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IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI RAHUL CHAUDHARY (JUDICIAL MEMBER)

ITA No. 2320/MUM/2016
Assessment Year: 2010-11
&
ITA No. 803/MUM/2017
Assessment Year: 2011-12

ACIT-3(1)(2), Room No. 607, 6th floor, Aayakar Bhavan, Mumbai-400020. **Appellant**	**Vs.**	Hikal Ltd., 717/718, Maker Chambers V, Nariman Point, Mumbai-400021. **PAN No. AAACH 0383 A** **Respondent**

Revenue by	:	Mr. Sanjay Vishwas Rao Deshmukh, CIT-DR/ Mr. R.N. D'Souza, DR
Assessee by	:	Mr. Sanjay Parikh, AR
Date of Hearing	:	02/11/2022
Date of pronouncement	:	28/12/2022

ORDER

PER OM PRAKASH KANT, AM

These two appeals by the Revenue have been preferred against the order dated 25/01/2016 and 14/10/2016 passed by the Ld. Commissioner of Income Tax (Appeals) –8, Mumbai [in short, the Ld. CIT(A)] for A.Y. 2010-11 and 2011-12. As identical issues are

raised in these appeals, therefore same were heard together and disposed off by way of this common order for convenience and avoid repetition of facts.

2. First, we take up the appeal of Revenue in ITA No. 2320/Mum/2016 for assessment year 2010-11. The grounds raised in the appeal are reproduced as under :

> **On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance u/s14A of the IT Act at Rs.86,60,051/- made by the AO in the normal computation of income and us 115JB of the IT. Act without appreciating the fact that the assessee has neither established that no part of interest bearing fund as well as expenses so claimed has found its way into the investments in Mutual Funds/Shares nor adduced any documentary evidences during the course of assessment proceedings before the a O"*
>
> *2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting addition made by the AO for allocation of H.O. expenses among Non-EOU and EOU units for the purpose of computation of exemptone Ise SOB orthe IT. ACt CITIA) 1961, without appreciating the fact that the assessee has not followed the uniform" criteria while allocating R&D expenses to the EOU and non-EOU units and the AO has allocated the expenses on basis of the turn over from the EOU and Non- EOU.*
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> *3. "On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting addition made by the AO on account*

of interest on bank accounts dividend and misc. income totaling to Rs.178.75 lakhs by holding the interest income claimed by the assessee was neither accrued from such activity nor derived from the activities of the EOU unit relying on the decision of Hon'ble for Supreme Court in the case of Pandiyan Chemicals vs. CIT, 129 Taxman 539."

4. "On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting addition made by tie 40 of the case and in lav, the L50, citA, ere the A0: 8 failed to produce any of the suppliers, brokers or transporters in connection with the assets purchased on which depreciation was claimed in spite of opportunities provided in this regards."

5. "On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in go g deleting the disallowance of Rs.15,69,80,805/- made by assessing officer on account of premium on foreign currency convertible bonds without appreciating the fact that above expenditures are provision for premium Of FCCBs and the assessee has made payment in the next year alongwith the TDS thereon."

6. " On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of Rs. 15,69,80,805/-made by the assessing officer on account of premium on foreign currency convertible bonds without appreciating the fact that FCCB were issued for acquiring the overseas business which is a capital expenditure and the premium on FCCB has been provided from the securities premium account which reflect capital receipts on the and had

never be offered for income tax in any of the earlier assessment year.

7. "On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in c fl holding that the loss from non- eligible unit w/s 10B cannot be set off against the profit from eligible unit us 10B for the purpose of determining the allowable par deduction us 10B of the Act, without appreciating the fact that there is no specific restriction u/s 10B or section 70 for setting off business loss from non exempt unit against profit from exempt unit u/s 10B."

8. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the issue of deduction us 10B, regarding set off the losses of non- eligible unit against the eligible unit in favour of the assessee relying upon the decision of the Hon ble ITAT in assessee's own case for the A.Y. 2004-05, ignoring the fact that the above decision of the Hon'ble ITAT was not accepted by the department and appeal u/s 260A was filed before the Hon'ble High Court and the Hon'ble High court had admitted the issue raised by the Department as substantial question of law vide order dated 19.11.2012 and the same is pending for final decision."

3. Briefly, the facts of the case are that during the year under consideration, the assessee company was engaged in carrying on business of manufacturing and marketing of organic and agro-chemical products. The assessee filed its regular return of income for the year under consideration on 30.09.2010 declaring total income at Rs. NIL under normal provisions of the Income Tax Act,

1961 [in short "the Act"] after claiming entire business income of Rs.12,87,29,134/- for set off against the brought forward losses and unabsorbed depreciation. The Book Profit u/s. 115JB of the Act was declared at Rs.59,48,35,167/-. The case of the assessee was selected for scrutiny and statutory notices were issued and served upon the assessee company. In the assessment completed u/s. 143(3) of the Act on 31/03/2013, the Assessing Officer made various additions and computed the total Income at Rs.28,52,31,345/- under normal provisions of the Act and Book Profit at Rs.60,34,95,220/- u/s. 115JB of the Act. Since the tax determined on Book Profit u/s. 115JB was higher than that under the normal provisions of the Act, the Book Profit determined at Rs. 60,34,95,220/- was taken as the Total Income for the income tax purpose. Aggrieved by various additions made by the Assessing Officer, the assessee company preferred appeal before the Ld. CIT(A) on various grounds who partly allowed the appeal of the assessee. Aggrieved by the order of the ld. CIT(A), the Revenue is in appeal before us.

4. The ground No.1 of the appeal relates to the deletion of the disallowance of Rs.86,60,051/- made u/s. 14A of the Act in the normal provisions of the Act and u/s. 115JB of the Act.

5. Brief facts qua this issue-in-dispute are that the assessee received dividend income of Rs. 34,600/- which was claimed as exempt. The assessee did not make any *suo moto* disallowance u/s.

14A of the Act in its return of income. The Assessing Officer rejected the plea of the assessee that no expenditure was incurred in relation to earning exempt income. He observed that the assessee company had made substantial investment in equities which stood at Rs. 18.16 crores and the assessee claimed interest of Rs. 34.83 crores on borrowed funds. The assessee did not establish that no part of interest bearing fund had been utilised for investments in shares/mutual funds. Further, the investment decisions are complex in nature requiring substantial market research, analysis, etc. which lead to incurrence of various administrative expenses as well. Accordingly, he invoked the provisions of section 14A of the Act and applied the computation mechanism provided in Rule 8D of the Income Tax Rules,1962 [in short, "the Rules"]. However, the ld. CIT(A) deleted the disallowance u/s. 14A on the ground that 98% of the investment is made in appellant's own subsidiary foreign companies for the purpose of holding controlling stake in the group concerns which are also not covered within the scope of section 14A of the Act and that no new investments are made in the year under consideration whereas the dividend income earned is incidental and miniscule.

6. The ld. Departmental Representative for the revenue argued that the ld. CIT(A) has not appreciated the fact that the assessee has neither established that no part of interest bearing fund as well as expenses so claimed has been found its way into the investments in Mutual Funds/Shares nor adduced any documentary evidences

during the course of assessment proceedings before the Assessing Officer. He argued that the onus is on the assessee to prove that no interest bearing funds have been utilised in making investments yielding exempt income and that no expenses at all have been incurred towards earning of exempt income. Accordingly, he submitted that the decisions relied upon by the ld. CIT(A) in his order and that by the ld. Counsel of the assessee in the course of hearing are not applicable and on distinguished facts. In rebuttal, the ld. Counsel of the assessee argued that the dividend earned by the assessee company is only incidental and miniscule. Further, the investments was made out of own funds – Share Capital of Rs. 16.44 crores and Reserves & Surplus of Rs. 382.60 crores against the investments of Rs. 18.16 crores. Even the dividend was directly credited to the appellant's bank account and no actual expenditure was incurred in relation to earning of exempt income. The ld. Counsel of the assessee also requested to restrict the disallowance to the extent of exempt income only.

7. We have heard the rival contentions and perused the material available on record. The assessee has earned dividend of Rs. 34,600/- in the year under consideration and it has adequate own funds to cover the investments yielding exempt income. The Assessing Officer has invoked the provisions of section 14A of the Act on the premise that one to one nexus of utilisation of interest bearing funds have not been established by the assessee. It is seen that the assessee had a mixed pool of funds and it is now well

settled by the Hon'ble Supreme Court in the case of **South Indian Bank Ltd. (2021) 438 ITR 1 (SC)** that presumption can be drawn that the investments were made out of own funds where adequate such funds are available with the assessee and that no disallowance u/r. 8D(2)(ii) could be made. Further, we agree with the argument of the ld. Counsel of the assessee that the disallowance u/s. 14A of the Act is to be restricted to the extent of exempt income only as held in even assessee's own case by Hon'ble Mumbai Tribunal in A.Y.2008-09 (ITA No. 5387/Mum/2012) and 2009-10 (ITA No. 5388 and 5372/Mum/2012). The relevant finding is reproduced as under:

> *"7.2 The Id. CIT(A) in principle upheld the disallowance made u/s.14A of the Act by applying the Rule 8D (2) of the Rules but directed the Id. AO to exclude foreign investments while computing disallowance thereon. Against this order of the Id. CIT(A), we find Revenue has not preferred any appeal and only the assessee has preferred the appeal on the ground that disallowance cannot exceed exempt income. We find that this issue is no longer res integra in view of the decision of the Hon'ble Supreme Court in the case of Maxopp Investments reported in 402 IT 640 wherein it has been held that disallowance u/s.14A of the Act cannot exceed exempt income. The Id. AO is hereby directed to restrict the disallowance u/s.14A of the Act only to the extent of exempt income. Accordingly, the ground No.9 raised by the assessee is allowed."*

7.1 Respectfully, following Tribunal (supra), we direct the Assessing Officer to restrict the disallowance u/s. 14A of the Act to the extent of exempt income of Rs. 34,600/- in the form of dividend income only.

7.2 Further, disallowance of expenses u/s 115JB of the Act for earning exempted income is concerned, the Tribunal (supra) in AY 2008-09 and 2009-10 has restored the issue to the file of the Assessing Officer following the finding of Special Bench of Tribunal in Vireet Investments reported in 165 ITD 27. The relevant finding of the Tribunal (supra) is reproduced as under:

> *"8. The ground No.11 raised by the assessee is challenging the disallowance made u/s.14A of the Act while computing book profits u/s.115JB of the Act. The facts relevant for adjudication of this ground is already detailed by us in ground No.9 above. We find that the Special Bench of Delhi Tribunal in the case of Vireet Investments reported in 165 ITD 27 had categorically held that the computation mechanism provided in Rule 8D(2) of the Rules cannot be imputed in Clause (f) of Explanation 1 to Section 115 JB (2) of the Act. However, the actual expenses debited in the profit and loss account is required to be identified by the Id.AO as relatable to earning of exempt income. For this purpose, we deem it fit to set aside ground No.11 to the file of Id. AO for denovo adiudication and decide the same in the light of decision of Special Bench of Delhi Tribunal in the case of Vireet Investment decision reported in 165 ITD 27. Accordingly, the ground No. 11 raised by the assessee is allowed for statistical purposes."*

7.3 Respectfully, following the Tribunal (supra) the issue in dispute in the year under consideration, is restored to the file of the Assessing Officer for adjudication following the direction of Tribunal (supra). The ground No. 1 of the Appeal is partly allowed for statistical purposes.

8. The ground no. 2 relates to deletion of addition made for allocation of Head Office expenses among Export Oriented Units (EOU) and non-EOU units for the purpose of computation of exemption u/s. 10B of the Act and that the assessee has not followed the uniform criteria while allocating the R&D expenses to the EOU and Non-EOU units.

9. Briefly, the facts qua this issue in dispute are that the assessee has claimed exemption u/s. 10B of the Act. During the course of assessment proceedings, the Assessing Officer observed that the assessee company had incurred losses in Non-EOU units and gained profits in EOU units. He found that the assessee adopted 3 basic parameters for allocation of Head office and Research and development (R & D) expenses among EOU and non EOU viz.

(i) Manpower cost
(ii) Turnover/Sales
(iii) Fixed asset of each unit/plant.

9.1 In the opinion of the Assessing Officer, the method of allocating expenditure based on different parameters was inconsistent and concluded that the allocation of expenses was not in the proportion of turnover ratio of EOU and Non-EOU units. Accordingly, he also rejected the books of accounts. Further, in respect of allocation of R&D expenses between EOU and Non-EOU units, he observed that while on one hand the assessee boasts of cutting edge R&D to make its product world-class and on other hand, it has not allocated adequate expenditure of R&D to the EOU units. Accordingly, he concluded that the R&D expenses should be apportioned between EOU and Non-EOU units in the ratio of turnover. At para 10 of the assessment order, the Assessing Officer has reallocated the Head Office expenses and R&D expenses between the EOU and Non-EOU units based on the respective turnover and thereby reduced the claim of the assessee u/s. 10B of the Act. However, the ld. CIT(A) allowed the appeal on this issue on the premise that the assessee has been maintaining separate record of expenditure on R&D and other heads pertaining to each unit and, therefore, claim of expenses is based on factual. Further, this system of allocation has been consistently followed since A.Y. 2002-03 and even accepted by the Department.

10. Before us, the Ld. Departmental Representative (DR) for the revenue argued that the method of allocation of the assessee adopting mix of different parameters is not any uniform method and the approach of the Assessing Officer in bringing an uniform

method of allocation was appropriate. Hence, the Assessing Officer has rightly rejected the books of accounts and the reallocation done for the head office expenses and R&D expenses by the Assessing Officer be upheld.

11. In rebuttal, the ld. Counsel of the assessee argued that the assessee has been maintaining separate records for EOU and Non-EOU units and has been consistently following the same allocation method since A.Y. 2002-03. In respect of allocation of the Head office expenses based on set of parameters, the ld. Counsel of the assessee drew our attention to the order of Mumbai ITAT in its own case for A.Y. 2006-07 which is again followed in A.Y. 2009-10. The relevant extract from the ITAT order for A.Y. 2006-07 in ITA No. 5385/Mum/2012 is reproduced as under:-

> *"3.1. We have heard the rival submissions and perused the materials available on record. We find that the assessee company is engaged in the business of manufacturing and export of agro chemicals & drug intermediates. The assessee is having the following manufacturing units :-*
>
> - *MAHAD – Manufacturing agrochemicals TALOJA – Manufacturing agrochemicals in an Export Oriented Unit*
> - *(EOU) and claiming deduction u/s 10B of the Act*
> - *PANOLI – Manufacturing pharma products of lactam & cydohexidine in an Export Oriented Unit (EOU) and claiming deduction u/s 10B of the Act*

- *PANOLI – Manufacturing agrochemicals for local markets in NonEOU*
- *BANGALORE – Manufacturing pharma products for export in an Export Oriented Unit (EOU) and claiming deduction u/s 10B of the Act*
- *BANGALORE (R&D) - Company is doing Research & Development (R&D) in Non-EOU for in-house pharma products*
- *DOMBIVALI – Company is having incineration plant which is nonoperational for last 3 years*
- *BANGALORE (Non-EOU) – In this plant, Company does solvent recovery process for its Bangalore (EOU) and it was purchased in September 2005*

3.2. We find that the assessee company had while submitting its return of income computed the taxable income of EOU for which deduction u/s 10B of the Act was claimed and separately computed taxable income for other Non-EOU units. We find that the assessee had disclosed net taxable income of Rs. 3,09,61,809/- which was set off against the carried forward business losses of earlier years and ultimately declared NIL income in the return of income. We find that the Head Office Expenses of the assessee were allocated amongst various industrial undertakings on the basis of average gross block of assets, turnover and manpower employed. Accordingly, the allocation of head office expenses made by the assessee are as under:-

Taloja	*35.84%*
Mahad	*18.21%*
Panoli	*13.79%*

R&D	*4.63%*
Bangalore EOU	*27.53%*

3.3. We find that the ld AO without finding fault with the workings of the assessee and without passing a speaking order, directly proceeded to allocate the head office expenses on the basis of turnover as under:-

Mahad	*Rs 3,05,39,860.37*
Taloja	*Rs 5,99,73,967.17*
Panoli Non EOU	*Rs 2,30,97,963.36*
Panoli EOU	*Rs 77,75,378.24*
Bangalore EOU	*Rs 4,62,66,133.29*
R & D	*Rs 78,63,136.46*
	Rs 17,55,16,438.90

3.4. We find that the assessee before the ld CITA had pleaded that expenditure at CBD office are not in relation to specific unit as it is incurred as a common expenditure for all the units as a whole. Accordingly, such expenditure has been allocated by the assessee on the basis of certain scientific ratio i.e average of gross block of the units, sales of the units and manpower employed in the respective units. The same basis was followed by the assessee consistently since so many years which had been accepted by the revenue in the past. It was pleaded that the ld AO simply allocated the CBD expenses on the basis of turnover , by ignoring the criteria of gross block of assets and manpower employed in the respective units without any basis. The assessee tried to justify its basis of allocation by stating that all the units are though operational but at a different level of age of operationality and that the adoption of turnover criteria would be lopsided as certain units are capital intensive and labour intensive. Therefore, the assessee company had adopted the balanced approach by taking the average of gross

block of assets, turnover and manpower employed in the respective units for the purpose of allocation of common expenses. It was pleaded that the result of the allocation of common expenses on the basis of turnover had resulted in the reduction in the profit of EOU unit of Rs 27,92,178/- and consequently resulted in reduction of loss of Non EOU unit by the same amount. Despite these contentions, the ld CITA simply upheld the action of the ld AO without giving any independent findings. We find that since the allocation basis of common expenditure has been rejected by the lower authorities without any basis and by totally ignoring the various contentions raised thereon in respect of each of the behaviour of various units and the past assessments framed in the hands of the assessee u/s 143(3) of the Act. The copies of various assessment orders passed in the case of the assessee in earlier years are as under:-

Asst Year 2002-03 – 143(3) dt 18.2.2005 – Pg 227 of Paper Book

143(3) rws 147 dt 31.12.2009- Pg 235 of paper book

Asst Year 2003-04 – 143(3) dt 10.1.2006 – Pg 245 of Paper Book 143(3) rws 147 dt 31.12.2009 – Pg 249 of Paper book

Asst Year 2004-05 – 143(3) dt 23.2.2006 – Pg 258 of Paper Book 143(3) rws 147 dt 31.12.2009 – Pg 261 of paper book

Asst Year 2005-06 – 143(3) dt 31.12.2007 – Pg 276 of Paper Book

Hence, we are inclined to grant relief to the assessee by applying the principle of consistency and in the absence of change in facts during the year under consideration. Accordingly, the reduction in profit of EOU unit of Rs. 27,92,178/- and consequential reduction of loss of Non EOU unit by the same amount is hereby reversed and relief is granted to the assessee. Accordingly, the Ground No. 2 raised by the assessee is allowed."

11.1 As regards the allocation of R&D expenses, he drew our attention to the fact that identical issue in assessee's own case is decided by the Mumbai Tribunal in A.Y. 2006-07(ITA No. 5385/Mum/2012), , which has been further followed in AY 2007-08 and 2008-09. The relevant extract from the ITAT order for A.Y. 2006-07 is reproduced as under:-

4.1. We have heard the rival submissions and perused the materials available on record. During the year under consideration, the assessee had claimed deduction u/s 35(1)(iv) of the Act towards capital expenditure on research and development to the tune of Rs. 1,47,44,014/-. The assessee also claimed deduction u/s 35(2AB) of the Act towards in house research and development expenses to the tune of Rs. 4,30,14,243/-. We find that the assessee has units manufacturing pharma products and agro chemicals and out of which, some units are eligible for deduction u/s 10B of the Act. The details of units eligible for deduction u/s 10B of the Act have already been tabulated supra. During the course of assessment proceedings, the ld AO sought an explanation as to

why R&D expenses should not be attributed to EOU units where deduction u/s 10B of the Act has been claimed. It is not in dispute that the assessee is entitled for deduction u/s 10B of the Act for the respective units and the dispute lies only in the computation figure thereon. We find that the assessee had furnished a letter from Ministry of Science & Technology recognising in house R&D unit of assessee. The evidence in this regard is enclosed in page 140 of the paper book filed before us. We find that the assessee had submitted before the lower authorities that it took around 5 to 7 years to develop a product and chances of success were very low. It was also submitted that R & D unit was a standalone unit having its own customers and capable of generating independent revenue. The assessee had billed separately to its customers in the said unit and generated revenue which are enclosed in pages 144 to 193 of the paper book filed before us. Accordingly, the assessee pleaded that there is no need to allocate R&D expenditure to other units as R&D unit is a separate unit by itself capable of generating independent revenue having its own customers.

4.2. However, without prejudice to the said argument, the assessee submitted that maximum 5% of expenses and depreciation of R&D unit may be allocated to Bangalore EOU unit.

4.3. We find that these submissions did not hold any water and the ld AO observed that assessee was not allocating expenses of R&D unit to EOU unit in order to claim higher deduction u/s 10B of the Act. We find that the ld AO also did not accept the Bangalore R &D unit as a standalone unit as

assessee had claimed deduction u/s 35(2AB)(1) of the Act and in the opinion of the ld AO, the deduction u/s 35(2AB) of the Act could be claimed only by a company manufacturing or producing any drugs etc. The ld AO further noted that the Bangalore R&D unit had generated revenue of Rs. 4,09,20,348/- against claim of deduction u/s 35(1)(iv) of the Act for Rs. 1,47,44,014/- and deduction u/s 35(2AB) of the Act for Rs.4,30,14,243/-. Accordingly, the ld AO held that the Bangalore R &D unit was not a standalone unit and allocated expenses to the extent of Rs.2,86,76,162/- to different EOU units. We find that the ld AO further held that deduction u/s 35(1)(iv) of the Act with respect to R&D expenses of Rs.1,47,44,014/- and deduction u/s 35(2AB) of the Act of Rs.4,30,14,243/- was to be reduced from the profits of EOU units. This action of the ld AO was confirmed by the ld CITA.

4.4. We find from the perusal of the financial statements of the assessee enclosed in the paper book filed before us, R & D unit is an independent unit having its own separate plant and situated in a different location. The activity carried out in the said R&D unit is totally different from that carried out at the other units i.e research for developing new products and processes. The said R&D unit has a separate electric meter, has independent staff, unit requires independent inputs or raw materials etc. Separate books of accounts are maintained for this R &D unit so as to deduce the division wise profitability. The said unit does not need any support from any of the other units and can function independently having its own customers and capable of generating independent revenue on its own.

Hence expenditure of R&D unit cannot be apportioned to EOU units which has no connection with R&D unit.

4.5. We further find that similar claim of the assessee was accepted by the revenue in the past scrutiny assessments. The details of the same are asunder:-

> *<u>"Asst Year 2002-03 – 143(3) dt 18.2.2005 – Pg 227 of Paper Book</u>*
>
> *We find that the ld AO had accepted R& D Unit at Bangalore as a separate unit and deduction u/s 10B of the Act was not disturbed by the ld AO except for other income and miscellaneous income.*
>
> *<u>Asst Year 2002-03 - 143(3) rws 147 dt 31.12.2009- Pg 235 of paper book</u>*
>
> *We find that in this assessment, deduction claimed u/s 10B of the Act was adjusted only in respect of Taloja unit of the assessee which has nothing to do with the Bangalore Pharma unit and R &D unit apart from making disallowance u/s 14A of the Act.*
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> *<u>Asst Year 2003-04 – 143(3) dt 10.1.2006 – Pg 245 of Paper Book</u>*
>
> *The division wise profitability statement is enclosed in page 244 of the paper book filed before us. We find that the ld AO had accepted R& D Unit at Bangalore as a separate unit and deduction u/s 10B of the Act was not disturbed by the ld AO except for other income and miscellaneous income.*

Asst Year 2003-04- 143(3) rws 147 dt 31.12.2009 – Pg 249 of Paper book

We find that in this assessment, deduction claimed u/s 10B of the Act was adjusted only in respect of Taloja unit of the assessee which has nothing to do with the Bangalore Pharma unit and R &D unit apart from making disallowance u/s 14A of the Act. Asst Year 2004-05 – 143(3) dt 23.2.2006 – Pg 258 of Paper Book We find that the ld AO had accepted R& D Unit at Bangalore as a separate unit and deduction u/s 10B of the Act was not disturbed by the ld AO except for other income and miscellaneous income.

Asst Year 2004-05 - 143(3) rws 147 dt 31.12.2009 – Pg 261 of paper book

We find that in this reopened assessment, the ld AO sought to make allocation of total expenses of R&D unit to Bangalore EOU after observing that assessee itself had allocated 5% of total expenses thereon. Accordingly, the ld AO made adjustment of allocation of expenses by allocating Bangalore R&D Unit expenses, deduction u/s 35(1)(iv) of the Act expenses between Pharma EOUs and Bangalore R&D unit on the basis of turnover. But we find that this entire reopened assessment was ultimately quashed by this tribunal, against which , according to ld AR, no further appeal was preferred by the revenue before the Hon'ble High Court. The ld DR also was not able to provide any evidence in this regard before us. Hence the entire allocation of expenses made by the ld

AO stood ultimately quashed by the tribunal and had reached finality thereon.

Asst Year 2005-06 – 143(3) dt 31.12.2007 – Pg 276 of Paper Book

We find that the ld AO had accepted R& D Unit at Bangalore as a separate unit and deduction u/s 10B of the Act was not disturbed by the ld AO except for other income and miscellaneous income."

4.5.1. We find from the past behaviour of the department in the income tax scrutiny assessments of the assessee, the revenue had not sought to disturb the contentions of the assessee with regard to this impugned issue. No addition or disallowance could be made merely based on the concession given by the assessee on without prejudice basis that 5% of R &D expenses could be allocated to other units. There is no estoppel against the statute. There is no basis also for the said allocation to be carried out. No contrary evidence has been brought on record by the ld DR before us at the time of hearing. Hence we are not inclined to accede to the request of the ld DR that atleast 5% of expenses should be subject matter of allocation to other units. There is absolutely no change in the facts and circumstances of the case during the year under consideration and hence the revenue having accepted the stand of the assessee in earlier years has to strictly abide by the principle of consistency. Reliance in this regard has been rightly placed by the ld AR on the following decisions :-

a) Decision of Hon'ble Jurisdictional High Court in the case of CIT vs Macbrout Engineering (P) Ltd reported in 232 Taxman 406 (Bom) ;

b) Decision of Hon'ble Delhi High Court in the case of CIT vs EHPT India P Ltd reported in 350 ITR 41 (Del) which is directly addressed on the method of allocation of expenses based on manpower deployed in each unit;

c) Decision of Hon'ble Gujarat High Court in the case of CIT vs Torrent Pharmaceuticals Ltd reported in 393 ITR 625 (Guj) which is directly addressed on the point of independent research centre and also on the point of expenditure of R&D unit which is eligible for deduction u/s 35(1)(iv) of the Act need not be reduced from profits ;

d) Decision of Hon'ble Jurisdictional High Court in the case of Zandu Pharmaceuticals Works Ltd vs CIT reported in 350 ITR 366 (Bom) 4.5.2. Respectfully following the aforesaid decisions, we hold that there is no need to allocate expenses of Rs 2,86,76,162/- to EOU units and that assessee would be eligible for deduction u/s 35(1)(iv) of the Act of Rs 1,47,44,014/- and the same need not be allocated to EOU units.

4.6. With regard to yet another contention of the ld AO that deduction u/s 35(2AB) of the Act could be claimed only by a company manufacturing or producing products, we find that the said section 35(2AB) of the Act does not restrict the research and development only with respect to the products already in existence. From the bare reading of the Explanation to Section 35(2AB) of the Act, we find that 'expenditure on scientific

research', in relation to drugs and pharmaceuticals, shall include expenditure incurred on clinical drug trial, obtaining approval from any regulatory authority under any Central, State or Provincial Act and filing an application for a patent under the Patents Act, 1970. It is not in dispute that the assessee is already engaged in manufacturing pharma products. Accordingly, the assessee would be entitled for deduction u/s 35(2AB) of the Act.

4.7. In view of the aforesaid observations, we hold that allocation of expenses of Rs 2,86,76,162/- to EOU units, allocation of deduction u/s 35(1)(iv) of the Act of Rs 1,47,44,014/- and allocation of deduction u/s 35(2AB) of the Act of RS 4,30,14,243/- to other units is not warranted in the peculiar facts and circumstances of the instant case."

12. We have heard the rival contentions and perused the material on record. The facts that the assessee has been maintaining separate record of accounting of expenses EOU and Non-EOU units has not been disputed by the Department. Details of unit wise revenue earned and expenses incurred in respect of HO/units namely CBD (HO), MAHAD, TALOJA, DOMBIVALI, PANOLI (non-EOU), PANOLI (EOU), BLR(EOU), BLR(Non-EOU), BLR (R&D) and PUNE, is available in paper book pages from PB-32 to 45. The issue in dispute is regarding firstly, the Head office (CBD) expenses, which have been further allocated by the assessee applying a special allocation key of combination of fixed assets, sales and manpower expenses and claimed the same to be scientific

allocation, which has been rejected by the Assessing Officer and he has applied allocation key of sales turnover. The second issue in dispute is regarding allocation of Research & Development (R & D) expenses , which according to the assessee need not to be allocated, as R & D unit work on standalone basis and do not assist to EOU units, whereas according to the Assessing Officer R & D expenses have benefited the assessee by by way of increased exports of EOU units.

12.1 Regarding the allocation of Head office expenses, the assessee referred to submissions dated 17/01/2015 filed before the Ld. CIT(A) (avaialbale on PB 131 to 189) and submitted that the assessee company during the year incurred common expenditure of ₹109,19,13,378/- which has been allocated following the hybrid method (consisting of three different criteria of fixed asset of each plant, turnover and manpower) and allocated the expenditure into the broad category of manufacturing units, which was worked out to ₹61,00,52,004/-for EOU units enjoying exemption under section 10B of the Act and ₹48,18,61,374/- for non-EOU units. The assessee contended that this method of allocation of head office expenses was being followed consistently from assessment year 2003-04 onwards and which has been accepted by the Income-tax Department. On perusal Of the paperbook, detailed allocation for the year under consideration has not been found however basis of allocation from assessment year 2006-07 to assessment year 2009-10 is available on paperbook page 217 to 220. The way, the

assessee has applied key of allocation, can be seen from the average percentage worked out for each unit by averaging their fixed assets, sales turnover and manpower. For ready reference, the statement of allocation of head office expenses (CBD) for assessment year 2006-07 on paperbook page 217 is extracted as under:

AY 2006-07

Statement of Allocation of HO-CBD/NP expenses as on 31.03.2006

Rs. In Lacs

		Taloja	Mahad	Panoli	B'lore-R&D	B'lore-Pharma	Dombivli	Total
Option-I	Basis of allocation-Fixed Assets							
	Gross Block	10684	3826	1710	817	4635	0	21672
	% of Total	49.30	17.65	7.89	3.77	21.39	0.00	100.00
Option-II	Basis of allocation-Sales							
	Sales	6176	4127	4410	409	6560	0	21682
	% of Total	28.48	19.03	20.34	1.89	30.26	0.00	100.00
Option-III	Man Power basis							
	Man Power	217	131	96	60	226	0	730
	% of Total	29.73	17.95	13.15	8.22	30.96	0.00	100.00
	Total							
	Fixed Assets	49.30	17.65	7.89	3.77	21.39	0.00	100.00
	Sales	28.48	19.03	20.34	1.89	30.26	0.00	100.00
	Man Power	29.73	17.95	13.15	8.22	30.96	0.00	100.00
	Total	107.51	54.63	41.38	13.88	82.60	0.00	300.00
Average of above	%	35.84	18.21	13.79	4.63	27.53	0.00	100.00

	Salary	Adm	Dep	Interest	Total	Income	
H.O. Allocation	671.57	921.37	77.41	179.41	1849.76	94.60	
Taloja	240.67	330.19	27.74	64.29	662.89	33.90	30.39
Mahad	122.30	167.79	14.10	32.67	336.86	17.23	15.44
Panoli	92.63	127.09	10.68	24.75	255.15	13.05	11.70
Bangalore	184.91	253.69	21.31	49.40	509.31	26.05	23.35
R & D	31.06	42.61	3.58	8.30	85.55	4.38	3.92
Total	671.57	921.37	77.41	179.41	1849.76	94.6	

13. Before us, the Ld. counsel of the assessee has firstly contended that this method of allocation is being consistently followed by the assessee and accepted by the Department. As far as contention of the acceptance of the method by the department is concerned, we find that Assessing Officer has rejected this method from assessment year 2006-07 onward, but in further appeal proceedings it has been allowed to the assessee. The second contention of the assessee that it is the more scientific method of allocation, which has brought effect of fixed assets of the unit, its turnover and manpower. The assessee tried to justify basis of allocation by submitting that all the units operates at different level of age of operationality and that adoption of turnover criteria would be lopsided as certain units are capital intensive and labour-intensive, and therefore the assessee company adopted the balance approach of taking the average of gross block of assets, turnover and manpower employed in the respective units for the purpose of allocation of the common expenses.

13.1 Before us the Ld. counsel of the assessee submitted that the method followed in past and accepted by the Department consistently, cannot be deviated in absence of justification as to why the said method could not be accepted. In support of the contention the Ld. counsel relied on the decision of **Hon'ble Delhi High Court in the case of CIT Vs EHPT India Private Limited (2013) 350 ITR 41(Delhi)**.

13.2 In the case of EHTP India Private Limited (supra), the issue in dispute is regarding allocation of indirect expenses among STP and non-STP units. The assessee followed “head Count” as key for allocation of indirect expenses, whereas according to the revenue “turnover” should be basis for allocation of indirect expenses. In the case also there was a contention on behalf of the assessee that the assessee allocated expenses on headcount following consistent allocation key. The Hon’ble Delhi High Court (supra) held that though there is no fixed formula as which allocation key, whether it is headcount or turnover could be applied across the cases and it depends on case to case, however as far as issue of consistency is concerned, the regular method followed should not be disturbed without a just cause. The relevant finding of the Hon’ble Delhi High Court in reproduced as under:

> *10. The provisions of sub-section (4) of section 10A, relied upon by the Assessing Officer, apply for the purpose of segregating the profits of the business into export profits and domestic profits. It is a statutory formula for ascertaining what are profits derived from the export of the eligible items. It has to be read with sub-section (1). It says that the export profits have to be apportioned on the basis of the ratio which the export turnover bears to the total turnover of all the businesses of the eligible undertaking. We are not in the present case concerned with sub-section (4). That sub-section will apply when the combined profits - profits of the exempt unit and those of the non- exempt unit - have been ascertained; the next step will be to apportion them on the*

basis of the ratio which the export turnover bears to the total turnover. What we are concerned herein is the stage before that. We are concerned herein with the method by which the indirect or common expenses - expenses which are incurred for both the exempt and taxable units - are to be apportioned between the two units. To apply the formula prescribed in sub-section (4) may be appropriate in a given case considering its peculiar facts. But applying the same formula to all cases of apportionment without having regard to the history of assessments and other relevant factors may not be justified.

11. In Hukam Chand Mills Ltd. (supra), in the context of apportioning profits accruing to the assessee under the several categories of businesses carried on by him in British India, it was held that the question as to the method of apportionment was essentially one of fact depending upon the circumstances of the case. It was recognized that in the absence of any statutory or fixed formula, any finding on the question would involve an element of guess work and that "the endeavor can only be to be approximate and there cannot in the very nature of things be great precision and exactness in the matter" (at page 552). In the recent judgment of the Supreme Court in CIT v Bilahari Investment P. Ltd. (2008) 299 ITR 1, the facts were these. The assessee was subscribing to chits and was maintaining the accounts on mercantile basis. The discount on the chits, which was actually the profit arising to the assessee, was declared at the end of the chit period, which at times exceed a period of 12 months. This method adopted by the assessee was being

accepted by the department for a number of years. However, for the assessment years 1991-92 to 1997-98 the Assessing Officer took the view that the discount on the chits should be assessed every year, taking into account the number of instalments paid and remaining to be paid. The contention of the assessee was that the method adopted by him has been consistently accepted in the past and there was no justification for any departure. Accepting the submission, the Supreme Court held as under:

"As stated above, we are concerned with the assessment years 1991-92 to 1997-98. In the past, the Department had accepted the completed contract method and because of such acceptance, the assessee, in these cases, have followed the same method of accounting, particularly in the context of chit discount. Every assessee is entitled to arrange its affairs and follow the method of accounting, which the Department has earlier accepted. It is only in those cases where the Department records a finding that the method adopted by the assessee results in distortion of profits, the Department can insist on substitution of the existing method. Further, in the present cases, we find from the various statements produced before us, that the entire exercise, arising out of change of method from the completed contract method to deferred revenue expenditure, is revenue neutral. Therefore, we do not wish to interfere with the impugned judgment of the High Court."

In the light of the observations of the Supreme Court in Hukum Chand Mills Ltd. (supra), in a case where alternative

> *methods of apportionment of the expenses are recognized and there is no statutory or fixed formula, the endeavour can only be towards approximation without any great precision or exactness. If such is the endeavour, it can hardly be said that there is an attempt to distort the profits. On the contrary, as we have already pointed out, distortion of profits may arise if the consistently adopted and accepted method of apportionment is sought to be disturbed in a few years, especially in a case such as the present one where the deduction under Section 10A is available over a period of ten years and only in some years the method of apportionment of income is disturbed.* ***In other words, there is no "just cause" made out for abandoning the past method."***

(emphasis supplied externally)

13.3 Thus, if a just cause is made out then the past method could be disturbed. To err is human but there cannot be any justification for perpetuating an error. **Hon'ble Supreme Court in the case of Distributors (Baroda) (P) Ltd. vs. Union of India (1985) 47 CTR (SC) 349 : (1985) 155 ITR 120 (SC)**, observed as follows :

> *"To perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience. In this, we derive comfort and strength from wise and inspiring words of Justice Bronson in Pierce vs. Delameter : 'a Judge ought to be wise enough to know that he is fallible, and, therefore, ever ready to learn; great and honest enough to discard all mere pride of opinion and follow the truth wherever it may lead; and courageous enough to acknowledge his errors.'"*

13.4 When we examine the facts of the instant case in view of the above decisions, we find that fixed asset base and labour headcount has been considered by the assessee for allocation in addition to the key of turnover to show that method applied by the assessee is more scientific which takes into account the operational ability and labour-intensive operation of the units. However we do not understand as how the age of the fixed asset (value of the WDV) or No. of labour employed in a unit will impact allocation of head office expenses amongst the units. The age of the fixed assets or labour expenses will impact the profitability of the respective unit but that cannot be a criteria for allocating various head office expenses amongst the units. The assessee has provided details composition of the head office expenses before us, which are available on Paper Book page 32. The expenses consist of personnel cost of ₹12,54,44,014/-, other expenses of ₹14,89,95,863/- and Finance charge ₹26,38,33,237/-; depreciations ₹1,12,71,812/-. The total of these expenses of ₹54,95,44,917/- has been added for the losses under other income of (-)₹54,23,68,460/- thus making total head office expenses to ₹109,19,13,377/-. For example, if we presume that head office expenses consist of salary of directors, Chief financial officer etc. then allocation amongst unit should be on the basis of work hours they have put for each unit. Further, the finance expenses consist of finance cost and interest ect., then same should be allocated in the proportion of the capital or the funds utilized by various units. Similarly, the allocation of the other

expenses under the head office expenses depends on the nature of expenses and no uniform criteria of average of the percentage of fixed assets, sales and manpower could be applied. In our opinion, the formula applied by the assessee is not scientific in any manner. Though there is no statutory formula for allocation of head office expenses, but the legislature has applied formula of the "turnover" for computing the profit for the purpose of deduction or exemption, in various sections of the Act, wherever profit of units eligible for exemption or deduction has not been separately accounted in the books of accounts. Therefore, in the facts and circumstances of the case, we feel it appropriate to restore this issue back to the file of the Assessing Officer, for deciding afresh, with the direction to the assessee to provide complete detail of head office expenses of ₹109,19,13,378/-. The Assessing Officer is then will decide application of the appropriate allocation key depending on the nature of the expenses and the contribution of said expenses in operation of various units.

13.5 As far as research and development expenses is concerned, the contention of the assessee is that R & D unit at Banglore is operating on stand-alone basis and generating its revenue from its activity of research and development, and therefore no allocation of R&D expenses to the export oriented unit is required. The relevant submission of the assessee filed before the Ld. CIT(A), available on page 111 of the paperbook is reproduced as under:

"2.3 The Research and Development unit at Bangalore is independent and standalone unit generating revenue by itself by sale of product developed inhouse. The formulation developed by the Research and Development unit at Bangalore is not at all dealt with by other units of the appellant company. The appellant company submits that the unit wise quantity details of all the finished goods produced and sold during the year by the appellant company to evidence that the product sold by the R & D unit at Bangalore are not at all dealt with by any other unit of the appellant company.

2.4 The appellant company has R & D unit as a separate and independent unit at Bangalore in the nature of research and development facility. The appellant company has engaged the dedicated team in respect of research and development. The appellant company as such, carrying out independent research activity at Bangalore. The appellant company has been doing customs synthesis work right from the time it acquired the unit. The research and development unit has an independent source of income. The appellant company has intent to develop the IP (Intellectual Property Rights) which has the gestation period of minimum 3 to 7 years. It requires a lot of efforts to develop the business as any entrepreneur would carry out the research work with the appellant company cautiously.

2.6 It takes a long period before they could grant the appellant company the research work independently. In order to gain the confidence in the appellant company's

activity, the customers start with small cost research activity and series of such gaining experience the customers would start evaluating bigger projects.

2.7 It is further submitted that the appellant company has carried out the research work in respect of the various formulations and as part of small research which has been sold to the various clients. In fact, the various formulations in respect of which the research was carried out by Bangalore unit are not at all dealt with by other units of the appellant company. The Bangalore unit has carried out the research into various formulations. Therefore, it cannot be said that the research and development activity carried out by Bangalore unit is dedicated to the other units of the appellant company.

2.8 The Bangalore unit as explained above is an independent unit carrying out research formulations and developing several innovative and cost effective process. The company has engaged the professional scientific competence team and has made the investment in world class scientist and laboratory instrumentation. The Bangalore research and development unit is known for its expertise in discovery research, analytical method development, synthesis of impurities etc. Therefore, the contention of the Learned Assessing Officer that the Bangalore unit is not a standalone unit is against the facts and without any base."

13.6 In this regard, we may like to reproduce a part of the submission of the assessee dated 21st Nov. 2014 filed before the Ld.

CIT(A), which is available on paperbook pages 79 to 130. On page 80 to 81 of the paperbook, the assessee has provided details of the operation activity of various units as under:

> ***"Mahad*** *- The unit was set Up in 1988 for the manufacture of intermediates for agrochemicals. It can handle complex chemistries involving chlorination, nitration, hydrogenation etc. the main products are 3.5 DCA, MCA, Diuron and Isoproturun. The costing of the products are being done on the absorption method and under this method all the costs are allocated on to the quantities produced. The unit is making positive contribution but due to the plant being very old, having low margin and product being available easily in the market also due to high fixed cost it is running in losses.*
>
> ***Taloja*** *- This is a fully integrated plant to manufacture Thiabendazole and is an Export Oriented Unit. The product is sold to Syngenta Crop Protection AG with whom company have a buy back arrangement.*
>
> *R & D Center at Bangalore: - The appellant company has developed Research and Development units at Bangalore for development of various pharma products and also developing know-how for third parties on project assignment basis.*
>
> *Therefore, the Research and Development centre is treated as standalone unit generating income itself by sale of products developed by it.*

The R & D centre is located at 32/1 Kalenaagrahara, Bannerghatta, Bangalore 560076 having state of art facilities and offers the following services. The letter dated 14.03.2005 was issued by the Ministry of Science and Technology Department of Scientific and Industrial Research granting recognition of in-house R&D unit. The Ministry of Science and Technology, Department of Scientific Industrial Research New Delhi granted the recognition of in-house R & D unit to the appellant company vide letter dated 07.12.2007

This center is a standalone unit generating income itself by sales of product developed and by transferring the know-how developed by it.

Panoli *- The plant is located in Gujarat and production activities inclus manufacture of agrochemicals and formulation of Ekalux and Nuvan.*

Panoli EOU- *manufactures the pharma intermediate Gabapentine lactum.*

Bangalore Pharma *- The Bangalore EOU unit manufactures bulk API like Gabapentin, Acebutolol, Gemfibrozil etc. It exports Gabapentin to US and Canada markets."*

13.7 Further on page, 109 of the paperbook, the assessee has provided detail of the R&D activity carried out by the R & D Bangalore unit. The relevant paragraph is reproduced as under:

"2.2 The R & D centre is located at 32/1 Kalenaagrahara, Bannerghatta, Bangalore 560076 having state of art

facilities and offers the following services. The letter dated 14.03.2005 was issued by the Ministry of Science and Technology - Department of Scientific and Industrial Research granting recognition of in-house R&D unit.

- *Synthesis of Intermediates and APIs.*
- *Process Development.*
- *Troubleshooting and optimization of process*
- *State of the art labs with supporting analytical capabilities*
- *Highly qualified PhD scientists and 38 M. Sc chemists with many years of experience are working.*
- *Approved by DSIR*

The Ministry of Science and Technology, Department of Scientific Industrial Research New Delhi granted the recognition of in-house R'& D unit to the appellant company vide letter dated 07.12.2007. The copy of the letter alongwith the terms and condition of recognition of R & D in-house unit is also furnished. The Ministry of Science and Technology has also extended the recognition upto 31.03.2015 vide letter dated 26.03.2010.

In view of the above recognitions it can be observed that the research and development activity carried out at Bangalore units is a standalone and independent unit. The terms and condition on the basis of which the approval granted by the Ministry of Science and Technology suggest that such conditions are peculiar to the independent units who carries out the actual research, process developed by the unit.

Therefore, the allocation of the research and development expenditure of each of the undertakings on the basis of the respect units turnover is not justifiable.

Out of the 14 products which are developed in our R&D 3 to 4 have been commercialized at our USDA approved plant and other products are being supplied to small scale companies as sale. The increase in R&D in this center has helped in increase in exports, reduction in trouble shooting, scale up of process and product development. ***The details of R&D programmers/projects were***

1) ***Gabapentin cost reduction***
2) *FDEB new process development*
3) *Donepezil new process development*
4) *Triprolidine cost reduction*
5) *Ondensetron cost reduction*
6) *Quetiapine new process development*

The R&D center has developed following new products/process during the last three years

1) *FDEB*
2) *Decoquinate*
3) *Bupropion*
4) *Venlafaxine*
5) *Donepezil*
6) *Quetiapine*
7) *HBP 167*
8) *Indole derivative*
9) *Levetiracetam*

13.8 On perusal of the above submission of the assessee reproduce in para 13.6 above, we find that the Panoli EOU unit is engaged in manufacturing of pharma intermediate namely "Gabapentine Lactum". On the other hand, the R&D projects taken by the R & D unit reproduced above in para 13.7 includes project on "Gabapentin cost reduction". When we examine, both these factual information provided by the assessee we find that the R&D unit is carrying out the project of reduction in cost of Gabapentine, which is one of the product manufactured by the EOU unit. In such circumstances, the contention of the assessee that R&D unit is not engaged in research and development of EOU units is a false submission and need to be thoughly examined by way of issuing commission by the Assessing Officer to a Scientific Officer dealing with Pharma product. In view of above, we feel it appropriate to restore this issue of allocation of R&D expenses amongst various unit to the file of the Ld. Assessing Officer for deciding afresh. It is needless to mention that the assessee shall be afforded adequate opportunity of being heard.

14. The ground No. 2 of the appeal of the revenues is accordingly allowed for statistical purposes.

15. The ground no. 3 of the appeal relates to deletion of addition of Rs. 9,816/- made by the Assessing Officer on account of interest on bank accounts, dividend and miscellaneous income totaling to Rs. 178.75 lacs holding that the said income was not accrued or derived from the activities of the EOU unit.

16. Brief facts qua this issue are that during the year under consideration, the assessee has earned certain other income as shown in Schedule 15 of the Balance Sheet which included interest on bank accounts, dividend and miscellaneous income totaling to Rs.178.75 lacs which have been considered for claiming exemption u/s 10B of the Act. The Assessing Officer took the view that the income from the manufacturing unit exporting an article or thing shall be eligible for exemption u/s. 10B. Hence, if any income is not derived from the activity stipulated from such unit i.e. EOU unit, then the assessee cannot claim deduction u/s. 10B of the Act on said income. The interest income claimed by the assessee neither accrued from such activity nor derived from the activities of the EOU unit. Accordingly, relying upon the decisions of Hon'ble Supreme Court in the case of Pandiyan Chemicals Ltd. v. CIT 129 Taxman 539 and Hon'ble Mumbai ITAT in the case of SovikaInfotek Ltd. v. ITO (ITA No. 3007 & 3008/M/2004) denied the claim of interest income u/s. 10B of the Act to the extent of Rs. 9,816/-.

16.1 However, the ld. CIT(A) deleted the said addition of Rs.9,816/-. Aggrieved with this, the Revenue is in appeal before us.

17. The Ld. Departmental Representative for the revenue argued that the assessee has not been able to show any independent records being maintained. Further, for the purpose of claim u/s. 10B, it is important that the interest income is derived from the activities of EOU unit which the assessee has failed to establish.

18. In rebuttal, the Ld. Counsel of the assessee submitted that the assessee has a 100% export oriented pharma unit at Bangalore and was required to issue bank guarantee/letter of credit without which the assessee could not have exported the goods. Bank insists on placing fixed deposits before giving bank guarantees/letter of credits. He submitted that the assessee got power connection from Maharashtra State Electricity Company Distribution, for which it had to give deposits. He mainly relied on the orders of the Hon'ble Mumbai ITAT in its own case for A.Y. 2003-04 and 2004-05, 2005-06 and 2008-09 which in turn had followed the decision of the Hon'ble Bombay High Court in the case of CIT v. Indo Swiss Jewels Ltd. 284 ITR 389.He also submitted that interest income is to be included in EOU unit and eligible for deduction u/s. 10B of the Act for which he relied on various case laws which have been rendered after considering the decision of **Hon'ble Supreme Court in the case of Liberty India 317 ITR 218**, viz.:

- **CIT v. Hewlett Packard Global Soft Ltd. [2018] 403 ITR 453 (Kar.)**
- **Odisha Power Generation Corporation Ltd. v. ACIT [2022] 215 dtrr (Ori) 73**

18. We have heard the rival contentions and perused the relevant material on record. It is the contention of the ld. Counsel of the assessee that this issue of interest income is to be included in computing the income of EOU unit and deduction be granted u/s. 10B of the Act accordingly, as the issue is covered by the decision of the assessee's own case for various years as discussed above.

However, from the available records, we are unable to hold as to how the said interest income is earned out of fixed deposits kept as a margin for letter of credits or bank guarantees. During the course of the hearing, the Ld. counsel of the assessee was asked to provide correlation of interest received with each deposit and to show that the deposit was placed for bank guarantee for the purpose of the business. However, it was submitted that matter being more than 10 years old, the relevant records were not available immediately for such correlation. In the circumstances, we feel it appropriate to restore this issue to the file of Assessing Officer to verify the actual nature of the transaction and follow the guiding principles of the orders of Hon'ble Mumbai ITAT in assessee's own case, accordingly. Hence, this ground of appeal of the revenue is allowed for statistical purposes.

19. The ground no. 4 relates to deletion of depreciation on bogus fixed assets.

20. Briefly the facts qua this issue are that the assessee had purchased fixed assets amounting to Rs.31,91,334/- from 2 parties namely M/s. Jupiter Multitrade Pvt. Ltd. (Rs.17,10,582/-) and M/s. Varah Laxmi Sales Agency (Rs. 14,80,742/-), in respect of whom the Assessing Officer had received information from Sales Tax Authorities that the said parties had issued bogus bills. The Sales Tax Authorities had forwarded copies of

(i) statements of Shri Rajendra S. Bhimrajka, Shri Subhash SamwarmalBhimrajka, Shri Mukesh S. Bhimrajka recorded on oath on 16.07.2011 along with affidavit dated 18.07.2011 of Shri Rajendra S. Bhimrajka and affidavit dated 16.07.2011 of Shri Nitin L. Kamble, who were managing the affairs of M/s. Jupiter Multitrade Pvt. Ltd.

(ii) Statement of Shri Jalpesh Haritkumar Thakkar, proprietor of M/s. Pawan Enterprises and Manager & son of Shri Haritkumar Jayantilal Thakkar, who is proprietor of M/s. Varah Laxmi Sales Agency recorded on oath on 08.12.2010, and statement of Shri PragneshGaurishankar Mehta, who was managing affairs of M/s. Varah Laxmi Sales Agency recorded on oath on 06.01.2011.

20.1 In the aforesaid statements, the persons whose statements were recorded have categorically admitted that they have indulged in the activity of issuing bogus bills against certain percentage of commission besides other confessions related to issue of bogus bills. In the assessment completed, the Assessing Officer found that adequate evidences in support of the claim of alleged fixed assets have not been furnished by the assessee and even the assessee failed to produce any of the suppliers of those fixed assets. Accordingly, he disallowed the depreciation of Rs. 16,34,030/- on such fixed assets. Aggrieved the said disallowance, the assessee

preferred appeal before the ld. CIT(A), who gave relief to the assessee. Aggrieved by this, the revenue is in appeal before us.

21. The Ld. Departmental Representative for the revenue argued that the goods inward receipt/report is of no evidentiary value as the same is prepared by the assessee itself. The assessee has not furnished as to how it had come in the direct contract of the alleged parties. The assessee has not provided present address of the parties/suppliers. The assessee has not even explained as to how the fixed assets are used. Even the assessee has not furnished any confirmations from these parties. Also, the Sales Tax Department certified that the aforesaid parties are Hawala operator after conducting independent inquiries. Even the parties are not produced by the assessee before the Assessing Officer. Accordingly, the ld. Departmental Representative submitted that the disallowance of depreciation be upheld.

22. In rebuttal, the Ld. Counsel of the assessee submitted that ample documentary evidences were placed on record in the course of assessment proceedings being:

- Details of purchase of fixed assets
- Copies of receipt of goods
- Copy of bank statements
- Purchases being not made through any broker
- Goods purchased are not sold to any party.

22.1 The ld. Counsel submitted that the Assessing Officer having accepted the purchases from M/s. Jupiter Multitrade Pvt. Ltd. for A.Y. 2009-10, the said order being final, no disallowance could be made with respect to assets purchased in the earlier year and on which deprecation was claimed during the year. As regards the purchase of fixed assets during the year, the assessee drew attention to the various documentary evidences filed before the Assessing Officer and that he has not disproved any evidence that Good Receipt notes prepared at the factory at Mahad was fabricated. The Assessing Officer has merely acted on his own suspicion and assumptions. In this regard, reliance is placed on the decision of Hon'ble Bombay High Court in the case of **PCIT v. Rishabdev Tachnocable Ltd. (2020) 424 ITR 338 (Bom)**. Assessing Officer also sought to rely on statement of third parties but no opportunity to cross examine them was given to the assessee which is against the principles of natural justice in view of **Andaman Timber Industries v. CCE (Civil Appeal No. 4228 of 2006)** followed by the Hon'ble Bombay High Court in **H.R.Mehta v. ACIT (2016) 387 ITR 561 (Bom.)**

23. We have heard the rival contentions and perused the material on record. The Assessing Officer has computed disallowance of depreciation on plant & machinery. The relevant part of the impugned assessment order is reproduced as under:-

8.7 In view of the above discussion, the claim of depreciation @ 15% (including additional depreciation @ 20%) for less than 180 days to the tune of ₹5,58,481/- (₹299352 in respect of Jupiter Multitrade Pvt. Ltd + ₹2,59,130 in respect of Varah Laxmi Sales Agency) in respect of non-genuine purchases is held to be bogus and is considered merely accommodation entries with a view to evade the tax. Also, the assessee has purchased Plant & Machinery from Jupiter Multitrade Pvt. Ltd. in F.Y.2008-09 in respect of which depreciation of ₹10,75,549/- @ 15% has also been claimed during the year under consideration on opening W.D.V. of 3 71,70,328/- thereof. The same is also required to be disallowed as incurred in respect of non-genuine purchases. It leads to disallowance of ₹16,34,030/- (5,58,481 + 10,75,549) on account of bogus purchases/expenditure. Penalty proceedings u/s.271(1)(c) of the IT Act are initated separately for furnishing inaccurate particulars of income, thereby concealment of income chargeable to tax.

(Addition: ₹16,34,030/-)

23.1 Thus, we find that the disallowance consist of two amounts. The first amount of ₹5,58,481/- which is the depreciation in relation to purchase in the year under consideration. The second amount of depreciation amounting to ₹10,75,549/-relates to purchase of plant and machinery in financial year 2008-09 i.e. assessment year 2009-10.

23.2 We find that revenue has not brought on record that purchase corresponding to the depreciation disallowed of Rs.10,75,549/-, have been held as nongenuine in assessment year 2009-10 and unless the purchase of said plant and machinery is not held as non-genuine in assessment year 2009-10, depreciation on the said amount cannot be disallowed on the WDV of said plant and machinery in the year under consideration. The deletion of disallowance to the extent of ₹10,75,549/- is accordingly, upheld. Regarding the amount of ₹5,58,481/-, we find that the Assessing Officer asked the assessee to file confirmation from those **parties** or produce them for verification of the fact of supplying those goods to the assessee, which have been claimed by the assessee as installed as plant and machinery, however neither the assessee provided there current addresses not produce them before the Assessing Officer for verification. In such circumstances the claim of the assessee for producing them for cross-examination is not justified because it is the assessee who claimed the depreciation on the goods and therefore it is primary onus of the assessee to substantiate the expenses of depreciation claimed engine failure to do so, he cannot shift its onus to the Assessing Officer. In the facts and circumstances of the case, we set aside the finding of the Ld. CIT(A) on the issue in dispute and uphold the disallowance made by the Assessing Officer of the depreciation to the extent of ₹5,58,481/-. The ground of the Revenue is accordingly allowed partly.

24. The ground no. 5 & 6 relates to the deletion of disallowance of Rs. 15,69,80,805/- on account of premium on foreign currency convertible bonds.

25. Brief facts qua this issue are that the assessee had issued Foreign Currency Convertible bonds in F.Y. 2005-06. These bonds were convertible at the option of the bondholder on or after 01.11.2005 but prior to close of business on 10.10.2010 at a fixed exchange rate of Rs. 44.93 per USD and at a price of Rs. 745/- per share of face value of Rs. 10/-. If the bond holder did not opt for conversion into shares, the said bonds were to be redeemed @132.56% of its face value on 21.10.2010. As the bond holders had not converted any bonds till 31.03.2010 and the possibility of their exercising the option to convert @Rs. 745/- per share was remote, the assessee was certain that it would have to redeem the bonds at a premium. Accordingly, assessee made a provision for premium on redemption of bonds of Rs. 15,69,80,805/- on pro rata basis. The balance premium of Rs. 3,55,04,925/- was made in F.Y. 2010-11. In the books of account, the said premium was adjusted against the Securities Premium Account, however, the same was claimed as revenue expenditure in the computing the total income. In the assessment completed, the Assessing Officer disallowed the said premium mainly for the reason that it has not been crystallised in the year under consideration and is just a provision and that even the TDS thereon has not been deducted. Aggrieved by the disallowance of said premium, the assessee preferred appeal before

the ld. CIT(A) who deleted the said disallowance. Aggrieved by the same, revenue is in appeal before us.

26. The Ld. Departmental Representative for the revenue argued that the assessee has just made a provision which has not been crystallised in the year under consideration and that no payment has even been made during the year. Further, the premium is worked our for the period from the date of issue i.e. November 2005 to 31st March, 2010. No TDS has been deducted. Even such bonds were issued for acquiring overseas business which is nothing but a capital expenditure. Also, the premium on bonds has been provided from the Securities Premium Account which reflects capital receipts only which had never been offered for tax in any earlier years. He therefore submitted that the disallowance of premium on foreign currency convertible bonds [for short, FCCBs) be upheld.

27. In rebuttal, the ld. Counsel of the assessee submitted that the assessee is consistently following mercantile system of accounting and the provision of premium amounts is allowable as deduction. Even if FCCBs were issued for acquisition of a new business, loan is a liability and expenses incurred in connection with the same is allowable as a deduction. Premium was contingent upto the earlier year. Bond holder could exercise the option 7 business days prior to 21.10.2010 if market price exceeds 16% of the conversion price for a continuous period of 60 consecutive days on the stock exchange. As price was below exercise price, it became certain that the bond

holders would redeem the bonds. Hence, premium became certain during the year under consideration. He relied on the decision of **Tungabhadra Industries Ltd. 76 Taxman 185 (Kolkata)** wherein it is held that premium on redemption of debentures is allowable deduction. He further argued that merely because assessee adjusted premium out of Securities Premium account in its books would not mean that the same is not allowable as a deduction for which he relied on **Kedarnath Jute Mgs. Co. Ltd. v. CIT (1971) 82 ITR 363 (SC)** and **United Commercial Bank v. CIT 240 ITR 335 (SC)**. He also drew our attention to the decision of the Hon'ble Supreme Court in the case of **Metal Box Company of India Ltd. v. Their Workmen (1969) 73 ITR 53 (SC)** have held that *"Contingent liabilities discounted and valued as necessary, can be taken into account as trading expenses if they are sufficiently certain to be capable of valuation and if profits cannot be properly estimated without taking them into consideration. An estimated liability under a scheme of gratuity, if properly ascertainable and its present value is discounted, is deductible from the gross receipts while preparing the profit and loss account. This is recognised in trade circles and there is nothing int eh Bonus Act which prohibits such a practice. Such a provision provides for a known liability of which the amount can be determined with substantial accuracy. It cannot, therefore, be termed a "reserve". Therefore, the estimated liability for the year on account of scheme of gratuity should be allowed to be deducted from the*

gross profits. The allowance is not restricted to the actual payment of gratuity during the year."

27.1 He further stated that the second proviso to section 40(a)(ia) provides that if the assessee is not deemed to be an assessee in default, then, the assessee shall be deemed to have deducted and paid the tax on such sum on the date of furnishing the return of income and would be eligible for deduction. Reliance in this regard is also placed on the decision of Hon'ble Bombay High Court in the case of PCIT v. Perfect Circle India Pvt. Ltd. (2019) 13 ITR -OL 78 (Bom). The ld. Counsel submits that as the assessee has not been deemed to be in default, deduction of premium is allowable and merely because TDS was deducted and paid in subsequent year, would not disentitle the assessee of deduction of premium.

28. We have heard the rival submissions of the parties. We find that the premium expenses on FCCB has been disallowed by the Ld. Assessing Officer mainly on two grounds. Firstly according to him the expenses are in the nature of capital expenditure and therefore not allowable as revenue expenditure. Secondly according to him the expenses are contingent in nature and not acertained liability and therefore same are not allowable in the year under consideration. We find that identical issue of expenses of premium on FCCB are in the nature of liability whether ascertained and revenue expenditure, has been decided by the Coordinate Bench of the Tribunal in the case of **Strides Shasun Limited Vs ACIT in ITA**

No. 8614/Mum/2011 for assessment year 2007-08, wherein the Tribunal observed as under:

> *"36. The assessee claimed 1/5th of FCCB premium amounting to ₹12,80,23,824/- and 1/5th of the FCCB issued expenses amounting to ₹98,97,774/- as deduction. The AO noticed from the annual report of the assessee that it has adjusted an amount of ₹5,04,08,369/- under the head expenses related to issue of FCCB in the balance sheet against securities premium account in AY 2006-07. The AO required the assessee to explain how it is allowable as revenue expenditure. The AO after considering the explanation of the assessee noted that the FCCB issued is capital expenditure in nature and cannot be allowed under section 37 of the Act. According to AO, the premium of redemption is neither due nor incurred during the year and it is just a provision for liability arising in future. Accordingly, the AO disallowed the claim of deduction and the assessee carried the matter to DRP, who also confirmed by holding that the FCCB premium of redemption is just a provision for liability arising in future and therefore agreed that the AO i.e. premium of redemption cannot be allowed as deduction because the expenditure is neither fructified or ascertained. Aggrieved, now assessee is in appeal before Tribunal.*
>
> *37. We have heard the rival contentions and gone through the facts and circumstances of the case. The learned Counsel for the assessee explained the facts that the assessee company has issued FCCB (listed in Singapore Stock Exchange) to the extent of US $ 40 million. These bonds carry*

an interest rate of 0.5% p.a. and are redeemable on April 19, 2010 at 136.78 percent of the Principal amount. Further, these bonds are convertible into shares by Bond holders on or after May 18, 2005. The total issue expenses relating to the issue of FCCB is USD $ 10,77,926 claimed in equal installments over a period of 5 years. Further, we find that these Bonds may be redeemed only in full, at any time on or after 18th April 2008 but before April 19th 2010 with a redemption premium of 68% p.a. As on 31' December 2005 the additional amount (including exchange fluctuation) which is payable on redemption was provided for under Debenture Redemption Reserve with a corresponding adjustment to Securities Premium. Further, none of the bonds were offered for conversion as on 31st March 2007. Further, the FCCB issue expenses have been allowed as a deduction in the Company's own case for the AY 2006-07. Based on GAAP principles, the premium needs to be accrued; consequently the liability has been accrued in the books in the year of receipt of FCCB funds. Premium on redemption amounting to USD 16 Million has been accrued in the financials for the year ending 31 December 2005 based on the office circular. The liability is crystallized in the year of issue; however, it is discharged in the year of redemption.

38. In view of these facts, we are of the view that when a Company issues FCCB, it incurs a liability to pay a larger amount than what is borrowed and such higher amount payable by the Company will be for the purpose of its business in order to generate funds for its business activities. The amounts so obtained are used by the

Company for the purposes of its business. Hence the liability to pay the additional amount would therefore be revenue expenditure. The additional amount is nothing but an interest computed at 6.8% p.a. We find that the assessee also relied on the decision of Hon'ble Bombay High Court in the case of CIT vs. SM Holding and Finance Pvt. Ltd. 2003 264 ITR 370 Bombay. Before the Hon'ble Bombay High Court in the question raised was regarding the claim of 1/5th of premium of redeemable debentures and the question referred before the Hon'ble High Court was as under: – "Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal has erred in deleting the addition of Rs. 54,75,000 made on account of 1/5th (1/10th) of premium on the redeemable debentures without considering the fact that no liability had accrued during the year under appeal and it was a contingent liability which was payable only after the expiry of 10 years and directed the Assessing Officer to follow the decision of Supreme Court in the case of Madras Industrial Investment Corporation Ltd. v. CIT [1997] 225 ITR 802(SC) where facts of the case are different from those of Supreme Court's decision?" And Hon'ble High Court has held in Para 5 as under:-

"5. We do not find any merit in the above arguments advanced on behalf of the Department. Firstly, we have gone through the records and proceedings (R & P). In the entire R & P, there is nothing to indicate alterations of terms and conditions during the subsistence of the issued convertible debentures during the assessment year in question. Secondly, in the annual reports of the company and also in

the audit reports given by the auditors, it has been certified that zero interest unsecured redeemable convertible debentures of Rs. 100 each redeemable after 10 years at a premium of 100 per cent had been issued during the assessment year in question. There is no reason for us to discard this note of the auditor. Even in the assessment order, no reasons have been given by the Assessing Officer for discarding this note of the auditors. Lastly, we may point out that even assuming for the sake of argument that the borrower had a discretion to change the terms of the issued debentures, there is nothing in the record to show that during the assessment year in question the borrower had exercised such a discretion. In the absence of factual matrix, we have no option but to confirm the judgment of the Tribunal. In our view, the judgment of this Court in the case of Taparia Tools Ltd. (supra) is applicable to this case. In our view, the judgment of the Supreme Court in the case of Madras Industrial Investment Corpn. Ltd. (supra) is also applicable.

39. In view of the above facts, we are of the view that the assessee has rightly claimed the liability as expense and we allow the same. This issue of assessee's appeal is allowed."

28.1 Being, issue in dispute before us identical to the issue decided by the Tribunal (supra) above, respectfully following the finding of the Tribunal, we uphold the finding of the Ld. CIT(A) on the issue in dispute. The ground raised by the Revenue is accordingly dismissed

29. The ground no. 7 & 8 relates to setting off of loss of Non EOU unit against income from EOU units.

30. Brief facts qua this issue are that the assessee has certain units which were EOU units entitled to deduction u/s. 10B of the Act and had also other Non EOU units. The Assessing Officer while allowing the deduction u/s. 10B of the Act adjusted the loss of Non EOU units against the profits of EOU units and allowed deduction u/s. 10B of the Act accordingly. Aggrieved by this, the assessee preferred appeal before the Ld. CIT(A) who allowed the issue in favour of the assessee following the order of Hon'ble ITAT in its own case in earlier years. Aggrieved by this, the revenue is in appeal before us.

31. The Ld. Departmental Representative for the revenue argued that the adjustment of setting off of loss from Non EOU units against the profits of EOU units is not barred as there is no specific restriction u/s. 10B or section 70 in this regard. Further, he stated that the order of the Hon'ble ITAT in its own case which has been relied by the assessee for A.Y. 2004-05 has been challenged by the department in High Court which is pending for final decision after the admission of the appeal vide order dated 19.11.2012.

32. In rebuttal, the ld. Counsel of the assessee submitted that the losses of Non EOU units cannot be set off against the profits of the EOU units. In this regard, he relied on his own ITAT decisions for A.Y. 2003-04, 2004-05, 2005-06, 2007-08, 2008-09 which might be followed again. He also invited our attention to the order of the Hon'ble Supreme Court in the case of **CIT & Another v. M/s.**

Yokogawa India Limited (2017) 391 ITR 274 (SC) in support of his contentions. He accordingly prayed that following the above decisions, the Assessing Officer might be directed to allow deduction u/s. 10B of the Act without setting off the losses of Non EOU unit and that direction be given to him to allow the carry forward of losses of Non EOU unit as per provisions of law.

33. We have heard rival contentions and perused the relevant material on record. The issue in dispute is whether the losses of Non EOU units could be adjusted against the profit of EOU units, prior to computation of deduction/exemption under section 10B of the Act. On the issue in dispute, the Ld. CIT(A) has observed as under:

> *"5.6.3 The Hon'ble Income Tax Tribunal vide order dated 10/07/2010 permitted and held that the business losses of the non eligible unit, whose income is not eligible for exemption under section 10B of the Income Tax Act cannot be set off against the profit of the undertaking eligible for deduction under section 10B for the purpose of determining the deduction under section 10B of the Act. Therefore, denying of the carry forward of losses of Non-EOU unit is not justifiable."*

33.1 The relevant finding of the Coordinate Bench of the Tribunal in ITA No. 5386/MU M/2012 for assessment year 2007-08 is reproduced as under:

> *"24. We have considered the rival submissions and perused the material available on record. We find that the Co-ordinate*

Bench of Tribunal in assessee's own case in M/s Hikal Ltd. v/s ACIT, in ITAs No. 1039 & 1040/ Mum./2007, vide order dated 16/07/2010, for assessment year 2003-04 and 2004-05, while deciding similar issue in favour of assessee, observed as under:

> *"34. This issue is covered by the decision of the Madras Special Bench in the case of Scientific Atlanta India Technology Pvt. Ltd. v/s ACIT. The question before the Special Bench was as follows: "Whether the business losses of a non-eligible unit whose income is not eligible for deduction u/s 10A of the Act, have to be set off against the profits of the undertaking eligible for deduction u/s 10A for the purpose of determining the allowable deduction u/s 10A of the Act?*
>
> *35. The Tribunal held as follows: We have to answer the question posed before us by holding that the business losses of a non-eligible unit, whose income is not eligible for deduction u/s 10A of the Act, cannot be set off against the profits of the undertaking eligible for deduction u/s 10A for the purpose of determining the allowable deduction u/s 10A of the Act."*

25. The learned DR could not show any reason to deviate from the aforesaid order and no change in facts and law was alleged in the relevant assessment year. Accordingly, respectfully following the judicial precedent in assessee's own case cited supra, grounds No. 7 and 8 raised in assessee's appeal are allowed."

33.2 Further in ITA No. 5387/Mum/2012, the Coordinate Bench in the case of the assessee for assessment year 2008-09, following the decision of the Hon'ble Supreme Court in the case of CIT Vs Yokogawa India Limited (supra) directed to allow deduction under section 10B of the Act without setting of the losses of non EOU units. The relevant finding of the Tribunal (supra) is reproduced as under:

> *"2.3. Further, we find that the said view is also covered by the decision of the Hon□ble Supreme Court in the case of CIT vs. Yokogawa India Ltd., reported in (2017) 145 DTR 1 (SC) dated 16/12/2016. Respectively following the aforesaid judicial precedents, we direct the ld. AO to allow deduction u/s.10B of the Act without setting off of the losses of non-EOU units. The ld. AO is further directed to allow the carry forward of losses of non-EOU units in accordance with the law. Accordingly, the ground Nos. 1 & 2 raised by the assessee are allowed."*

33.3 Respectfully following the above finding, we uphold the order of the Ld. CIT(A) on the issue in dispute and accordingly the ground No. seven and eight of the appeal of the Revenue are dismissed.

34. Now we take up the appeal of the Revenue for assessment year 2011-12. The ground raised by the Revenue are reproduced as under:

> *1. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance u/s14A of the IT Act at Rs.79,82, 199/- made by the AO without*

appreciating the fact that the assessee has neither established that no part of interest-bearing fund as well as expenses so claimed has found its way into the investments in Mutual Funds/ Shares nor adduced any documentary evidences during the course of assessment proceedings before the A.O."

2. 'Whether on the facts and circumstances of the case and in law, the ld. I CIT(A) erred in deleting addition made by the AO for allocation of H.O expenses among Non-EOU and EOU units without appreciating the fact that the assessee has not followed the uniform criteria while allocating the R&D expense to the EOU and Non-EOU units and the AO has allocated the expenses on basis of the tum over from the EOU and Non-EOUP"

3. "Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) erred in deleting addition made by the AO of depreciation of Rs. 14,95,028/-claimed on the bogus purchase of fixed assets without appreciating the fact that the assessee failed to prove genuineness of the claim during the assessment proceedings?"

35. As far as ground No. 1 of the appeal of Revenue is concerned, the Ld. CIT(A) has mentioned that fact of the instant year are identical to the facts of the case for assessment year 2010-11. The relevant funding of the Ld. CIT(A) is reproduced as under:

5.1.1 The first ground of appeal relates to disallowances us 14A of Income Tax Act 1961 r.w. Rule 8D amounting to Rs 86,60,051/-. The assessing officer has dealt with this issue at para 4 of his assessment order dated 31.03.2013. He observed

that the appellant had shown dividend income amounting to Rs. 34,600/- which was exempt us 10 (34). Further, the assessing officer notes that the appellant stated that it had investment of Rs. 18.16 crore as on 31.03.2010 and there was no addition of investment during FY 2009-10. The appellant had also stated to the assessing officer that there was no expenditure incurred in relation to such income.

5.1.2 The assessing officer observed that the appellant had claimed Rs. 34.83 crore as interest on borrowed funds. He observed that the appellant had not established that no part of interest-bearing fund had found its way into the investments which were giving tax exempt dividend. He further observed that investment decisions are very complex and must have involved certain administrative costs and, therefore, it is not correct to say that no expenditure was incurred in making the investment. He has proceeded to then make disallowance under section 14 A r.w.Rule 8D.

5.1.3 I find that the following facts have not been at all disputed by the assessing officer and are in fact supported by the financial statements and other documents available to the assessing officer during the course of assessment proceedings:

i. *98% of the investment is made in appellant's own subsidiary and foreign companies for the purpose of holding controlling stake in the group concerns.*
ii. *Investment of Rs. 2.6 crores is in equity shares of a foreign company Jiangsu Chemstar Chemical Co. Ltd., China and not covered within the scope of disallowance under section 14A.*

iii. *During the year, the appellant company has not made any new investment which would result in exempt income.*

iv. *As on 31.03.2010 the appellant's interest-free own funds in form of Share Capital and Reserves and Surplus stood at Rs. 3 99.05 crores.*

v. *The dividend receipt is directly credited to ECS system through bank accounts and the expenditure items shown in the appellant's profit and loss account are directly related to the business of the company.*

vi. *During the year the appellant has incurred finance charges of Rs. 34.83 crores which includes heads like bank charges, bank guarantee commission, interest on packing credit, interest on overdue bills et cetera. All these items of interest charges are directly relatable to the appellant's business.*

5.1.4 Although, in the past, applicability of section 14A of the Act as well Rule 8D of the I-T Rules have been subject matter of numerous litigations and disputes, over the years, the provisions have benefitted from the light of judicial interpretations from various judicial authorities, both in this jurisdiction as well as elsewhere in the country. The essence of the said provisions have been distilled by those Hon'ble Courts to the extent that the scope for subjective interpretation is practically ended and lower judicial authorities have to abide by the principles laid down by higher authorities. The facts of each case have to be put through the filter of judicial pronouncements to reach a decision that is in conformity with the tenet of judicial discipline."

35.1 The issue in dispute raised being exactly identical to the issue raised in assessment year 2010-11, therefore following our finding in assessment year 2010-11, the Ld. Assessing Officer is directed to restrict the disallowance u/s 14A of the Act to the extent of exempted income of ₹45,950/- earned by the assessee during the year under consideration. The ground of the appeal of the Revenue is accordingly allowed partly.

36. The ground No. 2 of the appeal of the Revenue relates to ground No. 2 raised in assessment year 2010-11, therefore following our finding in assessment year 2010-11, the ground raised in the year under consideration is allowed for statistical purposes.

37. The ground No. 3 of the appeal of the Revenue is concerned to deletion of depreciation of ₹14,95,028/- claimed on purchase of fixed assets, which were held by the Assessing Officer as bogus. In the year under consideration the issue pertains to purchase from three dealers namely M/s Mahavir Enterprises, M/s Krasna Enterprises and M/s Krisana Enterprises. The finding of the Ld. CIT(A) on the issue in dispute is identical to his finding in assessment year 2010-11. The facts and circumstances in the instant assessment year being identical to the facts in circumstances on the issue in dispute in assessment year 2010-11, therefore following our finding in assessment year 2010-11 on the issue in dispute, the ground of the appeal of the Revenue is allowed.

38. In the result, the appeal of Revenue for assessment year 2010-11 and 2011-12 are partly allowed for statistical purposes.

Order pronounced in the Open Court/under Rule 34(4) of the ITAT Rules, 1963 on 28/12/2022.

Sd/-	**Sd/-**
(RAHUL CHAUDHARY)	**(OM PRAKASH KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai;
Dated: 28/12/2022
Rahul Sharma, Sr. P.S.

<u>Copy of the Order forwarded to</u> :

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

BY ORDER,

//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai