below.

46. Considered the rival submissions and material placed on record, we have perused various orders of the Coordinate Bench in assessee's own case for the Assessment Years 1992-93 to 2001-02. We further observe that on identical issue Coordinate Bench decided the issue in favour of the assessee in assessee's own case for the A.Y. 2000-01 in ITA.No. 6226/Mum/2004 dated 07.07.2017. For the sake of clarity, relevant ratio is reproduced below: -

> *"10. The next issue in this appeal in ITA No. 6226/Mum/2004 for AY 2000-01 is as regards to the expenses disallowed by AO and confirmed by CIT(A) of foreign visitors. For this assessee has raised following ground No.3: -*
>
> > *"The CIT(A) erred in upholding the disallowance of Hotel and airfare expenses incurred on foreign visitors to India amounting to Rs.1,54,201/- on the ground that these expenses were not for the purpose of the business."*
>
> *11. At the outset, the learned Counsel for the assessee took us through the assessment order Para 10, whereby foreign visitors traveling expenses and other expenses were disallowed by observing as under: -*
>
> > *"10. Expenditure on foreign visitors has been claimed at Rs. 1,54,201/- on account of travel and other expenses. It is submitted by the assessee vide letter dated. 31 01 .2003, that the foreign visitors are worldwide Functional specialist in Pharmaceuticals, Agrochemicals, formulations,*

marketing, financial operations, information and technology, members of the Board etc. They are senior and experienced personnel coming to India to impart training and conduct discussions on company's business, finance and marketing strategies, Technical matters, solutions of computer related problems etc. The assessee has claimed that these expenses have been incurred wholly and exclusively for the purposes of company's business. However, the assessee has not been able to furnish any evidence whatsoever in support of its above claim. In the assessment orders for A.Y. 1995-96, 1996- 97;1997-98, 1998-99 and 99-2000 the expenditure on foreign visitors was held to be on account of the business of the parent foreign company M/s. Ciba Geigy, Basle / M/s Novartis AG Baste. However, since the facts for this year are similar to that of earlier years, in view of the fact that the assessee has not proved that the expenses were wholly and exclusively for the purpose of its business and considering the reasons recorded in earlier assessment years, the total amount of Rs.1,54,201/- is disallowed as being non-business expenditure."

12. The learned Counsel for the assesse, in view of the above observation of the AO argued that this being a historic issue, the revenue is consistently disallowing this expense from AYs 1995-96 to 1999-2000 and the Tribunal allowed the claim of foreign visitors expenses consistently in all these years and he similarly referred to the order of Tribunal in ITA No.498/Mum/2003 whereby vide Para 40 & 41 of the Tribunal's order the issue was allowed as under: -

"40. Ground no. 9 relates to the disallowance of total air fare expenses incurred on foreign visitors, this issue has been discussed by the AO at page 36 vide para 17 of his order. The AO has followed the findings of A.Y. 1994-95 and disallowed the entire expenditure incurred on foreign visitors. When this addition was challenged before the CIT(A), the CIT(A) considered the grievance of the assessee at para 17 of page 36 of its order. The CIT(A) was convinced with the expenditure on travelling of foreign directors and directed the AO to allow this expenditure of Rs.5,56,647/-. However, for the remaining amount, the CIT(A) observed that the assessee has failed to establish the business relevance of the expenditure and confirmed the balance.

> *41. Aggrieved by this finding, assessee is before us. Counsel for the assessee submitted that in earlier year i.e. A.Y. 1992-93 and 1993-94 similar disallowances have been considered by the Tribunal and counsel requested that the findings may be followed for the year under consideration. The ld. DR fairly conceded to this submission. We have carefully perused the order of the Tribunal for A.Y. 1993-94 in ITA No.334/Mum/1997. We find that identical issue has been considered by the Tribunal at para 38 of page 12 of its order. We find that the Tribunal has given its finding on para 43 of page 13 of its order wherein the Tribunal has followed the findings in assessee's own case for A.Y. 1992-93 and allowed the claim of the expenses. Facts being identical, we have no hesitation in following the findings of the Tribunal in assessee's own case given in earlier orders. We accordingly direct the AO to delete the addition of Rs.11,37,257/-. Ground no. 9 is allowed."*
>
> *13. The learned Sr. DR fairly conceded the position. After hearing both the sides and going through the facts of the case, we find that the issue is squarely covered in favour of assessee and against the Revenue and assessee has also filed details of foreign visitors before us. Keeping in view the facts and circumstances, we delete the disallowance and allow this issue of assessee's appeal."*

47. On a careful reading of the above order of the Tribunal, we find that this issue is squarely covered in assessee's favor by the various decisions of Tribunal right from AYs 1996-97 to AY 2000-01. Since the issue is exactly similar and grounds as well as the facts are also identical, respectfully following the above decision in assessee's own case for the A.Y. 2000-01, we allow the ground raised by the assessee.

48. Coming to Ground No. 8 of grounds of appeal which is in respect of disallowance of incremental liability on account of pension payable under the erstwhile Voluntary Retirement Scheme of FY 1992-93. (Disallowance: Rs.22,17,950 and Relief: Rs. 1,94,75,828). Ld. AR submitted that during the captioned assessment year, the assessee has claimed incremental VRS pension liability of ₹.22,17,950 in connection with its Bhandup unit. Payments made in relation to the VRS Scheme during the captioned AY amounted to Rs.2,92,95,739. The claim of the assessee is being disallowed by the Assessing Officer during the assessment proceedings since A.Y. 1993-94 onwards on the ground of it being an unascertained contingent liability. The same position has been followed for the captioned assessment year wherein the Assessing Officer has disallowed the Assessee's claim for incremental VRS pension liability. The Assessing Officer has further made reference to the provisions of section 35DDA of the Act, introduced with effect from 1st April 2001, and observed that claim for expense is possible only in case of payment under a VRS Scheme and not at the time of creation of a provision. The Assessee's argument that the provisions of section 35DDA of the Act are applicable only to VRS Schemes instituted after 1 April 2001 has also been rejected by the Assessing Officer. However, the Assessing Officer has allowed

claim of ₹.1,94,75,823 being 1/5th of the payments made under the VRS Scheme during A.Ys.2006-07, 2007-08 and the captioned assessment year.

49. Ld. AR further submitted that the assessee allowing claim of the entire incremental VRS pension liability in the captioned AY instead of amortizing payments made during the captioned AY over 5 years would not be prejudicial to the interest of the Revenue. This is because the tax rate applicable to domestic companies and cess rates remain unchanged @30% and 3% respectively over AYS 2008-09 to 2012 13 whereas the surcharge has reduced from 10% to 7.5% (AY 2011-12) and then 5% (AY 2012-13).

50. In support of the assessee contention that incremental VRS provision made on actuarial basis is allowable as revenue expenses, Ld. AR relied on various orders of ITAT in assessee's own case for the A.Ys. 1997-98 to 2001-02. Ld. AR further relies on following precedents in support of its contention that allowing claim of the entire incremental VRS pension liability in the captioned AY instead of amortizing payments made during the captioned AY over 5 years would not be prejudicial to the interest of the Revenue: -

(i). Excel Industries Limited (358 ITR 295) (Supreme Court);
(ii). Nagri Mills Ltd (33 ITR 681) (Bombay High Court); and

(iii). Vishnu Industrial Gases P. Ltd. (Delhi High Court) (ITR No 229/1988) dated 6 May 2008

51. Ld. AR further submitted that incremental liability on account of pension under VRS should be allowed as revenue expenses in view of ITAT order for previous years. Further, the action of disallowing the same and allowing the actual payment in subsequent year, is revenue-neutral (on account of fact that tax rates are common), accordingly prayed that disallowance in one year and allowing the same in next year will have no tax impact and hence, no addition on account of the same is warranted.

52. Ld.DR vehemently supported the orders of the authorities below.

53. Considered the rival submissions and material placed on record, we have perused various orders of the Coordinate Bench in assessee's own case for the Assessment Years 1993-94 to 2001-02 and also other case laws relied on by the assessee. We further observe that on identical issue Coordinate Bench decided the issue in favour of the assessee in assessee's own case for the A.Y. 2001-02 in ITA.No. 3379/Mum/2009 dated 30.04.2021. For the sake of clarity, relevant ratio is reproduced below: -

"6.1 The assessee claimed an amount of Rs.253.73 Lacs towards incremental VRS (Voluntary Retirement Scheme) for Bhandup unit

which was on the basis of actuarial valuation. As held in earlier years, the liability was a contingent liability. Similar disallowance made in AY 199394 was confirmed by Ld. CIT(A). Similar disallowance was in assessment order for AYs 1994-95 to 2000-01. However, actual payment of VRS payment made during relevant year was to be allowed. In this year, assessee made payment of Rs.417.76 Lacs which was to be allowed whereas the claim of Rs.253.72 Lacs as per actuarial valuation was to be disallowed. The said adjustment resulted into net relief of Rs.164.04 Lacs to the assessee.

6.2 The Ld. CIT(A) noted that in appellate order for AYs 1998-99 to 2000-01, Ld.AO was directed to allow the deduction of incremental liability of VRS and also allow that part of actual payment made during the year relating to the provision created during financial year 1992-93 but disallowed in AY 1993-94. Similar directions were given by Ld. CIT(A) for this year, against which revenue is in further appeal before us.

6.3. We find that this issue has been adjudicated in Tribunal's order for AY 2000-01, para nos.31 to 34. In concluding para-34, the bench restored the issue to the file of Ld. AO for re-adjudication as per directions given in Tribunal order for AY 1995-96. The assessee sought rectification of the directions vide MA No.50/Mum/2018. The Learned Judicial Member concurred with the submissions that Tribunal order for AY 1995-96 stood amended by MA order dated 27/02/2015 wherein deduction was allowed to the assessee. Accordingly, applying the amended order, the deduction would be allowable to the assessee. However, the Learned Accountant Member, vide separate order, opined that the issue was to be recalled and placed before regular bench for fresh adjudication. Keeping in view the contrary views, a reference was made u/s 255(4) to Hon'ble Vice President (third member) who concurred with the view of Hon'ble Judicial Member. Finally, following majority view, confirmatory order was passed by the bench on 27/09/2019 allowing assessee's miscellaneous application. Thus, this issue has already attained finality in assessee's favor in AY 2000-01 wherein the bench has upheld the stand of Ld. CIT(A). Respectfully following the same, we confirm the impugned order, on this issue. Ground No.4 of revenue's appeal stand dismissed which renders ground no.3 of assessee's cross-objection infructuous. The assessee's cross objection stands dismissed as infructuous."

54. On a careful reading of the above order of the Tribunal, we have perused various orders of the Coordinate Bench in assessee's own case for the Assessment Years 1993-94 to 2001-02. Since the issue is exactly similar and grounds as well as the facts are also identical, respectfully following the above decision in assessee's own case for the A.Y. 2001-02 and also following consistent stand of the Tribunal, we allow the ground raised by the assessee.

55. Coming to Ground No. 9 which is in respect of adjustment of excess and short year-end provision, Ld. AR submitted that the assessee makes provisions in its books of accounts based on various services/benefits received by it. Thus, in reality there is no excess provision except for the normal under or over accrual. During the AY 2007-08, total provisions of ₹.21,88,24,077 have been created for expenses which inter-alia include employee related payables, Central Sales Tax/ VAT expenses, Annual Awards Function, etc. Payments against the provisions during the captioned AY amount to INR 18,76,66,388. From the balance, excess provision for Central Sales Tax/ VAT expenses, provident fund contribution and bonus amounting to ₹.1,51,22,225 have been suo-moto disallowed by the assessee. The remaining excess provision of ₹.1,60,35.464 (representing meager 7.33% of the total

provisions) has been disallowed by the Assessing Officer during the assessment proceedings. Further, the Assessing Officer has allowed relief of ₹.2,39,05,469 being excess provision disallowed in AY 2007-08 reversed in the captioned AY and made further disallowance of ₹.48,269 being short provision of AY 2007-08 paid in the captioned AY but allowed in AY 2007-08. The Assessing Officer has failed to appreciate that the adjustments made in relation to the year-end provision are tax neutral since disallowance/ allowance for year 1 is allowed/ disallowed in year 2.

56. In support of contention that provisions on best estimate should be allowed as deduction Ld. AR relied on following case laws: -

(i). Rotork Controls India (P) Limited (314 ITR 62)(SC)
(ii). JCIT vs ITC LTD (112 ITD 57) (KOL SB)
(iii). Bharat Earth Movers vs CIT (245 ITR 428)(SC)

57. Further, relying on following case laws, Ld.AR submitted that the disallowance of excess and short year end provisions is revenue-neutral accordingly, no addition on account of the same is warranted.

(i). Excel Industries Limited (358 ITR 295) (Supreme Court);
(ii). Nagri Mills Ltd (33 ITR 681) (Bombay High Court); and
(iii). Vishnu Industrial Gases P. Ltd. (Delhi High Court) (ITR No 229/1988)

58. Ld. AR submitted that Provisions made on best estimate basis should allowed as deduction for the year under consideration and further, the disallowance of excess and short year end provisions in current year and allowing the same in subsequent year, is revenue-neutral (on account of fact that tax rates are common), accordingly disallowance same in one year and allowing the same in next year will have no tax impact and hence, no addition on account of the same is warranted.

59. Ld. DR vehemently supported the orders of the authorities below.

60. Considered the rival submissions and material placed on record, we observe that there are two types of provisions accounted at the year end, first is the related expenses for the year under consideration without ascertaining the portion/head of expenses or the actual value. In the second type of provisions, the portion/head of expenses are ascertained but the actual value of the expenses are estimated. The assessee regularly follows the procedure of creating provisions and suomoto disallows the expenditure which are excessive in the next assessment year. The historical data shows that the assessee makes the adjustment every year which are in the range of 7-8% and it consistently follows the same and if there is short, it accounts

the same in the with next assessment year. It will have tax neutral effect considering the fact that the same rate of tax are applicable. We observe that in the case of Rotork Controls India (P) Limited (supra), the Hon'ble Supreme Court held as under:-

> *"Held, reversing the decision of the High Court, that the valve actuators, manufactured by the assessee, were sophisticated goods and statistical data indicated that every year some of these were found defective: that valve actuator being a sophisticated item no customer was prepared to buy a valve actuator without a warranty. Therefore, the warranty became an integral part of the sale price; in other words, the warranty stood attached to the sale price of the product. In this case the warranty provisions had to be recognized because the assessee had a present obligation as a result of past events result ing in an outflow of resources and a reliable estimate could be made of the amount of the obligation. Therefore, the assessee had incurred a liability during the assessment year which was entitled to deduction under section 37 of the Income-tax Act, 1961.*
>
> *The present value of a contingent liability, like the warranty expense, if properly ascertained and discounted on accrual basis can be an item of deduction under section 37. The principle of estimation of the contingent liability is not the normal rule. It would depend on the nature of the business, the nature of sales, the nature of the product manufactured and sold and the scientific method of accounting adopted by the assessee. It would also depend upon the historical trend and upon the number of articles produced.*
>
> *A provision is a liability which can be measured only by using a substantial degree of estimation. A provision is recognized when: (a) an enterprise has a present obligation as a result of a past event; (b) it is probable that an outflow of resources will be required to settle the obligation, and (c) a reliable estimate can be made of the amount of the obligation. If these conditions are not met, no provision can be recognized.*

The principle is that if the historical trend indicates that a large number of sophisticated goods were being manufactured in the past and the facts show that defects existed in some of the items manufactured and sold, then provision made for warranty in respect of such sophisticated goods would be entitled to deduction from the gross receipts under section 37."

61. Respectfully following the above said decision of the Hon'ble Supreme Court, the ground raised by the assessee is allowed.

62. Coming to Ground No. 10 of grounds of appeal which is in respect of disallowance under section 14A read with rule 8D- of I.T. Rules for an amount of ₹.6,43,513/-. Ld. AR submitted that during the captioned AY, the assessee has earned dividend income [exempt under section 10(33) of the Act] amounting to ₹.84.13,754/- and interest from securities [exempt under section 10(35) of the Act] amounting to ₹.25,21,501/-. There are no specific expenses or efforts involved in earning the exempt income. Either cheques are received and deposited into the bank by the treasury department or are the incomes are directly credited into the bank account. Accordingly, the Assessee has computed a sum of ₹.1,21,445 as attributable towards earning exempt income and disallowed the same under section 14A of the Act in the computation of income. The disallowance has been computed on the basis of estimated time incurred by the treasury department towards investment

decisions and its ancillary and subsidiary activities. However, the Assessing Officer has rejected the methodology adopted by the Assessee and proceeded to compute the disallowance after invoking rule 8D but without recording satisfactory reasons establishing the incorrectness of its suo-moto disallowance.

63. Ld.AR contended that disallowance u/s 14A cannot be made where no satisfaction has been recorded by the Assessing Officer as to the incorrectness of the claim of the Assessee that no expenditure has been incurred for earning exempt income and he relied on following case laws for the above contention:

(i). Maxopp Investment Limited (402 ITR 640) (SC);
(ii). Godrej & Boyce Manufacturing Company Ltd. (394 ITR 449) (SC);
(iii). Reliance Capital Asset Management Ltd. (ITA No 487 of 2015) (dated 19 September 2017) (Bombay HC) affirmed by SC (98 Taxmann.com 361 (SC);
(iv). Sociedade De Fomento Industrial (P.) Ltd. (ITA No 34 of 2014);
(v). Bombay Stock Exchange Ltd. (ITA No 1017 of 2017) (Bombay HC);
(vi). Tata Industries Limited (ITA 67, 68, 278 and 299/Mum/2018) (Mumbai Tribunal)

64. Ld. AR further submitted that no additional disallowance under section 14A is warranted, since, Assessing Officer has failed to record satisfaction for making disallowance under section 14A of the Act.

65. Ld.DR vehemently supported the orders of the authorities below.

66. Considered the rival submissions and material placed on record, we observe that Ld. AR submitted that Assessing Officer has not recorded satisfaction even though assessee has suomoto disallowed certain expenditure. However, we observe from the Assessment Order that Assessing Officer has clearly considered the submissions of the assessee relating to the 14A and observed as under: -

> *"11.3 However, this contention of the assessee cannot be accepted. Firstly, the assessee has a large investment portfolio of Rs.22 Crore as on 31.03.2008, consisting of shares/Units of various companies/Mutual Funds and Government securities as per Schedule 6 to the Balance Sheet containing details of investments. For managing such a large investment portfolio and taking care of return thereon, certain managerial and administrative time and expenditure has to be spent by the assessee. It may be appreciated that even single individual having a few deposits of varied terms and interest rates feels helpless by the task of deciding where to invest and then keeping a tab on has entitlements and correspondingly receipts for the above investments. It cannot be the case of the assessee that it chose to make diverse investments in various companies without there being any strategy, policy decision and involvement of expert professional well equipped with logistics support behind it. Therefore, it cannot be accepted that expenditure of merely Rs.121445/- as submitted by the assessee, is attributable to the activity of earning income which is exempt from tax.*
>
> *11.4 Secondly, it is to be noted that investment in shares/Units of various companies/Mutual Funds and Govt. Securities and receipt of dividend thereon, does not form part of assessee's main business of manufacturing & trading of pharmaceutical products. The same is an*

entirely separate line of business, the income of which falls under the head of "income from other sources". In fact the assessee's business manufacturing pharmaceutical products has nothing to do with the above activity of investment in shares of other companies & Govt. Securities. The assessee, therefore, cannot be said to be carrying on an indivisible business. Rather, the business of pharmaceuticals and that of investment in share/ securities are separate and severable ventures having no relationship with each other. As such, as held by the apex court in Rajasthan State Warehousing Corporation Vs. CIT (2000) 1242 ITR 451], the principle of apportionment of expenditure will apply. Moreover section 14A introduced with retrospective effect specifically provides that the expenditure incurred on earning exempt income is not allowable."

67. Assessing Officer has clearly discussed the issue relating to 14A disallowance and discussed specifically why he has imposed 14A in this case. There is no specific format for recording satisfaction. However, the Hon'ble Supreme Court in the case of Mak Data P. Ltd., *v.* CIT [(2013) 358 ITR 593 (SC)] held that Assessing Officer is not required to record his satisfaction in a particular manner or reduce it with writing (even though on the issue of section 271(1)(c) of the Act). In our considered view, as per the Assessment Order, the reasons recorded by the Assessing Officer in Para No. 11.3 and 11.4 for invoking Rule 8D are proper satisfaction and the cases relied by the assessee are distinguishable. Accordingly, this ground is dismissed.

68. Coming to Ground No. 11 of grounds of appeal which is in respect of addition of unutilized CENVAT credit to the closing stock u/s. 145A of the Act for an amount of ₹.1,16,67,603/-. At the time of hearing, Ld.AR submitted that this ground is not pressed. In view of the submissions of the Ld. AR, this ground is dismissed as not pressed.

69. Coming to Ground No. 12 of grounds of appeal which is in respect of short grant of TDS Credit, Ld.AR submitted that assessee has filed rectification application under section 154 of the Act dated 8 November 2012 [against the assessment order under section 143(3) read with section 144C(13) of the Act] and 1 April 2020 [against intimation under section 143(1) of the Act]. Ld. AR prayed that Assessing Officer be directed to allow the TDS credit after due verification.

70. Ld. DR fairly agreed that issue may be restored back to Assessing Officer for verification.

71. Considered the rival submissions and material placed on record, we observe that Assessing Officer has completed Assessment under section 143(3) r.w.s 144C(13) of the Act. Therefore, certain informations were not

available with him at the time of completion of the final Assessment Order. However, assessee has filed rectification application u/s. 154 of the Act and it is the duty imposed on the Assessing Officer to complete the rectification process within six months. Even otherwise the Assessing Officer should have intimated the same. Therefore, we are inclined to remit this issue back to the file of the Assessing Officer to verify the claim of the assessee as per the Act after giving them a proper opportunity of being heard and we direct the Assessing Officer to complete the rectification within one month on receipt of this order. Accordingly, ground raised by the assessee is allowed for statistical purpose.

72. Coming to Ground No. 13,14 and 15 of grounds of appeal, Ld. AR of the assessee submitted that these grounds are consequential in nature and need not be adjudicated. In view of the submission of the assessee these grounds are not adjudicated and kept open.

73. Coming to additional ground of appeal raised by the assessee which is in respect of deduction of education cess and higher education cess paid on income tax for the year, Ld. AR of the assessee submitted that the assessee would like to withdraw this additional ground. In view of the submissions of

the Ld. AR as assessee withdrawn this ground. Hence, this ground is dismissed as withdrawn.

74. In the result, appeal filed by the assessee is partly allowed as stated above.

Order pronounced in the open court on 28th September, 2022.

Sd/-	Sd/-
(AMIT SHUKLA)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai / Dated 28/09/2022
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum