IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I', NEW DELHI

BEFORE SH. I. C.SUDHIR
JudicialMember
AND
SH. PRASHANT MAHARISHI,
Accountant Member

ITA No. 196/Del/2013
A.Y.: - 2008-09

Ranbaxy Laboratories Ltd. 12th Floor, Devika Tower, 6, Nehru Place New Delhi **PAN No. AAACR0127N** **(APPELLANT)**	Vs	ACIT Range -15 New Delhi **(RESPONDENT)**

Date of pronouncement	25/04/2016
Assessee by:	1. Shri Ajay Vohra, Sr. Adv. with Sh. Rohit Jain, Adv.and Ms. Deepanvee Rao,Adv. on corporate tax issues 2. Sh. Rahul Mitra, C.A. with Sh. Derendra Gulari, C.A and Sh. Vinay Verma, C.A. on transfer pricing issues
Revenue by:	Shri Amrendra Kumar, CIT, DR

Per Prashant Maharishi, AM:

01. This appeal is preferred by assessee (hereinafter referred to as " Appellant") against order ofAssessing officer (hereinafter referred to as 'AO') passed u/s 143 rws 144C of The Income Tax Act (hereinafter referred to in short 'The Act') dated 16.11.2012 in pursuance of direction of Learned Dispute Resolution panel (Hereinafter referred to in short as 'DRP') -II,

New Delhi dated 29 September, 2012 raising following grounds of appeal :

"That on the facts and circumstances of the case, and in law, the Assessment Order dated 16.11.2012 passed under section 143(3) r.w.s. 144C of the Income Tax Act, 1961 (The Act') in pursuance to the directions issued by the Learned Dispute Resolution Panel ('Ld. DRP') is illegal and bad in law.

1. *That the Ld. DRP erred on facts and in law in confirming the additions/ disallowances proposed in the draft order passed by the assessing officer without judiciously considering the factual and legal objections to the draft assessment order.*

2. *That the DRP erred on facts and in law in not directing the assessing officer to delete various additions/ disallowance, which were squarely covered in favour of the appellant by the appellate orders for the earlier years.That the Ld. DRP erred, both on facts and in law, in confirming the addition of Rs.238,16,00,000 by holding that the appellant's international related party transactions do not satisfy the arm's length principle as envisaged under the Act and in doing so the Ld. DRP has grossly erred in agreeing with the Ld. Transfer Pricing Officer's ('TPO') action of:*

   2.1 *disregarding the arm's length price ('ALP') and the methodical benchmarking process carried out by the appellant in the Transfer Pricing ('TP') documentation maintained by it in terms of section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 ('Rules');*

   2.2 *not accepting the overseas Associated Enterprises ('AEs')* *as the tested party, being the least complex of the transacting entities and instead considering the appellant as the tested party, thus violating the basic principles of TP.*

2.3 *disregarding the approach adopted by the appellant of undertaking a regional benchmarking in the TP report, which is in line with the globally accepted TP principles.*

2.4 *holding that relevant and sufficient financial data is not available for the comparable companies selected by the appellant.*

2.5 *not taking into cognizance the arguments put forth by the appellant in support of the fact that financial accounts of the overseas AEs need not be re-casted and ignoring the fact that the financials of the overseas comparables furnished in the TP report have similar period as that of the AEs.*

3. *That the Ld. AO/DRP erred in rejecting the re-casted financials of the overseas AEs, for the period April 2007 to March 2008*

4. *That the Ld. AO/DRP erred in not appreciating the economic analysis submitted based on single year data (year 2007 and 2008) for benchmarking the margin earned by overseas AEs*

5. *That the Ld. AO/DRP erred in modifying the supplementary economic analysis conducted by the appellant, taking appellant as the tested party and while doing so the Ld. AO/DRP has grossly erred by:*

5.1 *disregarding the ALP and the methodical benchmarking* *process carried out by the appellant while preparing the supplementary economic analysis as submitted before the Ld. DRP and Ld. TPO in order to meet their requirements;*

5.2 *disregarding the approach adopted by the appellant of using the multiple year/ prior available year's data in the supplementary economic analysis and holding that current year (i.e. Financial Year 2007-08) data for comparable companies should be used despite the fact that the same was not necessarily available to the appellant at the time of preparing TP documentation;*

5.3 *resorting to arbitrary rejection of low profit making companies based on erroneous and factually incorrect reasons;*

5.4 *selecting random companies as comparables without providing a search strategy and thereby undertaking cherry picking of comparables with the sole objective of making the adjustment;*

5.5 *modifying the search strategy consistently applied by the appellant and including certain companies that are not comparable to the appellant in terms of functions performed, assets employed and risks assumed;*

5.6 *committing factual errors in computation of the operating margin of the comparables;*

5.7 *making TP adjustment on total turnover including domestic sales as well as exports made to non AEs and not restricting the amount of adjustment to international transactions with*

AEs thereby disregarding judicial pronouncements;

5.8 *not appreciating that TP adjustment cannot exceed the total profit made by the overseas AEs from the international transactions entered into with the appellant company.*

6. *On the facts and in the circumstances of the case and in law, the Ld. AO/TPO/DRP has erred in making arbitrary/ frivolous statements based on conjectures/ surmises and unsound presumptions, which are not in accordance with the facts of the case.*

7. *On the facts and in the circumstances of the case and in law, the Ld. AO/DRP has erred in disregarding sound TP principles and judicial pronouncements in India in undertaking the TP adjustment.*

8. *That the Ld. AO/DRP erred on facts and in law in disallowing Rs. 1,03,33,543, being deferred employees compensation debited to the Profit & Loss Account (P&L) pursuant to company's Employees Stock Option Scheme (ESOP).*

8.1 *That the AO/DRP erred on facts and in law in holding that employees compensation expense claimed by the appellant did not represent a crystallized liability and the claim being without any evidence, random in nature, hence not allowable as deduction.*

8.2 *That the AO/DRP further erred on facts and in law in holding that since the appellant did not deduct any tax at source, the amount claimed was disallowable under section 40(a) (ia) of the Act.*

8.3 *Without prejudice, that the AO/DRP erred on facts and in law in not even allowing deduction of employees compensation relatable to options actually exercised and/ or shares allotted pursuant to ESOP.*

9. *That the Ld. AO/DRP erred on facts and in law in not allowing deduction of the contributions of Rs.47,00,000 and Rs. 12,50,000 made by the appellant to Ranbaxy Community Healthcare Society (RCHS) and Ranbaxy Science Foundation (RCF) under the provisions of sections 35/37 of the Act.*

9.1 *That the AO/DRP erred on facts and in law in holding that the contribution made was not allowable since the recipient did not show the amount as taxable receipts.*

9.2 *That the AO/DRP further erred on facts and in law in holding that since the appellant did not deduct any tax at source, the amount of contribution claimed was disallowable under section 40(a) (ia) of the Act.*

10. *That the AO/DRP erred on facts and in law in disallowing Rs.7,40,66,105 under section 14A of the Act, by applying the formula prescribed in Rule 8D of the Income Tax Rules, 1962 ("the Rules").*

10.1 *That the AO/ DRP erred on facts and in law in proceeding to make disallowance under section 14A of the Act simply on the basis of method/ formula prescribed in Rule 8D of the Rules, without appreciating that:*

(a) *there is nothing on record to dispute the contention of the appellant that no expenditure, over and above* *expenditure suo-moto disallowed by the appellant was actually incurred in relation to the exempt income;*

(b) *Preconditions for applying Rule 8D as prescribed in sub-sections (2) &(3) of section 14A of the Act were not satisfied.*

10.2 *That the AO/ DRP erred on facts and in law in not appreciating that there was no nexus between any interest expenditure incurred by the appellant and the exempt income and consequently, no part of interest expenditure was, in any case, disallowable under section 14Aof the Act.*

10.3 *That the AO / DRP erred on facts and in law in holding that the primary reasons for making investment was to earn exempt income, for making disallowance u/s 14A of the Act, which is in complete disregard to material put on record by the appellant.*

11. *That the AO/DRP further erred on facts and in law in making upward adjustment of Rs.7,40,66,105 while computing book profit under section 115JB of the Act, without appreciating that:*

(a) *adjustment, if any, could have only been made out of expenditure actually debited to the audited accounts;*

(b) *the method/ formula prescribed in Rule 8D of the Rules was not relevant for computing book profit.*

12. *That the Ld. AO/DRP erred on facts and in law in disallowing the entire*

deduction of Rs.1,36,68,21,506/ crores claimed by the appellant under sections 80-IB and 80-IC of the Act in respect of profits derived by five separate and independent eligible units.

12.1 *That the AO/ DRP erred on facts and in law in denying the deduction claimed on the ground that separate balance sheet and profit and loss account were allegedly not maintained by the appellant for the eligible Units/ undertaking, thereby violating the condition prescribed in section 80 IA (7) of the Act.*

12.2 *That the AO/ DRP failed to appreciate that the deduction claimed by the appellant under sections 80IB & 80IC of the Act was duly supported by audit report(s) in Form 10CCB and accounts maintained in SAP/ ERP based elaborate, comprehensive and robust accounting system/ software.*

12.3 *That the AO/DRP has grossly erred in holding that the Appellant has not furnished separate report in respect of units / undertakings in the Form No.l0CCB without verifying the fact that the same were submitted during the assessment proceedings.*

12.4 *That the AO/ DRP exceeded jurisdiction in holding that the appellant was not eligible to claim deduction under sections 80IB & 80IC of the Act for the year under consideration, without appreciating that on identical facts deduction had been allowed in the earlier year(s).*

12.5 *That the AO/ DRP erred on facts and in law in leveling* *various baseless allegations to hold that the eligible profits computed and claimed by the appellant in respect of various units were not reliable, without judiciously appreciating the factual and legal submissions.*

12.6 *That the AO/ DRP erred on facts and in law in further holding that the appellant was not eligible for deduction under sections 80IB & 80IC of the Act since there were no eligible profits once:*

(a) *other incomes are excluded from the gross business income of the appellant;*

(b) *profit of selling and distribution function network and other profit centers, constituting independent/ separate activity, are excluded;*

(c) *Profits of the eligible units are computed after attributing relevant expenses and after considering arm's length results.*

12.7 *That the AO/ DRP erred on facts and in law in alleging that the appellant violated the provisions of sub-sections (5) and (8) of section 80 IA of theAct.*

12.8 *That the Ld. AO/DRP erred on facts and in law in proposing alternate computation mechanisms (particularly in paras B-1, B-2 and D of the impugned order) to arrive at the profits eligible for deduction under section 80-IB and section 80-IC of the Act, disregarding the method prescribed under the Act.*

13. *That the AO/DRP erred on facts and in law in not adjudicating the claim of weighted deduction under section 35(2AB) of the Act on the cost of assets provided to the employees working in approved Research & Development (R&D) facilities and engaged in execution of R&D activities.*

14. *That the AO/DRP erred on facts and in law in not adjudicating on the claim of deduction of Rs.2,23,06,073, being the demand raised under the Drugs (Price Control) Order, 1979.*

15. *That the AO/DRP erred on facts and in law in not adjudicating on the adjustment of exchange fluctuations on External Commercial Borrowings, Hedging contracts in relation thereto and hedging charges to the cost of capital assets, and allowing depreciation there on as part of actual cost of the depreciable assets.*

16. *That the AO/DRP erred on facts and in law in adjusting book profit under section 115JB of the Act by Rs.98,53,213 on account of provision for diminution in value of current investments written back during the year.*

17. *That the AO erred on facts and in law in law in charging interest under section 234B of the Act.*

18. *That the Ld. AO/DRP have erred in making arbitrary/ frivolous statements based on conjectures/ surmises and unsound presumptions, which are not in accordance with facts of the case.*

19. *That the above grounds of objection are independent of, and without prejudice to one another."*

02. The assesse is a public limited company engaged in the business of manufacturing and sale of pharmaceutical products. In consonance with its business, assesse carries on research and development activities for development of new drugs and formulation, which is also one of main activities of the assesse company. It is also engaged in trading of pharmaceuticals. During the year, it has earned profits on manufacturing activity as well as long-term capital gain on sale of land. It has also claimed deduction u/s 80 G and 80 IB & 80 IC of the Income tax Act

03. Assesse filed its return of income 29.09.2008 declaringtotal income of Rs.1583214228/- according to the normal computation and declared book profit of Rs.7623353938/- u/s 115JB of the Income tax Act. Assesse filed audit report in form NO. 3CEB u/s 92E and in Form no 10 CCB of the income tax act on 30 September 2008. Further the return was revised on 25.03.2010 wherein book profit u/s 115JB was shown at Rs.7637048100/- and regular income was shown at Rs.1968846227/-. As the book profit tax was more than the regular income tax hence, return of income was taken at book profit income as per section 115JB of the Act.

04. Assesse has entered into international transaction with its associated enterprises more than Rs.15 crores. Therefore, ld. AO referred the matter to Transfer Pricing officer (in short hereinafter referred to as 'TPO'). Ld. TPO passed an order u/s 92CA (3) of the Act on 31.10.2011 wherein an adjustments of Rs.238.60 crores was made on account of determination of Arm's length price (hereinafter referred to in short as 'ALP') of various International transaction entered in to by assesse with

its Associated Enterprises (hereinafter referred to in short as 'AE'). Based on the report of ld. TPO, ld. AO passed draft assessment order u/s 144C rws. 143(3) on 29.12.2011 at an income of Rs.5813340115/- and computed book profit u/s 115JB of the Act at Rs.7720967422/-. Against this assesse filed objections before the Learned Dispute Resolution panel that passed its direction on 29.09.2012. Based on those directions, ld. AO passed final assessment order u/s 143(3) r.ws 144C on 16.11.2012. Assesse being aggrieved with the final assessment order passed by the Additional Commissioner of Income Tax, Range-15, New Delhi has preferred an appeal before us raising 19grounds that are listed above.

05. Ground No 1 is general and grounds no. 2 to 7 relates to the transfer pricing issues and ground no 8 to 19 relates to corporate tax issues in this appeal.

06. Ground No.1 is raised against the assessment order dated 16.11.2012 alleging that it is illegal and bad in law. Assessee mentioned that that the order is passed without judiciously considering factual and legal objections to draft assessment order by ld. DRP. Assessee further mentioned that ld. DRP has erred in not deleting/ adjudicating/ directing on various addition and disallowances, which are squarely covered in favour of assesse by appellate orders for earlier years in assessee's own case. This ground is general in nature and as against each addition/disallowances separate grounds are raised, therefore, this ground is not dealt with by the parties before us and hence, it is dismissed.

Transfer pricing issues

07. Now we proceed to discuss each of the grounds raised by the assessee on transfer pricing issues. On behalf of revenue Shri

Rahul Mitra, CA, submitted detailed arguments on the issues, which were supported by his written synopsis and paper books relating to transfer pricing issues containing TP documents, Copies of Advance pricing agreements entered in to and paper book covering submissionsand a separate paper book of various decisions relied upon. Ld., CIT DR Shri Amrendra Kumar, also submitted extensively relying about ld. TPO, and Ld. DRP. We have perused their arguments and written submissions carefully.

08. Ground No.2 to 7 of the appeal are related to addition of Rs.238,16,00,000/- with respect to determination of ALP of International transactions of the assesse with its associated enterprises holding that same do not satisfy the Arm's length principal as per transfer pricing regulations.

09. The brief facts of the international business of the assesse are that asses is in business of manufacturing of pharmaceutical for many decades and carries on research and development activities related to its business commensurate with its size and area of operation. It is engaged in the manufacture of active pharmaceutical ingredients (API) and formulations from its many manufacturing units located at multiple locations. It is engaged in multiple operations relating to research and development, manufacturing, quality control process, obtaining regulatory approvals etc. It also has substantial tangible assets and intangibles. It has wholly owned subsidiaries, joint ventures and representative liaison offices in several countries. Regarding its international transactions with AEs who purchases API, raw material, formulations from the appellant and sales them to customers in overseas markets. The Associates Enterprises are mainly engaged in selling,

distribution activities except few who are also engaged in conversion of APIs into dosage form, repacking, and finishing activities etc.

10. Assessee entered in to following international transactions during the year.

Sl No.	Nature of transactions	Amount (in INR) Refer page no.473 of the paperbook	Method applied (refer page no.414 and 415 of the paperbook
1.	Sale of APIs	8685223772	Transactional Net Margin method (TNMM)
2.	Sale of dosage formulations	14141615556	TNMM
3.	Sale of machines, spares and consumables	88757051	TNMM
4.	Purchase of dosage formulations	35214894	TNMM
5.	Allocation of SAP licensed and maintenance charges	13564066	Comparable uncontrolled price (CUP) method
6.	Market research and support services availed	863649036	TNMM
7.	Provision of technical services	76325310	TNMM

8.	Technical services availed	59740808	TNMM
9.	Royalties and technical fees received	559814477	TNMM
10.	Contract manufacturing services availed	108636205	TNMM

11. According to the Transfer pricing Study Report (hereinafter referred to in short as 'TP Report') submitted it was mentioned that appellant is a manufacturer who is exposed to normal risk such as risk for success and failure of the business operations and on the other hand the associated enterprises are only engaged in sales and distribution activities and few on secondary manufacturing.Therefore, AE assumes lesser risk than the assesse and based on this functional analysis it was mentioned that these AEs have less complex operations and bare a minimum risk without owning any intangible property or unique asset and therefore these AEs have been selected as the 'tested party' for the purpose of economic analysis. On these premises, TP study was carried out and it was submitted that the transaction of associated enterprises are at Arm's length.
12. Ld. TPO rejected the selection of the foreign AEs as 'tested party' holding that there is a geographical difference between the comparables submitted by the assesse with the foreign AEs and assesse has compared the AEs in countries with comparables of different countries, hence, according to ld. TPO there are no comparables available of those countries. It was also held by him relying on OECD guidelines of 2010 on Transfer pricing that the tested party can be taken for which the most reliable comparables can be found. It was further held

that comparability should be judged with reference to the geographical locations of the parties to the transactions. He also referred to decision of coordinate bench of ITAT in assessee's own case wherein the ITAT has rejected foreign tested parties because of single set of comparables for benchmarking international transactions entered in to with AEs across the globe were used.On this issue the ld. TPO vide order sheet entry dated 14.03.2011 asked the assesse to furnish separate TP study report taking Indian entity (i.e. assessee) as tested party which was submitted on 11.05.2011 and further a show-cause notice was also issued on 03rd October 2011 on this issue which was replied by assesse on 24th October 2011. On consideration of reply,ld. TPO held that relevant and sufficient, reliable and accurate financialdata are not available in most of the cases and further as the accounting policy isdifferent from country to country,and as it relates to different financial years, he rejected the foreign AEs as tested parties. Ld. TPO then treated the assesse company as tested party for the reason that most reliable financial data is easily and readily available in case of the assessee as tested party as well as the comparable. After that the ld. TPO selected five final comparable whose average PLI of OP/OE was 20.41% and after granting R&D adjustment of 0.5% computed the Arm's length prices of International transactions at Rs 4450.75 crores whereas price charged by the assesse is Rs. 4212.59 crores and thereby resulting in a difference Rs.238.16 crores which was proposed to be added to the income of the assessee. Against this assesse preferred objections before ld.DRP against the draft order containing above TP addition. Ld. DRP vide its direction dated 29.09.2012 has held that it is in complete agreement with the approach followed by the TPO that the assesse should have been taken as the tested party for determining ALP for benchmarking international transactions following TNMM methods as the most appropriate method. Therefore, assessee is in appeal before us on Transfer pricing issues.

13. Before us on these TP grounds, Shri Rahul Mitra , CA, ld. AR submitted that ground No.2.2 of the appeal is against not accepting overseas associated enterprises as the tested partythough same being the least complex entities of the transacting parties. He submitted that these groundsmight first be heard on grounds of TP adjustment. He submitted a written synopsis and for which he referred to page no.3 of that synopsis regarding selection of tested parties. He submitted that ld. TPO has rejected the contention of the assesse for taking foreign AEs as tested party because of five following reasons:-

(i) The Hon'ble Incom Tax Appellate Tribunal ("ITAT") in the case of Appellant itself for AY 2004-05 rejected overseas AEs as tested parties.

(ii) The financial statements of overseas AEs (except Nihon) are for the period January to December. Financial accounts of the overseas AEs should be re-casted from December ended figures to March ended figures so that the period January to March 2008 is also covered.

(iii) Relevant and sufficient financial data, which are reliable and accurate as required under the Income tax rules, is not available for all the comparables.

(iv) Region-wise benchmarking has been carried out instead of the country wise benchmarking of the margins of assessee's AEs located in 28 countries, which is not reliable since the economic conditions of two countries might not be the same even within the same continent selected.

(v) Appropriate comparables for all overseas AEs are not available and therefore assessee should be selected as tested party since the most reliable data is easily and readily available.

14. Ld. AR. Strongly objected to these findingsof ld. TPO andsubmitted that for following reasons the selection of assesse cannot be made as the tested party, but AEs should be selected as 'Tested Party'. :-

(a) He submitted that that on August 7, 2015, the Appellant had entered into Advance Pricing Agreement (hereinafter in short referred to as 'APA') under Section 92CC of the Act, 1961 with Central Board of Direct Taxes ("CBDT"), Ministry of Finance, Government of India in respect of AY 2014-15. In the APA, based on the functions, asset and risk ("FAR") analysis of the Appellant and the AEs, it has been concluded that assessee is an entrepreneur manufacturer and the AEs are functioning as a distributor / secondary manufacturer. Based on the same, the CBDT has approved that for the purpose of transfer pricing analysis, AEs should be selected as the tested party with TNMM as the most appropriate method. The concept of regional benchmarking has also been approved by the CBDT. While the APA has been entered with respect to AY 2014-15 and shall not have statutory binding effect for the assessee for AY 2008-09i.e the year under appeal, but that there has been no change in the FAR analysis of assessee and the AEs in this assessment year vis-à-vis the year approved in the APA, same shall have persuasive value. As CBDT has principally approved the concept of overseas AEs adopted as the tested party in the Appellant's own case for AY 2014-15, the same treatment shall be given to the International transactions, which are also same in this year i.e. in AY 2008-09. Thereafter he referred to the various clauses and conditions of APA.

(b) He further submitted that the assesse is performing complex functions owning valuable intangible and bearing significant risk compared to their AEs. For support , he referred to the revised TP guidelines of July 22, 2010 and specifically Para 3.19 of that guidelines.

(c) He further referred to United States TP regulations andPara 6.3.3.1 of UN TP manual and India Chapter 10.3.1.3to support his contention that less complex entities should be selected as tested parties.

(d) Therefore, he contended that selection of foreign AE as tested partyis in accordance with Indian TP regulations, OECD TP guidelines, UN Transfer pricing manual and TP regulations of United States.

(e) He further submitted that as the selection of the tested party is upper most steps in the process suggested by OECD in transfer pricing comparability analysis and therefore it is first step. Therefore, selection of tested party is to be made based on the above-referredguidelines other it may give erroneous results.

(f) He submitted that this view has been affirmed in decision of Development consultants Pvt. Ltd. Vs. DCIT, 115 TTJ

557 and General Motors India Pvt. Ltd. Vs. DCIT (ITA No.3096 and 3308 of ITAT Ahmedabad. He relied on decision of Mastek Ltd. and Garware Polyester where overseas entities were selected as tested party.

(g) Regarding the order passed by the tribunal, he submitted that the principal of selection of tested party that least of the complex transacted parties in that year has been approved. However, as the single set of comparables for that year was maintained with respect to various AEs the Hon'ble ITAT has held that assessee should be taken as tested party. In the current year, assesse has maintained the comparable with respect to various AEs keeping in view the functional and geographical similarity. Therefore, he submitted that order of ITAT was rendered because of lacuna in TP documentation that is not the case in the present year. Therefore, to the facts of the case of this year above judgment should not be applied approving assessee as tested party. However, the principle of selection of tested party is to be followed.

(h) He further submitted that present year shows regional benchmarking undertaken by the appellant and reliability of data of comparables. He further submitted that in APA agreed by the assesse with CBDT December ending data have been specifically approved. Therefore, the reliable and sufficient data of the AEs are available for comparability analysis and data ending December should be accepted.

(i) He further submitted that Income tax Act and Rules framed thereunder do not bar selection of foreignAEs as Tested party.

(j) He also pointed out several factual errors in computation of margin of comparable companies and submitted that TP adjustment should be restricted to transactions with AE and not on overall turnover of the company.

(k) He further objected that addition could not exceed the total profit made by the overseas AES on sale of products of assesse.

(l) He also objected to several quantitative filters applied by ld. TPO.

In the end, he contended that the order of ld. TPO and confirmation by that by Ld. DRP is erroneous. He strongly contended that foreign AEs should be taken as tested party and thereafter the TP study report prepared by the assessee should be examined fordetermination of Alp of the International transactions of the assessee.The Thrust of his argument was mainly on selection of tested party and it was submitted that this issue may be decided first for carrying on onward process of determination of ALP.

15. Against this ld. DR submitted that:-

(a) That tribunal in the assessee'sown case for earlier year has held against the assessee that foreign AE cannot be taken as tested party

(b) Regarding claim of the aseesee the APA has been entered in to between the assesse and CBDT, he submitted that it is merely a negotiated agreement and cannot be relied upon for this year.

(c) He further submitted that APA cannot be applied retrospectively in the present year as it is beyond the roll back period of APA, if any. He further referred to the APA stating that it is specifically applicable for AY for which it is entered in to .

(d) He submitted that at Page 4 of the TPO order Para No.5 stating that no comparables are available and in absence of comparable data foreign party cannot be taken as tested party

16. In rejoinder ld., AR relied on commentary on OECD for tested parties and US TP manual. He further submitted that it is undisputed that APAP does not apply other than the year for which it is entered but the principles laid down there in are equally applicable particularly when International Transactions and FAR analysis for both the years of assessee and AES are similar.

17. On specific query from the bench, whether the FAR analysis of the year under appeal and FAR analysis for the APA year are similar. It was submitted by ld. AR that they are identical. He drew attention towards the APA as well as the submission dated 11.05.2011, he also referred page no.190 of that submission to show the risk analysis of this year with the risk analysis for the year for APA. He also referred to the TP study report and APA to show the similarities between the facts of functions performed, Assets deployedand risksassumed by the assessee and AEs. Therefore, he submitted that they are similar nature of transactions with similar FAR analysis.Ld. DR has notmentioned any difference in the Nature of transactions and FAR analysis of the transacting parties of the year of the APA and the year under appeal.

18. We have carefully considered the rival contentions. We have also perused the relevant paragraphs of the several documents relied upon before us in the form of two paper book volumes,

One supplementary paper book and one decision paper book on transfer pricing issues.

19. Generally, in transfer pricing comparability analysis, the tested party is usually the party participating in a transaction for which profitability most reliably can be ascertained and for which the reliable data of comparables can be found and the tested party will typically be the party with least intangibles.

20. As per section 92C(1) of the Act, ALP of the international transact is required to be determined using any of the profit based prescribed methods, being the Most Appropriate method (MAM) having regard to the nature of transaction or class of transactions. However, in order to determine the MAM for determining the ALP, it is first necessary to select the 'tested party'. The transfer pricing l□□□□□□□□E □□v □□□ia does not pro any guidance on the concept of 'tested party'; however, there are some decisions on this issue, which can be of great help.

21. In order to understand the concept of tested party, one need to refer to the transfer pricing legislations of developed countries where the principles of transfer pricing have been in use for a long time and act as a guiding force for all the developing economies. The transfer pricing guidelines issued by the US Internal revenue services under section 482 provide and discuss the concept of transfer pricing. Section 1.482-5 of the US Transfer Pricing Regulations state that 'the tested party will be the participant in the controlled transaction whose operating profit attributable to the controlled transactions can be verified using the most reliable data and requiring the fewest and most reliable adjustments, and for which reliable data regarding uncontrolled comparables can be located. Consequently, in most cases the tested party will be the least complex of the

controlled taxpayers and will not own valuable intangible property or unique assets that distinguish it from potential uncontrolled comparables. Thus, in a sense, the tested party would have lesser risk as compared to the other transacting party or the real entrepreneur.

22. As per the OECD Transfer Pricing Guidelines 2010, when applying a cost plus, resale price or transactional net margin method, it is necessary to choose the party to the transaction for which a financial indicator (mark-up on costs, gross margin, or net profit indicator) is tested. The choice of the tested party should be consistent with the functional analysis of the transaction. As a general rule, the tested party is the one to which a transfer pricing method can be applied in the most reliable manner and for which the most reliable comparables can be found, i.e. it will most often be the one that has the least complex functional analysis.

23. As per UNTPM 2013,

> "*5.3.3. Selection of the Tested Party*
>
> *5.3.3.1.When applying the Cost Plus Method, Resale Price Method or Transactional Net Margin Method it is necessary to choose the party to the transaction for which a financial indicator (mark-up on costs, gross margin, or net profit indicator) is tested. The choice of the tested party should be consistent with the functional analysis of the controlled transaction. Attributes of controlled transaction(s) will influence the selection of the tested party (where needed). The tested party normally should be the less complex party to the controlled transaction and should be the party in respect of which the most reliable data for comparability is available. It may be the local or the foreign party. If a taxpayer wishes to select the foreign associated enterprise as the tested party, it must ensure that the necessary*

relevant information about it and sufficient data on comparables is furnished to the tax administration and vice versa in order for the latter to be able to verify the selection and application of the transfer pricing method.

24. The OECD guidelines at Para no.3.18 provides as under:-

"*3.18 When applying a cost plus, resale price or transactional net margin method as described in Chapter II, it is necessary to choose the party to the transaction for which a financial indicator (mark-up on costs, gross margin, or net profit indicator) is tested. The choice of the tested party should be consistent with the functional analysis of the transaction. As a general rules, the tested party is the one to which a transfer pricing method can be applied in the most reliable manner and for which the most reliable comparables can be found i.e. it will most often be the one that has the less complex functional analysis.*

3.19 This can be illustrated as follows. Assume that company a manufactures two types of products, P1 and P2 that it sells to company B, an associated enterprise in another country. Assume that A is found to manufacture P1 products using valuable, unique intangibles that belong to B and following technical specification set by B. Assume that in this P1 transaction, A only performs simple functions and does not make any valuable, unique contribution in relation to the transaction. The tested party for this P1 transaction would most often be A. Assume now that A is also manufacturing P2 products for which it owns and uses valuable unique intangibles such as valuable patents and trademarks, and for which B acts as a distributor. Assume that in this P2 transaction, B only performs simple functions and does not make any valuable, unique contribution in relation to the transaction. The tested part for the P2 transaction would most often be B."

25. From the above guidance certain principles emerges in selection of tested party

(a) The choice available of tested party for comparability only in CUP method , TNMM and 'Other method', in other methods such as RPM and CPM choice of selecting a tested party is not available. In any case,it is not required in Profit split method.

(b) The tested party normally should be the least complex partytothe controlled transactions.

(c) Availability of Most reliable data of tested party and requirement of minimum adjustments is also one of the most important aspects in selection of tested party.

(d) There is no bar against the selection of Tested party either Local party or Foreign party. Neither Income Tax Act and nor any guidelines on Transfer pricing provides so. Therefore selection of tested party is to further the object of comparability analysis by making it less complex and requiring fewer adjustments.

(e) There ma be many circumstances where the data related to one party to the controlled transaction may be available easily, readily and in abundance. However the first step is to look at the FAR study of that party and if found to be complex than other party, then such party should be rejected as tested party and preference may be given to another entity which is least complex and is having reasonably reliable data for comparability. Therefore, the driving force in selection of tested party should be the least complex FAR of the party than the volume of comparable data.

In this background, we proceed to decide the issue.

26. Appellant has entered into advance pricing agreement under section 92CC of the Act on 07 August 2015 with CBDT for AY 2014-15 . According to Para, 1(F) of that agreement tested party means associated parties as listed in Appendix 1. According to the annexure-1, it has been agreed between the parties that the TNMM with PLI of operating profit margin computed based on audited financials of AE, being the tested party, shall be the method to benchmark the covered transactions in the case. In order to select the comparables regional benchmarking shall be applied in case country-by-country benchmarking is not feasible the same shall be preferred over regional bench marking. In that appendix, CBDT has agreed to benchmark South African, Ireland and Romania AEs benchmarking region as Europe. In case of Nigeria, Malaysia and Morocco the regional benchmarking has been acc of Asia. In case of South Africa, Peru the benchmarking of Europe and in case of Egypt, Brazil and Thailand benchmarking of Asia is accepted. According to Parano.5, it is also emphatically mentioned that foreign AEs are the tested parties. It is also important to notice that how this agreement has been reached between the parties. Page No 500 where in it is held that applicant i.e. appellant is an entrepreneur manufacturer where in the functions performed by it are

(a) R & D for both the products and processes

(b) Production and supply of formulations and APIs

(c) Provision of technical support and quality control process for the AEs

(d) Application for regulatory approvals from foreign governments

(e) Management support

In the riskassumed byappellant is discussed at page no 502 to 505 of the paper book. After that page no 505 to 523 the functions performed by each of the AEs and risk assumed is discussed. It shows that the functions performed by AEs are very limited and naturally, consequent risks assumed are less. After that at page no 525 and 526 of the paper book where in it is agreed that manner in which segmentation of the AEs would be computed being December/ March year end which would be certified by the independent cost accountants. It is further provided that in case of AES are secondary manufacturers as well as low risk distributors margins would be computed separately. Therefore, APA has been agreed on the whole mechanism of computation of Alp of International transactions of the assessee.

27. It is also important

28. The issue that arises is though APA is signed for AY 2014-15 can it ha@mpact on the transactions for the year under appeal. According to The APA it shall apply in respect to previous year 2013-14 relevant to AY 2014-15, however principals laid down for comparability analysis in that does have a greater persuasive value. It is not the case of the assesse that APA should be applied for this year but it is the prayer that principles laid down by the highest revenue authority should be accepted by revenue at least for the purpose of starting the first step of comparability analysis for this year as the nature of international transactions, FAR of appellant and AEs respectively are similar. The availability of data is also on the similar lines as agreed in APA.Though the critical

assumptions referred to a set of taxpayer related facts, it mentions that this APA would not have any effect on other years. May that be the case, but the concept and the methodology laid down in APA can have the guidance value for the revenue authorities for the purposes of comparability analysis. The main intent of the advance pricing agreements isto protect the fair share of the revenue of the states in simple and efficient manner and to protect the tax base. Need for Advance pricing agreements are emerging out of current global complex economic situations and its impact on revenue of tax compelling governments to intensify and streamline their transfer pricing compliance efforts to reduce the disadvantage in staking their claim for tax. Higher risk of disputes may be reduced by the advance pricing agreements. On the same intentions and objects, the ld. TPO is also required to compute the ALP of the International transactions of the Assessee for this year. Therefore, the agreement entered into by CBDT with the assesse, which has considered all the aspects of the manner of determination of ALP which are also similar for the this year, should be given highest sanctity and therefore mechanism suggest in that agreement should be necessarily followed in determining ALP of the transactions for this year.

29. Though In the APA signed by the assessee there is no " roll back provisions" for the year under appeal, however we analyses the circumstances, which provides for applying that rule. Rule 10MA of the Income tax Rules 1962 provides for the roll back provisions as under :-

> **10MA.** *(1) Subject to the provisions of this rule, the agreement may provide for determining the arm's length price or specify the manner in which arm's length price shall be determined in relation to the*

international transaction entered into by the person during the rollback year (hereinafter referred to as "rollback provision").

(2) The agreement shall contain rollback provision in respect of an international transaction subject to the following, namely:—

(i) the international transaction is same as the international transaction to which the agreement (other than the rollback provision) applies;

(ii) the return of income for the relevant rollback year has been or is furnished by the applicant before the due date specified in Explanation 2 to sub-section (1) of section 139;

(iii) the report in respect of the international transaction had been furnished in accordance with section 92E;

(iv) the applicability of rollback provision, in respect of an international transaction, has been requested by the applicant for all the rollback years in which the said international transaction has been undertaken by the applicant; and

(v) the applicant has made an application seeking rollback in Form 3CEDA in accordance with sub-rule (5);

(3) Notwithstanding anything contained in sub-rule (2), rollback provision shall not be provided in respect of an international transaction for a rollback year, if,—

(i) the determination of arm's length price of the said international transaction for the said year has been subject matter of an appeal before the Appellate Tribunal and the Appellate Tribunal has passed an order disposing of such appeal at any time before signing of the agreement; or

(ii) the application of rollback provision has the effect of reducing the total income or increasing the loss, as the case may be, of the applicant as declared in the return of income of the said year.

On reading above rule, it is clear that if the International transactions are same in the year of APA and the year for which roll back is applied, roll back is allowed to the assessee on certain normal condition of filing return of income, Report of accountant and a request in specified format. Off course, it has also normal revenue safeguarding exclusion clauses of income going below the returned income and where ITAT has passed an order on the subject. Therefore even the rules provide that if the International Transactions are same in the year of APA and in the past year than both the parties, assessee and CBDT may agree for applying the agreements contained in APA agreed. In the present case, it is not disputed that the international transactions in both the years are not same. Therefore, we draw support from Rule 10 MA of Income tax Rules 1962 in applying the methodologyas accepted in APA for the impugned year in appeal.

30. As the FAR Analysis of the year under APA as well as the year under appeal are similar and it is also an established fact that the tested parties selected by the APA i.e. foreign AEs are least complex and adequate financial data for comparison on region basis / country basis are available and further the financial transactions are same, we hold that based on APA for A Y 2014-15 the selection of tested party should be taken as Foreign AE for the current year too.

31. On looking at the TP Study report of the assesse placed at page Nos. 409 to 478 of Paper Book Volume-II as well as the order of TPO it is apparent that assesse has also adopted region based analysis and also country by country analysis of comparable where they are available. Therefore, in the TP study report as far as the tested party is concerned we do not agree with the observation of the TPO that no comparables are available. It runs contrary to the finding of the CBDT in APA.

32. Coming back to the order of coordinate bench in case of assesse for AY 2004-05 it is apparent that tribunal has accepted that least complex party to the transaction should be taken as tested party. In that year due to the weakness of the TP

documentation of the assesse where assesse compared the operating margin of all the overseas AEs with reference to a single set of comparables selected from around the world without any regard to the functional and geographical dissimilarities. In that set of facts, coordinate bench has held that such comparability analysis is not appropriate and therefore in absence of comparable data there was no option but to uphold the appellant as a tested party. Therefore,coordinate bench has upheld the principle thattested party should be least complex but on the facts of the case for that year on non-availability of comparable data, it is so held. In the current year, the appellant has adduced reasonably comparative data based on region and country for comparing the foreign AEs. Therefore the facts in the present year are quite distinct than the year decided by ITAT i.e. A.Y. 2004-05. In view of this, we reject the reasons assigned by ld. TPO for rejecting the selection of overseas AE as the tested party.

33. Ld. AR has cited many decisions, which are on the principle of selection of tested party, which is least complex. We are of the view that there is no dispute on this principle as it is well recognized and well accepted in all those decisions. This too has been held by coordinate bench in the case of the assessee for A.Y. 2004-05. We have perused those decisions and applied the same in reasoning and our findings. For the sake of brevity we refer the decision of coordinate bench in General motors India Private Limited V DCIT In ITA No3096/Ahd/2010 and 3308/Ahd/2011 where in majority of the decisions were considered on the issue of selection of 'tested party' and it held as under :-

"11.1. We shall now proceed to peruse the judicial views on the issue. The case laws relied on by the assessee is as under:

(i) Mastek Limited v. Addl. CIT in ITA No.3120/Ahd/2010 dt.29.02.2012:

In this case, the question came up for consideration before the earlier Bench of this Tribunal was as to whether a minute examination of functional profile is necessary for the selection of comparables and the answer given was that functional profile must be first examined and after that proceed to select the comparable. In this case, the comparables chosen by the assessee were discussed by the TPO and those were discarded for the basic reason that the companies those quoted by the assessee were dealing in product distribution whereas the TPO was of the view that the AE was nothing but 'front office' of the assessee and simply engaged in marketing activity. After due consideration of the issue, the Hon'ble Bench had observed thus:

"16.1… (on page 47) It is clear that arm's length price is to be determined by taking result of comparable transactions and those transactions must be in comparable circumstances. It is therefore required to have a proper study of specific characteristics of controlled transaction. It is also required that there should be proper study of functions performed to match the identical situations under which functions have been performed. Then risk profile is also required to be compared. We may like to add that there are so many perspectives which were required to be compared and in this connection the Hon'ble Courts have also suggested so, such as, comparison of functional profile, similarity in respect of assets employed and a thorough screening of the comparables etc. Hence, in the present case, it is necessary to consider an analysis that

whether the comparables selected by the TPO had analogous functional profile to that of functional profile of the assessee. It is true that functional profile and assets and risk analysis was made available but that is to be correctly understood in the light of the nature of International transaction carried out by the assessee with the said AE. A similar problem was considered by ITAT Delhi Bench in the case of Bechtel India Pvt. Ltd v. DCIT (2011- TII-07-ITAT-DEL-TP) where the assessee stated to be engaged in the business of providing electronic data support service to AE and the difficulty arose that the said function was compared with the companies engaged in the business of development of software. So the question was that whether a minute examination of functional profile is necessary for the purpose of selection of comparables and the answer given was that functional profile must be first examined and after that proceeds to select the comparables. Interestingly, in the present case now before us, comparables chosen by the assessee were discussed by the TPO and those were discarded. The basic reason for rejection of those comparables was that the companies those were quoted by the assessee were dealing in product distribution whereas the TPO was of the view that the AE was nothing but 'front office' of the assessee and simple engaged in marking activity. In this context, we are of the view that in order to determine the most appropriate method for determining the arm's length price, first it is necessary to select the 'tested party' and such a selected party should be least complex and should not be unique, so that prima facie cannot be distinguished from potential uncontrolled comparables."

We are in agreement with the findings of the earlier Bench (supra) that such a selected party should be least complex and should not be unique.

(ii) Development Consultants (P) Ltd v. ACIT – 136 TTJ 129 & followed by Sony India (P) Ltd v. DCIT 114 ITD 448: 315 ITR 150 (Cal):

The issue before the Tribunal was that the CIT (A) had confirmed the adjustments to the international transactions of the assessee with its AEs based at Bahamas, USA without considering the submissions and the financial of the AEs explaining the facts etc. In case of the merits of the case for international transactions entered by the assessee with TKC, the submission made on behalf of the assessee was as under:

"26.

1………………………………………………………………………………… ……….

2………………………………………………………………………………… ………

3………………………………………………………………………………… ……….. 4. TKS is the entrepreneur company and has created significant marketing intangibles over the years. It uses its marketing intangibles to generate the work and assumes all the market, price and product risks. TKC came out the work on its own, only parts of the job are sub-contracted to the assessee for its convenience. Futher, being an entrepreneur company, it is difficult to determine the profits of ATKC with respect to work downloaded to India (as the revenue received for work off-shored to India cannot be separately identified). Further, the revenue generated from the services provided by *the assessee would form only a small part of the entire operations. The value of engineering drawing and design services rendered by the assessee to TKC for AY 2002-04 was Rs.1,58,43,923/- and for AY 2004-05 it was Rs.1,45,77,704/-. The value of service forms approximately 6% to 7% of the Cost of Sales to TKC. HENCE, THIS Shri Rahul Mitra argued, shows that testing the margins of TKC would not serve the purpose of determining the arm's length nature of the transactions undertaken by the assessee with TKC. Hence, the recourse available to test the arm's length price of the services rendered by the assessee to TKC is to test the margins from the Indian side. In view of the discussion on tested part earlier, the assessee was selected as the tested party being least complex of the two entities. Hence, the transfer pricing analysis in this case was done from the Indian side, wherein, the margins of the assessee with respect to services provided to TKC were compared internally with services provided to other third parties in foreign market.*

Taking into account the divergent submissions, the Hon'ble Tribunal had recorded its findings that –

> *"33. Based on facts and our findings of the case, after due consideration of all the facts, we conclude that the analysis undertaken by the assessee to determine the arm's length price of the international transaction with Datacore USA is correct and on the basis of the analysis it is seen that transaction undertaken by the taxpayer with Datacore US is at arm's length for both the assessment years."*

(iii) In the case of Ranbaxy Laboratories Limited v. Additional CIT reported in 110 ITD 428, the Hon'ble Delhi Tribunal had recorded its findings that –

"58. ……………………………………………………………… The tested party normally should be the party in respect of which reliable data for comparison is easily and readily available and fewest adjustments in computations are needed. It may be local or foreign entity, i.e., one party to the transaction. The object of transfer pricing exercise is to gather reliable data, which can be considered without difficulty by both the parties, i.e., taxpayer and the revenue. It is also true that generally least of the complex controlled taxpayer should be taken as a tested party. But where comparable or almost comparable, controlled and uncontrolled transactions or entities are available, it may not be right to eliminate them from consideration because they look to be complex. If the taxpayer wishes to take foreign AE as a tested party, then it must ensure that it is such an entity for which the relevant data for comparison is available in public domain or is furnished to the tax administration. The taxpayer is not then entitled to take a stand that such data cannot be called for or insisted upon from the taxpayer."

In substance, a foreign entity (a foreign AE) could also be taken as a tested party for comparison.

11.2. At this juncture, we would like to refer to the United Nation's Practical Manual on Transfer Pricing for Developing Countries wherein the selection of the tested party has been dealt with. This Manual has been the work of many authors which included India, Norway, Nigeria, Italy, USA, Netherlands, Brazil, China, OECD, Japan etc. For ready *reference, the relevant portion of it observation is extracted as under:*

> *"5.3.3. Selection of the Tested Party: 5.3.3.1. When applying the Cost Plus Method, Resale Price Method or Transactional Net Margin Method (see further Chapter 6) it is necessary to choose the party to the transaction for which a financial indicator (mark-up on costs, gross margin, or net profit indicator) is tested. The choice of the tested party should be consistent with the functional analysis of the controlled transaction. Attributes of controlled transaction(s) will influence the selection of the test party (where needed). The tested party normally should be the less complex party to the controlled transaction and should be the party in respect of which the most reliable data for comparability is available. It may be the local or the foreign party. If a taxpayer wishes to select the foreign associated enterprise as the tested party, it must ensure that the necessary relevant information about it and sufficient data on comparables is furnished to the tax administration and vice versa in order for the latter to be able to verify the selection and application of the transfer pricing method."*

With regard to the challenges emerging in transfer pricing in India, it has been observed as under:

> *"10.4. Emerging Transfer Pricing Challenges in India*
>
> *10.4.1. Transfer pricing Regulations in India*
>
> *10.4.1.1……………………………………………………………….*
>
> *10.4.1.2…………………………………………………………………*
>
> *10.4.1.3 The Indian transfer pricing administration*

> *prefers Indian comparables in most cases and also accepts foreign comparables in cases where the foreign associated enterprise is the less or least complex entity and requisite information is available about the tested party and comparables.*

11.2.1. It was also vouched during the course of hearing by the learned Sr. Counsel that the financial details including operating margin of comparable companies along with the back-up computations were furnished before the TPO in the transfer pricing documentation [Source: Pages 113 to 210 of the Transfer Pricing Study]. This contradicts the assertion of the learned DR that the assessee had not furnished any financial information of the comparable companies.

11.2.2. The United Nation's Practical Manual on Transfer Pricing also contradicts the TPO's argument that GMDAT should not be selected as the tested party as the comparable companies selected by the assessee doesn't fall within his jurisdiction and he can neither call for any additional information nor scrutinize their books of accounts etc.,

11.2.3. However, we find inconsistency in the stand of the TPO to the effect that while rejecting the assessee's approach for selecting GMDAT as the tested party by citing a reason that there was no reliable data available for both GMDAT and comparables and, therefore, GMDAT cannot be taken as the 'tested party', however, on the same breath, as rightly highlighted by the assessee, the TPO had taken GMDAT as the tested party while making adjustment to transaction relating to payment of royalty by GMI to GMDAT.

11.2.4. Rebutting the Revenue's allegation made during the course of proceedings that the segmental financial statement of GMDAT was not reliable, the assessee reiterates that the segmental data relied upon for benchmarking international transactions relating to import of CKD Kits and components was completely reliable and was based on sound allocation keys. To substantiate its claim, the assessee has also furnished a report on factual findings certified by the statutory auditors – Deloitte Anjin LLC.

11.2.5. Moreover, we find that the DRP had not considered in great detail the plea of the assessee as to why GMDAT should not be selected as the tested party for analyzing the inter-company transactions. Instead, the DRP had, in a cryptic manner, concluded that the results of assessee have to be compared with the stand alone results of Mahindra & M the automotive segment.

11.2.6. In this connection, we tend to recall the ruling of the Hon'ble Jurisdictional High Court [Special Civil Application No.8179 of 2010 dated 31.8.2010] in the case of AIA Engineering Ltd. v. Dispute Resolution Patel through Secretary-DRP & 1. After due consideration of rival submissions, the Hon'ble Court had ruled thus –

"16…..If the Dispute Resolution Panel was of the opinion that the application dated 22.4.2010 could not have been entertained, it should have considered the objections filed by the petition on merits. As a consequence of the impugned order, firstly the objections raised by the petitioner have not been decided, secondly, in view of the directions issued by the Dispute Resolution Panel, the petitioner would not be in a position to avail of the remedy of appeal before commissioner (Appeals) against the draft assessment order; and thirdly, in the light of the observation made by the dispute Resolution

Panel that the petitioner has chosen to withdraw the objections, preferring any appeal against the impugned order before any forum would be an exercise in futility, as no appeal would be entertained against an order passed on a concession. Thus, the dispute Resolution Panel has virtually closed all doors for the petitioner. In the circumstances, impugned order of the Dispute Resolution Panel suffers from the vide of being contrary to the record as well as non-application of mind, in as much as the petitioner had never sought withdrawal of the objections filed by it. The impugned order also causes immense prejudice to the petitioner as recorded hereinabove. In the circumstances, the impugned order of the Dispute Resolution Panel, therefore, cannot be sustained…."

11.3. We shall now peruse the case laws on which the learned DR had placed reliance in the findings of the Hon'ble Mumbai Tribunals in the cases of (i) Aurionpro Solutions Ltd v. Addl. CIT in ITA No.7872/Mum/2011 dated 12.4.2013; and (ii) M/s Onward Technologies Ltd v. DCIT (OSD) in ITA No.7985/Mum/2010 dated 30.4.2013.

(i) In the case of Aurionpro Solutions Ltd (supra), the issue before the Hon'ble Bench was that the assessee engaged in the business of software development and web designing services and that the assessee had lent loans to its AEs stationed at USA, Singapore and Bahrain. The assessee had claimed that the said loans as working capital advanced to its 100% subsidiary outside India. When the issue was referred to TPO, the TPO took a view that as in a third party comparable situation, advances would bear interest and, therefore, need to charge a markup as per CUP method. Accordingly, the TPO proposed to benchmark the loans at

dollar denominated LIBO [London Inter Bank Operative] rate plus mark up of 3%. When the issue landed up before the DRP, the DRP had, after analyzing the issue, directed the AO/TPO to compute the interest on loans to AE @ 14% per annum thereby enhanced the transfer pricing adjustment. Aggrieved assessee took up the issue with the Tribunal. The Hon'ble Tribunal, after due consideration of the issue in depth and for the reasons recorded therein, directed the AO/TPO to determine the arm's length interest at Libor plus 2% on the monthly closing balance of advances during the FY. We have, with due regards, perused the issue and the findings of the Hon'ble Bench in detail. Ironically, the main issue before the Bench was the percentage of (@Y@lculated on the loan advanced by the assessee to its foreign AEs. We are, therefore, of the view that this case is not directly applicable to the issue under dispute.

(ii) In the case of M/s. Onward Technologies Ltd (supra) as relied on by the Revenue, it is observed that the assessee, a parent company had international transaction with its AEs. With regard to IT enabled services provide to its AEs, the assessee had chosen six comparables with its foreign AEs as a tested party. The TPO had ignored the working of the assessee whereby selecting 20 comparable cases. When the issue reached before the Tribunal for resolve, the Hon'ble Bench had, after having considered rival submissions, recorded its findings, among others, as under:

"11.2.2.(On page12)

So, it is the profit actually realized by the Indian assessee from the transaction with its foreign AE which is compared *with that of the comparables. There can be no question of substituting the profit realized by the Indian enterprise from its foreign AE with the profit realized by the foreign AE from the ultimate customers for the purposes of determining the ALP of the international transaction of the Indian enterprise with its foreign AE. The scope of TP adjustment under the Indian taxation law is limited to transaction between the assessee and its foreign AE. It can neither call for also roping in and taxing in India the margin from the activities undertaken by the foreign AE nor can it curtail the profit arising out of transaction between the Indian and foreign AE at arm's length. The contention of the ld. AR in considering the profit of the foreign AE as 'profit A' for the purposes of comparison with profit or comparables, being 'profit B', to determine the ALP of transaction between the assessee and its foreign AE, misses the wood from the tree by making the substantive section 92 otiose and the definition of 'internal transaction' u/s 92B and rule 10B redundant. This is patently an unacceptable position having no sanction of the Indian transfer pricing law. Borrowing a contrary mandate of the TP provisions of other countries and reading it into our provisions is not permissible. The requirement under our law is to compute the income from an international transaction between two AEs having regard to its ALP and the same is required to be strictly adhered to as prescribed. This contention is, therefore, repelled."*

With have duly perused the findings of the Hon'ble Bench cited supra. In this connection, we would like to point out that various Tribunals have taken divergent views in respect of *selection of 'tested party'. To illustrate, the earlier Bench of this Tribunal in the case of Mastek Limited ITA No.3096/Ahd/2010 (AY- 2006-07) (supra) had stressed that (at the cost of repetition)*

> *"we are of the view that in order to determine the most appropriate method for determining the arm's length price, first it is necessary to select the 'tested party' and such a selected party should be least complex and should not be unique, so that prima facie cannot be distinguished from potential uncontrolled comparables".*

The Hon'ble Calcutta Tribunal in the case of Development Consultants (P) Ltd (supra) had recorded its findings that

> *"33. Based on facts and our findings of the case, after due consideration of all the facts, we conclude that the analysis undertaken by the assessee to determine the arm's length price of the international transaction with Datacore USA is correct and on the basis of the analysis it is seen that transaction undertaken by the taxpayer with Datacore US is at arm's length for both the assessment years."*

Thirdly, the Hon'ble Delhi Tribunal in the case of Ranbaxy Laboratories Limited (supra) took a stand that

> *'If the taxpayer wishes to take foreign AE as a tested party, then it must ensure that it is such an entity for which the relevant data for comparison is available in public domain or is furnished to the tax administration.'*

Then, the United Nation's Practical Manual on Transfer Pricing for Developing Countries had observed that

> *"5.3.3.1...... The tested party normally should be the less complex party to the controlled transaction and should be the party in respect of which the most reliable data for comparability is available. It may be the local or the foreign party. If a taxpayer wishes to select the foreign associated enterprise as the tested party, it must ensure that the necessary relevant information about it and sufficient data on comparables is furnished to the tax administration...."*

11.4. Considering the divergent views expressed by various Tribunals (supra) and majority of them were in favour of selecting the 'tested party' either from local or foreign party and the United Nation's Practical Manual on transfer pricing for developing countries had observed that 'It may be the local or the foreign party', we tend to agree with the same."

34. Above decision reproduced by us covers many divergent views of the coordinate benches and after considering them coordinate bench has reiterated all the principles noted by us for selection of tested party. Hence, we also draw staunch support from that decision.

35. Therefore,for the reasons stated above, ground no 2.2 of the appeal is allowed with a direction that overseas associated enterprises are accepted as 'tested party' being the least complex of the transacting entity for the year for comparability analysis of international Transactions of the assessee- appellant.

36. As we have already decided the first step of comparability analysis in ground no 2.2 of the appeal we set aside othergrounds no. 2 to 7 except 2.2 to the file of TPO to compute ALP of the international transactions accordingly. In the result

ground nos.2 to 7 except ground no.2.2 are allowed for statistical purposes. Needless to say that ld. TPO/ AO shall give due weightage to the Advance pricing agreement signed by the assessee with CBDT on other issues also (other than the issue of ' selection of tested Party') for determination of ALP and in case of any divergent view, the assessee shall be granted an adequate opportunity to substantiate any claim/ arguments on the manner of determination of ALP.

Corporate Tax Issues

37. Now we proceed to decide the corporate tax issues in this appeal where ld. AR of the assessee Shri Ajay Vohra, Sr. Advocate, presented extensive arguments on each of the issues supported by his written synopsis and also paper books on the various grounds. Ld. CIT DR defended each of them on behalf of revenue citing the orders of lower authorities extensively. We deal with them as under.

38. Now we come to ground no.8 of the appeal, which is against, disallowance of Rs.10333543/- being deferred employees compensation debited to the profit and loss account pursuant to company'sEmployees'Stock Option Scheme.

39. The brief facts are that the assesse has claimed deduction of this sum on issuance of options to certain eligible employees to acquire equity shares of the company at price lower than the market value in terms of ESOP scheme of the assesse. Under the Scheme, as part of the employee compensation measure, an option to purchase the shares of the appellant-company after the completion of the vesting period was granted to the

employees of the company at a discounted price to the fair market value of the share. The difference between the fair market value of the shares and the amount paid by the employee on actual exercise of option represented employee compensation expense. In accordance with the mandatory SEBI guidelines, the difference between the fair market value of the shares and the amount receivable from the employee at the time of exercise of option was debited/ charged to the profit and loss account as expenses. Therefore, the appellant claimed a deduction the scheme as amount of deferred compensation. The ld. AO did not allow holding that it is contingent liability. Further it was also stated that it is in the nature of bonus commission etc. and therefore not allowable u/s 40(a)(ia) of the Act. The ld. DRP upheld the order of the AO. Before us, it was contended that the above said amount is allowable u/s 37(1) of the Act as it is in lieu of the services rendered, as issue of ESOP is a standard method of remunerating employees. This scheme is also approved by SEBI guidelines. It is also submitted that it is not a contingent liability but the actual expenditure incurred. Further, it was submitted that issue is now squarely covered in favour of the assessee by the decision Hon'ble Special Bench in case of Biocon ltd. 144 ITD 21. It was also contended that now this issue is also squarely covered in favour of the assesse by decision of Hon'ble Madras high court in case of CIT Vs. PVP Ventures ltd. 211 Taxman 554.

40. Against this ld. DR submitted that the liability is contingent in nature and also stated that in case of assesse itself in the prior years it has been held against the assesse. He relied on the orders of the AO and DRP.

41. We have carefully considered the rival contentions. The issue is now squarely covered in favour of the assesse by the decision of Honourable Madras high court in CIT Vs. PVP Ventures (supra) ,where in it is held that amount of difference between the market value of the shares issue under ESOP allotted to the employees debited to the profit and loss account in accordance to SEBI guidelines is an ascertain liability and allowable as revenue expenditure u/s 37(1) of the Act. It is also noteworthy that the decision in the case of the assessee in earlier years where this deduction was denied has been considered by the special bench of tribunal in case of BIOCON Limited V DCIT 35 taxmann.com 335 (SB) as under :-

"**9.2.8** Though discount on premium is nothing but an expenditure u/s 37(1), it is worth noting that the Hon'ble Supreme Court in the case of *CIT* v. *Woodward Governor India (P.) Ltd.*[2009] 312 ITR 254/179 Taxman 326 has gone to the extent of covering "loss" in certain circumstances within the purview of "expenditure" as used in section in 37(1). In that case, the assessee incurred additional liability due to exchange rate fluctuation on a revenue account. The Assessing Officer did not allow deduction u/s 37. When the matter finally reached the Hon'ble Supreme Court, their Lordships noticed that the word "expenditure" has not been defined in the Act. They held that : "the word "expenditure" is, therefore, required to be understood in the context in which it is used. Section 37 enjoins that any expenditure not being expenditure of the nature described in sections 30 to 36 laid out or expended wholly and exclusively for the purposes of the business should be allowed in computing the income chargeable under the head "profits and gains of business or profession". In sections 30 to 36 the expression "expenditure incurred", as well as allowance and depreciation, has also been used. For example depreciation and allowances are dealt with in section 32, therefore, the parliament has used expression "any expenditure" in section 37 to cover both. Therefore, the expression "expenditure" as used in section 37 made in the circumstances of a particular case, covers an amount which is really a "loss" even though the said amount has not gone out from the pocket of the assessee'. From the above enunciation of law by the Hon'ble Summit Court, there remains no doubt whatsoever that the term 'expenditure' in certain circumstances can also encompass 'loss' even though no amount is actually paid out. Ex consequenti, the alternative argument of the ld. DR that discount on shares is 'loss' and hence can't be covered u/s 37(1), also does not hold water in the light of the above judgment. In view of the above discussion, we, with utmost respect, are unable to concur with the view taken in *Ranbaxy Laboratories Ltd.* (*supra*)."

Further whether the ESOP expenditure is a contingent loss has also been considered in the same decision as under :-

"B. Is discount a Contingent liability ?

9.3.1 *The learned Departmental Representative supported the impugned order by contending that the entitlement to ESOP depends upon the fulfilment of several conditions laid down under the scheme. It is only when all such conditions are fulfilled and the employees render services during the vesting period that the question of any ascertained liability can arise. He submitted that during the entire vesting period, it is only a contingent liability and no deduction is admissible under the provisions of the Act for a contingent liability. The options so granted may lapse during the vesting period itself by reason of termination of employment or some of the employees may not choose to exercise the option even after rendering the services during the vesting period. It was, therefore, argued that the discount is nothing but a contingent liability during the vesting period not calling for any deduction. In the opposition, the learned AR submitted that the amount of discount claimed by the assessee as deduction is not a contingent liability but an ascertained liability. He stated that in the ESOP 2000, there is a vesting period of four years, which means that the options to the extent of 25% of the total grant would vest with the eligible employees at the end of first year after rendering unhindered service for one year and it would go on till the completion of four years.*

9.3.2 *It is a trite law and there can be no quarrel over the settled legal position that deduction is permissible in respect of an ascertained liability and not a contingent liability. Section 31 of the Indian Contract Act, 1872 defines "contingent contract" as "a contract to do or not do something, if some event, collateral to such contract does not happen". We need to determine as to whether the liability arising on the assessee-company for issuing shares at a discounted premium can be characterized as a contingent liability in the light of the definition of contingent contract. From the stand point of the company, the options under ESOP 2000 vest with the employees at the rate of 25% only on putting in service for one year by the employees. Unless such service is rendered, the employees do not qualify for such options. In other words, rendering of* *service for one year is sine qua non for becoming eligible to avail the benefit under the scheme. Once the service is rendered for one year, it becomes obligatory on the part of the company to honor its commitment of allowing the vesting of 25% of the option. It is at the end of the first year that the company incurs liability of fulfilling its promise of allowing proportionate discount, which liability would be actually discharged at the end of the fourth year when the options are exercised by the employees. Now the question arises as to whether the liability at the end of each year can be construed as a contingent one?*

9.3.3 *The Hon'ble Supreme Court in Bharat Earth Movers v. CIT [2000] 245 ITR 428/112 Taxman 61 dealt with the deductibility or otherwise of provision for liability towards encashment of earned leave. In that case, the company floated beneficial scheme for its employees for encashment of leave. The earned leave could be accumulated up to certain days. The assessee created provision of Rs. 62.25 lakh for encashment of accrued leave and claimed deduction for the same. The Assessing Officer held it to be a contingent liability and hence not a permissible deduction. When the matter finally came up before the Hon'ble Supreme Court, it was held that the provision for meeting the liability for encashment of earned leave by the employee was an admissible deduction. In holding so, the Hon'ble Apex Court observed that : "the law is settled : if a business liability has definitely arisen in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of the liability. It should also be capable of being estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied the liability is not a contingent one. The liability is in praesenti though it will be discharged at a future date. It does not make any difference if the future date on which the liability shall have to be discharged is not certain." From the above enunciation of law by the Hon'ble Supreme Court, it is manifest that a definite business liability arising in an accounting year qualifies for deduction even though the liability may have to be quantified and discharged at a future date. We consider it our earnest duty to mention that the legislature has inserted clause (f) to section 43B by providing that "any sum payable by the assessee as an employer in lieu of any leave at the credit of his employee" shall be allowed as deduction in computing the income of the previous year in which such sum is actually paid. With this legislative amendment, the application of the ratio decidendi in the case of Bharat Earth Movers (supra) to the provision for leave encashment has been nullified. However, the principle laid down in the said judgment is abs incurred by an assessee is deductible notwithstanding the fact that its quantification may take place in a later year. The mere fact that the quantification is not precisely possible at the time of incurring the liability would not make an ascertained liability a contingent.*

9.3.4 *Almost to the similar effect, there is another judgment of the Hon'ble Supreme Court in the case of Rotork Controls India (P.) Ltd. v. CIT [2009] 314 ITR 62/180 Taxman 422. In that case, the assessee-company was engaged in selling certain products. At the time of sale, the company provided a standard warranty that in the event of certain part becoming defective within 12 months from the date of commissioning or 18 months from the date of dispatch, whichever is earlier, the company would rectify or replace the* *defective parts free of charge. This warranty was given under certain conditions stipulated in the warranty clause. The assessee made a provision for warranty at Rs. 5.18 lakh towards the warranty claim likely to arise on the sales effected by the assessee. The Assessing Officer disallowed the same on the ground that the liability was merely a contingent liability and hence not allowable as deduction u/s 37 of the Act. When the matter finally came up before the Hon'ble Supreme court, it entitled the assessee to deduction on the "accrual" concept by holding that a provision is recognized when : "(a) an enterprise has a present obligation as a result of a past event; (b) it is probable that an outflow of resources will be required to settle the obligation : and (c) a reliable estimate can be made of the amount of the obligation". Resultantly, the provision was held to be deductible.*

9.3.5 *When we consider the facts of the present case in the backdrop of the ratio laid down by the Hon'ble Supreme Court in Bharat Earth Movers (supra) and Rotork Controls India (P.) Ltd. (supra), it becomes vivid that the mandate of these cases is applicable with full force to the deductibility of the discount on incurring of liability on the rendition of service by the employees. The factum of the employees becoming entitled to exercise options at the end of the vesting period and it is only then that the actual amount of discount would be determined, is akin to the quantification of the precise liability taking place at a future date, thereby not disturbing the otherwise liability which stood incurred at the end of the each year on availing the services.*

9.3.6 *As regards the contention of the ld. DR about the contingent liability arising on account of the options lapsing during the vesting period or the employees not choosing to exercise the option, we find that normally it is provided in the schemes of ESOP that the vested options that lapse due to non-exercise and/or unvested options that get cancelled due to resignation of the employees or otherwise, would be available for grant at a future date or would be available for being re-granted at a future date. If we consider it at micro level qua each individual employee, it may sound contingent, but if view it at macro level qua the group of employees as a whole, it loses the tag of 'contingent' because such lapsing options are up for grabs to the other eligible employees. In any case, if some of the options remain unvested or are not exercised, the discount hitherto claimed as deduction is required to be reversed and offered for taxation in such later year. We, therefore, hold that the discount in relation to options vesting during the year cannot be held as a contingent liability."*

In view of this,we cannot follow the decision of coordinate bench in case of the assessee itself for earlier years. No other contrary decision has been brought to our notice by ld. DR.Therefore order of AO is reversed holding that Rs.10333543/- being deferred employees compensation debited to the profit and loss account is allowable u/s 37(1) of the Act.

42. Ld. AO has further held that even otherwise this deduction is hit by provision of section 40a (ia) of the act and as no tax is deducted on this payment it is disallowable. No such provision for deduction of tax at sources on this expenditure has been brought to our notice. Therefore we hold that provisions of section 40a(ia) does not apply to 'payment of salaries' for the year under appeal. Hence, this argument of the revenue is also rejected. In the result ground no 8 of the appeal is allowed.
43. Ground no.9 of the appeal is against disallowance of deduction of contribution of Rs.47 lacs and Rs.1250,000 made by the appellant to Ranbaxy Community Healthcare Society and Ranbaxy Science Foundation u/s 35/ 37 of the Act. During the relevant previous year appellant contributed this sum and deduction u/s 80G of the Act was claimed. Vide note no.13 to the computation of the income such contribution was claimed as deduction u/s 37 of the Act. Ld. AO disallowed it holding that it was not incurred for the purposes of the business and alternatively as no tax has been deducted it was disallowable u/s 40a(ia) of the Act . Ld. DRP confirmed the findings of the AO.
44. Before us, it was contested that contributions were made in the course of the business of the appellant and therefore it resulted into advantage on business carried on by the appellant and hence incurred wholly and exclusively for the purpose of the business. It was also stated that this issue is squarely covered in favour of the appellant by the decision of the Tribunal in appellant's own case in ITA 4251 and 3925/Del/2002 for AY 1997-98. It was further submitted that this order here been further upheld by Hon'bleDelhi High Court by order dated 17.03.2011. It was further held that the tribunal has allowed

the claim of the assesse for AY 2002-03, 2003-04 to 2005-06 and against which department's appeal has been dismissed by Hon'ble Delhi high Court vide order 20.11.2012.Regarding applicability of section 40a(ia) it is submitted that in absence of any service to the recipient no tax is required to be deducted and hence it is not disallowable.

45. Against this, the ld. DR relied on the orders of the AO and ld. DRP.

46. We have carefully considered the rival contentions. In view of the decision of Hon'ble Delhi high court in case of assesse for AY 1997-98 order dated 17.03.2012 in ITA no.743/2008 and 20.11.2012 for AY 2002-03 to AY 2005-06, We reverse the decision of the AO and direct to delete the disallowance of Rs.47 lacs and Rs.1250000/- of contribution made by appellant to Ranbaxy Community Healthcare Society and Ranbaxy Science Foundation. Furthermore regarding failure to deduct tax on this sum, Ld. DR. could not point out particular section, which warrants deduction of tax at sources on this payment. Therefore, we also hold that in absence of specific section under which the tax is required to be deducted on such contribution without their being any service rendered by the recipient of the contribution disallowance u/s 40a(ia) also cannot be made. In the result ground no.9 of the appeal is allowed.

47. Ground no.10 of the appeal is against disallowance of Rs.74066105/- u/s 14A of the act by applying the formula prescribed under Rule 8D of the Income Tax Rules, 1962.

48. During the year appellant received Rs.7968/- towards dividend income which is exempt u/s 10 of the Act. The investments on which this dividend income is received were made before many

years. In case of investment in Great Eastern Shipping Company Ltd wasamounting to Rs.34899/- only. Further dividend of Rs.4242/- out of Rs.7968/- is received on shares that were sold by the assesse before many years howeveritwere not registered in the name of the buyer. During the year company itself has disallowed Rs.3311708/- u/s 14A of the act on account of expenditure incurred by the company on its Treasury Division.However, ld.AO applied the Rule 8Dof the Income Tax Rules 1962 and computed disallowance of Rs.77378363/- and reduced suo motto disallowance made by the appellant of Rs.3311708/- from it and made addition of Rs.74066105/- u/s 14A of the Act. Ld. DRP confirmed the action of the AO. Therefore, assesse is in appeal before us.

49. Before us it was contended that

(a) Rule 8D was wrongly computed by Ld. AO considering the entire investment including investment which did not yield any exempt income. He should have only considered the investments, which has yielded the exempt income; if at all disallowance under Rule 8D was to be made.

(b) As meager dividend of Rs.7968/- is received and disallowance computed by Ld. AO far more in excess of dividend income which is incorrect. Assessee itself has made huge disallowance on this count which is also far more in excess of the dividend income. i.e. exempt income.

(c) In absence any satisfaction with regard to suomotto disallowance already made by assessee, Rule 8D cannot be invoked automatically without recording any satisfaction by the Ld. AO that it is incorrect.

For each of this contention ld. AR submitted large judicial pronouncement including that of jurisdictional high court.

50. Against this ld. DR submitted that for AY 2008-09 there is no escapement of disallowance according to Rule 8D and therefore he relied on the orders of Ld. AO and ld. DRP.

51. We have carefully considered the rival contentions. In this case assesse himself has disallowed Rs.3311708/- which itself is far more in excess of exempt income. Honourable Delhi high court in Joint Investments (p) Limited V CIT 59 taxmann.com 295 has held that

> **"9.** In the present case, the AO has not firstly disclosed why the appellant/assessee's claim for attributing Rs. 2,97,440 as a disallowance under s. 14A had to be rejected. *Taikisha Engg. India Ltd.* (*supra*) says that the jurisdiction to proceed further and determine amounts is derived after examination of the accounts and rejection if any of the assessee's claim or explanation. The second aspect is there appears to have been no scrutiny of the accounts by the AO-an aspect which is completely unnoticed by the CIT (A) and the Tribunal. The third, and in the opinion of this Court, important anomaly which we cannot be unmindful is that whereas the entire tax exempt income is Rs. 48,90,000, the disallowance ultimately directed works out to nearly 110 per cent of that sum, i.e., Rs. 52,56,197. By no stretch of imagination can s. 14A or r. 8D be interpreted to mean that the entire tax-exempt income is to be disallowed. The window for disallowance is indicated in s. 14A, and is only to the extent of disallowing expenditure "incurred by the assessee in relation to the tax exempt income". This proportion or portion of the tax exempt income surely cannot swallow the entire amount as has happened in this case."

Therefore, according to us, as such no further disallowance u/s 14A can be imputed. Furthermore,we did not find any satisfaction of the AO with regard to examination of the books of account of the assesse that how disallowance already offered by assesse of Rs.3311708/- which are also certified by the tax auditor is incorrect. In absence of such satisfaction AO does not have any authority to invoke provisions of Rule 8D. On this count also the addition cannot be upheld. Honourable Delhi high court in case of CIT V TaikishaEngineering Limited in 54 taxmann.com 109 has held as under :-

> ***13.*** *We need not, therefore, go on to sub Rule (2) to Rule 8D of the Rules until and unless the Assessing Officer has first recorded the satisfaction, which is mandated by sub Section (2) to Section 14A of the Act and sub Rule (1) to Rule 8D of the Rules.*
>
> ***14.*** *The view and legal ratio expressed above is not being elucidated for the first time. The Delhi High Court in Maxopp Investment Ltd. v. CIT [2012] 347 ITR 272/203 Taxman 364/15 taxmann.com 390 has observed:-*
>
> *'Scope of sub-sections (2) and (3) of Section 14A*
>
> *Sub-section (2) of Section 14 A of the said Act provides the manner in which the Assessing Officer is to determine the amount of expenditure incurred in relation to income which does not form part of the total income. However, if we examine the provision carefully, we would find that the Assessing Officer is required to determine the amount of such expenditure only if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under the said Act. In other words, the requirement of the Assessing Officer embarking upon a determination of the amount of expenditure incurred in relation to exempt income would be triggered only if the Assessing Officer returns a finding that he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. Therefore, the condition precedent for the Assessing Officer entering upon a determination of the amount of the expenditure incurred in relation to exempt income is that the Assessing Officer must record that he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. Sub-section (3) is nothing but an offshoot of sub-section (2) of Section 14A. Sub-section (3) applies to cases where the*

assessee claims that no expenditure has been incurred in relation to income which does not form part of the total income under the said Act. In other words, sub-section (2) deals with cases where the assessee specifies a positive amount of expenditure in relation to income which does not form part of the total income under the said Act and sub-section (3) applies to cases where the assessee asserts that no expenditure had been incurred in relation to exempt income. In both cases, the Assessing Officer, if satisfied with the correctness of the claim of the assessee in respect of such expenditure or no expenditure, as the case may be, cannot embark upon a determination of the amount of expenditure in accordance with any prescribed method, as mentioned in sub-section (2) of Section 14A of the said Act. It is only if the Assessing Officer is not satisfied with the correctness of the claim of the assessee, in both cases, that the Assessing Officer gets jurisdiction to determine the amount of expenditure incurred in relation to such income which does not form part of the total income under the said Act in accordance with the prescribed method. The prescribed method being the method stipulated in Rule 8D of the said Rules. While rejecting the claim of the assessee with regard to the expenditure or no expenditure, as the case may be, in relation to exempt income, the Assessing Officer would have to indicate cogent reasons for the same.

Rule 8D

"As we have already noticed, sub-section (2) of Section 14A of the said Act refers to the method of determination of the amount of expenditure incurred in relation to exempt income. The expression used is - "such method as may be prescribed". We have already mentioned above that by virtue of Notification No.45 of 2008, dated March 24, 2008, the Central Board of Direct Taxes introduced Rule 8D in the said Rules. The said Rule 8D also makes it clear that where the Assessing Officer, having regard to the accounts of the assessee of a previous year, is not satisfied with (a) the correctness of the claim of expenditure made by the asses see; or (b) the claim made by the assessee that no expenditure has been incurred in relation to income which does not form part of the total income under the said Act for such previous year, the Assessing Officer shall determine the amount of the expenditure in relation to such income in accordance with the provisions of sub-rule (2) of Rule 8D. We may observe that Rule 8D (1) places the provisions of Section 14A(2) and (3) in the correct perspective. As we have already seen, while discussing the provisions of Sub-sections (2) and (3) of Section 14A, the condition precedent for the Assessing Officer to himself determine the amount of expenditure is that he must record his dissatisfaction with the

correctness of the claim of expenditure made by the assessee or with the correctness of the claim made by the assessee that no expenditure has been incurred. It is only when this condition precedent is satisfied that the Assessing Officer is required to determine the amount of expenditure in relation to income not includable in total income in the manner indicated in sub-rule (2) of Rule 8D of the said Rules.

It is, therefore, clear that determination of the amount of expenditure in relation to exempt income under Rule 8D would only come into play when the Assessing Officer rejects the claim of the assessee in this regard. If one examines sub-rule (2) of Rule 8D, we find that the method for determining the expenditure in relation to exempt income has three components. The first component being the amount of expenditure directly relating to income which does not form part of the total income. The second component being computed on the basis of the formula given therein in a case where the assessee incurs expenditure by way of interest which is not directly attributable to any particular income or receipt. The formula essentially apportions the amount of expenditure by way of interest (other than the amount of interest included in clause (i)) incurred during the previous year in the ratio of the average value of investment, income from which does not or shall not form part of the total income, to the average of the total assets of the assessee. The third component is an artificial figure - one half percent of the average value of the investment, income from which does not or shall not form part of the total income, as appearing in the balance sheets of the assessee, on the first day and the last day of the previous year. It is the aggregate of these three components which would constitute the expenditure in relation to exempt income and it is this amount of expenditure which would be disallowed under Section 14A of the said Act. It is, therefore, clear that in terms of the said Rule, the amount of expenditure in relation to exempt income has two aspects - (a) direct and (b) indirect. The direct expenditure is straightaway taken into account by virtue of clause (i) of sub-rule (2) of Rule 8D. The indirect expenditure, where it is by way of interest, is computed through the principle of apportionment, as indicated above. And, in cases where the indirect expenditure is not by way of interest, a rule of thumb figure of one half percent of the average value of the investment, income from which does not or shall not form part of the total income, is taken.'

15. *Even earlier the Bombay High Court in Godrej and Boyce Mfg. Co. Ltd. (supra) had referred to Section 14(2) of the Act and observed:-*

'Under sub-section (2), the Assessing Officer is required to determine the amount of expenditure incurred by an assessee in relation to such income which does not form part of the total income under the Act in accordance with such method as may be prescribed. The method, having regard to the meaning of the expression "prescribed" in section 2(33), must be prescribed by rules made under the Act. What merits emphasis is that the jurisdiction of the Assessing Officer to determine the expenditure incurred in relation to such income which does not form part of the total income, in accordance with the prescribed method, arises if the Assessing Officer is not satisfied with the correctness of the claim of the assessee in respect of the expenditure which the assessee claims to have incurred in relation to income which does not part of the total income. Moreover, the satisfaction of the Assessing Officer has to be arrived at, having regard to the accounts of the assessee. Hence, sub-section (2) does not ipso facto enable the Assessing Officer to apply the method prescribed by the rules straightaway without considering whether the claim made by the assessee in respect of the expenditure incurred in relation to income which does not form part of the total income is correct. The Assessing Officer must, in the first instance, determine whether the claim of the assessee in that regard is correct and the determination must be made having regard to the accounts of the assessee. The satisfaction of the Assessing Officer must be arrived at on an objective basis. It is only when the Assessing Officer is not satisfied with the claim of the assessee, that the Legislature directs him to follow the method that may be prescribed. In a situation where the accounts of the assessee furnish an objective basis for the Assessing Officer to arrive at a satisfaction in regard to the correctness of the claim of the assessee of the expenditure which has been incurred in relation to income which does not form part of the total income, there would be no warrant for taking recourse to the method prescribed by the rules. For, it is only in the event of the Assessing Officer not being so satisfied that recourse to the prescribed method is mandated by law. Sub-section (3) of section 14A provides for the application of sub-section (2) also to a situation where the assessee claims that no expenditure has been incurred by him in relation to income which does not form part of the total income under the Act. Under the proviso, it has been stipulated that nothing in the section will empower the Assessing Officer, for an assessment year beginning on or before April 1, 2001, either to reassess under section 147 or pass an order enhancing the assessment or reducing the refund already made or otherwise increasing the liability of the assessee under section 154.'

16. *Equally illuminating are the following observations in Godrej and Boyce Mfg. Co. Ltd. (supra)*

". . . However, if the assessee does not maintain separate accounts, it would be necessary for the Assessing Officer to deter-mine the proportion of expenditure incurred in relation to the dividend business (i.e., earning exempt income). It is for exactly such situations that a machinery/method for computing the proportion of expenditure incurred in relation to the dividend business has been provided by way of section 14A(2)/(3) and rule 8D."

17. *More important and relevant for us are the observations in Godrej and Boyce Mfg. Co. Ltd. (supra) on requirement and stipulation of satisfaction being recorded by the Assessing Officer with reference to the accounts under Section 14(2) of the Act and Rule 8D(1) of the Rules. It was observed:-*

"Parliament has provided an adequate safeguard to the invocation of the power to determine the expenditure incurred in relation to the earning of non-taxable income by adoption of the prescribed method. The invocation of the power is made conditional on the objective satisfaction of the Assessing Officer in regard to the correctness of the claim of the assessee, having regard to the accounts of the assessee. When a statute postulates the satisfaction of the Assessing Officer "Courts will not readily defer to the conclusiveness of an executive authority's opinion as to the existence of a matter of law or fact upon which the validity of the exercise of the power is predicated". (M. A. Rasheed v. State of Kerala [1974] AIR 1974 SC 2249). A decision by the Assessing Officer has to be arrived at in good faith on relevant considerations. The Assessing Officer must furnish to the assessee a reasonable opportunity to show cause on the correctness of the claim made by him. In the event that the Assessing Officer is not satisfied with the correctness of the claim made by the assessee, he must record reasons for his conclusion. These safeguards which are implicit in the requirements of fairness and fair procedure under article 14 must be observed by the Assessing Officer when he arrives at his satisfaction under sub-section (2) of section 14A. As we shall note shortly hereafter, sub-rule (1) of rule 8D has also incorporated the essential requirements of sub-section (2) of section 14A before the Assessing Officer proceeds to apply the method prescribed under sub-rule (2)."*

18. *It is in this context we feel that the findings recorded by the CIT(A) and the Tribunal are appropriate and relevant. The clear findings are that the assessee had sufficient funds for making investments in shares and mutual funds. The said findings coupled* *with the failure of the Assessing Officer to hold and record his satisfaction clinches the issue in favour of the respondent assessee and against the Revenue. The self or voluntary deductions made by the assessee were not rejected and held to be unsatisfactory, on examination of accounts. Judgments in Tin Box Co. (supra), Reliance Utilities and Power Ltd. (supra), Suzlon Energy Ltd. (supra) and East India Pharmaceutical Works Ltd. (supra) would be relevant if the satisfaction of the Assessing Officer is in issue, and such question of satisfaction is with reference to the accounts".*

Therefore, in view of above two decisionsof Honourablejurisdictional High court we hold that no such further disallowance over and above what is admitted by the assessee can be made.Hence, ground no.10 of the appeal of the assesse is allowed and disallowance of Rs.74066105/- u/s 14A of the Act is directed to be deleted.

52. Ground no.11 of the appeal is against making an upward adjustment of Rs.74066105/- while computing the book profit u/s 115JB of the Act. The facts and the details of such disallowance are already covered by us while deciding ground no.10 of the appeal and further while offering book profit tax assessee has already added back the amount disallowed u/s 14A in normalcomputation to the book profit of the assesse u/s 115JB of the act. Form no 29B submitted in the paper book shows that.

53. Before us the ld. AR contended that ld. AO has added the amount of disallowance u/s 14A of the act made in the normal computation of Income also to the book profit of the company while working out tax payable in accordance with section 115JB of the Income tax Act. He submitted that this action of the ld. AO is erroneous. He submitted that section 14A of the act applies to Chapter IV of the Income tax Act whereas the

computation of book profit is made under ChapterXIIB of the act and therefore no disallowance u/s 14A of the act which is restricted to chapter IV of the act can be made while computing book profit u/s 115JB of the act. He further submitted that the addition to the book profit vide clause No.(f) to explanation 1 also speaks about amount of expenditure relatable to any income to which section 10 applies whereas Rule 8D covers all expenditure including hypothetical disallowance. He submitted that disallowance u/s 14A of the act cannot be read into computation of books profit u/s 115JB of the Act. He further relied on decision of Hon'ble Delhi High Court in case of Pr. CIT Vs. Bhushan Steel Ltd in ITA no. 593/2015 dated 29.09.2015. He further relied on the decision of coordinate bench in Quippo Telecom Infrastructure vs. ACIT in ITA No, 4931/Del/2010.

54. Against this ld., DR relied on the orders of the lower authorities.

55. We have carefully considered the rival contentions. The ld. AO has imputed the addition u/s 115JB of the Act as disallowance computed u/s 14A read with Rule 8D of the Income Tax Rule 1962. As we have already deleted the disallowance as per ground No.10 of the appeal wherein we have held that the amount of disallowance cannot be worked out by ld. AO without recording satisfaction on examination of books about the correctness of disallowance made by the assesse which in this case has been made by assesse of Rs.3311708/-.We have also held that disallowance cannot exceed the amount of exempt income. Hence, now no disallowance survives u/s 14A of the act so far as normal computation of total incomeof the appellant. The AO has added to the book profit amount of expense disallowed u/s.14A applying rule 8D of the Income tax

act. As per our considered view, no addition u/s.115JB is warranted for amount of disallowance u/s.14A of the IT Act. Our view is supported by following decisions :—

(i) Cadila Healthcare Ltd. v. Addl. CIT [2012] 21 taxmann.com 483 (Ahd. - Trib);

(ii) Reliance Industrial Infrastructure Ltd. [IT Appeal Nos. 69 & 70/(Mum) of 2009, dated 5-4-2013];

(iii) Essar Teleholdings Ltd. [IT Appeal No. 3850 (Mum.) of 2010, dated 29-7-2011];

(iv) J.K. Paper Ltd. [IT Appeal Nos. 4027 & 4080 (Ahd.) of 2008 & 979 (Ahd) of 2006];

(v) National Commodity Derivatives Exchange Ltd. [IT Appeal No. 2923 (Mum) of 2010, dated 26-8-2011]; and

(vi) Quippo Telecom Infrastructure Ltd. [IT Appeal No. 4931 (De1hi) 2010, dated 18 February 2011] (Delhi).

Respectfully following the propositions laid down in the previously mentioned decisions, we direct the Ld. AO to exclude the amount of addition of Rs.7,66,40,105/- made u/s.14A, while computing the book profit u/s.115JB.In view of this we allow ground no.11 of the appeal.

56. Ground no.12 of the appeal is against the disallowing the entire deduction of Rs.136,68,21,506/- claimed by the assesse u/s 80IB and 80IC of the Act in respect of five separate and independent eligible units. Facts relating to this ground are that In the previous year relevant to the assessment year 2008-09, i.e. the year under consideration, the appellant claimed deduction amounting to Rs.136.68 crores under section 80IB/IC of the Act in respect of the following undertakings:

a) Goa–Deduction u/s 80IB: Rs.9.02 crores

b) New Tablet Plant – I (Ponta) - Deduction u/s 80IB: Rs.22.06 crores

c) New Tablet Plant - II- (Ponta) - Deduction u/s 80IB: Rs.15.61 crores

d) New SGC Plant (Ponta) - Deduction u/s 80IB: Rs.37.64 crores

e) New Tablet Plant – III (Ponta) - Deduction u/s 80IB: Rs.52.35 crores

In respect of the previously mentioned units, the appellant submittedthat it has maintained separate books of accounts on SAP ERP, which were duly audited and report of the auditor along with the profit and loss account of the units was filed along with the return of income. The net profits of the units were computed by (i) reducing actual direct expenses incurred at respective units; and (ii) allocating and apportioning common expenses debited at head office/research center, based on sales.During the course of the assessment, the ld. AO specifically directed the appellant to justify the claim of deduction of Rs.136.68 c[illegible]and 80IC of the Act during the previous year relevant to the assessment year 2008-09. In response to the previously mentionedquery, submissions dated 21.11.2011, 25.11.2011, 30.11.2011 and 12.12.2011 were filed before the assessing officer substantiating the claim of deduction under sections 80IB and 80IC of the Act. The assessing officer rejected the contentions of the appellant, completed the assessment vide draft order dated 23.12.2011 under section 143(3) r.w.s. 144C, inter-alia, denying the claim of deduction under sections 80IB/80IC of the Act. Against the previously mentioned order, the appellant filed objections before the ld. DRP, which upheld the draft order passed by the assessing officer. Accordingly, final assessment order was passed by the assessing officer under section 143(3) r.w.s. 144C of the Act where in claim of deduction amounting to Rs.136.68 crores under sections 80IB/80IC of the Act on the ground that the aforesaid units of the appellant were not operating in isolation, as claimed, and it was only for the purpose of claiming deduction that the appellant had tried to allocate expenses between various units. The assessing officer further alleged that common books of accounts were maintained for the appellant company as a whole and separate books of accounts for the eligible undertakings were not maintained. Ld. AO also held that the profit of units eligible for deduction under section 80IB/IC of the Act, were disproportionately high as compared to total business profits of the appellant-company and further that global sales price was adopted for the purpose of claiming higher deduction. Ld. AO further held that appellant did not give the basis of apportionment of common expenses, etc. Ld. DRP agreed with the order of Ld. AO. Therefore, assessee is in appeal before us on this ground.

57. Before us the |Ld. AR specifically contested this disallowance on following grounds:-

a) He submitted that the appellant has been claiming deduction under section 80IB/IC of the Act in respect of the aforesaid units at Goa and Ponta Sahib from the assessment year 2002-03 onwards. He submitted that during the year under consideration, the appellant had set up one new unit at Ponta Sahib, being New Tablet

Plant – IIII, which, too, operates in the similar way as the others units, which were set up in the earlier years and independently satisfied all the prescribed conditions. It is submitted that the claim of deduction under sections 80IB/ IC of the Act, has been consistently examined and allowed to the appellant on a year-to-year basis.

b) Further, he submitted that it is of utmost importance to note that for the assessment years 2001-02 and 2002-03, re-assessment proceedings under section 147 of the Act were initiated in the case of the appellant and one of the reasons for reopening the assessment was for verifying deduction under section 80IB/IC of the Act, especially in context of basis of allocation of head office and research & development expenses. Further on verifying the basis of allocation of head office and research & development expenses adopted by the appellant, the assessing officer did not make any disallowance/adjustment to the claim of deduction made by the appellant under section 80IB/IC of the Act. Therefore,claim of deduction by the appellant under sections 80IB/IC of the Act has been duly examined on all relevant factors in the earlier years and on being fully satisfied, the deduction was allowed.It is, however, only in the assessment year 2008-09, that the assessing officer, for the first time, denied the claim of deduction made under section 80IB/IC of the Act on the primary ground that the appellant had failed to maintain separate books of accounts in respect of unit(s) for which deduction was claimed. In this regard, hesubmitted that it is a well settled proposition of law that where the Act provides for a deduction which is allowable to an appellant for a certain term/ period (such as a period of consecutive ten years in present case), the Revenue is required to examine the eligibility of the appellant and whether all statutory preconditions are satisfied in the first year in which the appellant claims such a term deduction. In such cases, without disturbing the assessment for the initial year, it is not open to the Revenue to make disallowance of such deduction in the subsequent year(s), unless there is a material change in the fundamental facts.Reliance, in this regard, is placed on the following observations made in the following decisions:

(i) Saurashtra Cement & Chemical Industries v. CIT: 123 ITR 669 (Guj)

"*No doubt, the relief of tax holiday under s. 80J can be withheld or discontinued provided the relief granted in the initial year of assessment is disturbed or changed on valid grounds. <u>But without disturbing the relief gra□□(@□Y@□he Income -tax Officer cannot examine the question again and decide to withhold or withdraw the relief which has been already once granted.</u>*"

(ii) CIT v. Paul Brothers: 216 ITR 548 (Bom.)

"Either in section80HH or in section80J, there is no provision for withdrawal of special deduction for the subsequent years for breach of certain conditions. <u>Hence unless the relief granted for the assessment year 1980-81 was withdrawn, the Income-tax Officer could not have withheld the relief for the subsequent</u>

years. (See Gujarat High Court decision in the case of Saurashtra Cement v. CIT: 123 ITR 669.

Hence, the approach of the Tribunal on all the counts has been perfectly legal.”

(iii) CIT v Gujarat State Fertilizers Co. Ltd: 247 ITR 690 (Guj.)

“Having heard learned counsel for the parties and critically examining the relevant provisions contained in section 80J in the light of the decisions cited before us, we are of the considered opinion that, as in the preceding assessment years, the appellant cannot be denied the benefit of deduction at the prescribed rate under section80J on the capital employed in the form of residential accommodation given to the shopkeepers in the township of the appellant.”

(iv) CIT v Fateh Granite (P) Ltd.: 314 ITR 32 (Bom.)

“8. On behalf of the appella □□□□□□□□ □□□□E □ counsel drawn our attention to the judgment of the Gujarat High Court in the case of Saurastra Cement & Chemical Industries Ltd v. CIT (1979) 11 CTR (Guj) 139: [1980] 132 ITR 669 to contend that once the revenue had allowed the relief for the previous assessment year, it was not open to disturb the relief for the subsequent years without disturbing the relief granted in the initial year. Our attention is also invited to the judgment of this court in the case of CIT vs. Paul Brothers reported in [1995] 216 ITR 548 where in court was considering the issue for the assessment year 1981-82. This court took a view that for the purpose of Section80-HH or Section80-J, there is no provision for withdrawal of deduction for the subsequent year for breach of certain conditions, unless the relief granted for the earlier year 1981-82 was withdrawn. For the reasons set out earlier, we need not consider this aspect. We find no merit in this appeal and accordingly, the same is dismissed.”

(v) CIT v. Western Outdoor Interactive Pvt. Ltd: 349 ITR 309, (Bom) held as under:

"We have considered the submissions. We find that the submissions made by Mr. Pardiwalla on the basis of the decision of this Court in the matter of Paul Brothers (supra) and Director of Information Pvt. Ltd. (supra) merits acceptance. Therefore, in this case, it is not necessary for us to decide whether SEEPZ unit was set up/formed by splitting up of the first unit. In both the above decisions, this Court has held that where a benefit of deduction is available for a particular number of years on satisfaction of certain conditions under the provisions of the Income Tax Act, then unless relief granted for the first assessment year in which the claim was made and accepted is withdrawn or set aside, the Income Tax officer cannot withdraw the relief for subsequent years. More particularly so, when the revenue has not even suggested that there was any change in the acts warranting a different view for subsequent years. <u>In this case for the assessment years 2000-01 and 2001-02 the relief granted under Section10A of the Act to SEEPZ unit has not been withdrawn. There is no change in the facts which were in existence during the assessment year 2000-01 vis a vis the claim to exemption under section10A of the Act. Therefore, it is not open to the department to deny the benefit of Section10A for subsequent assessment yearsi. e. assessment years 2002-03 and 2003-04 and 2004-05. Besides that, on consideration of the facts involved both the Commissioner of Income Tax (Appeals) and the Tribunal have recorded a finding of fact that the SEEPZ unit is not formed by splitting up of the first unit.</u>"

(vi) CIT vs. Escorts Ltd : 338 ITR 435

(vii) CIT vs. Delhi Press Patra Prakashan Ltd. (No.2) : 355 ITR 14

(viii) CIT vs. Tata Communications Internet Services Ltd.: 251 CTR 290

In view of the above, it is submitted that since deduction under sections 80IB/IC of the Act are deductions admissible for a certain term, the question whether or not the statutory conditions precedent to the admissibility thereof (including the question whether separate books of accounts are maintained) are fulfilled in the case of an appellant, is required to be examined by the Revenue in the first year in which such deduction was/were claimed. The deduction having been admitted in the earlier years, which have now attained finality, it is not, it is submitted, open to the Revenue to disallow the claim of the appellant for deduction under those provisions for the year under consideration without disturbing the claim for earlier years. In this regard, it will be appreciated that the units were set up in earlier years and deduction in respect of profits derived therefrom was, in principle, allowed year after year (except certain variation in the quantum in certain years) after thorough examination. In that view of the matter, the deduction claimed by the appellant calls for being allowed in the year under consideration too.

c) He submitted that it is well settled proposition that if there being no change either in facts or in law, as compared to the earlier and subsequent years, the position accepted/ determined by the Department needs to be followed even on the principle of consistency. He relied on following decisions for this proposition:

(i) CIT vs. Excel Industries Ltd.: 358 ITR 295 (SC)

(ii) Radhasoami Satsang v. CIT: 193 ITR 321 (SC)

(iii) DIT (E) v. Apparel Export Promotion Council: 244 ITR 734 (Del)

(iv) CIT v. Neo Polypack (P) Ltd: 245 ITR 492 (Del.)
(v) CIT v. Dalmia Promoters Developers (P) Ltd: 281 ITR 346 (Del.)
(vi) DIT v. Escorts Cardiac Diseases Hospital: 300 ITR 75 (Del.)
(vii) CIT v. P. KhrishnaWarrier: 208 ITR 823 (Ker)
(viii) CIT v Harishchandra Gupta 132 ITR 799 (Ori)
(ix) CIT v. SewaBharti Haryana Pradesh: 325 ITR 599 (P&H)
(x) CIT v. Rajasthan Breweries Limited.: ITA 889/2009 (Del) – SLP dismissed.

Thus, he submitted that the revenue having accepted that the aforesaid units were eligible to claim deduction under section 80IB/IC of the Act in all the earlier years, the same stand ought not to be changed/ modified during the year under consideration even on the principle of consistency, particularly, when no new fact/ information has been brought on record for the same

d) Referring to one of the reasons for denial of deduction that separate books of account and balance sheet and profit and loss account were allegedly not maintained/ prepared for the eligible units/ undertaking, thereby violating the condition prescribed in section 80IA(5)/(7) of the Act, he submitted that Ld. assessing officer failed to appreciate the case of the appellant that its records were maintained on a “business area” basis on SAP ERP System, which satisfies the condition prescribed in section 80IA(5)/(7) of the Act, For this he drew our attention to the written synopsis wherein he has elaborately discussed the accountingpractice of the company same is discussed for the sake of clarity as under :-

A '**business area**' is an organizational unit within the financial accounting system and corresponds to a defined business segment or area of responsibility, which includes the following:

(i) 'Pharma manufacturing unit'; and
(ii) 'API manufacturing unit'.

Each business area is further sub-divided for e.g. the manufacturing business area further comprises of various plants. Each plant is given a separate Plant Code within the business area. In this regard, it may be noted that a plant location may have different production units (referred to as 'Blocks'), manufacturing different kinds of medicines. The appellant refers to the units, which are eligible to claim deduction under section 80-IB/IC of the Act, as "New Industrial Undertaking" (NIU). Hence,transactions/entries relating to each business area or its plants are distinctly identifiable by way of separate code(s) assigned in the SAP ERP System. At each of the plant company manufactures different kind of medicines and in different package form. Each medicine in its packaged form is referred to as Stock Keeping Unit (SKU). Further, each batch of SKU manufactured by the Company is allotted a unique batch number and related details of sales and material cost are identified based on such batch number and plant wise SKU codes. In the SAP ERP System of the appellant, the following codes are assigned to identify each and every transaction:

(i) Plant Code is assigned for every Plant within each Business area;

(ii) Unique batch number is assigned to each batch of packed form of medicine [i.e., SKU];

(iii) Each and every production order of medicine is assigned separate and identifiable code, based on which the entire expenses incurred to produce the medicine is identifiable;

(iv) Each and every item of raw material is assigned separate and identifiable code; therefore, consumption of raw-material is identifiable;

(v) Each and every product manufactured is assigned unique product code starting with "8" series;

(vi) Unique packaging code is assigned starting with "3" series at the time of initiating packaging;

Hence all the transactions (e.g., Costs, revenues, etc.) for each of the product at every level viz., Business Area, Plant, etc., are separately identifiable. Each undertaking of the appellant is treated as independent and separate unit based on the combination of coding hierarchy in the ERP based accounts. An expenditure relating to a unit is recorded in the manner that such expenditure gets captured to the respective unit only, since each and every direct expenditure, at the time of recording is recorded based on the coding hierarchy, which identifies the Business unit for which transactions are being recorded. For example, sale by Unit 1 would be recorded in such manner that the sale is clearly identifiable to Unit 1, which will be different, separate and distinct from sales maintained for all other units of the appellant. This is similarly true for each and every item of revenue and direct expense recorded in the ERP based software. A total cost includes the following:

(i) Direct costs, i.e., costs directly related to manufacturing the product. Such costs include raw material cost, labour cost, packaging cost and excise duty, quantification which has not been disputed by the assessing officer. It may be noted that such direct costs in majority of the cases form more than 60% of the total expenses during the year under consideration.

(ii) Common Manufacturing costs i.e., cost of common utilities used by manufacturing blocks located at a plant location, which are allocated to each block on the basis of raw material consumption/ value of assets. Such costs includePower, fuel, boiler related expenses, stores and spares, consumables.Plant administration expenses, for e.g. security, human resource, insurance of inventories/ fixed assets, travel, printing and stationery, rates and taxes, etc. Further, other overheads, namely expenses of head office, international division, etc., are allocated to the relevant Block on the basis of the sales. The above approach has been traditionally followed by the appellant to compute the total cost of the respective units.

e) On the basis of above system of recording accounting transactions by the company ld.AR submitted that this basis of computation of profits of the undertaking is clearly disclosed and form part of the audit report under sections 80IB/IC of the Act in Form 10CCB .For this he referred to page no 974 to 1038 of the paperbook where in the relevant balance sheet, profit and loss account and certificate of deduction claimed in attached. He submitted that in the ERP based software of the company , reports and financial statements for each unit can be taken out separately capturing the transactions directly relating to the Business Unit prior to any allocable item and on the basis of the financial results generated from the ERP based software, unit wise accounts of each of the eligible units are prepared and also the non-eligible units are prepared and thereafter, the appellant ultimately consolidates and prepares its financial statements. It is further submitted that based on unit wise accounts prepared, the appellant claims deduction under section 80IB/ 80-IC of the Act, which is duly supported by certificate of the Chartered Accountant.

f) He submitted that ld. AO was swayed by the facts that only common thing in the entire system is that a common ERP based accounting software is installed at the company level. He also took us to production & sales process adopted by the appellant submitted in the form of a flow chart to show that based on the unique product/batch code, the details of all transactions/entries relating to each business area or its plants are distinctly identifia[illegible]e, as per which profits of each unit has been arrived at. In nutshell, he submitted that financial accounts are recorded separately from each of the locations into the live ERP software installed andall the transactions (e.g. costs, revenues, etc.,) for each product and each plant are separately identifiable. He further submitted that ld. AO has not disputed that each and every item of sales and direct costs are identifiable. As regards common manufacturing/ head office/R&D expenses, he submitted that same are allocated to units consistently followed year to year and accepted by the Revenue from assessment years 2002-03 to 2007-08.

g) Regarding observation of ld. AO that allocation of head office expenses and R&D expenses has not been made on a reasonable basis he submitted that in so far as R&D expenses is concerned, the same primarily represents cost related to the development of 'new' medicinal products. It is only after innovation of the new product that the same is produced. In these circumstances, the appellant, in line with the traditional allocation methodology adopted in the earlier years apportioned 30% of such R&D expenses to the individual undertakings in the ratio of sales. His main thrust was that allocation was made based on proper allocation key and same is accepted by revenue in earlier years.

h) Ld. AR also assailed the observation of ld. AO that the said products, as and when invented in future, would be manufactured by each of the units or any one of them. He submitted that there is nothing to indicate that in the event of the appellant deciding to commercially exploit the benefits of the R & D work, the products would be manufactured by the said units. Therefore, his submission was that the presumption of a nexus between the R & D activities and the units is incorrect.

i) Regarding allocation of head office expenses hesubmitted that the same relates to costs that have been incurred on an entity level and pertains to the company as a whole. Thus, the appellant apportions 75% of such head office expenses to the individual undertakings based on sales. He submitted that the appellant has been consistently following the previously mentioned method of allocation of expenses/common expenses to arrive at taxable profits of the eligible unit, since commencement thatduly certified by the auditors and hasbeen accepted in the assessments completed in the past. He further relied on the decision of Honourable Delhi high court in the case of CIT vs. EHPT India Pvt Ltd: 350 ITR 41 (Del) where in allocation of expenses based on head counts andturnover is upheld to stress that there is no bar in law for common expenses to be allocated on a scientific/ rational basis to the eligible unit.

j) Therefore,he submitted it from above method of accounting followed by the assessee that itamounts to maintenance of separate books of account for each of the undertakings.He further refuted the observation of ld. AO that the appellant failed to give the true and correct profits of the undertaking merely because a trial balance was not provided when complete details of each and every transaction is maintained and profit and loss account and balance sheets are available.

k) He submitted that under the provisions of section 80IB/IC of the Act, there is no provision/ requirement of maintenance of separate books of account in respect of each eligible undertaking. What is only required is that the assessee has to furnish report of a Chartered Accountant in the prescribed Form No.10CCB certifying that deduction has been rightly computed in respect of profit derived from the undertaking. Ld. AR extensively referred to provisions of section 80 IA (7) of the act, Form No 10CCB, and relevant income tax rules and submitted that it law does not prescribe maintenance of separate books of accounts for the claim of these deduction. He further relied on the following decisions:

DCIT vs. SMR Builders: 54 SOT 105 (Hyd)

ACIT vs Sabarkantha District Co-operative Milk producers Union Ltd: ITA No. 2613 of 2012 (Ahd)

Therefore he submitted that that it is not appropriate to read the requirement of maintaining separate books of accounts of the eligible business/ undertaking in section 80IA(7) of the Act, as a pre-condition to claim deduction under that section, even though there is no such requirement in law. Nevertheless, in any way assessee has maintained separate books of accounts in the SAP ERP system. Therefore, otherwise it cannot be said that assessee has not maintained separate books of accounts for eligible units.

l) With reference to the allegation of the assessing officer that the appellant has adopted global selling price, which included element of profits earned from the selling and distribution activity and hence could not be considered to be at arm's length, Ld. AR referred to the provisions of section 80 IA (8) of the act and submitted that the provisions of section 80IA(8) of the Act are not at all applicable to the case of the appellant in so far as no inter-unit transfer of products are made by the appellant. For this, he explained the business process of the appellant that New Industrial Units (NIU)'s, which are eligible to claim deduction under sections 80IB/IC of the Act, are manufacturing different pharma products in different package forms, referred to as SKU's. These SKU's manufactured by the NIU's are the final finished products which are readily saleable in the market and no further processing/packaging is required in such SKU's. The finished pharma products in the form of SKU's manufactured by the NIU's are either sol□ □ □ □ □ □ □ e overseas markets or in the domestic markets in India and no transfer of any SKU is undertaken between the units. The products manufactured and meant for export in overseas markets are cleared from NIU's to the company's godown (situated in Village Rahulkhedi, Indore or Okhla, Delhi) vide a Stock Transfer Note. Thereafter, from the godown, the SKU's are transferred to clearing and forwarding agents for facilitating transfer to the overseas customers of the company outside India. Further, the SKU's sold within India are cleared from NIU's to centralized godown of the Company situated at Nangli Poona, Delhi. Thereafter, from this godown, the SKU's are transferred to stockists of the Company at respective locations in India. Thus, in essence, the NIU's (which are eligible to claim deduction under sections 80IB/IC of the Act) clear the SKU's to the company's godown for final sale to the stockists. The godown only facilitates movement of goods from NIU's for onward sales. Hence, no stock transfer takes place from one unit to the other unit. Further NIU does not recognize any amount as 'sale' in its books of accounts, until the SKU manufactured by the respective NIU is actually sold to the stockists. The NIU books the amount of sale based on price at which SKU has been transferred to the stockists from the godown. Therefore, accordingly provisions of section 80 IA (8) do not apply to the appellant.

m) Further, it was submitted without prejudice and even otherwise, even if it is presumed (without admitting) that the products are transferred to another unit, then, too, such transfer has been made at arm's length, For this he relied on the Circular No.169, dated 23.6.1975 and decision of Hinchcliff (Inspector of Taxes) v. Crabtree [1971] 81 ITR 677

(Cal) on interpretation of what is market value and submitted that the final sale price is the gross income of each unit. He also stressed up on the facts that entire selling and development costs are also allocated to each unit; for that reason, too, adoption of final sale price is inevitable.

n) Further, in respect of the Selling & Distribution function of the appellant, it is respectfully submitted that selling & development network (S&D) is an integral part of the appellant-company and works cohesively with other functions hence the cost incurred by this function has been considered as common cost and is accordingly, allocated to the manufacturing units of the company by considering it to be a separate cost center like any other department. Therefore, according to him sellingand distributions functions cannot be separately taken as profit center. He relied up on decision of the Ahmedabad Bench of the Tribunal in the case of Cadila Healthcare Limited vs. ACIT: 21 taxmann.com 483 where in this whole controversy has been considered and decided in favour of assessee regarding services given by the entity to the NIUs of selling and distribution to be charged at the market rate for working out legible profit of NIus.

o) Further, as far as the computation of deduction based on profits from manufacturing activities in the ratio of turnover of manufacturing units with that of the company, he submitted that the method of computation sought to be applied by the assessing officer has nowhere been prescribed under section 80IB/IC of the Act. He relied on the following decisions:

(i) Maral Overseas Ltd. vs. ACIT: 136 ITD 177 (SB)

(ii) Scientific Atlanta India Technology (P) Limited: 38 SOT 252/ 129 TTJ 273 (SB)

p) Further, Ld. AO has held that since balance sheet in respect of the eligible undertakings was not filed along with such Form 10CCB, the conditions of section 80IA(7) of the Act were violated and thereby the appellant was not eligible to claim deduction under section 80 IB/IC of the Act. For this, Ld. AR submitted that during the course of assessment proceedings, in support of its claim of deduction under sections 80-IB/IC of the Act filed prescribed Form 10CCB along with profit & loss account. He agreed that though the appellant had not enclosed the balance sheet in respect of the eligible undertaking along with the prescribed Form 10CCB, but it was duly filed before the Dispute Resolution panel. Further, the profit & loss account was duly filed with the assessing officer alongwith the Form 10CCB during the assessment proceedings only. The said statements were, thus, available with the assessing officer at the time of passing the final assessment order.His further argument was that Assessee has made substantial compliance, that too before the passing of the final assessment order, thereforeit was not proper on the part of the assessing officer to deny the legitimate claim of deduction on a technical ground of non-filing of balance sheet with the return of income. For the proposition that the filing the report of the chartered accountant is mandatory but filing the same along with the return of income is directory, he relied on following decisions

i. CIT vs. Nagpur Hotel Owner's Association: 247 ITR 201 (SC)

ii. CIT v. Centimeters Electricals (P.) Ltd.: 317 ITR 249 (Del)

iii. CIT v. Axis Computers India P. Ltd.: 178 Taxman 143 (Del)

iv. CIT vs. Web Commerce (India) (P.) Ltd.: 178 Taxman 310 (Del) – SLP of revenue dismissed in SLP No. SLP (C) No. 20057 of 2009

v. CIT v. Panama Chemical Works: 245 ITR 684 (MP)

vi. CIT V. Berger Paints (India) Limited: 254 ITR 503 (Cal.)

vii. CIT V. Punjab Financial Corporation: 254 ITR 6 (P&H) (FB)

viii. CIT v. G. Krishna Nair: 259 ITR 727 (Ker)

ix. CIT V. Shiva Rice & Dal Mills: 273 ITR 265 (P&H)

x. CIT V. Gupta Fabs: 274 ITR 620 (P&H)

xi. CIT v. Parry Agro Industries Ltd.: 284 ITR 353 (Ker)

xii. CIT v. Panama Chemical Works: 292 ITR 147 (MP)

xiii. CIT V. Print Systems & Products: 285 ITR 260 (Mad.)

xiv. Amit vegetable Oil Ltd. v. CIT : 158 Taxman 36 (All)

xv. CIT v. Shivanand Electronics: 75 Taxman 93 (Bom)

xvi. CIT v. Dr. L.M. Singhvi: 157 Taxman 312 (Raj)

xvii. CIT V. Medicaps Ltd.: 323 ITR 554 (MP)

xviii. CIT vs. American Data Solutions (P.) Ltd: 223 Taxman 143 (HC) (Kar)

xix. CIT vs. Godha Chemicals (P.) Ltd.: 353 ITR 679 (Raj.) (Mag)

xx. CIT vs. Gujarat Oil & Allied Services: 201 ITR 325 (Guj)

xxi. CIT v. A.N. Arunachalam: 208 ITR 481 (Mad)

xxii. CIT v. Shivanand Enterprises: 209 ITR 63 (Bom)

xxiii. Zenith Processing Mills v. CIT: 219 ITR 721 (Guj)

Therefore, he submitted that the assessing officer erred in denying the claim of deduction under section 80IB/IC of the Act on the ground of non-filing of balance sheet of the eligible units, without appreciating that, the same were filed during the DRP proceedings and were available at the time of passing the final assessment order.

58. For the previously mentioned cumulative reasons, he submitted that the ld. AO grosslyerred in denying the claim of deduction made under section 80IB/IC of the Act.

59. Countering the claim of the ld. AR, ld. DR submitted before us citing Pg. 974 of the paper book volume IV stating that in AY 2002-03 assesse has not claimed any deduction u/s 80IB of the Act. He further submitted that this is the first year of verification of computation methodically adopted by the assesse so that even if the deduction has not been disturbed in the first year the revenue has full right to verify the deduction. The condition would have been applicable only if the deduction has been claimed, verified and then allowed from this angle.

60. He further submitted that no separate books of account have been maintained by the units for which deduction has been claimed. The computerized SAP system cannot be said that where assesse has prepared balance sheet and profit and loss account for the units from the SAP, assessehas maintained separate books of accounts. He further submitted that declaration in Form No.10CCB shows that the assesse has

submitted the balance sheet and profit and loss account;however, there was no such balance sheet andonly profit and loss account was submitted along with audit report.

61. He further submitted that no separate balance sheet was maintained as is evident from page 999 where the assumptions have been noted for the purpose of allocation of various expenditure. Hence, he submitted that no separate books of account are maintained for eligible units however, allocated statement of expenditure and adjusted profit and loss account and balance sheet are prepared for claiming deduction.

62. He further submitted that assesse claimed deduction also on trading profit for which deduction u/s 80IC and 80IB are not eligible.

63. He referred to Page No.51 of the assessment order where the gross taxable of the assesse 178.64 crores and if the other income from the pure trading etc. amounting to Rs.225.83 crores is excluded it results into the loss and therefore the assesse is not eligible for any deduction, as there is no profit. He further referred to page no.58 of the assessment orders and submitted that there are four reasons given by the AO on that page namely

(i) Assesse does not maintain a separate balance sheet and profit and loss account of the undertaking.

(ii) Other income not eligible for deduction is more than the gross business income returned by the company therefore there is no profit

(iii) The assesse does not record the sales at Arm's length pricing and if the profit of selling and distribution and b rand profit are excluded which are profit center in itself then there is a loss

(iv) The assesse has failed to determine profit in accordance with section 80IA (a) of the Act and has not allocated expenses which are related to manufacturing activity and if it is done there would be a loss.

64. He further referred to page no.973 wherein which is a statement showing computation of deduction with respect to various units and he submitted that deduction u/s 80IC with respect to new tablet plant No.III is the first time claimed during the year amounting to Rs.523509006/- and therefore this claim has been examined for the first time during the year and hence without considering the other points there is no deduction allowable to the assesse on this sum at least.

65. Based on the above submission it was submitted that the whole issue of claim of the deduction should be set aside to the file of Assessing officer and for this he relied on the decision of ACIT Vs. Amarnath Reddy 126 ITD 113 (TM) TII-425-ITAT Madras dated 29.09.2015.

66. In rejoinder the ld. AR submitted that

(a) There are no trading profits, which are included in the computation of deduction of the eligible units, and the ld. DR has not pointed out how they are included in the computation of profit.

(b) Thatthe issues are legal and the full facts are available before the bench and as the matter is required to be decided is a matter of principle and the method adopted by the assesse for working is clear, accepted and followed consistently there is no need for setting aside the issue.

(c) That comparison of gross total income with the income eligible for unit for deduction is erroneous and ld. DR has not pointed out where is the error in the computation of profits of eligible units. He relied on the provisions of section 80 A which speaks about the deduction from gross total income. He also took us to the computation of total income to show that there is no substance in the argument of the revenue on this count. He submitted that no error has been pointed out by the Ld. AO or the ld. DRP of Ld. DR in the computation of deduction of income, of eligible undertaking.

(d) That the claim of deduction of tablet plant No.III is supported by audit report available at Page 1026 and further at page 1030 of the paper book the profit is quantified at Rs.523509006/- and in the declaration it shows the balance sheet which is at page no.1031 and profit and loss account is also at page no.1032 of the paper book. He submitted that it is prepared on the same basis following the same accounting practices and adopting same methodology therefore though, deduction is claimed for the first year there is no infirmity pointed out by the revenue in the working of deduction.

(e) That the four points, which have been stated at page 58 of the order, have already been replied and in rebuttal nothing has been stated by the ld. DR. as the submission of the assesse has not been controverted there is no point in referring to the four points submitted by ld. DR once again. However, he reiterated his submission.

67. On query by the bench about the first year of the claim andsubsequent status of those units a chart has been submitted by the ld. AR showing for each of the units' initial year of the assessment of claim and whether the deduction for the years was claimed in the return of income, and whether such claim was examined, whether such deduction claimed was allowed and reason for variations in the deduction claimed and allowed. Assesse has also submitted the copy of the assessment orders for respective years that have been submitted in supplementary paper book by the assesse. It was further submitted in the chart that AY 2001- 2002 and 2002-03 reassessment proceedings were initiated for verification of allocation of head office and R&D expenses with respect to claim of the assesse u/s 80IB and 8IC and after verification no disallowance or adjustment to the claim of the assesse was made and relevant assessment orders were placed in the paper book.

68. We have carefully considered the rival contentions. During the year assesse has claimed deduction u/s 80IB and 80IC as under:-

Name of unit	Section under which claimed	Year of establishment	Year of claim	Initial year of the claim	Amount claimed	remarks
Goa Plant	80IB	31.03.2002	7th	2002-03	90204832	Profit for year is Rs.300682774/- and deduction is claim @30% of the eligible profit.
New Tablet Plant-I	80IC	31.03.2005	4th	2005-06	Rs.220579510	It is eligible for deduction @100% of profit for the year
New Tablet Plant-II	80IC	31.03.2006	3rd	2006-07	Rs.156142930	It is eligible for deduction @100% of profit for the year
New SGC plant	80IC	31.03.2007	2nd	2007-08	Rs.376385228	It is eligible for deduction @100% of profit for the year
New tablet plant-III	80IC	31.03.2008	1st	2008-09	RS.523509006	It is eligible for deduction @100% of profit for the year

69. In case of Goa plant, the deduction was claimed firstly in AY 2002-03 and subsequently issue was reopened for verification of this claim u/s 147 of the Act and subsequently in order u/s 143(3) rws 147 of the Act, the claim of the assesse was accepted. Hence, the claim was examined and allowed for this unit in the initial year.

70. Regarding claim of deduction u/s 80IC of the Act in case of New Tablet Plant-I the initial year of deduction is AY 2005-06. During the course of assessment proceedings, the assesse submitted copy of audited accounts of New industrial undertaking and submitted the basis for computation of the profit eligible for deduction for these undertakings. During the course of assessment proceedings assesse was specifically asked to explain the reasons and basis for apportionment of 30% R&D expenditure and 75% of the head office expenses to this new undertaking. Assesse explained vide letter 02.12.2008 and after going through the submission made the assesse and based on allocation explained by the assessee, profits of the undertaking u/s 80IB/80IC were accepted by the AO. Therefore, in the initial year the claim of deduction for the unit New Tablet Plant-I was claimed, examined and allowed.

71. In case of New Tablet Plant-II which was set up in AY 2006-07, the assesse did not claim any deduction in view of provision of section 80A(2).

72. Similarly, in case of new SGC Plant which was set in AY 2007-08 the assesse did not claim any deduction for that year in view of the provision of section 80A(2) of the Act as the gross total income of the assesse was negative.

73. In case of New Tablet Plant-III, this is the first year of deduction and assesse has claimed the same in return of income and it is under dispute in this appeal.

74. It is argument of the ld. AR that it is the well settled proposition of law that where the act provides for the deduction for a certain term period the revenue is required to examine the claim of deduction and its eligibility to examine whether all statutory conditions are satisfied in the first year in which the appellant claims the deduction.If revenue does not disturb the claim of the assesse in that year, it is not open to revenue to disallow the deduction in the subsequent years. The various authorities cited by the ld. AR are specifically on the point in favour of the assessee. The contention of the revenue that this is the first year in which the methodology of claim of deduction of the assesse is being verified is not accordance with the previous assessment orders passed by the AO with respect to deduction u/s 80IB with respect to Goa plant and deduction u/s 80IC of the Act for New Tablet Plant-I. On perusal of those orders, it is apparent that these deductions claimed by the assesse in the initial year of this industrial undertaking have been examined in detail andthen allowed by the revenue after making enquiry. In view of this, the argument of the revenue cannot be accepted that these deductions have not been examined. For this finding, we have material on record the assessment history in the form of assessment orders of the assessee for those years. However in case of New Tablet Plant-II and New SGC plant it is apparent that in absence of positive gross total income no deduction was claimed for AY 2006-07 and 2007-08 and therefore the claim of deduction by the assesse for these two plants is the first year of examination of

claim. Obviously new Tablet Plant-III has been set up during this year only and therefore AY 2008-09 is the first year of examination of the claim of the assesse by the AO. Before us the Ld. DR has not pointed out any changes in the facts or law relating to those yeas with the facts of this year with respect to deduction claimed by the assessee with respect to Goa plant and New tablet Plant –I.Therefore, deduction related to these plants cannot be questioned in this year afresh without disturbing the deduction in initial year of the claim. Our view is also supported by the decisions of various Honourable High courts, one of the leading judicial precedent quoted before us is of Honorable Delhi high court in 34 taxmann.com 3 (Delhi) in case of CIT V Delhi Press Patrika Parakashan P Limited where in it is held that

> ***"69.*** *The next controversy that needs to be addressed is whether it was open for the Assessing Officer to deny the benefit of Section 80-I of the Act to the assessee having allowed benefit to the assessee in the preceding three years. It is contended on behalf of the assessee that it was necessary for the Assessing Officer to be consistent with the assessment for the earlier years. The question as to the qualification of Unit Nos. 2 & 3 as industrial undertakings arose in the earlier years and the Assessing Officer had accepted that Unit Nos.2 & 3 qualified for deduction under Section 80-I of the Act in the earlier years. By virtue of section 80-I(5) of the Act deduction under section 80-I of the Act was available to an assessee in the assessmentyear relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles or things (such assessment year being the initial assessment year) and each of the seven assessment years immediately succeeding the initial assessment year. This necessarily implied once the issue as to eligibility under section 80-I of the Act was examined and allowed in the initial assessment, the same was allowable in the subsequent years also unless there was any material change in the succeeding years.*
>
> ***70.*** *It is well settled law that the principles of res judicata do not apply to income tax proceedings and assessment for each year is an independent proceeding. It is now equally well established that issues that have been settled and accepted over a period of time should not be revisited in subsequent assessment years in absence of any material change which would justify the change in view.*

71. The Supreme Court in the case of Radhasoami Satsang (supra) has held that unless there is a material change in justifying the revenue to take a different view the earlier view which has been settled and accepted of a several years should not be disturbed. The relevant extract from the said judgment is quoted below:—

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

On these reasonings in the absence of any material change justifying the Revenue to take a Y@view of the matter - and if there was not change it was in support of the assessee- we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income-Tax in the earlier proceedings, a different and contradictory stand should have been taken. We are, therefore, of the view that these appeals should be allowed and the question should be answered in the affirmative, namely, that the Tribunal was justified in holding that the income derived by the Radhasoami Satsang was entitled to exemption under ss. 11 and 12 of the Income Tax Act of 1961."

72. The decision of the Supreme Court in the case Radhasoami Satsang (supra) was on the facts where the question as to the entitlement for exemption under Section 4(3)(i) of the Income Tax Act, 1922 had not been granted for the assessment year 1939-40. The assessee had challenged the assessment order which was accepted by the Appellate Assistant Commissioner who upheld the assessee's claim for exemption. This view was consistently followed by the successive Assessing Officers till 1963-64. In these circumstances, the Supreme Court held that the view that had been settled and accepted over a period of years should not be allowed to be disturbed.

73. This court in the case of Lagan Kala Upvan (supra), following the decision of the Supreme Court in the case of Radhasoami Satsang (supra) has also held that where a particular view has been accepted by the Assessing Officer to several years the same cannot be permitted to be departed from unless there is some material facts that justified such a change. Similar view has been expressed by this court in the case of Modi Industries Ltd. (supra). In this case, while considering a claim of deduction made by an assessee under section 80J of the Act, this High Court held as under:—

"The second question relates to the claim of the assessee for deduction under Section 80J of the Income Tax Act in respect of its new unit namely 10 ton Furnance Division and Steel Unit 'B'. This case *pertains to the assessment year 1976-77. A perusal of the order of the Assessing Officer would reveal that for the first time, claim under Section 80J of the Act was made by the assessee in the assessment year 1973-74. The assessee was denied that claim by the Assessing Officer. For this reason, the Assessing Officer denied the claim in this assessment year as well, taking note of the fact that the matter pertaining to 1973-74 was pending before the Income Tax Tribunal.*

It is a matter of record that the appeal filed by the assessee for the assessment year 1973-74 was allowed by the Income Tax Appellate Tribunal. The effect thereof was that the assessee was granted the requisite deduction under Section 80J of the Act for the assessment year 1973-74. The Department has sought reference under Section 256(1) of the Act which reference application was also rejected by the Tribunal. Likewise, for the assessment years 1974-75 and 1975-76, the claims of the assessee were allowed. The assessee, once given thededuction under Section 80J of the Act is entitled to such a deduction for a period of 5 years. If the assessee has been allowed the benefit of Section 80J in the last three precedingyears, there is no reason to deny the same for the instant assessment year. We, therefore, answer this issue also in favour of the assessee and against the revenue."

74. *In the present case, the claim of the assessee under section 80-I of the Act was examined and allowed by the Assessing officer for three years preceding the assessment year 1991-1992. It is relevant to note that assessments in the earlier years i.e. relating to assessment years 1988-89, 1989-1990 and 1990-1991 has not been disturbed by the Assessing Officer and there has been no change that could justify the Assessing officer adopting a different view in the assessment years 1991-92 and thereafter. As stated hereinbefore, in certain cases where the issues involved have attained finality on account of the subject matter of dispute having been finally adjudicated, the question of reopening and revisiting the same issue again in subsequent yearswould not arise. This is based on the principle that there should be finality in all legal proceedings. The Supreme Court in the case of Parashuram Pottery Works Co. Ltd. v. ITO [1977] 106 ITR 1 had held as under:-*

".....that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity...."

75. *In the facts of the present case, where although the Assessing officer has allowed the assessee deduction under section 80-I of the Act in the preceding years, one may still have certain reservations as to whether the issue of eligibility of Unit nos. 2 and 3 fulfilling the conditions has been finally settled, since the question has not been a subject matter of any appellate proceedings in the years preceding the assessment year 1991-*

92. However, there is yet another aspect which needs to be considered. By virtue of section 80-I(5) of the Act, deduction under section 80-I of the Act is available to an assessee in respect of the assessment year (referred to as the initial assessment year) relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles or things, or to operate its cold storage plant or plants or the ship is first brought into use or the business of the hotel starts functioning or the company commences work by way of repairs to ocean-going vessels or other powered craft. Such deduction is also available for the seven assessment years immediately succeeding the initial assessment year. Surely in cases where an assessee is held to be eligible for deduction in the initial assessment year, the same cannot be denied in the subsequent assessmentyears on the ground of ineligibility since the set of facts which enable an assessee to claim to be eligible for deduction under section 80-I of the Act occur in the previous year relevant to the initial assessment year and have to be examined in the initial assessment year. In such cases, where the facts on the basis of which the deductions are claimed are subject matter of an earlier assessment year and do not arise in the current assessment year, it would not be possible for an Assessing Officer to take a different view in the current assessment year without altering or reopening the assessment proceedings in which the eligibility to claim the deduction has been established.

76. *In cases where deduction is granted under Section 80-I of the Act, the applicability of the Section is determined in the year in which the new industrial undertaking is established. The qualification as to whether any industrial undertaking fulfills the condition as specified under Section 80-I of the Act has to be determined in the year in which the new industrial undertaking is established. Although the deduction under Section 80-I of the Act is available for the assessment years succeeding the initial assessment year, the conditions for availing the benefit are inextricably linked with the previous year relevant to the assessment year in which the new undertaking was formed. In such circumstances, it would not be possible for an Assessing Officer to reject the claim of an assessee for deduction under Section 80-I of the Act on the ground that the industrial undertaking in respect of which deduction is claimed did not fulfill the conditions as specified in Section 80-I(2) of the Act, without undermining the basis on which the deduction was granted to the assessee in the initial assessment year. This in our view would not be permissible unless the past assessments are also disturbed.*

77. *The Assessing Officers over a period of three years being assessment years 1988-89, 1989-1990 and 1990-1991 have consistently accepted the claim of the assessee for deduction under 80-I of the Act and it would not be open for the Assessing Officer to deny the deduction under Section 80-I of the Act on the ground of non fulfilment of the conditions under 80-I(2) of the Act without disturbing the assessment for the* *assessment years relevant to the previous year in which the Unit Nos.2 & 3 were established.*

78. *This view has also been accepted by a Division Bench of Gujarat High Court in the case of Saurashtra Cement & Chemical Industries (supra). In that case, the Gujarat High Court held that where relief of a tax holiday had been granted to an assessee in an initial assessment year in which the conditions for grant of tax holiday had to be examined, denial of relief in the subsequent years would not be permissible without disturbing the assessment in the initial assessment year. The relevant extract from the decision of the Gujarat High Court in Saurashtra Cement & Chemical Industries (supra) is quoted below:—*

"The next question to which the Tribunal addressed itself, and no our opinion rightly, was whether the Tribunal was justified in refusing to continue the relief of tax holiday granted to the assessee-company for the assessment year 1968-69, in the assessment year under reference, that is, 1969-70, without disturbing the relief granted for the initial year. It should be stated that there is no provision in the scheme of s. 80J similar to the one which we find in the case of development rebate which could be withdrawn in subsequent years for breach of certain conditions. No doubt, the relief of tax holiday under s. 80J can be withheld or discontinued provided the relief granted in the initial year of assessment is disturbed or changed on valid grounds. But without disturbing the relief granted in the initial year, the ITO cannot examine the question again and decide to withhold or withdraw the relief which has been already once granted."

79. *The Division Bench of the Bombay High Court in the case of Paul Brothers (supra) has also adopted the view expressed by the Gujarat High Court in the case of Saurashtra Cement & Chemical Industries (supra)."*

For the sake of brevity, we do not reproduceother decisions cited by ld. AR that reiterates the same principles that in absence of any change in facts / law etc. during intervening period the deduction granted after examination in initial year of a tax holiday period it cannot be questioned in subsequent years.

75. Therefore, we hold that as the deduction with respect to Goa Plant u/s 80IB which is in the 7th year of its claim out of 10 years, has earned eligible profit of Rs.300682774/- and

deduction thereon is claimed at the rate of 30% thereof amounting to Rs.90204832/- and New Tablet Plant-I u/s 80IC for which this is the 4th year of the claim and assesse has claimed 100% of the eligible profit amounting to Rs.220579510/- as deduction, cannot be disallowed in this year.

76. Coming to the second argument that the revenue should follow the consistency and where position has been accepted and determined by the department after examination of the facts and where there is no change either in the facts or in law than the earlier decision taken by the revenue should be adhered to. Ld. DR did not point out any changes in the facts and/or law in the year in which deductions granted in earlier years with respect to impugned year. We have carefully considered the argument of the ld. AR and we do not see any dispute on the principle of consistency as it has already been propounded by Hon’ble Supreme Court and various other Hon’ble High Courts. The latest in point of time is CIT V Excel Industries where honourable Supreme court has held that

*“**28.** Secondly, as noted by the Tribunal, a consistent view has been taken in favour of the assessee on the questions raised, starting with the assessment year 1992-93, that the benefits under the advance licences or under the duty entitlement pass book do not represent the real income of the assessee. Consequently, there is no reason for us to take a different view unless there are very convincing reasons, none of which have been pointed out by the learned counsel for the Revenue.*

***29.** In Radhasoami Satsang Saomi Bagh v. CIT [1992] 193 ITR 321/60 Taxman 248 (SC) this Court did not think it appropriate to allow the reconsideration of an issue for a subsequent assessment year if the same "fundamental aspect" permeates in different assessment years. In arriving at this conclusion, this Court referred to an interesting passage from Hoystead v.Commissioner of Taxation, 1926 AC 155 (PC) wherein it was said:*

"Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the

construction of the documents or the weight of certain circumstances. If this were permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted and there is abundant authority reiterating that principle. Thirdly, the same principle, namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken."

30. *Reference was also made to Parashuram Pottery Works Ltd. v. ITO [1977] 106 ITR 1 (SC) and then it was held: "We are aware of the fact that strictly speaking res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year. On these reasonings in the absence of any material change justifying the Revenue to take a different view of the matter - and if there was no change it was in support of the assessee - we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income Tax in the earlier proceedings, a different and contradictory stand should have been taken."*

31. *It appears from the record that in several assessment years, the Revenue accepted the order of the Tribunal in favour of the assessee and did not pursue the matter any further but in respect of some assessment years the matter was taken up in appeal before the Bombay High Court but without any success. That being so, the Revenue cannot be allowed to flip-flop on the issue and it ought let the matter rest rather than spend the tax payers' money in pursuing litigation for the sake of it."*

77. Therefore, following this principal also we are of the view that deduction for the year claimed by the assesse with respect to itsGoa Unit and New Tablet Plant-I cannot be disturbed on the principle of consistency also. Further, this argument cannot be taken shelter regarding the claim of the assesse for New Tablet Plant-II, SGC Plant and New Tablet Plant-III.

78. The third argument advanced by the assesse is that the accounts of the assesse are being maintained on SAP ERP System, which provides separate books of accounts resulting

into independent balance sheet and profit and loss account of the eligible unit. For this ld., AR explained in detail how the ERP system works and how it generates individual profit and loss account and balance sheet of the Industrial units. In the present business environment and looking to the nature of the business and the size of the operation of the company, it is apparent that it is multi product, multi-location company. The assesse has made a claim of various units, which is submitted before us from Page No.974 to 1038 of Paper Book Volume No.IV. The details of this is tabulated as under:-

Name of the unit	Date of Audit report as per Rule 18BBB	Supported by the balance sheet and profit and loss account of the unit	Page No.of PB Volume IV
Goa Unit	31.01.2012	Yes	974-986
New Tablet Plant-I	31.01.2012	Yes	987-999
New Tablet Plant-II	31.01.2012	Yes	1000-1012
New SCG Plant	31.01.2012	Yes	1013-1025
New Tablet Plant-III	31.01.2012	Yes	1026-1038

79. On examination of the above stated balance sheet and profit and loss account of the above industrial undertaking where the claim of the deduction of the assesse is worked out and certified by the Independent accountant is prepared based on similar accounting policies and practices. It is also apparent that the profit and loss and the balance sheet have been prepared on rational basis after allocation of proper

expenditure, which has been followed by the assesse consistently and based on the accounting practices followed in earlier years. The main reason for asking of separate books of accounts of the eligible undertaking is only to verify that whether the assesse has computed the eligible profits for deduction has some sanctity or not. Assesse has consistently followed allocation of 75% of head office expenses to the individual undertaking based on sales clocked by the individual units. This practice has been consistently followed by the assesse in past year and the revenue as stated by us earlier with respect to AY 2002-03 onwards, has accepted it. The Assessee has in brief and succinctly has explained the rationale behind allocation of each expenditure to the various units.Regarding R&D expenditure the Assessee has also followed the practice apportioning 30% to the individual undertaking in the ratio of sales. This methodology is based on logical reasoning and consistently followed by the assesse which has been accepted by the revenue in past in case of assessment of the Assessee. The ld. AO has held that the Assessee has maintained common books of accounts and therefore as separate books of accounts are not maintained therefore profit cannot be ascertain correctly. We have examined these arguments and we are of the view that as Assessee is maintaining its financial and operational records on SAP ERP systems the Assessee can at any moment of time on any day after every transaction can produce the product wise, units wise, geography wise, independent profit and loss account and balance-sheets. Therefore, in our opinion the contention of the ld. AO that common books of account are maintained and not separate books of account is devoid of any merit. As such, Assessee has contended that provision of section 80IB and 80IC does not provide that Assessee should maintain separate books of accounts with respect to eligible undertaking. It only provides as per provision 80IA (7) that the 'accounts' of the undertaking for the previous year for which deduction is claim should havebeen audited by an 'accountant'. The provision of the section does not talk about maintenance of 'separate books of accounts'. Provisions of section 80 IA (7) are as under :-

"(7) [38][The deduction] under sub-section (1) from profits and gains derived from an [39][undertaking] shall not be admissible unless the accounts of the [39][undertaking] for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant, as defined in the *Explanation* below sub-section (2) of section 288, and the assessee furnishes, along with his return of income, the report of such audit in the prescribed form[40] duly signed and verified by such accountant."

80. Rule 18BBB of the Income tax rules governing the certificate by an accountant provides as under :-

[98][**Form of audit report for claiming deduction under section 80-I or 80-IA or** [99][**80-IB or section 80-IC**]**.**

18BBB . (1) The report of the audit of the accounts of an assessee, which is required to be furnished under sub-section (7) of section 80-IA or sub-section (7) of section 80-I, except in the cases of multiplex theatres as defined in sub-section (7A) of section 80-IB or convention centres as defined in sub-section (7B) of section 80-IB [1][or hospitals in rural areas as defined in sub-section (11B) of section 80-IB], shall be in Form No. 10CCB.

(2) A separate report is to be furnished by each undertaking or enterprise of the assessee claiming deduction under section 80-I or 80-IA or 80-IB[1][or 80-IC] and shall be accompanied by the Profit and Loss Account and Balance Sheet of the undertaking or enterprise as if the undertaking or the enterprise were a distinct entity.

(3) In the case of an enterprise carrying on the business of developing or operating and maintaining or developing, operating and maintaining an infrastructure facility, the form shall be accompanied by a copy of the agreement of the enterprise with the Central Government or the State Government or the local authority for carrying on the business

of developing or operating and maintaining or developing, operating and maintaining the infrastructure facility.

(4) In any other case, the form shall be accompanied by a copy of the agreement, approval or permission, as the case may be, to carry on the activity signed or issued by the Central Government or the State Government or the local authority for carrying on the eligible business.

This rule also does not provide for maintenance of “separate books of accounts”.In view of the reading of section 80 IA (7) and Rule 18 BBB, we are of the view that law does not provide that for claiming deduction under those sections there is requirement to maintain separate books of accounts.

81. At this point of time we take note of the decision of Honourable Supreme court in case of M/s Arisudana Spinning Mills Limited V CIT 26 taxmann.com 39 (SC) which provides guidance on the issue of maintenance of separate account for the purpose of claiming deduction u/s 80 IA of the Act. Facts before the honourable Supreme Court were that The Assessing Officer found that the assessee-Company was engaged in the business of manufacturing of yarn. The assessee derived, during the relevant assessment year, a gross total income of Rs. 51,82,666/- from what it called 'manufacturing activity'. It denied that it had undertaken any trading activity during the year in question. On the said sum of Rs. 51,82,666/-, the assessee claimed deduction at the rate of thirty per cent under Section 80IA of the Act amounting to Rs. 15,54,800/-. The Assessing Officer found that the assessee had not <u>maintained a separate trading and profit and loss account</u> for the goods manufactured. In the assessment year in question, it appears that the assessee had sold raw wool, wool waste, textile, and knitting cloths. When a query was raised, the assessee contended that, business exigencies in the assessment year in

question, it had sold the above items. However, according to the assessee, the sale of raw wool, wool waste, etc., would not disentitle it from claiming the benefit under Section 80IA of the Act on the total sum of Rs. 51,82,666/- at the rate of 30%. Department found that the assessee has not maintained the accounts for manufacture of yarn actually produced as a part of industrial undertaking. Consequently, the Assessing Officer worked out, on his own, the manufacturing account, as indicated in his Order, giving a bifurcation in terms of quantity of raw wool produced. On Appeal before honourable court it was held as under :-

> "**4.** In our view, the findings given by ITAT and the High Court are findings of fact. In this case, we are not concerned with the interpretation of Section 80IA of the Act. On facts, we find that the assessee ought to have maintained a separate account in respect of raw material which it had sold during the assessment year. If the assessee had maintained a separate account, then, in that event, a clear picture would have emerged which would have indicated the income accrued from the manufacturing activity and the income accrued on the sale of raw material. We do not know the reason why separate accounts were not maintained for the raw material sold and for the income derived from manufacture of yarn."

On reading of the above decision, it is apparent that the main purposes of the maintenance of separate account are to deduce correct profit eligible for deduction. Hon Supreme court in above decision has also held in thebackground of the facts that assessee did not produce separate profit and loss account of the eligible undertaking. However, in the case of the assessee such profit and loss account was produced along with the report of the accountant since beginning. Therefore, assessee has maintained separate account of the profit eligible for industrial undertaking. In this case,an accountant has audited assessee's accounts of the eligible industrial undertakings and therefore it complies with the letter and spirit of the provisions of Income Tax Act. As mentioned earlier assessee has furnished the separate report of the undertaking which is accompanied by the profit and loss account of each of undertaking complying with the provisions of section 80IA (7) of the act and corresponding rule 18 BBB of the Income tax Rules 1962.. In view of this, the argument of the revenue that separate books of accounts are required to be maintained with respect to each unit does not have any support of the Income Tax Act or Rules framed thereunder.

82. Nonetheless, assessee has maintained books of accounts of the whole undertaking on SAP ERP systems from which on any day the independent profit and loss account and balance sheet as well as the respective ledgers, cashbook and bankbook and journal of any independent industrial undertaking is available. According to section 2 (12A) of the income tax Act books of accounts have been defined as under :-

> (*12A*)[42a] "books or books of account" includes ledgers, day-books, cash books, account-books and other books, whether kept in the written form or as print-outs of data stored in a floppy, disc, tape or any other form of electro-magnetic data storage device;]

On reading of the above, it is apparent assessee has maintained separate books of accounts, which are on the SAP ERP system, which provides transaction-by-transaction ledgers, daybooks, cashbooks, and other books such as quantitative details and stock registers. The Ld. AO was of the view that as the books of accounts are maintained for the entity as a whole, it has not maintained separate books of accounts for the eligible industrial undertaking. It will further be appreciated that the primary purpose of maintaining separate books of account in any provision of the Act is only to enable the assessing officer to verify that deduction under any particular provision has been correctly computed. If from any system/ software, identified and separate accounts relatable to any particular unit/ undertaking are discernible and are capable of being generated, the same, in our view, is sufficient compliance with the requirement of maintenance of separate books of account, if any. However, it is to be noted in present era of technological evolution that old age notions of the maintenance of accounts and business records do not survive and business entity today survives on real time information on each aspect of its business process. In this era when an entity maintains its accounting and business records on Enterprise Resource Planning system, which is a standard procedure or program to optimize all business processes including Sales, Logistics, Production, Quality, Finance of an entity and SAP is a name of software product and it's a company name too which a leading provider of these solutions, it is rather incorrect to say that separate books of accounts are not maintained by the assessee. Evidence led before ld. AO in the form of profit and loss accounts, before ld. DRP in the form of the profit and loss account and complete balance sheets of the undertaking, before 'accountant' who certified the deduction of the units, its balance sheet and profit and loss accounts and before us all these records are attached in the form of paper book which are quoted by us above. In view of such overwhelming evidence, we reject contention of ld. AO and Ld. DRP that assessee has not maintained separate books of accounts. We hold that assessee has maintainedseparate books of accounts from which correct profit can be deduced at any time of the each of the eligible undertaking.Our view also gets support from the decision of coordinate bench in case of 54 SOT 105 (Hyd) in case of SMR builders where in it is held that:-

"**37.** Section 80IA(7) which is applicable to the provisions of Sec. 80IB requires the accounts of the eligible undertaking to be audited and a certificate to be filed. The essence of this requirement is that, at any given time the financial position of the undertaking, should be ascertainable. The intent is that the profits of the undertaking eligible for the deduction can be properly identified. This requires maintenance of accounts in such a fashion that the sales of the eligible business are known, the expenses - both direct and indirect are identifiable and the common expenses are apportioned. The details filed before CIT(A) clearly demonstrate that in the case of the assessee, the profits of the eligible unit can be clearly ascertained from the accounts maintained. Expenses incurred for the project are known and all incomes, including indirect income arising to the project have been considered. The accounts have also been audited and a certificate, as required, has been filed. This being so, the Assessing Officer has erred in holding that separate accounts were not maintained for the eligible business and that the assessee is, therefore, not eligible for deduction u/s. 80IB(10) of the Act."

83. Addressing the next arguments of the revenue that there are certain items of other income, which are reduced from the computation of total income then the manufacturing activity results in loss. For this, propositionLD. DR drew our attention to page no 51 of the assessment order where ld. AO has stated that assessee has earned Royalty Income of Rs 18.91 Crs, (ii) export Incentives of Rs 78.93 crores, (iii) sundries and miscellaneous income Rs 33.74 Cr and Income from trading activity of Rs 94.25 Crores totaling to Rs 225.83 Crs. . It was stated that the gross total income of the assessee is Rs. 178.64 Crores and if the above stated income are excluded i.e. of Rs 225.83 Crores the total income of the assessee will result in to loss and therefore there is no profit in manufacturing activity of the assessee and hence no d deduction is allowable to the assessee. On this aspect we have

carefully perused the computation of total income filed by the assessee which is at page no 1145 to 1155 of the paper book where the gross total income of the assessee is Rs. 3347340467 and claim of the deduction u/s 80 IB/IC of the act of Rs 1366821506/-. Therefore, it is apparent that assessee's deduction is not exceeding the gross total income of the assessee. We have perused the provision of section 80 A of the act which provides as under :-

> **Deductions to be made in computing total income.**
>
> **80A.** (1) In computing the total income of an assessee, there shall be allowed from his gross total income, in accordance with and subject to the provisions of this Chapter, the deductions specified in sections 80C to [48][80U].
>
> (2) The aggregate amount of the deductions[49]under this Chapter shall not, in any case, exceed the gross total income of the assessee.

The only condition that is prescribed u/s 80A of the act is that deduction allowable to the assessee under Ch VIA cannot exceed the gross total income of the assessee. Here as already mentioned grosstotal income of the assessee is Rs. 3347340467/- and out of which deduction u/s 80 G of the act is a claimed at Rs. 11672734/- and deduction u/s 80 IB and IC of the act of Rs 1366821506/- of the act totaling to Rs. 1378494420/-.This results in to taxable income for Rs 1968846227/-.Therefore this ground of objection of the revenue is unsustainable in view of the clear provisionsof section 80 A of the income tax act.

84. Regarding allocation key of 'sales' for allocation of common expense , the R & D expenses primarily represents cost related to the development of 'new' medicinal products. It is only after innovation of the new product that the same is produced. In these circumstances, the appellant, in [illegible]th the traditional

allocation methodology adopted in the earlier years apportioned 30% of such R&D expenses to the individual undertakings in the ratio of sales.Further,there is no evidence laid down by revenue that that in the event of the appellant deciding to commercially exploit the benefits of the R & D works, the products would be manufactured by the said units. Further on allocation of head office expenses we fully agree that it relates to costs that have been incurred on an entity level and pertains to the company as a whole. Appellant has apportioned 75% of such head office expenses to the individual undertakings based on sales. This method of allocation has been consistently followed by the assessee since commencement, whichis duly certified by the auditors and accepted in the assessments completed in the past. We do not find any irrationality in the al above allocation keys adopted by the assessee firstly and for the reason that it has been accepted by the revenue in past it cannot be disputed now in subsequent years without there being any change in the factsand / or law. Honourable Delhi high court in the case of CIT vs. EHPT India Pvt Ltd: 350 ITR 41 (Del) where in allocation of expenses based on head counts and turnover is upheld to stress that there is no bar in law for common expenses to be allocated on a scientific/ rational basis to the eligible unit has held 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 1/168 Taxman 95, 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 Hukam 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.”***

[Underlineand Bold supplied by us extracted from taxmann.com]

In view of the above decision of Honourable Delhi high court, allocation keys of R & d expenses as well as common expenses have rational, accepted by revenue in past years, there is no justification that how it distorts profit, in absence of compelling reasons to change i.e. ‘just cause’, wereject the stand of revenue innot accepting the above allocation methodology adopted by the appellant.

85. Coming to the next argument of the revenue that the sales recorded by the independent units are not Arm’s length. For this argument of the revenue a deeper examination of sub-section 8 of section 80(IA) of the Act is required which provides for inter unit transfer of goods and services should be at the market value of the goods and services which means the price that such goods or services would ordinary fetchin the open market. Firstly ld. AR of the assessee has submitted that there is no inter unit transfer of any goods and services and therefore provisions of section 80(IA) (8) does not apply. This fact has remained uncontroverted. None of the transaction has been pointed before us, which shows that there is inter unit transfer of goods or services. Therefore in absence of any instances of such transfer of goods or services pointed out before us by revenue we are of the view that provision of section 80 IA (8) are not attracted.

86. Further,it is submitted by the assessee that various units are manufacturing different products and final products are sold in the openmarket. Sales of each of the unit are accounted in the profit and loss account by the appellant of that unit. It is not pointed out before us that what is the material or services that has not been accounted for by the asssees as sales and itis not at themarket rate and what is the market rate of such product or services sold by those units. It is emphatically stated that there is no inter unit transfer of the goods or services. In view of the above,we do not have any option but to reject the objection of the revenue of invoking section 80 IA (8) of the Act on this issue.

87. It is one of the contention of revenue that selling and distribution activity is itself a separate profit center and therefore whatever services have been provided by the selling and distribution arm of the company to the eligible undertaking should have been charged and reduced from the profit of the industrial undertaking after valuing service of selling and distribution arm of the company <u>at market rate</u>. At present assessee has allocated it <u>at cost</u>. Therefore, ld. AO has invoked provisions of section 80 IA (8) of the act. It is not dispute that that products manufactured by these industrial units are sold by selling and distribution arm of the assessee and the cost incurred is allocated to these respective units on the basis of appropriate allocation key of 'sales'. Ld. AR of the appellant relying on the decision of coordinate bench of Cadila Healthcare Ltd vs. ACIT 21 Taxmann.com 483 has submitted that there cannot be any specific demarcation between manufacturing and selling activities of the assessee and profit accrues only at the time of sales of the goods only. Therefore,

the contention of the revenue that selling and distribution function of the assessee is a separate profit center is required to be rejected at threshold. We have carefully considered the argument of ld. AR and of the revenue on this point as well as the ld. AO and Ld. DRP. We are of the view that this argument is almost similar to the argument raised by the revenue in the case of Cadila Healthcare Ltd vs. ACIT 21 Taxmann.com 483. Coordinate bench has dealt with these arguments from all the angles of the controversy and has held as under :-

> *"**9.4** Ld. Counsel has asserted that undisputedly, it was an "inter-division transfer", hence it was expected to record the same at arm's length price. He has pleaded that the assessee is blowing hot and cold in the same breath. When it comes to transfer of services and goods, it opposes arm's length price adjustment and says that the expenses which have Gú&@ Y@ not be taken into consideration. As discussed earlier, this logic do not commensurate with the provisions of the sections. Even then for argument sake if the expenses relatable to current year are to be apportioned; it was found that the assessee had not apportioned even a penny of the expenses in development and research of new products of Baddi Unit.*
>
> ***9.5** Next, Revenue's Counsel has drawn our attention on the profit & loss account of the eligible Unit, i.e. Baddi Unit, (refer Page No.87 of the paper-book). Ld. DR has said that sales to the tune of Rs. 1,19,13,22,749/- were recorded for the accounting period ended on 31.3.2006. He has pleaded that if the said Unit was to sale its products on stand alone basis, then the said Unit which was only two years old could not fetch such high sale price. The said Unit has shown high profit at Rs. 1,16,82,91,400/-. The goods manufactured by the said Unit were transferred to the marketing division of the assessee-company and the sale ð per the final sale price of the product. But the fact is that the marketing divisions and the C&F are involved, therefore the sales are realized by the main marketing division. He has thus pleaded that the profit derived from "marketing function" cannot be dragged to the manufacturing unit for the purpose of claiming deduction u/s.80IC. The Special Provision is confined to certain Undertakings, as defined in the Statute, and such eligible undertakings are entitled for the deduction of the profit of such undertakings only. He has again drawn our attention that the only source of income should be the eligible source of income and not other sources of income, such as, profits of marketing division or profits on account of established brand. For the allocation of profit of manufacturing unit the mandate is very clear because Income Tax Rule, 1962 contains Rule 18BBB wherein as per sub-rule(2) a separate report is to be furnished by each undertaking and that report shall be accompanied by a profit & loss account and balance-sheet of that Undertaking as if the Undertaking is a distinct entity. He has therefore argued that the allocation of the profit of a manufacturing unit should be made on stand alone basis. He has questioned that how the sale price of the products of the Baddi Unit were determined and recorded. Because of the brand value the sale price must have been determined by the management as if the profit is earned by the assessee-*

company on sale of the products of the Baddi Unit. It was recorded on the presumption that the sales were executed by the Head Office by charging brand value, the name of the product and the goodwill of the Company. In any case, according to Ld. DR, a reasonable expenditure should have been provided, so that such an abnormal profit @ 58.66% could be checked.

9.6 *In support of the above submissions, Mr. Srivastava has placed on strong reliance on the decision of Hon'ble Supreme Court in the case of CIT v. Ahmedbhai Umarbhai & Co. [1950] 18 ITR 472 for the legal proposition that, quote "The profits received relate firstly to his business as a manufacturer, secondly to his trading operations, and thirdly to his business of import and export. Profit or loss has to be apportioned between these businesses in a business like manner and according to well established principles or accountancy." Unquote. He has also placed reliance on Liberty India (supra) .*

10. *We have heard both the side at length. The controversy as raised by the Addl. CIT Mr. Mahesh Kumar, officiating as AO, has serious repercussions on the subject of computation of "eligible profit" while claiming a deduction under the Statute. The adjustments as suggested by the AO while working out the manufacturing profit of an eligible Unit has a far reaching consequences on all such tax-payers; therefore we have to deal this issue carefully and little elaborately, so that we can reach to a logical conclusion.*

10.1 *To begin with, it is better to elucidate that the I.T. Act has only defined 'income' (Sec. 2(24)) as well as 'business' (Sec. 2(13)) but not the term "profit and gains". However, the section we have to deal with i.e. Sec. 80 IC revolves around the term 'profits and gains'. As per section 2(13) 'business' includes trade, commerce or manufacture. In auxiliary, as per section 2(24) 'income' includes (i) profits and gains. An 'income' has to have a component of 'profits & gains' but all type of 'profits & gains' may not be an 'income' for tax purpose under the Act. The section in controversy i.e. Sec. 80 IC of the Act is embedded with both these terminology, reproduced verbatim :—*

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

10.2 *The 'business' is prescribed in sub-section (2) in the following manner :*

(2) This section applies to any undertaking or enterprise

(a) which has begun or begins to manufacture or produce any Article or thing ………

Therefore, 'manufacturing' is the first criteria for the eligibility of the 'business' to qualify for the deduction. Hence the 'profits' are required to be derived from a manufacturing undertaking which is producing the specified article. That 'profit' is inclusive in the 'gross total income'. As already noted, the terminology "profit" has not been defined in this Act therefore we have taken the help of other resources. The basic question is that what is the "profit" of a manufacturing unit?

Firstly, the term "Profit" implies a comparison between the stage of a business at two specific dates separated by an interval of a year. Thus fundamentally the meaning is that the amount of gain made by the business during the year. This can be ascertained by a *comparison of the assets of the business at the two dates. To determine the "profit" of a manufacturing Unit the accounting standard has given certain guidelines, enumerated in short. In the accounting the "profit" is the difference between the purchase price and the cost of bringing the product to market. A "gross profit" is equal to sales revenue minus cost of goods sold or the expenses that can be traced directly to the production of the goods. Rather, the "operating profit" is also defined as equal to sales revenue minus cost of goods plus all expenses, except interest and taxes. Most of the manufacturing companies have 'Total Cost' based pricing method. Total Cost has, broadly speaking, two components; i.e. raw-material plus value addition (it includes all overheads). Therefore, profit margin is price minus total cost. In manufacturing Unit, thus cost of conversion is production overheads, such as, direct labour cost and inextricably linked expenditure of production. In general, every manufacturing concern has fixed manufacturing capacity. So the objective of such concern ought to be to maximize the profit. Now the problem, as posed, is that let us assume that the said manufacturing unit is producing two products; viz. "A" & "B". For production of "A" product, let us say, there is less working hours, but fetching more value for less money. However, in the production of product "B" due to complex process of manufacturing it requires more working hours. For pricing product "B" the situation is that more money expenditure and may fetch less value. Therefore, in the processing department it is not possible to segregate the two components to determine the segregated margins. Keeping this accounting principle in mind, we revert back to the language of section 80IC which says that a deduction is permissible of such profits of a specified Undertaking engaged in manufacturing of certain article or thing. The business of the said enterprise/concern should be manufacturing of article or thing and the profit therefrom is eligible for deduction u/s.80IC if that profit is part and parcel of the gross total income. As noted hereinabove, profit is the difference between the purchase price and the cost of production along with the cost of bringing the product to market. This basic principle of accountancy, as appeared, have been adopted by Baddi Unit because as per Profit & Loss account, cost of material, personal cost and general expenses, corporate expenses were reduced from the sale price to arrive at the "profit before tax" i.e. Rs. 116,82,91,400/-.*

***10.3** It is not in dispute that for Baddi Unit the assessee has maintained separate books of accounts and therefore drawn a separate profit and loss account. In such a situation, whether the AO is empowered to disturb the computation of profit, is always a subject matter of controversy. From the side of the assessee, reliance was placed on Addl. CIT v. Delhi Press Patra Prakashan [2006] 10 SOT 74 (Delhi) (URO). In this case, the assessee was claiming deduction u/s.80IA in respect of a Unit No.4. The said Unit was showing profit @ 62%. As against that, AO has noticed that a margin of profit shown by the assessee as a whole was only to the extent of 10%. The AO has therefore recomputed the profit of the said Unit by applying sub-section (10) of section 80IA and restricted the profit of the said Unit to 10% only. While dealing this issue, the Respected Coordinate Bench has concluded that it was not justified to disturb the working of profit merely because the profit rate of eligible unit was substantially higher than overall rate of profit of other Units of the assessee, more so when separate books were maintained by the assessee in respect of the said eligible Unit. In the present case as well the AO has proceeded to disturb the profit of the Baddi Unit and held that only 6% profit is eligible for deduction u/s.80IC.While doing so, identically, the AO has not pinpointed any defect in the working of the "profit" of the Baddi Unit. In such a situation, we can say that the* *legal proposition as laid down by Delhi Bench can also be applied in the present appeal as well.*

10.4 *The AO has also concluded that only the incremental profit, representing the difference between the profits earned earlier when the products were procured on P2P basis and the profits earned by the Baddi Unit, should be treated as a manufacturing profit. The AO has then said that earlier the assessee was procuring the products on P2P basis and showing the average profit at 80%, however, on the basis of average selling rate of the produces manufactured by Baddi Unit the average profit was gone up to 86%. The AO has therefore restricted the deduction only at 6%. He has placed reliance on Rolls Royce Plc (supra). In that case, the assessee was a UK based company carrying on marketing and sales activities in India through a subsidiary. The subsidiary was also rendering support services to the assessee, a UK based company. The assessee was carrying out manufacturing operations. It was held that 35% of its profits could be attributed to the marketing activities carried out in India and, therefore, chargeable to tax in India. The facts of that case were altogether different and there was a finding that undisputedly there was a PE in India and as per Indo-UK DTAA the income has to be taxed in India. An another fact was that there was no separate account of the assessee's India operation and the AO had found that on the basis of global accounts the profits were determined on sales. In that case, marketing was said to be the primary activity for earning profit. The profit was directly due to operation in India. In that context the word "attributable" was considered and then it was held that such part of the income as it was reasonably attributable to the operations carried out in India is taxable. The expression "business connection" was also considered and then it was found that it will include a person acting on behalf of a non-resident and carried on certain activities is having business connection. A business connection has to be real and intimate and through which income must accrue or arise whether directly or indirectly to the non-resident. On those facts, since it was found that R&D activities were carried out by the assessee, therefore, 15% of the profit was allocated to the R&D activities and balance of the profit was attributable to the marketing activities in India. The said decision was entirely based upon the connectivity of the marketing operations with the profits. The CBDT Circular No.23 of 1969 dated 23/07/1969 was also taken into account wherein it was opined that where a non-resident's sales to Indian customers are secured through the services of an agent in India then that profit is attributable to the agent's services. Meaning thereby because of the close connection of the agent's marketing activity the proportionate profit was attributed to the said activity. Contrary to this, there was no finding that upto the extent of 80%, the profit was attributed to the assessee-company. The segregation between 80% and 6% was not on account of any evidence through which it could independently be established that the major portion of the profit could be attributed to the assessee-company and rest of the profit could only be attributed to the Baddi Unit.*

10.5 *The AO has also made out a case that the book profit percentage of Baddi Unit was 58.67%, whereas the profit of the assessee-company as a whole was 11.88%. If we further elaborate this aspect, then the AO has also given a working through which the average selling rate was 86.36% of the Baddi Unit. Meaning thereby if we presume for example that the assessee has gross profit of 86%, then the net profit was disclosed at 58%. A question thus arises that what beneficial purpose could be served for the reduction of gross profit to a lower percentage of net profit, specially when the allegation of the A.O. was that there was an attempt to declare higher profit of Baddi* *unit to get more advantage of deduction. On perusal of the P&L account, it is an admitted factual position that the assessee has in fact debited certain expenses which have included head office expenses, such as, marketing expenses and corporate expenses. Meaning thereby the net profit of the Baddi Unit was not merely production cost minus sale price, but the difference of sale price minus all general expenses which were attributable to the sales. Therefore, it is not reasonable to say that unreasonably the profit was escalated. The difference between the two percentages of profit, i.e. about 28% (G.P. - N.P.) thus represented the expenditure which could be said to be in respect of marketing network and brand of the product related expenses. The AO has not complained about the allocation of expenditure as made by the assessee while computing the profit of the Baddi Unit. Once the assessee has itself taken into account the related expenses to arrive at the net profit, then it was not reasonable on the part of the Revenue Department to further reallocate those expenses by curtailing the percentage of eligible profit.*

***10.6** From the side of the Revenue, ld. Special Counsel has argued that in terms of the provisions of section 80IA(5) the deduction is to be computed as if such eligible business is the only source of income of the assessee. According to him, the manufacturing profit was the only source of income and that alone should be accounted for in the P&L account to claim the deduction u/s.80IC of the Act. Ld. DR has explained that as per the view of the A.O. up-to 80% of the profit was the result of efficient marketing net work plus due to the brand name of the company. Only 6% was the manufacturing profit, per A.O. It is true that section 80IC does recognized the provisions of section 80IA. Refer, Sub-section (7) of section 80IC which prescribes as follows:—*

"Section 80IC(7) : The provisions contained in sub-section (5) and sub-sections (7) to (12) of section 80IA shall, so far as may be, apply to the eligible undertaking or enterprise under this section."

Due to this reason, our attention was drawn on the provisions of section 80IA(5) of IT Act; reads as under:—

"Section 80IA(5) : Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made."

As per this section, the profits of an eligible undertaking shall be computed as if such eligible business i source of income of the assessee. In this section again, the Statute has used three terms, i.e. "profit", "business" and "income". As narrated hereinabove an 'income' has a wider expression than the 'profit'. Likewise, 'business' has also a wider meaning than the word 'income'. In the present case, manufacturing of pharmaceutical products is declared as "eligible business". Then the question is that what is the profit of such an eligible business? On careful reading of this sub-section, it transpires that the said eligible profit should be the only source of income. If we examine the separate profit & loss account of Baddi Unit, then it is apparent that the only source of income was the sales of the qualified products. In the said P&L A/c there *was no component of any other sources of income except the sale price and otherwise also the assessee has confined the claim only in respect of the eligible profit which was derived from the sales of the pharmaceutical products. This section do not suggest that the eligible profit should be computed first by transferring the product at an imaginary sale price to the head office and then the head office should sale the product in the open market. There is no such concept of segregation of profit. Rather, we have seen that the profit of an undertaking is always computed as a whole by taking into account the sale price of the product in the market.*

10.7 *The Ld. AO has suggested that the assessee should have passed entries in its books of account by recording internal transfer of the product from Baddhi Unit to the head office marketing unit and that too at arm's length price. From the side of the appellant an argument was raised that what should be the arm's length price in a situation when a product is ultimately to be sold in the open market. Whether the AO is suggesting that an imaginary line be drawn to determine the profit of the Baddi Unit at a particular stage of transfer of products. Definitely a difficulty will arise to arrive at the sale price as suggested by AO on transfer of product from Baddi to head office. What could be the reasonable profit which is to be charged by the Baddi Unit will then be a subject of dispute and shall be an issue of controversy. On the contrary, if the sale price is recorded at the market price, which is easily ascertainable, that was recorded in the Baddi Unit account, the scope of controversy gets minimal. Rather, the intense contention of the Ld.AR is that the facts of the case have explicitly demonstrated that the goods manufactured at Baddi Unit were transported to various C&F agents across the country for sale purpose. Therefore, the eligible business is the manufacturing of pharmaceutical products and the only source of income was the profit earned on sale of the products.*

10.8 *An interesting argument was raised by ld. Special Counsel that the provisions of section 80IA(8) prescribes the segregation of profit in case of transfer of goods from one Unit to another Unit. But section 80IA(8) reads as follows:—*

'Section 80IA(8) : Where any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee, or where any goods [or services] held for the purposes of any other business carried on by the assessee are transferred to the eligible business and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the eligible business does not correspond to the market value of such goods [or services] as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of such eligible business shall be computed as if the transfer, in either case, had been made at the market value of such goods or services as on that date:

Provided that where, in the opinion of the Assessing Officer, the computation of the profits and gains of the eligible business in the manner hereinbefore specified presents exceptional difficulties, the Assessing Officer may compute such profits and gains on such reasonable basis as he may deem fit.

Explanation : For the purposes of this sub-section, "market value", in relation to any goods or services, means the price that such goods or services would ordinarily fetch in the open market.

Where any goods held for the purpose of the eligible business are transferred to any other business carried on by the assessee, then if the consideration for such transfer as recorded in the accounts of the eligible business do not correspond to the market value of such goods, then for the purposes of the deduction the profits and gains of such eligible business shall be computed as if the transfer has been made at the market value of such goods as on that date. Though the section has its own importance but the area under which this section operates is that where one eligible business is transferred to any other business. We again want to emphasis that the word used in this section is "business" and not the word "profit". We can hence draw an inference by describing these two words and thus have precisely noted that 'eligible business' has a different connotation which is not at par or identical with the "eligible profit". The matter we are dealing is not the case where business as a whole is transferred. This is a case where manufacturing products were sold through C&F in the market. Even this is not the case that first sales were made by the Baddi Unit in favour of the head office or the marketing unit and thereupon the sales were executed by the head office to the open market. Once it was not so, then the fixation of market value of such good is out of the ambits of this section. If there is no intercorporate transfer, then the AO has no right to determine the fair market value of such goods or to compute the arm's length price of such goods. The AO has suggested two things; first that there must be inter-corporate transfer, and second that the transfer should be as per the market price determined by the AO. Both these suggestions are not practicable. If these two suggestions are to be implemented, then a Pandora box shall be opened in respect of the determination of arm's length price vis a vis a fair market and then to arrive at reasonable profit. Rather a very complex situation shall emerge. Specially when the Statute do not subscribe such deemed inter-corporate transfer but subscribe actual earning of profit, then the impugned suggestion of the AO do not have legal sanctity in the eyes of law.

10.9 *A very pertinent question has been raised by ld.AR Mr. Patel that what should be the line of demarcation to determine the sale price of a product if not the market price. As far as the present system of fixation of sale price of the product is concerned, a consistent method was adopted keeping in mind the several factors, depending upon the market situation, we have been informed. But if the assessee is compelled to deviate from the consistent method of pricing, then any other suggestion shall not be workable because no imaginary line of profit can be drawn, precisely pleaded before us. So the uncertainty is that on the production cost what should be the reasonable mark-up which shall cover up the margin of profit of a manufacturing unit. And why at all this complex working of computation be adopted by this assessee when a very simple method is adopted that on one side of the P&L A/c the production cost plus overheads were debited and on the other side of the P&L A/c sale price was credited to computed the profit. There are certain expenditure which are notional expenditure and there are certain expenditure which are self-generated to create the brand value of a product. Naturally, the allocation of notional expenditure particularly in respect of self-generated brand is a matter of hypothesis and not a matter of realty. Logically it is not realistic to set apart a value of a self generated brand which had grown in number of years.*

10.10 *The segment reporting of profit is although in practice but the purpose of such reporting is altogether different. Such segment information is particularly useful for financial analysis, so that the management may keep a close watch on the performance of the diversified business lines. The areas of demarcation are business segment,* *geographical segment, etc. But as far as the Revenue of an enterprise is concerned while segmentation is required, then Revenue from sales to external customers are reported in the segmented statement of profit and loss. In an accounting system, an intra-company sale between divisions or units is not regarded as Revenue for the purpose of such financial reporting. As per the Accounting Standards an Enterprise Revenue ignores in house-sales that represent Revenue to one segment and Expense to another. In this connection, the AO has discussed the Hon'ble Supreme Court decision pronounced in the case of Liberty India (supra). The AO wanted to justify his attempt of segmentation on the basis of the theory that only the profits derived due to manufacturing activity can be said to be derived from eligible undertaking. It was contested by AR before us that the "segment reporting" is about the segregation of business and not about the segregation of any specific activity. In the case of Liberty India (supra) it was observed that the IT Act broadly provides two types of tax incentives, namely, investment linked incentives and profit linked incentives. The Court was discussing Chapter VIA which provides incentive in the form of tax deductions to the category of "profit linked incentives". The incentive is linked with generation of 'operational profit'. Therefore, the respected Parliament has confined the grant of deductions only derived from eligible business. Each eligible business constitutes a stand alone item in the matter of computation of profit. The Court has said that because of this reason the concept of "segment reporting" was introduced in Indian Accounting Standards. Ld. Counsel Mr. Srivastava has argued that the deduction u/s.80IC is a profit linked incentive. Only the Operational Profit has to be claimed for 80IC deduction. According to him, each of the eligible business constitutes a stand alone item in the matter of computation of profit. For the computation of profit of an eligible business the word used is "derived" in section 80IC which is a narrower connotation, as compared to the word "attributable". In other words, by using the expression "profits derived by an undertaking", Parliament intended to cover such sources not beyond the first degree, i.e. the first degree of manufacturing activity. The law pronounced by the Hon'ble Supreme Court is final and should not be disputed. However, a judgement is to be correctly interpreted.*

10.11 *Finally, on the question of segmentation of profit a vehement reliance was placed on an old precedent namely Ahmedbhai Umarbhai & Co. (supra). Facts of that case was that the assessee had owned three Mills at Bombay and one at Raichur (Hyderabad). The assessee was manufacturing oil from groundnuts. The produced at Raichur, Hyderabad is partly sold at Raichur and partly in Bombay. The question was in respect of the liability under Excess Profit Tax Act (EPT Act) for the oil manufactured at Raichur but sold in Bombay. The controversy was that the assessee had contended that a part of the profits derived from sales in British India of the oil manufactured at Raichur was attributable to the manufacturing operations at Raichur which are an essential part of their business and that such profit must be excluded from the assessment under EPT Act. It was narrated that in other words, the Act brings within its ambit all income in the case of a person resident in British India which accrues or arises or which is deemed to accrue or arise to him in British India during the accounting year. If Sec. 5 of the Act stopped short at that stage, it was undoubted that in the case of the respondent who is a resident in British India all his income, no matter where it arose, within British India or without British India, would be chargeable to excess profits tax just in the same way as it chargeable to income-tax under the Indian IT Act. The whole of his income arising in Raichur has legitimately been taxed under that Act. In that decision also, the word "business" was defined, i.e. business includes any trade, commerce or manufacture. It has also been said that all businesses, to which the said law applied, carried on by the* *same person shall be treated as one business for the purpose of the said Act. The question was about the manufacturing activity and it was contended that if a man is a manufacturer as well as a seller of goods, then in his case the term "part of a business" means carrying on all the two activities together and therefore constitute the part of the business. One of the Hon'ble Judges has said that the activities which the assessee carried on at Raichur was certainly a business of the assessee. On one hand, it was argued that the accrual of profit must necessarily be at the place where the sale proceeds are received or realized. But on the other hand, it was argued that the profits received relate (i) firstly to his business as a manufacture, (ii) secondly to his trading operations and (iii) thirdly to his business of export. On that basis, it was opined that the profit or loss has to be apportioned between these businesses in a business like manner and also according to well established principle of accountancy. This apportionment of profits between a number of businesses which are carried on by the same person at different places determines also the place of accrual of profit. The act of sale is the mode of realizing the profits. If the goods are sold to a third person at Mill premises, one could have said that the profits arose by reason of sale. The Profit would only be ascribed to the business of manufacture and would arise at the Mill Premises. Merely because a Mill owner has started another business organization in the nature of sale depot, that cannot wholly deprive the business of manufacture of its profits, though there may have to be apportionment in such a case between the business of manufacture and business of shop keeping. The question which was answered was that whether in respect of the manufacturing business of the assessee in Raichur, profits accrue or arise and if so, at what place. One of the Hon'ble Judges has opined that the manufacturing profit arise at the place of manufacture and that the sale profits arise at the place of sale and that the apportionment has to be made between the two, though the place of receipts and realization of the profits is the place where the sales are made. Simultaneously it was also opined that the manufacturing profit could not be said to have accrued at that place because there was nothing done from which the profits could accrue. There was an interesting contradiction because of the divergent views and it was also expressed that it was a fallacy to regard the profits as arising solely at the place of sale. It was said that the revenue of the company are derived from a series of operation, including the purchase of raw-materials or partly manufactured articles, completely manufacturing its products and transporting and selling them, and receiving the proceeds of such sales. The essence of its profit-making business is a series of operations as a whole.*

***10.12** We have carefully perused this decision of the Hon'ble Supreme Court as cited by the Special Counsel Mr. Srivastava. At the outset, we want to place on record that the entire issue before the Hon'ble Supreme Court was in respect of third proviso to section 5 of EPT Act. The said proviso was duly a reproduced in para-40 of the order and for ready reference typed below:—*

"Provided further that this Act shall not apply to any business the whole of the profits of which accrue or arise in an Indian State, and where the profits of a part of a business accrue or arise in an Indian State, such part shall, for the purposes of this provision, be deemed to be a separate business the whole of the profits of which accrue or arise in an Indian State, and the other part of the business shall, for all the purposes of this Act, be deemed to be a separate business."

The point for consideration was that whether on those facts the third proviso to section 5 could be invoked. The manufacturing activity of making ground-nut oil was carried out *at Raichur (Hyderabad) which was treated as a separate business within the meaning of the said proviso and thereupon it was claimed as exempt being carried out within the territorial jurisdiction of Indian State. So the Court has observed that to succeed in their claim, it is incumbent upon the assessee to show that there was in fact a part of a business and that the profit had actually accrued or arose in that part of an Indian State. The Court has clearly stated in para-41 that both the elements should found exist and then only the business could be treated as a separate business. However, the said proviso has propounded only deeming provisions, as is apparent from the language of the section itself. For the purpose of the said section, it was deemed to be a separate business. The whole of the profits of which accrue in an Indian State and the other part of the business be deemed to be a separate business. In para-44, the Hon'ble Court has discussed the problem with reference to certain decisions of English Courts and then made an observation that it had been held that if separation is possible in such cases, the proper course is to follow that sever the profits of the two businesses and assess accordingly. The result of the discussion was that the profits of the two businesses were directed to be apportioned. Simultaneously, the Hon'ble Court has also made an observation, quote "It is true that these are cases where several businesses were amalgamated and carried on together, or more of which were not liable to tax or excess profits duty; but the principle of apportionment upon which these cases were decided could, in my opinion, be applied with equal propriety to cases where one part of the business is distinct and separate from the other parts and is capable of earning profits separately." unquote. The Hon'ble Judge was therefore very much concern about the fact that the business should be capable of earning profits sepaely. Rather, in the subsequent paras it was further made clear that the manufacturing profit could be sub-divided only if there was no insuperable/challenging difficulty in making such apportionment. A possibility was therefore discussed that there could be apportionment of the net profit that accrue to the business of the assessee and one portion of it could be allotted to that part of the business which relates to the manufacture of the said commodity which was ultimately sold in the market.*

The Raichur factory certainly has business connection in British India for a part of the oil manufactured by it is sold through the Bombay establishment of the assessee. That all the operations of the Raichur business are not carried on in Bombay. Therefore, the profits that would be deemed under this section to accrue or arise in Bombay will only be the profits which may reasonably be attributed to that part of the operations carried on in Bombay, that is to say, to sale of part of its oil in Bombay. In this context, an observation was made that a trade is completed at a place where a business transaction is closed. Profits of a business are undoubtedly not "received" till the commodity are sold and they are ascertained only when the sale take place. This aspect has not been doubted or challenged even in the said order. But in the said order the question was that if a part of a business consisted of manufacturing activity and that activity can be segregated so as to compute the yield profit, then whether such profit accrue only at the place where the manufacture are sold. To answer this question, the Hon'ble Court has commented in para-49 that there was no express direction as to apportionment in the third proviso to section-5 of EPT Act. The opinion expressed was very specific that a profit can accrue in respect to that part of a business only when apportionment is possible. The Hon'ble Court has said that only on the said assumption that apportionment was possible the said proviso was based upon that presumption only. If no apportionment can be made in respect of the process of a particular business, then that will not be considered to be a part of the business at all and held that the proviso *will not apply. It was concluded that the principle of apportionment was implied therein. After this detailed discussion, we thus arrive at the conclusion that the principle of apportionment was the criteria for segregating the manufacturing profit if it was feasible to do so. As against that in the present case the assessee has computed the profit of the Baddi Unit on the basis of the well accepted principle of accountancy that a profit is accrued where a transaction is closed, meaning thereby the profit arises solely at the time of sale.*

10.13 *After the detailed discussion, before we close the controversy we would like to express that the AO's proposition of segmentation of eligible profit of the manufacturing unit was not altogether meaningless. This approach of the AO cannot be brushed aside on the fact of it. But at present, when the method of accounting as applicable under the Statute, do not suggest such segregation or bifurcation, then it is not fair to draw an imaginary line to compute a separate profit of the Baddi Unit. The Baddi Unit has in fact computed its profit as per a separately maintained books of account of the eligible manufacturing activity. To implement the method of the computation at stand alone basis, as conveyed by the AO, the manufacturing unit has prepared a profit & loss account of its manufacturing-cum-sale business activity. If the Statute wanted to draw such line of segregation between the manufacturing activity and the sale activity, then the Statute should have made a specific provision of such demarcation. But at present the legal status is that the Statute has only chosen to give the benefit to "any business of drug manufacturing activity" which is incurring expenditure on research activity is eligible for this prescribed weighted deduction. The segregation as suggested by the AO has first to be brought into the Statute and then to be implemented. Without such law, in our considered opinion, it was not fair as also not justifiable on the part of the AO to disturb the method of accounting of the assessee regularly followed in the normal course of business. It is true that otherwise no fallacy or mistake was detected in the books of accounts of Baddi Unit prepared on stand alone basis through which the only source of income/profit was the manufacturing of the specified products. We therefore hold that the AO's action of segregation was merely based upon a hypothesis, hence hereby rejected. These two grounds Nos.6 & 7 are allowed."*

We have carefully perused this decision and note that the controversy in this ground of appeal with respect to applicability of section 80 IA (8) of the act, on marketing and other selling distribution as well as research and development services provided by the undertaking as a whole to the eligible industrial undertaking at the cost or market rate for working out the eligible profit for deduction, has been decided. Ld. DR could not point out any other contrary judgment to the decision cited by the Ld. AR. Therefore, we respectfully following the above decision of coordinate bench hold that provisions of section 80 IA (8) of the act does not apply to the assessee ontransfer of services of marketing division of the company to the eligible industrial undertaking whose profits are claimed as deductible.

88. Further ld. AO has also given one of reason that the claim of the assessee is not admissible because of the reason that along with Form NO.10CCB assessee was required to file the balance sheet and profit and loss account of the eligible undertaking. It is admitted fact that assessee did not file balance sheet along with Form No.10CCB but has filed profit and loss accompanied with that audit report.Subsequently, before ld. DRP, those were filed and were available with ld. DRP as well as with AO at the time of framing final assessment order. Hence it is contended by the ld. AR that substantial compliances has been made by the assessee by filing the profit and loss account and complete compliance before passing of the final assessment order by filing the balance sheet. Hence,ld. AR contended that if the full details are available with the AO before passing of assessment order merely because there is some technical default deduction cannot be denied. This argument was examined and it is found that assessee has submitted the profit and loss account along with Form NO.10CCB and later on also the balance sheet before finalization of final assessment order i.e. those were filed before the DRP, we are of the view that assessee cannot be denied the deduction merely for this reasons. Further, the balance sheet filed later on by the assessee also did not contain any error or any fact, which could have shown that deduction claimed by the assessee, is erroneous. It is also important to note that no adverse remark is made either by the ld. AO or by ld. DRP on the balance sheet of the eligible undertakings though it were

available before them for proper verification and examination. Ld. AR of the appellant has submitted a plethora of judicial precedents covering this issue on this issue we refer to the decision of Honourable Delhi high court on this issue rendered in case of CIT V Axis Computer India Private Limited in 178 taxman 143 where in it is held that

> "2. This Court has already interpreted the latter provisions and has held the same to be directory and not mandatory. The contention of the revenue was that unless and until the audit report is filed along with the return, the benefit of section 10A could not be available to the assessee. Recently, we have considered the identical provisions of section 80-IA(7) in the case of CIT v. Contimeters Electricals (P.) Ltd. [IT Appeal No. 1366 of 2008, decided on 2-12-2008] and held <u>that as long as the audit report is filed before the framing of the assessment, the provisions of section 80-IA(7) would be complied with inasmuch as the same are directory and not mandatory</u>. A similar view would have to be taken in the present case also inasmuch as the provisions are the same. Consequently, we do not find any fault with the conclusions arrived at by the Tribunal. No substantial question of law arises for our consideration. The appeal is dismissed." [Underline supplied by us]

In this case, appellant has already filed the audit report and the profit and loss account of the units however; the profit and loss account was filed before ld. DRP but in any way available with ld. DRP and Ld. AO at the time of finalization of the assessment order. In the decision cited before us HonourableDelhi high court has held that even if the audit report is not filed then also the deduction cannot be denied if same is filed before finalization of assessment. Therefore case of the assessee stands on the better footing. No other contrary decision was put before us by revenue. Hence, we do not wish to agree to the contention of the revenue that as the balance sheets were not filed by the assessee of those eligible industrialundertaking whole of the deduction is not allowable to the assessee.

89. Coming to the computation of the eligible income of the assessee for all the eligible units, Ld. AO could not point out any error except dealt with by us which are not on the issue of facts of the case but all of them are on legal grounds, which we have answered in preceding paragraphs of this order. In view of claim of the assessee supported by the audited certificate as provide u/s 80 IA (7) of the act read with rule 18 BBB and supported by the profit and loss account and balance sheets of the assesse, allocation of all the expenses based on the accepted formula which the assessee is applying for last several years and which has also not been disputed by the ld. AO in past years and allocation key of 'sales' of the units is also not disputed, it deserves to be accepted. We are also of the view that allocation of the expenses are on rational basis and accepted by revenue in earlier years with respect to eligible units claiming deduction for those years. Therefore, along with the old units i.e. Goa Plant and new tablet plant –I of the assessee along with the new tablet plant No –II and III and new SCG plant deduction u/s 80 IB and 80 IC is allowable as computed by the assessee.

90. Now we come to the last ground of objection raised by the revenue that this matter of examination of claim of the assessee should be set aside back to the file of ld. AO for fresh verification and for this ld. DR. relied on the decision of coordinate bench 126 ITD 113. Against this Ld. AR raised the objection that this issue should not be set aside as only law

points are involved in this issue and no further facts are required to be examined.We have carefully considered the rival contentions on this issue. We have noted the above cited decision in Assistant Commissioner of Income-tax *, Central Circle-III(3) v Amarnath Reddy where in it is held as under :-

"6. *Now, let us examine whether the plea sought to be raised by the ld. D.R. can be admitted by the Tribunal or not. Though several authorities have been cited in the course of hearing, the basic judgment is that in the case of Hukumchand Mills Ltd. (supra). In that case, in order to arrive at the correct written down value of the assets, the Tribunal permitted the department to raise a plea to find out whether the assessee was allowed any depreciation under an enactment which was in force earlier, i.e., before the Indian Income-tax Act was made applicable to the assessee. The Court held that the subject-matter of the appeal before the Tribunal was the question as to what should be the proper written down value of the assets for calculating the depreciation allowance under the Indian Income-tax Act. It was certainly open to the department, in the appeal filed by the assessee before the Tribunal, to support the finding of the AAC with regard to the written down value on any of the grounds decided against it. In the case before the Supreme Court, earlier enactment was to be referred to, whereas in the present case only a different provision of the same enactment has to be considered. Therefore, I see no reason as to why the plea of the ld. D.R. cannot be accepted. In the present case, of course, the department is the appellant unlike in the case of Hukumchand Mills Ltd. (supra). But, in my view, it makes no difference. The department is aggrieved by the deletion of disallowance of expenditure which disallowance was made under one particular provision. The subject-matter of the appeal was whether the expenditure claimed by the assessee was allowable or not. If it was not disallowable under one particular provision but is disallowable under any other provision, the subject-matter, viz., the allowability of expenditure remains the same. There are a number of decisions in which it has been held that the Tribunal can base its decision on a ground not raised before the appellate authority or in the grounds of appeal before it but is not bound to do so. It is not precluded from considering a point which arises out of the appeal merely because such point had not been raised or urged by either party at the earlier stage of the proceedings. Some of these decisions, only to name a few, are CIT v. Indian Express (Madurai) (P.) Ltd. [1983] 140 ITR 705[1] (Mad.), CIT v. AC Paul [1983] 142 ITR 811 (Mad.) and CIT v. Ice Suppliers Corpn. [1967] 64 ITR 195 (Punj.). In fact, the jurisdictional High Court has explained the ratio in the case of Hukumchand Mills Ltd. (supra) very elaborately. It has particularly explained the following observation of the Supreme Court in the case of Hukumchand Mills Ltd. (supra) :*

"The Tribunal has, however, discretion not to admit any fresh plea being put forward when it would involve investigation of facts."

Explaining the above observation, the Madras High Court in the case of N.P. Saraswathi Ammal (supra) observed as follows at page 23 of the report :

"We do not regard the last observation as a fetter on the Tribunal's jurisdiction to admit a new plea. For, the power to listen to a new contention and decide the appeal on that basis has been spelled out by the Supreme Court from the terms of the statute. The exercise of that power does not depend on the presence of any other factor, excepting that the new plea comes from a party to the appeal. Even in a case where fresh facts are called for to decide the new plea, the Tribunal would have jurisdiction to entertain that plea. How the Tribunal wishes to get at the relevant facts in order to decide the new point may be quite a different thing. The Tribunal may either remand the matter for the purpose, or proceed to investigate the facts themselves. In this part of the decision-making alone, there is scope for the play of the Tribunal's discretion. As to the very power to entertain a new plea, that is not to be ruled out, merely because a consideration thereof would call for further facts to be gone into. In Hukumchand Mills' decision [1967] 63 ITR 232, the Supreme Court laid down no fetter on the Tribunal's powers. That case, indeed, was a case where the new plea raised by the department before the Tribunal could not be considered without a further investigation into facts. Nevertheless, the Tribunal entertained the plea, and remitted the case to the ITO for the ascertainment of the relevant facts. The Supreme Court, in their decision upheld not only the Department's ne[illegible] A [illegible] new plea."

In the light of the above discussion, I agree with the view taken by the ld. J.M. to hold that the plea raised by the ld. D.R. is to be accepted and the matter is to be remanded to the Assessing Officer for considering the claim of the assessee for claiming deduction of unaccounted expenditure under section 37(1) of the Act."

In the above case the issue as set aside to the file of the ld. AO to decide and examine the facts in the course of hearing before the Tribunal, the revenue raised a fresh plea that the Assessing Officer should have invoked the provisions of section 37(1) and requested the Bench to remit back the matter to the file of the Assessing Officer to consider the allowability or otherwise of the expenditure under section 37(1). We do not find that any such fresh plea is raised by the revenue during the course of hearing which is not taken by the LD. AO or Ld. DRP. On factual points, nothing has been alleged by revenue, which remains to be examined, which is brought to our notice. In absence of any fresh plea by the revenue, we are afraid that we cannot agree with the contention of revenue. Our this reason also gets the support from the decision of coordinate bench in Zuari Leasing and Finance Corpo Limited V ITO 112 ITD 205 (Delhi) (T M) where in its held that :-

> "10. It is clear from above that primary power, rather obligation of the Tribunal, is to dispose of the appeal on merits. The incidental power to remand, is only an exception and should be sparingly used when it is not possible to dispose of the appeal for want of relevant evidence, lack of finding or investigation warranted by the circumstances of the case. Remand in a casual manner and for the sake of remand only or as a short cut, is totally prohibited. It has to be borne in mind that litigants in our country have to wait for long to have fruit of legal action and expect the Tribunal to decide on merit. It is, therefore, all the more necessary that matter should be decided on merit without allowing one of the parties before the Tribunal to have another inning, particularly when such party had full opportunity to establish its case. Unnecessary remands, when relevant evidence is on record, belies litigant's legitimate expectations and is to be deprecated. Having regard to aforesaid principle, it is necessary to look into records to see whether there is sufficient material on record to dispose of the issue on merit and there is no need to remand the issue to provide a fresh inning to the revenue."

Therefore, in view of the above decision and in absence of any fresh plea by any of the parties we donot intend to agree with the request of revenue to set aside this issue to the fileof ld. AO.

91. In view of above ground no. 12 of the appeal of the assessee with respect to claim of deduction u/s 80IC and 80IB of the Act amounting to Rs1,36,68,21,506/- is allowed.

92. Ground No.13 of the appeal is against not adjudicating the claim of deduction u/s 35(2AB) of the Act on the cost of the assets provided to the employees working in approved R&D facilities and engaged in research and development activities.

93. The brief facts of this ground is that the appellant has incurred an capital expenditure amounting to Rs.28532155/- on the assets which are provided to the employees who are working and executing R&D work of the company. According to section 35(2AB) weighted deduction on such assets @150% of expenditure is allowable. The assesse has claimed 100% deduction on this amount u/s 35(2) (ia) of the Act. The claim of the assesse was made in Note No.5(b) of the revised return filed by the assesse. Ld. AO did not consider this claim and ld. DRP has also not issued any direction. Before us ld. AR submitted that the appellant is eligible for this weighted deduction. He submitted that this issue is squarely covered in favour of the assesse in ITA No.1513/Del/2004 for AY 1999-2000 and for later on years.The Ld. DR submitted that the claim needs verification and it may be sent to ld. AO for verification.

94. We have carefully considered the rival contentions and we are of the view that the issue is squarely covered in favour of the appellant by decision of ITAT in assessee's own case. However, neither the AO nor the ld. DRP has applied its mind to the facts of this case and has not adjudicated on the issue. Facts of this expenditure with adequate details are also not record before us. Therefore we set aside this ground of appeal to the file of AO to verify the claim made by the assesse and if the facts and circumstances are similar to the issue decided by the ITAT in case of assesse for earlier years same may be allowed. In the result, ground 13 of the appeal is allowed with above direction.

95. Ground no.14 of the appeal is against not adjudicating the claim of deduction of Rs.22306073/- being the demand raised under the Drug Price Control Order, 1979. The brief facts of the case are that under DPCO in its report dated 31.10.2003 liability on the appellant company because of sale of formulation manufactured out of specified medicine amounting to Rs.22306073/- was determined. Consequently, Ministry of Chemical and Fertilizer raised this demand on the appellant on 31.05.2007. as the demand has arisen during FY 2007-08 the appellant in the note forming part of the return of income has claimed that this amount be allowed as deduction u/s 37 of the Act. However,ld. AO and DRP did not consider this issue at all. Before us ld. AR contended that this issue is raised in the return of income and should have been granted as deduction. He relied on circular no.14 dated 11.04.1955 wherein the duties of Assessing officer were specified for allowing refunds and reliefs to the assesse. He further relied on the decision of Hon'ble Supreme Court as well as other Hon'ble high courts and tribunal to press an argument that AO is duty bound to grant reliefs and benefits even if they are not claimed in the return of income. On merits, he submitted that issue is squarely covered by decision of Hon'ble high court in case CIT vs. Geoffrey manners & Co ltd 226 taxmann 135 and full facts are stated in the notes to the computation of total income and no new material is required to be placed on record. The Ld. DR relied on the orders of lower authorities and submitted that the claim needs verification and therefore it may be sent to ld. AO for verification.

96. We have carefully perused the rival contention. Honourable Mumbai high court in case of [2014] 49 taxmann.com 320

(Bombay) Commissioner of Income-tax v. Geoffrey Manners & Co. Ltd has dealt with identical issue as under :-

> ***3.*** *It is submitted by Mr.Suresh Kumar, learned counsel appearing for the Revenue, that the Tribunal committed grave and serious error of law in allowing deduction for the provision made on account of liability towards contribution to DrugPrice Equalization Account (DPEA). This is ignoring the fact that the liability is mere provision which was contingent in nature and it has not been crystallized during the previous year because the Assessee approached the Delhi High Court challenging the stipulation in the DrugPriceControlOrder. There was interim stay in favour of the Assessee. Eventually that Writ Petition was allowed. The order of the Delhi High Court was challenged in the Honourable Supreme Court by the Revenue and the Revenue succeeded. The Assessing Officer and the Commissioner concurrently held that the Assessee was entitled to the deductions only in the year in which the liability was actually accruing and the amount was payable. Since there was interim stay the Authorities took the view that as and when the liability is actually incurred or discharged that the deduction could be claimed. Such concurrent view should not have been held to be perverse and should not have been interfered by the Tribunal.*
>
> ***4.*** *In relation to this question it is submitted by Mr. Pardiwalla, learned Senior Counsel appearing for the Assessee, that the Tribunal has not committed any serious and grave error of law as projected. The Tribunal has in accepting the stand of the Assessee concluded that the liability is for contribution to the DrugPrice Equalization Account. The Assessee may have disputed the liability insofar as this contribution, however, the liability is clearly ascertainable one. There was no stay against accrual of the liability under clause 7(2) of the DrugPriceControlOrder. This being a statutory liability it is allowable in the year in which it arises irrespective of whether the Assessee disputes it or accepts the same.*
>
> ***5.*** *Mr.Pardiwalla submits that this is the consistent view and which also finds favour not only in the case of the Assessee, but in the case of M/s Glaxosmithkline Pharmaceuticals Limited. Mr.Pardiwalla places reliance on the order passed by the Division Bench of this Court on 05.03.2012 in Income Tax Appeal No.972/2009 (CIT v. Glaxosmithkline Pharmaceuticals*

Ltd.). He submits that the issue was answered in favour of the Assessee and against the Revenue. Our attention has been invited to paragraph 5 of this order and it is submitted that in relation to M/s Glaxosmithkline the Tribunal took the same view. That was for the Assessment Year 1984-1985. That order of the Tribunal dated 10.03.2006 had attained finality. The Tribunal followed its own decision in the case of Glaxosmithkline Pharmaceuticals Ltd. (supra) for previous Assessment Years 1982-1983 and 1983-1984. These decisions have also been held as final.

6. *The Tribunal in the instant case has followed the judgment of the Honourable Supreme Court in the case of Kedarnath Jute Mfg. Co. Ltd. v. CIT [1971] 82 ITR 363. In view thereof and finding that the Tribunal's order is in consonance with the facts and circumstances of the case, so also, the statutory liability having been created in the year in question and which has no bearing on the pending proceedings initiated by the Assessee or the dispute raised therein that we find that this question cannot be termed as substantial question of law.*

97. Therefore respectfully following the decision of Honourable Mumbai high court we are of the view that claim of the assessee of Rs.22306073/- on account of amount payable under Drug price Control Equalization is prima facie allowable. Further, we also agree with the argument of ld. AR that when the claim is made by the assesse by way of note then the ld. AO as well as DRP should have considered the claim of the assesse on merits. Not considering the issue and not adjudicating thereon is an injustice to the claim to which the assesse is eligible. In view of this, we direct the Ld. AO to verify the claim and, if found in accordance with the decision of Honourable Bombay high court it may be allowed. Ground No 14 of appeal is allowed.

98. Ground no.15 of the appeal is against not adjudicating on the adjustment of exchange fluctuation on external commercial

borrowing, hedging contract in relation thereto and hedging charges to the cost of capital asset and thereafter-granting depreciation thereon after considering it as a cost of acquisition of asset. During the year appellant has incurred mark-to market loos of Rs.46.40 crores on ECB raised for purchase of plant and machinery and other capital investment. It has also earned gain of Rs.22.12 crores. It has also incurred further expenditure of Rs.14.20 crores on borrowings and hedging contracts. The appellant this detail in the notes forming part of the return of income and submitted that deduction in respect of aforesaid expenditure may be allowed as deduction u/s 37 of the Act or same amount may be added to the cost of capital asset as actual cost and grant depreciation thereon. This issue remains un-adjudicated by ld. AO and ld. DRP did not issue any direction.

99. Ld.AR submitted that though assesse has submitted in the notes to the return of income,it was not adjudicated. Further, he submitted that as the borrowings were for the purpose of acquisition of capital assets the same is directly related to the cost of such asset and therefore should be added to the cost of such asset and will result in to depreciation allowance u/s 32 of the Act. Ld. DR relied on the orders of lower authorities.

100. We have carefully considered the rival contentions and we set aside this ground of appeal to the file of AO to verify the amount of expenditure incurred by the assesse on account of fluctuation of foreign exchange; and if they are on capital account related to acquisition of asset then to grant depreciation thereon in accordance with the provisions of law. In case if this expenditure is found to be of revenue,nature then

allows the same u/s 37(1) of the Act. In the result ground,No.15 of the appeal is allowed.

101. Ground no,16 is against adjustment made u/s 115JB of the Act to the book profit by Rs.9853213/- on account of provision for diminution in value of current investment return back during the year. The brief fact of this issue is that in AY 2007-08 the appellant created provision for diminution in the value of investment of Rs.23.9 crores by debiting to the profit and loss account. In assessment proceedings,this amount was disallowed while computing the book profit u/s 115JB of the Act. In AY 2008-09 assessee reversed the provision of Rs.9853213 by crediting it to the profit and loss account. Ld. AO did not reduce the amount of book profit by this sum and ld. DRP directed the AO to verify the provisions made as well as the write back of that provision. In final assessment order, AO held that there is no correlation between the amounts of provision created in previous year with the amount of reversal in the current year and therefore no reduction was granted.

102. Before us ld. AR submitted that when the amount of provision was made in the last year same was added back to the book profit and same provision was partly reversed during the year, AO refused to grant the deduction.

103. Ld. DR relied on the orders of lower authorities.

104. We have carefully considered the rival contentions. We fully agree with the submission of ld. AR that when the provision was made in the last year which was added back to the book profit of that assesse for that year and when the same provision is reversed in the current year the amount of reversal which is

credited to the book profit for this year cannot be taxed once again as it results into double taxation. In the result, we direct the AO to reduce the book profit u/s 115JB of the Act by the amount of reversal of the provision of Rs.98.53 lacs, which was out of provision made of Rs.23.9 crores added to the book profit in AY 2007-08. In the result ground, no. 16 of the appeal is allowed.

105. Ground no. 17 is against charging of interest u/s 234B of the Act as the interest u/s 234B is consequential and no arguments are advanced against or for this ground, we dismiss the same.

106. Ground no.18, 19 and 20 are not any issue specific issues but are general in nature. Therefore, they are dismissed.

107. In the end we are really grateful to the ld. Sr. Advocate Mr. Ajay Vohra and Shri Rahul Mitra from the side of assessee and Shri Amrendra kumar ld. CIT DR. from the side revenue for ably assisting us in disposal of this appeal where in the detailed arguments were raised on various diverse issues.

108. In the result, appeal of the assesse is partly allowed.

(Order Pronounced in the Court on 25/04/2016)

-Sd/-	-Sd/-
(I.C.Sudhir)	**(Prashant Maharishi)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 25/04/2016

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT

4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR