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

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI S RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No.3706/M/2010
Assessment Year: 2005-06

M/s. Piramal Enterprises Limited (Formerly known as Piramal Healthcare Limited) (Earlier known as Nicholas Piramal India Ltd.), Piramal Tower, Agastya Corporate Park, LBS Marg, Kamani Junction, Kurla (West), Mumbai – 400 070 **PAN: AAACN4538P**	Vs.	Dy. Commissioner of Income Tax, Range-8(2)(1), Mumbai.
(Appellant)		(Respondent)

ITA No.5091/M/2010
Assessment Year: 2005-06

Dy. Commissioner of Income Tax, Circle-8(2)(1), [Erstwhile DCIT Circle-7(1)], Mumbai.	Vs.	M/s. Piramal Enterprises Limited (Formerly known as Piramal Healthcare Ltd.) (As ultimate successor to Nicholas Piramal India Ltd.), Piramal Tower, Ganpatrao Kadam Marg, Lower Parel, Mumbai – 400 013 **PAN: AAACN4538P**
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Priyank Gala, A.R.
Revenue by : Shri P.D. Chogule, (Addl. CIT) Sr. A.R.

Date of Hearing : 13 . 10 . 2023
Date of Pronouncement : 11 . 01 . 2024

O R D E R

Per : Kuldip Singh, Judicial Member:

For the sake of brevity aforesaid cross appeals emanated from same impugned order passed by Ld. Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] for A.Y. 2005-06 are being taken up for disposal by way of composite order.

2. Appellant M/s. Piramal Enterprises Ltd. (hereinafter referred to as the assessee) and appellant DCIT, Circle-8(2)(1), [Erstwhile DCIT Circle-7(1)], Mumbai (hereinafter referred to as the Revenue) by filing aforesaid cross appeals sought to set aside the impugned order dated 22.02.2010 passed by Ld. CIT(A) on the grounds inter-alia that:

Grounds of Assessee's Appeal bearing ITA No.3706/M/2010 for A.Y. 2005-06

*"**Ground I:***

Compensation received on termination of agreement: Rs.92,76,62,688/-

1. On the facts and circumstances of the case and in law, the Learned Commissioner of Income Tax (Appeals) - 13, Mumbai ("the CIT (A)") erred in upholding the action of the Additional Commissioner of Income Tax, Range-7 (1), Mumbai ("the AO") of taxing the compensation received from Roche Diagnostics Gmbh (" RDG ") of Germany under a settlement agreement as "Business Income" instead of "Long Term Capital Gain" by applying provisions of Section 28(ii) (c) read with section 28 (va) (a) of the Income-tax Act, 1961 ("the Act").

2. He failed to appreciate and ought to have held that the compensation is paid to the Appellant for settlement due to termination of right to carry on the business of distribution of RDG's products and the right lost by the Appellant company vide agreement dated 20.10.2004 is a capital asset covered under the head "Capital gains" u/s 45 (1) of the Act.

3. Therefore, the Appellant, prays that the aforesaid receipt of compensation be treated as Capital Gain.

Ground II:

Addition on account of recalculation of capital gain on sale of Flat at Malbar Hill: Rs.2,98,680/-

1. On the facts and in the circumstances of the case and in law, the CIT (A) erred in confirming the action of the AO of not allowing the fair market value of the flat as on 1.4.1981, based on the valuation report, wherein the fair market value given is Rs.1,600/-, for arriving at the cost of acquisition for the purpose of computing Long Term Capital Gains on sale of flat at Malbar Hill and thereby confirming an addition of Rs.2,98,680/-.

2. He failed to appreciate and ought to have held that the Appellant had taken into consideration the correct market value of the flat based on valuation report from a registered Valuer.

3. The Appellant, therefore, prays that the aforesaid addition made by the AO be deleted.

Ground III:

Disallowance of payments made to Piramal Enterprises Ltd (PEL) u/s 40 A (2) (b): Rs.1,23,84,303/-

1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in directing the AO to allow payments made to PEL for consultancy fees and corporate service charges after verifying and comparing similar payments made by other group companies to PEL.

2. He failed to appreciate and ought to have held that on the basis of documents and submissions made by the Appellant he should have deleted the aforesaid addition.

3. The Appellant, therefore, prays that payments made to PEL be allowed fully.

Ground IV:

Disallowance of legal and professional charges incurred for system development: Rs.8,85,400/-

1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the action of the AO of disallowing legal and professional charges incurred for system development amounting to Rs.8,85,400/- by treating the same as Capital expenditure on the alleged ground that these expenses are incurred on software expenses and has enduring quality and long term benefits.

2. In doing so, he has treated the aforesaid expenditure as expenditure for acquisition of intangible assets.

3. He failed to appreciate and ought to have held that these expenses are related to software support for existing software systems and not for purchase of any new software. It mainly includes support for SAP, Lotus Notes at different locations and customization of Standard SAP reports as per requirements of the Appellant Company.

4. The Appellant, therefore, prays that the aforesaid expenses be allowed as revenue in nature.

Ground V:

Disallowance of advertising and business promotion expenses: Rs.70,90,129/-

1. On the facts and in the circumstances of the Case and in law, the CIT(A) erred in directing the AO to verify the facts and details relating to certain expenses out of advertising and business promotion expenses amounting to Rs.70,90,129/- on the basis of bills and accordingly directed the AO to decide the issue as per law.

2. He failed to appreciate and ought to have held that on the basis of evidences produced before him, he should have deleted the aforesaid addition.

3. The Appellant, therefore, prays that the AO be directed to allow the aforesaid claim for advertising and promotion expenses.

Ground VI:

Disallowance of deduction u / s 35(2AB) and u/s 35(1)(iv) in respect of Chennai unit: Rs.3,19,78,297/-

1. On the facts and circumstances of the case and in law, the CIT (A) erred in confirming the action of the AO of disallowing deduction u / s 35(2AB) and u/s 35(1)(iv) in respect of R &D (Revenue and Capital) expenses related to Chennai unit amounting to Rs.3,19,78,297/- as

excess deduction claimed on the alleged ground that appellant can claim the deduction only after date of approval i.e. 23.2.2005.

2. In doing so, the CIT (A) has directed the AO to verify the actual figures and recompute the disallowance.

3. He failed to appreciate and ought to have held that the Appellant was entitled to claim deduction from the starting date of the Chennai Unit in accordance with the period mentioned in the application. Since recognition was accorded till 31.3.2007 as per appellant's application it is therefore allowed for the period mentioned in the application and the deduction is to be allowed for the relevant financial year.

4. The Appellant prays that the A.O. be directed to allow aforesaid expenses u/s 35 (2AB) /35 (1) (iv) of the Act.

5. Without prejudice, the Appellant prays that the A.O. be directed to allow aforesaid expenses u/s 35/32 / 37 of the Act if not allowable u/s 35(2AB) / 35 (1) (iv) of the Act.

Ground VII:

Disallowance of depreciation on capital expenses of R&D unit: Rs.38,62,993/-

1. On the facts and circumstances of the case and in law, the CIT (A) erred in directing the AO to verify the facts as regard to the claim of depreciation on excess capital expenditure related to Chennai unit and delete the disallowance made if no depreciation was claimed.

2. He failed to appreciate and ought to have held that the appellant has never claimed such depreciation on capital expenditure and hence there is no question of disallowing the same. Further, he should have deleted the disallowance on the basis of submissions made by the Appellant.

3. The Appellant prays that the A.O. be directed to delete aforesaid addition made on account of depreciation.

GROUND VIII:

Disallowance of depreciation on opening WDV of computer software: Rs.26 ,23,012/-

1. On the facts and circumstances of the case and in law, the CIT (A) erred in confirming the action of the AO of disallowing depreciation on opening WDV of computers of Rs. 26 ,23,012/ on the basis of the order of the CIT (A) for A.Y. 2004-05.

2. He failed to appreciate and ought to have held that software was for upgrading the computers and for using computers with latest technology and hence the software was correctly shown under the head computers and depreciation @ 60% was allowable on the same.

3. The Appellant pray that the AO be directed to treat computer and computer software under one block namely computers and after which there will not be any cessation of block and accordingly the depreciation claimed by the Appellant be allowed.

Ground IX:

Disallowance of depreciation on additions to computer software: Rs.2,12,15,269/-

1. On the facts and circumstances of the case and in law, the CTT (A) erred in upholding the action of the AO of recalculating depreciation on computer software @ 25% instead of @ 60% as claimed by the Appellant and thereby disallowing excess depreciation of Rs.2,12,15,269/- on the alleged ground that software purchased separately and independent from computer purchases amounts to "intangible assets".

2. He failed to appreciate and ought to have held that software purchases are for upgrading the computers and for using computers with latest technology and hence the purchases are wholly and exclusively related to use of the computers and hence are correctly shown as additions under the head computers and depreciation @ 60% is allowable on the same.

3. The Appellant therefore prays that, depreciation on computer software be allowed @ 60% as correctly claimed by the Appellant.

GROUND X:

Addition on account of increase in the value of closing stock: Rs.2,07,14,000/-

1. On the facts and circumstances of the case and in law, the CIT (A) erred in directing the AO as regard to the recomputation of closing stock by not only adding back closing balance of unutilised MODVAT credit but by also including the element of MODVAT credit on purchases and sales.

2. In doing so, the CIT (A) has further erred in holding that no adjustment in the opening stock is possible by relying on the decision in

case of Melmould Corporation v. CIT (202 ITR 789) and observing that decision of Mahavir Aluminium (297 ITR 77) shall not apply.

3. He failed to appreciate and ought to have held that he has no powers to set aside the issue to the AO for verification instead he should have deleted the disallowance on the basis of submissions made by the Appellant. Further, irrespective of whether the Appellant follows gross or net method of valuation of stock, the amount of unutilized MODVAT credit has no impact on the profits of the Appellant.

4. The Appellate prays that the aforesaid addition be deleted.

GROUND XI:

Addition on account of insurance claim received during the year: Rs.2,75,00,000/-

1. On the facts and in the circumstances of the case and in law, the CIT(A) erred in upholding the action of the AO of treating the amount received on account of insurance claim as its income and accordingly adding the same to the total taxable income of the Appellant.

2. He failed to appreciate and ought to have held that the amount received was an ad-hoc payment by the insurance company to the Appellant which is "On account payment" released by them based on initial verification. The claim was only admitted by them, it does not mean that they have accepted the claim and will pay the full claim amount of Rs.1222.05 lacs. The final settlement of the claim was pending.

3. The Appellant, therefore prays that aforesaid addition of Rs.2,75,00,000/- be deleted.

4. Without prejudice to aforesaid, the appellant prays that the amount of claim received is related to assets and hence be reduced from block of assets.

GROUND XII:

Capital Gain on sale of RP House property: Rs.3,49,90,566/-

1. On the facts and circumstances of the case and in law, the CIT (A) erred in upholding the action of the A.O of not reducing Long Term Capital Gain of Rs.3,49,90,566/- arising on proportionate sale of Rhone Poulenc ("RP") House Property being land from the Return of Income on the protective basis.

2. The Appellant prays that A.O be directed to reduce Long term Capital Gain of Rs.3,49,90,566/- from Return of Income.

GROUND XIII:

Depreciation on RP House Property building:

1. On the facts and circumstances of the case and in law, the CIT(A) erred in upholding the action of the AO of not allowing depreciation on proportionate sale of Building by reducing entire sale proceeds related to Building and thereby reducing the said block to NIL in the previous year 2001-02.

2. The Appellant prays that A.O be directed to allow depreciation on Building by reducing only appropriate portion of sale proceeds from the said block.

GROUND XIV:

Treating Rental Income from RPIL House as "Income from other sources"

1. On the facts and circumstances of the case and in law, the CIT(A) erred in upholding the action of the A.O of treating the Rental Income from RP House as "Income from Other Sources" instead of "Income from House Property" as offered by the Appellant on the alleged ground that the Appellant is not the owner of the property.

2. He failed to appreciate and ought to have held that the Appellant was the owner of the property for the year under consideration.

3. The Appellant, therefore, prays that the A.O be directed to treat the Rental Income from above property as "Income from House Property"

GROUND XV:

Taxability of gain on repayment of Sales Tax Deferral Loan: Rs.8.23 crores

1. On the facts and circumstances of the case and in law, the CIT (A) erred in upholding the action of the AO of not considering the claim for gain on repayment of Sale Tax Deferral Loan as capital receipt on the alleged ground that no fresh claim can be made except by filing a revised return.

2. In doing so, he further erred in holding that the aforesaid amount is a trading receipt/business income relying on the decision of Chowrighee Sales Bureau p. Ltd. (87 ITR 542).

3. He failed to appreciate and ought to have held that as per legal position of law the said gain is not a revenue receipt taxable either u/s 41 (1) or under section 28 (iv) of the Income Tax Act, 1961 ("the Act") since the original liability to pay Sales tax was deferred and liability was converted into loan.

4. The Appellant prays that the A.O. be directed to treat the aforesaid gain as capital receipt, not chargeable to tax.

GROUND XVI:

The Appellant craves leaves to add to, alter and / or delete the above ground of appeal."

Grounds of Revenue's Appeal bearing ITA No.5091/M/2010 for A.Y. 2005-06

"1. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in directing the Assessing Officer that the depreciation not claimed by M/s.Boehirnger Mannhein India Ltd. and M/s. Piramal Holdings Ltd. should not be considered for the purpose of working out the written down value, to allow the depreciation thereon.

2. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deciding that the receipts of rental income from "Centre Point" are not chargeable under the head "income from other sources" but are chargeable under the head "income from house property" and to direct the Assessing Officer to grant deduction u/s.24(a).

3. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in deleting the disallowance made by the Assessing Officer in respect of deduction of Rs.24285714/- claimed u/s.35A in respect of the acquisition of the trade mark by M/s.Sarabhai Piramal Pharmaceuticals Ltd. (since merged with the assessee company).

4. While doing so, the Ld.CIT(A)'s failed to appreciate that Section 35A permitted deduction only upto A.Y. 1998-99 and in later years even the part deduction was not allowable.

5. On the facts and in the circumstance of the case and in law, the Ld.CIT(A) erred in deciding that the deduction u/s.80HHC for the purpose of section 115JB is to be worked out on the basis of adjusted book profit following the decision of Mumbai ITAT in the case of Syncome Formulations India Ltd. reported in 108 TTJ 105 (SB) although the ITAT's decision has been overruled by the Bombay High Court in the case of Ajanta Pharma Ltd. 180 Taxman 494.

6. The appellant prays that the order of CIT(A) on the above grounds be set aside and that of the AO restored. The appellant craves leave to amend or alter any ground or add a new ground that may be necessary."

3. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : the assessee company being into manufacturing and sale of pharmaceuticals deals in both prescription and DTC products as well as bulk drugs, chemicals and skincare products, filed its return of income for the year under consideration which was subjected to scrutiny. The assessee by filing the aforesaid appeal raised multiple grounds numbering 15 challenging the impugned order passed by the Ld. CIT(A). Our findings on the aforesaid grounds are as under:

Assessee's appeal bearing ITA No.3706/M/2010
Ground No.1

4. During the year under consideration as has been noticed from the computation of income assessee company is shown to have received an amount of Rs.92,76,62,688/- from Roche Diagnostics Gmbh (RDG) of Germany under a settlement agreement towards termination of agency, distribution and manufacturing rights granted to it by RDG vide agreement dated 30.06.1997 which has been offered by the assessee to tax under the head "capital gains" instead of showing the same as business income. However, declining the contentions raised by the assessee the Assessing Officer (AO) proceeded to hold that the proceeds received by the assessee company from RDG on account of termination of agency and distribution of products in India falls under the provisions of section 28(ii)(c) read with section 28(va)(a) of the Income Tax Act, 1961 (for short 'the Act'). Explanation filed by the assessee to the show cause notice issued by the AO is summarized by the AO in para 6.5 of the order as under:

"(i) The right lost by the assessee company vide agreement dated 20.10.2004 is a capital asset covered under the head 'Capital Gains' u/s 45(1) of the 1.T. Act

(ii) The rights under the distribution and marketing agreement was an asset of enduring value and by its cancellation, the trading structure of the assessee is impaired and the assessee has lost its right to carry on a business.

(iii) The assessee was not an agent of RGD and was carrying the distribution activity on its own behalf.

(iv) The assessee has lost a source of income/income earning apparatus which is a capital asset and taxable under the head capital gains u/s 55(2) of the I.T. Act."

5. Declining the contentions raised by the assessee the AO proceeded to hold that the entire receipt of Rs.92,76,62,688/- by the assessee from Roche Diagnostics Gmbh (RDG) of Germany under settlement agreement is a business income under section 28 of the Act and made addition thereof to the business income of the assessee. The Ld. CIT(A) upheld the addition made by the AO and the assessee is in appeal before the Tribunal.

6. The Ld. A.R. for the assessee challenging the impugned findings returned by the Ld. CIT(A) contended inter-alia that the amount in question received by the assessee from RDG is for transfer of business, which is a capital asset, as such chargeable to tax as capital gains; that the compensation has been received for transfer/extinguishment or termination of business rights under AMDA 1997 and therefore the same have been offered to tax as capital gain; that as per relevant clauses referred to during the course of argument of the settlement agreement the entire business has been transferred and the consideration which has been received is for the transfer of business as a whole and as such the amount

received does not fall under section 28(ii)(c) as well as under section 28(va)(a) of the Act as the compensation received is not merely for termination of agency nor the compensation is received for non-compete.

7. Without prejudice to the ground No.1 the assessee has also raised additional ground No.1(a) that "compensation received on termination of agreement to the tune of Rs.92,76,62,688/- is a capital receipt."

8. Additional ground raised by the assessee is allowed being legal ground which does not require any investigation by the Revenue Authorities as the same can be raised at any stage of the proceedings.

9. However, on the other hand, the Ld. D.R. for the Revenue in order to repel the arguments addressed by the Ld. A.R. for the assessee relied upon the order passed by the Ld. CIT(A) and contended that since the amount received by the assessee is an income from settlement made outside the court in United Kingdom (UK) the Revenue has rightly treated it as business income. It is further contended by the Ld. D.R. for the Revenue that when the assessee company and RDG have entered into an agreement to do business any settlement amount arisen out of it is the business income.

10. Before proceeding further we would like to bring on record some undisputed facts pertaining to the issue in question inter-alia that the assessee, earlier known as Nicholas Piramal India Ltd. (NPIL) had entered into an Agreement for Distribution,

Manufacturing and Agency (ADMA 1997) with one Boehringer Mannheim Gmbh (BM Germany) in 1997; that by virtue of the agreement (supra) the assessee acquired right to carry on above business, earlier carried out by BM Germany and its subsidiaries namely BM India Ltd. (BMIL) and BML Laboratories Ltd. (BMK); that by virtue of agreement (supra) the assessee stepped into the shoes of BMIL and acquired its entire business by way of amalgamation of BMIL into NPIL as per article 2.1 of the (ADMA 1997); that in 2004 RDG had acquired BM group all over the world and in the same year RDG unilaterally terminated certain obligations under 1997 agreement, which was challenged by the assessee in UK court as per jurisdiction given by the agreement (supra); that thereafter assessee and RDG entered into agreement out of court settlement by entering into a settlement agreement available on record; that as per settlement agreement the assessee and RDG mutually agreed to terminate the (ADMA 1997) withdrawal of cases in court, thus agreement (supra) stood terminated w.e.f. 01.01.2005 and RDG paid compensation to NPIL amounting to US$20.7 million i.e. Rs.92,76,62,688/-.

11. In the backdrop of the aforesaid undisputed facts the sole question arises for determination in this case is:

> *"As to whether compensation received by the assessee from RDG to the tune of Rs.92,76,62,688/- in out of court settlement for unilaterally terminating certain obligations under the agreement (supra) by RDG is an income assessed to capital gain or a business income"?*

12. The Ld. A.R. for the assessee in order to support its case that the sum received by the assessee company by virtue of out of court settlement agreement is chargeable to capital gain and drew our attention towards the relevant clauses of settlement agreement

which provides for transfer of entire business from NPIL to RDG as under:

> *"- Article 3.1 - NPIL shall transfer its legal title in all instruments placed with its customers to RDG and RDG shall purchase such instruments and purchase price of such instruments shall not exceed 1.3 million USD.*
>
> *- Article 3.4 (c) - which states that the third tranche of payment of compensation amount shall only be transferred on successful transfer of business. It may be noted that this clause speaks of transitional arrangement and cooperation from Assessee to ensure transfer of business under AMDA 1997 agreement to RDG or its subsidiary, associated or related company. Thus, clearly, reference it to transfer of business.*
>
> *- Article 3.5 NPIL shall sell its entire stock/inventory as on 01st January 2005 to RDG at landed cost.*
>
> *- Article 6.1 of the settlement agreement specifies that NPIL shall ensure a smooth transfer of entire business relating to the products of RDG.*
>
> *- Article 8 - Employees of NPIL to be transferred to RDG.*
>
> *- Article 6.8- RDG to help assist NPIL to collect outstanding payments due to NPIL from its customers and distributors indicates all future dealings with the customers and distributors would be with RDG."*

13. The Ld. A.R. for the assessee while referring to the aforesaid provisions of settlement agreement contended that since it has transferred entire business and its rights under the agreement (supra) has been terminated thus the amount received in consideration thereof is assessable as capital gain. It is further contended by the Ld. A.R. for the assessee that rights under the agreement are capital assets and relied upon the decision rendered by Hon'ble Bombay High Court in case of CIT vs. Tata Services Ltd. (1979) (1 Taxman 427)

14. However, on the other hand, the Ld. D.R. for the Revenue by relying upon the order passed by the AO as well as the Ld. CIT(A)

stated that the assessee company has received the sum in question from RDG of Germany under a settlement agreement towards termination of agency and as such section 28(ii)(c) has been rightly invoked and further contended that the compensation has been paid to the assessee to compensate it for leaving all the prospective future profits from the agency business of products of RDG. In order to decide the issue as to whether the compensation received by the assessee is for termination of agency, we need to advert to the relevant recitals of Agreement for Distribution, Manufacturing and Agency (ADMA), 1997 and settlement agreement as under:

(i) that the title of the ADMA, 1997 entered into between BM Company and assessee, which is a basic document reads as "agreement between BM Germany and Nicholas Piramal India Ltd. (assessee)" for "Agency, Distribution and Manufacturing License Agreement".

(ii) that as per class 4 of the ADMA, 1997 at page 78 BM India has been acting as commission agent in the territory for biochemical. By virtue of the agreement with BM India dated 24.10.1987 BM has taken over the relating rights and duties of Galenus Mannheim GmbH.

(iii) that the assessee has agreed to undertaken the entire business to BM India inter-alia agency for biochemical product.

(iv) that perusal of article 10.28 at page 35 of ADMA agreement shows that the assessee is a commission

agent of BM for biochemicals having limited rights and liabilities for this arrangement.

(v) that article 11 at page No.36 of ADMA, 1997 further shows that the supply prices of all the products charged by BM to NPIL shall be agreed upon by both the parties in marketing committee with reference to the higher and lower limits established by MB in particular for its international pharmaceutical business and the price prevailing in the territory for similar and/or competing products. The local selling price shall be determined by the marketing committee under article 15.3. In determining the local selling price of each product the marketing committee shall in particular take into account the price situation in the territory or similar and/or competitive products.

(vi) that article 11.1.1.3 assures the minimum margin to be earned by NPIL at 40%.

(vii) that as per article 11.1.2.4 commission to be earned by the assessee on various bulk products of biochemical was agreed upon as under:

(viii) that as per article 9.1 of the ADMA agreement (supra) ordering procedure has been laid down containing therein that in order to enable BM to arrange for purchasing, planning and order processing, NPIL shall provide BM with return estimates of the local sales,

the purchase requirements and firm orders of product in quantity and value according to BM forecast.

15. It is also agreed upon regarding order procedure for specific products if so requested by BM the parties agree upon specific ordering procedures for specific products with respect to raw materials, the parties agree that the order lead time shall be approximately three months.

16. In article 10.2 delivery of terms as to the delivery of products are agreed upon by stating therein that BM shall affect delivery of products ordered by NPIL in accordance with agreed upon ordering procedures as quickly as reasonably possible.

17. In the backdrop of the aforesaid terms and conditions the first question arises to be determined by the Bench is:

> *"As to whether compensation received by the assessee from RDG on account of termination of agency and distribution of products of RDG in India and provisions contained under section 28(ii)(c) read with section 28(va) & (a) of the Act are attracted?"*

18. The Ld. A.R. for the assessee challenging the findings returned by the AO contended that the compensation received by the assessee is not merely for termination of agency in order to invoke section 28(ii)(c) of the Act because the termination is not just termination of agency rights but also termination of distribution and manufacturing rights.

19. We have perused the impugned order passed by the Ld. CIT(A). In the light of the relevant clauses of Agency, Distribution and Manufacturing, Licence Agreement (ADMLA)

between BM and NPIL particularly clause no.3.1, 3.2.1, 3.2.2, 3.2.2.1, 3.2.3, 3.3.1, 3.3.1.1, 3.6, 7.3, 8.1.2, 11.1.2.2, 11.1.2.2.1, 11.1.2.3.1, 11.1.2.3.2, 11.1.2.4.

20. Conjoint reading of the various clauses as extracted above goes to prove that primarily parties to the agreement have agreed upon with each other for the purpose of distribution, marketing and sales of product for sales, sales and manufacturing of products by the assessee in India on the basis of a non transferable, non assignable, exclusive license in the territory under the patent, if any, information and know-how of BM to market distribute and sell in the territory under the trademarks. It is also clear from the agreement at the discretion of BM an information transferable, non assignable exclusive license to manufacture in the territory certain BM products which are pharmaceutical specialities. To manufacture laboratory diagnostic test kits were also subject of the agreement.

21. Clause 3.3.1.1 categorically suggests that the assessee is appointed as BM's exclusive commission agent in the territory for biochemical.

22. Furthermore, when we examine clause 3.6 it is also very categoric that the assessee would have no right to use or otherwise deal with BM's patent, trademark, denomination, products, knowhow and information for the purposes other than those of developing, manufacturing, marketing and selling and distributing the products under trademark and denomination. Not only this,

even any further trademarks if developed by the assessee in coordination with BM shall also be owned by BM.

23. For laboratory diagnostics parties to the agreement have also agreed that the assessee shall as a general rule receive a weighted average margin of 40% on the net sales of laboratory diagnostics. Similarly in case of Patient Care Diagnostics parties to the agreement agreed that the assessee shall as a general rule receive a weighted overall margin of 40% on the net sales such diagnostics and BM shall have a weighted average contribution of level (ii) of 40%.

24. It is also agreed upon between the parties as per clause 11.1.2.3.2 as a general rule the assessee shall receive a margin of 25% on instruments of the net sales and the BM shall have a level (ii) contribution of 40%. Terms for bio-chemicals as per clause 11.1.2.4 have also been settled between the parties for making payment of commissions on various bulk products viz. Fine Chemicals, Biocatalyst, Bulk Diagnostics.

25. So in view of the matter, we are of the considered view that when the assessee company by virtue of the agreement (supra) got non transferable, non assignable license to manufacture, market, distribute and sell products otherwise owned by the BM for a satisfied commission as agent of the assessee in the face of the fact that the entire intellectual property qua distribution and manufacturing of the product will remain with BM and the assessee shall not be entitled for any such ownership or title to the same.

26. Furthermore, the Ld. CIT(A) has also referred to the joint press release by the assessee and RDG Germany as per schedule of the agreement dated 20.10.2004 wherein it is mutually agreed to discontinue the agreement vide which the assessee was exclusively distributing diagnostics and Patient Care products of RDG. The assessee has agreed to cease to act as RDG's distributor w.e.f. 1st January 2005 when Roche Diagnostics takeover the distribution.

27. The Ld. D.R. for the Revenue contended that the assessee being the second largest pharmaceutical sales in India and is ranked in 4th in domestic formulation earned consolidated sales of Rs.13.9 billion and recorded his sales of Rs.726.1 million from the diagnostics and Patient Care product of Roche in India, which is 43.05% only of the total turnover of the assessee. The Ld. D.R. for the Revenue further contended that when the agreement (supra) was discontinued vide settlement agreement dated 20.10.2004 neither capital structure of NPIL has been affected nor it has affected the trading structure of NPIL business rather after settlement agreement the assessee's sales have been enhanced which is apparent from the sales data of the assessee for A.Y. 2005-06, 2006-07 & 2007-08 which is as under:

A.Y.	2005-06	2006-07	2007-08
Sales (in millions)	13846.8	15040.2	17032.8

28. So we are inclined to disagree with the contentions raised by the Ld. A.R. for the assessee that compensation received by the assessee was not for mere termination of agency rather it was for the sacrifice of all prospective future profits from the agency business of product of RDG. From the financials of the assessee

for the year under consideration and the subsequent years go to prove that there was no loss of business and at the same time terms and conditions of the agreement (supra) and settlement agreement apparently shows that the assessee by virtue of the agreement (supra) has worked as an agent for all intent purposes and as such received a compensation for loss of agency business, which is taxable as business income under section 28(ii)(c) read with section 28(va)(a) of the Act.

29. Consequently Revenue Authorities have rightly assessed the compensation received by the assessee under the head "profit and gains" from business and profession instead of long term capital gain as offered by the assessee.

30. So the contention raised by the Ld. A.R. for the assessee is that the compensation received by it from RDG is for transfer of business which is a capital asset and thus chargeable as capital gains is not sustainable.

31. The Ld. CIT(A) at page 12 has thrashed the facts in the light of the decision rendered by the Hon'ble Supreme Court in case of Kettlewell Bullen and Co. Ltd. vs. CIT [53 ITR 261 (SC)], CIT vs. Rai Bahadur Jairam Valji 35 ITR 148 (SC), CIT vs. Chari and Chari Ltd. 57 ITR 400 (SC) & Oberoi Hotel Pvt. Ltd. vs. CIT 236 ITR 903 and the decision rendered by Hon'ble Madras High Court in case of Indo Foreign Traders (P) Ltd. vs. CIT (1987) 166 ITR 308 (Mad.) and Chemplant Engineers (P) Ltd. vs. CIT (234 ITR 23).

32. Hon'ble Supreme Court in case of Kettlewell Bullen and Co. Ltd. (supra) held that where payment is made to compensate a person from cancellation of contract, as in the instant case qua agency distribution agreement dated 03.06.1997 terminated vide settlement agreement dated 20.10.2004 and such cancellation has left the assessee free to carry on his trade the receipt is revenue receipt.

33. Similarly, Hon'ble Supreme Court in case of CIT vs. Chari and Chari Ltd. (supra) has also held that when the termination of an agency did not impair the profit-making structure of the assessee, but was within the framework of the business, the receipt for termination of agency would be a revenue receipt. Hon'ble Madras High Court in case of Indo Foreign Traders (P) Ltd. vs. CIT (supra) held that when an assessee was appointed as a sales organizer of a drug company on commission basis and on termination of the said agreement compensation for termination of the agreement was income assessable to tax under section 10(va) of the Income Tax Act, 1922, which is akin to section 28(ii) of the Act. Ratio of the case law discussed by the Ld. CIT(A) is : any compensation received by a party on termination of the earlier agency agreement is a revenue receipt to be assessed as business income.

34. The contention raised by the Ld. A.R. for the assessee that agreement between the parties is to be read as intended by the parties and it is not open to AO to give another interpretation is also not sustainable because agreement in ADMA (supra) is categoric in all respects which has been further clarified by the settlement agreement (supra) and as such reliance placed on the decision

rendered by Hon'ble Calcutta High Court in case of CIT vs. Arun Dua (1989) 45 Taxman 246 is misplaced.

35. Furthermore, the provisions contained under section 28(ii)(c) are very categoric in giving the treatment of compensation received from the termination of any agency business which has been further clarified from the new provisions contained under section 28(va)(a) w.e.f. 01.04.2003, wherein it is specifically included within the purview of profit and gains of business "any sum whatever received or receivable in cash or kind under any agreement for guarantee any activity in relation to any business".

36. The contentions raised by the Ld. A.R. for the assessee inter-alia qua the provisions contained under section 28(va) that the existing provisions of clause (ii) of section 28(a) is restrictive in its scope as far as taxation of compensation is concerned; a large segment of compensation received in connection with business and employment is within the purview of taxation, is not sustainable because it is nowhere case of the assessee before the AO or the Ld. CIT(A) that because of settlement agreement qua the termination of agency and distribution business the compensation is in respect of business loss and employment. Rather in the preceding para it is discussed that after termination of the agency and distribution assessee's business has been increased considerably.

37. Moreover, when the assessee and the RDG were entered into agreement to do business and any settlement arrived at between them for termination of the business would be business income. The assessee has also raised one additional ground to supplement

ground No.1 to the effect that compensation received on termination of agreement is a capital receipt. When it is nowhere case of the assessee that it has lost its livelihood on account of termination of the business agreement compensation received by it by virtue of the termination agreement is business income.

38. So in view of what has been discussed above, we are of the considered view that answer to questions framed in para 11 & 17 of the order is "compensation received by the assessee from RDG to the tune of Rs.92,76,62,688/- in out of court settlement is a business income and not an income assessed to capital gains as claimed by the assessee" and as such provisions contained under section 28(ii)(c) read with section 28(va)(a) of the Act are attracted. Hence, the Ld. CIT(A) has rightly confirmed the addition of Rs.92,76,62,688/- as business income. Consequently ground No.1 is determined against the assessee.

Ground No.2

39. Undisputedly the assessee has sold a flat at Malabar Hills during the year under consideration and for computing the cost of acquisition of this flat the assessee adopted the fair market value as on 01.04.1981 based on valuation report of government valuer Mr. UD Chandey. The AO after rejecting the valuation made by the valuer calculated the cost of acquisition by assessing the rate at Rs.1480 per sq. ft. as compiled in the reference book by Mr. Santosh Kumar and Sunil Gupta and thereby made an addition of Rs.2,98,680/-.

40. We have perused the findings returned by the Ld. CIT(A) on this issue who has upheld the addition made by the AO by returning following findings:

"2.2 However, the assessee took the fair market value as on 1.4.81 based on the valuer's report wherein fair market value was taken at Rs.1,600/- per sq. ft. The assessee's registered Valuer stated that "the only fair C method of valuation of the property is that based on market value as on 01.04.1981. Registered instances of sales as on 01.04.1981 are not available. Using the reference in the Indian Valuers Directory and References Book by Mr Sntosh Kumar & Sunit Gupta as published by the Architects Publishing Corporation of India, the rate of residential units in buildings with lift has been given at Rs 1,480/- pr sq. ft. However the valuer took the fair market as on 1.4.81 at Rs 1,600/- per sq. ft. stating that in his opinion the property will fetch 5-10% more than the highest given in the reference book.

2.3 The facts have been considered. The rates of residential units in the Malabar Hill area as published by the Architects Publishing Corporation of India has been given at Rs. 1,480/- per sq. ft. The registered valuer has taken the Indian Valuer's Directory and reference book as the basis for valuing the flat as on 1.4.81. The Registered Valuer should not modify the same on the basis of his opinion and guess work without any material on record. Infact the whole of the Malabar Hill area is a posh area of South Mumbai. All the flats in this area belong to well to do persons and all the flats generally well maintained in this area. Accordingly assessee's registered valuer's comments that the value of the Assessee's flat should be increased by 5 to 10% more than the normal rates published without any differentiating facts are not maintainable."

41. When the assessee has calculated the cost of acquisition on the basis of fair market value determined by the government valuer the AO has no right to replace the government approved valuer's opinion on his own.

42. Admittedly for the year under consideration the AO did not have the power to refer the matter for valuation to the Department Valuation Officer (DVO) rather he was having the power under section 50A of the Act to refer the case to the valuation officer in case the valuation adopted by the assessee was lower than the fair market value. But at the same time section 50A of the Act inserted by Finance Act, 2012 is prospective in nature as has been held by Hon'ble Jurisdictional High Court in case of CIT vs. Pooja Prints (2014) 43 taxmann.com 247 (Bombay) by returning following findings:

"8. The contention of the revenue that in view of the amendment to Section 55A(a) of the Act in 2012 by which the words "is less then the fair market value" is substituted by the words" "is at variance with its fair market value" is clarifactory and should be given retrospective effect. This submission is in face of the fact that the 2012 amendment was made effective only from 1 July 2012. The Parliament has not given retrospective effect to the amendment. Therefore, the law to be applied in the present case is Section 55A(a) of the Act as existing during the period relevant to the Assessment Year 2006-07. At the relevant time, very clearly reference could be made to Departmental Valuation Officer only if the value declared by the assessee is in the opinion of Assessing Officer less than its fair market value"

43. So in view of the matter, we are of the considered view that the AO has no power to replace the valuer's opinion which is based upon facts and data available in public domain, with its own opinion, hence addition made by the AO and confirmed by the Ld. CIT(A) is ordered to be deleted.

Ground No.3

44. The AO made a disallowance of Rs.1,23,84,303/- on account of royalty and professional/management services on the ground that these payments are unreasonable, excessive and services are general in nature. The AO has disallowed the royalty @ 0.2% of the turnover and 25% of the other fees paid on ad-hoc basis.

45. So far as issue regarding payment of royalty is concerned, it is undisputed fact on record that identical issue has been decided in favour of the assessee in its own case in A.Y. 2008-09. These payments have been made by the assessee in accordance with the agreement which is continuing since 1995 available at page 329. Services rendered have been duly described in the agreement available at page 143 of the paper book. The Tribunal passed order in favour of the assessee in its own case for A.Y. 2008-09 available

at page 124 to 171 of the case law paper book qua payment of royalty to NPIL @ 0.5% of the turnover of the NPIL.

46. We have perused the order passed by the co-ordinate Bench of the Tribunal which is on identical facts, by returning following findings:

> *"21. We have considered rival submissions and perused materials on record. On a reading of the agreement dated 29th April 1995 with PEL a copy of which is at Page–859 of the paper book, it is noticed that in addition to the reimbursement of expenses incurred by PEL on behalf of the assessee, the assessee was also required to pay to PEL royalty @ not exceeding 0.5% of his turnover of goods manufacture and traded. Thus, it is evident that the payment made of `822 crore to PEL constitutes both reimbursement of expenses and royalty. This fact is also clear from the working of reimbursement of expenses and royalty at Page–237 of the paper book, which indicates that an amount of ` 6.75 crore was for reimbursement of expenses and `1.47 crore towards royalty. From the assessment order, prima–facie, it appears that the Assessing Officer while concluding that PEL has charged more to the assessee towards reimbursement of expenses than what is contemplated in the agreement is under a misconception of fact. However, in the order giving effect to the direction of the Commissioner (Appeals), the Assessing Officer has allowed the payment made towards expenditure fully and disallowed the amount of ` 1.47 crore towards royalty. When the terms of the agreement specifically provide for payment of royalty and royalty was paid in compliance to such term, there is no justification for disallowance of royalty payment. Disallowance made is deleted."*

47. So by following the order passed by the co-ordinate Bench of the Tribunal (supra) issue as to the payment of royalty is decided in favour of the assessee and the disallowance made by the AO and confirmed by the Ld. CIT(A) is ordered to be deleted.

48. However, so far as issue as to payment of consultancy and professional charges made by the assessee to the NPIL and disallowance thereof made by the AO @ 25% is concerned, the Ld. CIT(A) has issued specific directions to decide after verification by returning following findings:

"3.2 The AO was of the view that payments were high. So he allowed royalty @ 3% and disallowed 25% of consultancy and professional charges.

3.3 The AO may verify the royalty payments and consultancy and professional charges paid by the other group companies to PEL (the flagship company).

** If the comparative payments made by NPIL is more than the payments made by other group companies - the excess payments made by NPIL may be disallowed. Turnover may be adopted as the basis for determining excessiveness.*

** If there is no excessiveness on Turnover as the basis, the mess disallowance u/s.40A(2)(b) may be deleted as PEL is also being assessed to tax in Range 7(1) and is allegedly a full tax paying company."*

49. Aforesaid findings to be complied with by the AO are qua disallowance of 25% of the consultancy and professional charges because issue as to the royalty has already been decided in favour of the assessee by the Tribunal vide order (supra). So the AO is directed to verify it and decide after providing opportunity of being heard to the assessee within a period of six months after receipt of the order. Ground No.3 is partly allowed in favour of the assessee.

Ground No.4

50. The AO has disallowed legal and professional charges incurred for system development to the tune of Rs.8,85,000/- on the ground that the same is towards purchase of software and as such capital in nature. The assessee brought on record detail of these expenses available at page 216 to 241 of the paper book.

51. The Ld. CIT(A) has partly decided the issue in favour of the assessee and also issued directions to the AO to verify the facts and allow the expenses if the same are made towards maintenance,

however with respect to the other expenses the same is to be capitalized and depreciation @ 25% is to be ordered allowed. The assessee has not specifically challenged the allowance to the tune of 25% of other expenses restricted by the Ld. CIT(A).

52. So far as remaining maintenance expenses are concerned, the AO has been directed to verify the facts and maintenance charges claimed by the assessee are concerned, the AO has been directed to verify and allow the same being in the nature of revenue expenses. In these circumstances we direct the AO to decide the maintenance charges claimed by the assessee after due verification as per directions given by the Ld. CIT(A) within six months from the date of receipt of the order. So ground No.4 is also partly decided in favour of the assessee.

Ground No.5

53. Ground No.5 is not pressed by the assessee, hence the same is dismissed as not pressed.

Ground Nos.6 & 7

54. The assessee has claimed research and development expenses incurred during the year under consideration for Mulund unit, Mumbai and Ennore unit, Chennai as under:

	(in Lakhs)
"i) R&D - revenue exp. u / s 0.35(2AB)	*Rs.4140.62*
ii) R&D - capital exp. (building) u / s 0.35(1)(iv)	*Rs.3196.96*
iii) R&D - capital exp. (Plant & machinery, computers, etc) u / s 0.35(1)(iv)	*Rs.2350.13*
	Rs.9687.71

55. We have perused the impugned order passed by the Ld. CIT(A) who has directed the AO to verify the actual figures/expenses to work out the disallowance by returning following findings:

> *"* The AO should verify the actual figures/expenses. The disallowance to be accordingly worked out.*
>
> ** As per AO, the approval in respect of R&D unit at Chennai has been given by Ministry of Science and Tech. letter dated 23-2-05 upto 31-3-07 (no period mentioned). Besides, no approval in prescribed Form No.3CM has been enclosed before AO/before this office also. The said statutory Form No.3CM is a mandatory Form and as such, the AO has rightly held that R & D expenditure incurred at Ennore only after approval given by Ministry i.e. 23-2- 2005 can be allowed that too if given in Form No.3CM which is a. mandatory requirement. Besides, no breakup of expenditure in respect of R & D facility at Ennore between 23-2-05 and 31-3-05 has been given. The disallowance made by AO is upheld."*

56. The assessee has failed to bring on record approval in prescribed form No.3CM before the AO as well as the Ld. CIT(A). It is fact on record that only R&D expenditure incurred at Ennore for which approval has been given by the Ministry on 29.03.2005 can be allowed only if form No.3CM is brought on record. The Ld. A.R. for the assessee contended that despite filing form 3CL by the assessee with DSIR it has not received form 3CL, since it is an old data even copy of reminders filed by the assessee are not readily available with the assessee and it cannot be penalized for inaction on the part of the DSIR and pressed for deduction under section 35(2AB) to at least from the date of application i.e. June 25, 2004. It is also contended that identical issue in 2008-09 was restored to the AO to allow at least weighted deduction till form 3CM is given.

57. We have perused the order for A.Y. 2008-09 which is qua the identical issue of the co-ordinate Bench of the Tribunal restored the issue back to AO by returning following findings:

> *"27. We have considered rival submissions and perused materials on record. It is an undisputed fact that there is no approval by the competent authority in Form no.3CM in respect of the expenditure incurred towards the R&D facility. Section 35(2AB) of the Act mandates furnishing of approval in Form no.3CM for the purpose of availing deduction. It is the contention of the assessee that though, it has made application seeking approval in Form no.3CM, however, it is still awaited. As held by the Tribunal, Mumbai Bench, in case of PCP Chemicals Pvt. Ltd. (supra), approval by the competent authority in Form no.3CM is mandatory for claiming deduction under section 35(2AB) of the Act. The same view has also been expressed in Vivimed Labs Ltd. (supra). However, considering the contention of the learned Sr. Counsel that the assessee has applied for approval in Form no.3CM which is still pending, we are inclined to restore the issue to the Assessing Officer for providing an opportunity to the assessee to furnish the approval of the competent authority in the prescribed manner for claiming deduction under section 35(2AB) of the Act. This ground is allowed for statistical purposes."*

58. Since the issue is identical the same is restored to the AO to decide after providing opportunity of being heard to the assessee in view of the directions given by the Tribunal extracted above. Consequently ground No.6 is allowed for statistical purposes.

59. Ground No.7 is interconnected with ground No.6 being claim of depreciation on capital expenses and it is to be decided by the AO accordingly in the light of the findings returned on issue in ground No.6.

Ground Nos.8 & 9

60. The AO has disallowed the depreciation claimed by the assessee on opening WDV of computer software by following his own order passed in A.Y. 2004-05 and has restricted the claim of depreciation to 25% as against 60% for addition made during the

year. The Ld. CIT(A) upheld the addition made by the AO. The Ld. A.R. for the assessee contended that since depreciation in A.Y. 2004-05 was allowed by the Tribunal subsequent depreciation claimed by the assessee is consequential. Since the AO has followed his finding returned on this issue of A.Y. 2004-05 which has been overturned by the Tribunal by directing the AO to consider software and computer as one block the issue is remitted back to the AO to decide within six months from the receipt of copy of order as per findings returned by the Tribunal in assessee's own case for A.Y. 2004-05. Accordingly, ground Nos.8 & 9 are determined in favour of the assessee for statistical purposes.

Ground No.10

61. The AO by recomputing the value of closing stock made an addition of Rs.2,07,14,000/- of net unutilized modvat credit in closing stock. It is undisputed fact on record that the identical ground has already been decided in favour of the assessee in its own case in the year 2003-04, 2004-05, 2009-10 & 2010-11 copy of order is available at page 1 to 60 and 61 to 123 of the paper book-I.

62. We have perused the order passed by the Tribunal in assessee's own case for A.Y. 2002-03 in ITA No.3927/M/2006 order dated 20.02.2020 wherein the identical issue has been decided by following the order passed by the Tribunal in assessee's own case for A.Y. 2009-10 by returning following findings:

> *"5.1. We have heard rival submissions. We find that the ld. AO had recorded in the assessment order that in the tax audit report, the Tax Auditor mentioned that assessee is following EXCLUSIVE method of accounting for MODVAT with regard to inventory, purchases and consumption. The assessee vide letter dated 29/11/2004 had also*

contended that the aforesaid treatment had no impact on the profit at all. The ld. AO observed that unutilised balance of MODVAT credit on stock in trade is reflected in the balance sheet as an asset amounting to Rs.152.83 lakhs and as per the proviso of Section 145A of the Act, the unutilised MODVAT needs to be included in the value of closing stock. During the course of assessment proceedings, the assessee, without prejudice, claimed that the amount which was added to the closing stock in A.Y.2001-02 on similar lines as above i.e. Rs.86.56 lakhs should be allowed as part of the opening stock in A.Y.2002-03. This claim of the assessee was allowed by the ld. AO by increasing the opening stock to the extent of Rs.86.56 lakhs and the net addition on account of unutilised MODVAT credit was made by the ld. AO at Rs.66,27,443/-. This action of the ld. AO was upheld by the ld. CIT(A). We find that this issue was the subject matter of adjudication by this Tribunal in assessee"s own case for A.Y.2009-10 in ITA Nos.1257/Mum/2014 & 1486/Mum/2014 dated 07/05/2019 wherein it was held as under:-

> *"Adjustment of Inventory as per Sec. 145A : Rs. 1,16,08,088 21. We shall now advert to the contention of the ld. A.R that the A.O/DRP had erred in re-computing the value of the "closing stock" at Rs. 15,982.73 lacs as against Rs. 14,834 lacs and "opening stock" at Rs. 14,367.65 lacs as against Rs. 13,335 lacs, on the ground that the assessee is following exclusive method of accounting for MODVAT with regards to its inventory. It is the claim of the ld. A.R that irrespective of whether the assessee follows Inclusive or Exclusive method of valuation of stock, the amount of unutilized MODVAT shall have no bearing on the profits of the assessee. We find that the assessee had before the lower authorities objected to the aforesaid addition as was sought to be made by the A.O on three counts viz. (i) that requirement of valuing the purchases, sales and inventories for the purpose of determining the income under the head "Profits and gains of business or profession" was contrary to the accounting principles laid down by Accounting Standard-2 (for short "AS2"); (ii). that the ICAI had issued "Guidance Note on Tax Audit under Section 44AB of the I-T Act", which specifically requires the formats in which information as regards the valuation of purchases, sales and inventories under both inclusive and exclusive method are to be presented, and the same provides that irrespective of the methods being followed, the net impact on the profit and loss will be nil; and (iii). that irrespective of whether the assessee follows Inclusive or Exclusive method of valuation of stock, the amount of unutilized MODVAT credit will have no impact on the profits of the assessee. Apart there from, the assessee had also objected to the calculation of the "closing stock" and „opening stock" by the A.O by multiplying the stock value by the ratio of purchases (including excise) and purchases (net of*

excise). It is further averred by the ld. A.R that insofar the valuation of inventories as per Sec. 145A was concerned, the raw material, packing material, stores and works-in-progress was valued at cost, while for the finished goods were valued at cost or net realisable value, whichever was lower. In fact, it is the claim of the assessee that the „cost" has consistently been taken at net of MODVAT credit. On the basis of the aforesaid facts, it is stated by the assessee that the element of MODVAT was neither included in the consumption nor into cost for valuation of „closing stock". As such, it is the claim of the assessee that as it has debited its „profit & loss a/c" with purchases of raw material net of MODVAT Excise duty, therefore, the valuation of „closing stock" of raw material was also made at cost net of such excise duty. In sum and substance, it is the claim of the assessee that the costs which have not been debited to the profit and loss account at all, cannot be used for valuation of „closing stock". On the basis of its aforesaid submissions, it is the claim of the assessee that the deviation on the profit of the year on account of method of valuation prescribed under Sec. 145A is Rs. Nil, which formed part of the tax audit report as "Annexure B". 22. We have deliberated at length on the issue under consideration and find that the assessee for the purpose of its statutory accounts had followed the AS-2 on Valuation of Inventories, and the Guidance Note on Accounting Treatment of MODVAT/CENVAT issued by the ICAI. Accordingly, the assessee had followed the exclusive method for accounting purposes. However, for the purposes of income-tax it had worked out the impact of grossing up of tax, duty, cess etc. by restating the values of purchases and inventories by including inter alia the CENVAT credit. The adjustment required u/s 145A of the I.T Act was reflected in Clause 12(b) of the tax audit report of the assessee. As per Clause 12(b) the adjustment u/s 145A worked out at Nil. It is the claim of the assessee that the amount reflected in Clause 12(b) of the tax Audit report shall be treated as the adjustment required u/s 145A, and in support thereof had relied on the order of the ITAT, Mumbai in the case of Hawkins Cookers Ltd. Vs. ITO (2008) 14 DTR 206 (Mum). We have perused Clause 12(b) (Page 61 of „APB") of the Tax Audit report of the assessee and find that it is the claim of the assessee that the impact of grossing up of tax, duty, cess etc. by restating the values of purchases and inventories by inter alia including the effect of CENVAT credit will be Nil, subject to Sec. 43B that the duty, taxes, cess etc. is paid before the „due date" of filing of the return of income. As the ld. D.R had submitted that the aforesaid working of the assessee would require to be verified, we therefore, in all fairness restore the matter to the file of the A.O for readjudication. Needless to say, the A.O shall in the course of the set aside proceedings afford a reasonable

opportunity of being heard to the assessee, who shall remain at a liberty to substantiate its claim before him. The Ground of appeal No. V is allowed for statistical purposes."

5.2. Respectfully following the same, we deem it fit and appropriate, to remand this issue to the file of the ld. AO to decide the same in the light of directions issued by the Tribunal for the A.Y.2009-10 . Accordingly, the Ground No. II raised by the assessee is allowed for statistical purposes."

63. In view of the matter by following the order passed by the Tribunal in assessee's own case for A.Y. 2002-03 (supra) issue is remitted back to decide the same in the light of the direction issued by the Tribunal in assessee's own case for A.Y. 2009-10. So ground No.10 is allowed for statistical purposes.

Ground No.11

64. During the year under consideration the assessee has made a claim of Rs.12.22 crore with the insurance company on the basis of insurance cover purchased by it in respect of its corporate office where fire took place. The assessee company has received interim claim of Rs.2.75 crores on adhoc basis. The assessee has incurred a loss of Rs.7.95 crores approximately due to the fire accident. The AO has treated the payment of Rs.2.75 crores received by the assessee as insurance claim on adhoc basis and taxed the same under the head business or profession. The Ld. CIT(A) observed that the amount received by the assessee was windfall and as such the same is the revenue receipt taxable under the head business or profession.

65. The Ld. A.R. for the assessee contended that since the assessee has ultimately incurred a loss it cannot be taxed in its hand as revenue receipt. During the course of argument the assessee was

called upon to produce the evidence regarding loss incurred by it due to accidental fire which the assessee has not brought on record. Moreover all the four policies purchased by the assessee was for plant & machinery. The Ld. A.R.s for the parties to the appeals unanimously contended that the issue be remitted back to the AO to decide afresh on verifying the actual loss incurred by the assessee due to accidental fire. In view of the matter for cause of substantive justice the issue is remitted back to the AO to decide afresh within six months from the date of receipt of the order on filing actual loss suffered due to accidental fire. So ground No.11 is decided in favour of the assessee for statistical purposes.

Ground No.12

66. The AO made an addition of Rs.3,49,90,566/- on account of capital gain on sale of RP house by the assessee on protective basis. The Ld. A.R. for the assessee contended that the assessee has transferred house property namely RP house over a period of four years and offered the capital gain to tax over the respective period whereas the AO has assessed the entire amount in A.Y. 2002-03.

67. The Ld. A.R. for the assessee further contended that this ground has become infructuous in view of the order passed by the Tribunal in assessee's own case for A.Y. 2002-03 wherein it has been held that capital gains on the sale of RP house is to be taxed over four years.

68. We have perused the order passed by the Tribunal in assessee's own case for A.Y. 2002-03 wherein the Tribunal has ordered that capital gain on sale of RP house is to be taxed over

four years. So in view of the matter ground No.12 has become infructuous.

Ground No.13

69. The Ld. CIT(A) vide impugned order dismissed the ground raised by the assessee for allowing depreciation on RP house building. The Ld. A.R. for the assessee contended that this ground is also covered in favour of the assessee by the order passed by the Tribunal in assessee's own case for A.Y. 2002-03 & 2004-05.

70. We have perused the order passed by the Tribunal wherein it is held that the claim of the assessee for depreciation on the portion of the building not considered transferred as the assessee has transferred the property over a period of four years. So the AO is directed to verify as to which of the portion the assessee has claimed the depreciation which was not transferred during the year under consideration and accordingly allow the same in view of the order passed by the Tribunal in assessee's own case for A.Y. 2003-04 to 2004-05. Accordingly, this ground is decided in favour of the assessee.

Ground No.14

71. Lower Revenue Authorities have treated the rental income earned by the assessee during the year under consideration from the let out portion of RP house as income from other sources instead of income from house property. The Ld. A.R. for the assessee contended that this issue is also covered in favour of the assessee by the order passed by the Tribunal in its own case for A.Y. 2003-04 & 2004-05 wherein rental income earned by the

assessee from let out portion of RP house was treated as income from house property by returning following findings:

> *"43. We find in the assessee's own case the Honble Tribunal for A.Y.2003-04 in ITA no.4000/Mum/2007 & others dated 5-10-2021 has observed at page 45 Para 19.2 as under:*
>
> *19.2. The Ld.CIT(A) upheld the action of the Ld.AO in respect of treatment of rental income from RPIL house as income from other sources. How ever with regard to rental income derived from centere point , he directed the Ld.AO to treat the rental income as income from other house property and grant statutary deduction in terms of section 24(a) of the Act. Against the direction, the revenue is not in appeal before us.We find that the ownership of the RPIL House Vests with the assessee for four years and hence assessee continued to be the owner of the part premises of RPIL House and hence,the rental income thereon should be assessed only under the head Income From House Property and the assessee would be entitled for statutary deduction @30% U/sec24(a) of the Act for the same. Accordingly, the ground NoIX raised by the assessee is allowed. 44. The Ld.AR submitted that the assessee continues to be the owner of the part premises of RP house, therefore rental income has to be assessed under the head Income From House Property and supported the submissions with the decision of the Honble Tribunal for A.Y.2003-04. The Ld.DR fairly accepts the ITAT decision and accordingly, we direct the A.O. to assessed the rental income under the income from house property and allow deduction U/sec24(a) of the Act and we allow the ground of appeal in favour of the assessee."*

72. Accordingly following the order passed by the co-ordinate Bench of the Tribunal on the identical issue AO is directed to assess the rental income of let out portion of RP house as income from house property. This ground is decided in favour of the assessee.

Ground No.15

73. The AO has not considered the claim made by the assessee that gain on repayment of sale tax differential loan as capital receipt on the ground that no fresh claim can be made by the assessee except by filing revised return. Facts of this issue are the assessee has collected sales tax from the parties on behalf of the government

and was not deposited with the government as per scheme formulated by the Madhya Pradesh Government and was treated as deferred loan to the assessee. Subsequently the same was partly waived on prepayment and consequently the assessee has gained an amount of Rs.8.23 crore which was treated as revenue income by the Ld. CIT(A) instead of capital receipt claimed by the assessee. The Ld. A.R. for the assessee relied upon the decision rendered by Hon'ble Jurisdictional High Court in case of CIT vs. Suzler India Ltd. (2014) 369 ITR 717 affirmed by the Hon'ble Supreme Court.

74. We have perused the order (supra) passed by the Hon'ble Jurisdictional High Court which is on identical issue decided in favour of the assessee by returning following findings:

> *"1. The controversy before the Tribunal is that whether the difference of deferred sales tax liability is chargeable to tat as business income under section 41(1) being remission of cessation of trading liability or the same is exempted as capital receipt. (Para 32]*
>
> *2. The argument of the revenue is not that the assessee having paid Rs. 3.37 crores has obtained for himself anything in terms of section 41(1), but the assessee is deemed to have received the sum of Rs. 414 crores, which is the difference between the original amount to be remitted with the payment made. The revenue terms this as deemed payment by the state to the assessee. The Tribunal has found that the first requirement of section 41(1) is that the allowance or deduction is made in respect of the loss, expenditure or a trading liability incurred by the assessee and the other 302 302 requirement is the assessee has subsequently obtained any amount in respect of such loss and expenditure or obtained a benefit in respect of such trading liability by way of a remission or cessation thereof. As rightly noted by the Tribunal, the sales tax collected by the assessee during the relevant year was treated by the State Government as loan liability payable after 12 years in 6 annual/equal instalments. Subsequently and pursuant to the amendment made to the 4th proviso to section 38 of the Bombay Sales Tax Act, 1959, the assessee accepted the offer of SICOM, the implementing agency of the State Government, paid certain amount to SICOM, which, according to the assessee, represented the NPV of the future sum as determined and prescribed by the SICOM. In other words, what the assessee was required to pay after 12 years in 6 equal instalments was paid by the assessee prematurely in terms of the NPV of the same.*

That the state may have received a higher sum after the period of 12 years and in instalments. However, the statutory arrangement and Vide section 38, 4th proviso does not amount to remission or cessation of the assessee's liability assuming the same to be a trading one. Rather that obtains a payment to the State prematurely and in terms of the correct value of the debt due to it. There is no evidence to show that there has been any remission or cessation of the liability by the State Government. [Para 40]

3.In such circumstances, the Tribunal's conclusion that the difference between the NPV against the future liability credited by the assessee under the capital reserve account in its books of account, is a capital receipt is correct. It cannot be termed as remission or cessation of a trading liability and subsequently no benefit has arisen to the assessee in terms of section 41(1). [Para 42]"

75. Hon'ble Jurisdictional High Court held that where the assessee has made premature payment of deferred sales tax at present value of certain amount against the total liability as in the instant case, and credited balance amount to its capital reserve account, the said credited amount was a capital receipt. In view of the matter the Ld. CIT(A) has erred in treating the receipt as revenue receipt. The AO is accordingly directed to treat the same as capital receipt. Accordingly ground No.15 is decided in favour of the assessee.

Revenue's appeal bearing ITA No.5091/M/2010

Ground No.1

76. The assessee's claim for depreciation on assets of BMIL merged with assessee company w.e.f. 01.04.1996, calculated on WDV of the assets without adjusting for depreciation which was foregone for A.Y. 1995-96 & 1996-97 by the BMIL. The assessee has calculated the depreciation on WDV on the said assets without adjusting for depreciation which was foregone for A.Y. 1996-97 by the M/s. Piramal Holdings Ltd. (PHL). However, the AO has

recomputed the allowable depreciation on the basis of such adjustment. The Ld. CIT(A) by following the order passed by his predecessor in assessee's own case for A.Y. 1996-97 to 2004-05 and for A.Y. 1999-2000 allowed the depreciation by returning following findings:

> *"9.4 I have duly considered the issue. The issue is recurring one. In earlier years the AO had worked out WDV as on 31.3.1996 as if the depreciation for the assessment years 1995-96 and 1996-97 were notionally allowed by BMIL which had not opted to claim depreciation on its assets for AY 1995-96 and 1996-97. My learned predecessors in earlier assessment years have directed the AO to allow depreciation on the basis of the computation made by the appellant and not to reduce the WDV on the basis of notional amount of depreciation. Respectfully following the orders of my learned predecessor, the AO is directed to allow the depreciation as claimed by the appellant in respect of assets of BMIL. In the case of PHL the said concern had not claimed depreciation for AY 1996-97. The depreciation was thrust upon the AO. My learned predecessor had held that the AO was not justified to thrust upon the depreciation. In view of this decision of my learned predecessors in the case of the appellant itself for AYrs 1997-98,1998-99,1999- 2000,2000-01, 2001-02, 2002-03 and 2003-04, and 04-05- the AO is directed that the depreciation not claimed by BMIL and M/s PHL should not be considered for the purpose of working out the WDV and consequently allowing depreciation thereon.*
>
> *9.5. In the result this ground of appeal is allowed."*

77. It is brought to the notice of the Bench by the Ld. A.R. for the assessee that the findings returned by the Ld. CIT(A) in favour of the assessee have been upheld by the Tribunal in assessee's own case for A.Y. 2004-05 in ITA No.769/M/2008 decided on 20.06.2022. This legal position has not been controverted by the Ld. D.R. So the ground raised by the Revenue is hereby dismissed.

Ground No.2

78. The assessee company has offered receipt of its rental income from the property located in centre point to tax under the head income from house property. However, the AO has taxed the

same under the head income from other sources. It is brought to the notice of the Bench that this issue has also been covered in favour of the assessee by the order passed by the Tribunal in assessee's own case for A.Y. 2004-05.

79. We have perused the order (supra) passed by the Tribunal wherein findings returned by the Ld. CIT(A) that rental income earned by the assessee from centre point property is an income from house property. So in view of the matter ground No.2 raised by the Revenue is also dismissed.

Ground Nos.3 & 4

80. The assessee company has claimed deduction under section 35A qua acquisition of trade mark by M/s. Sarabhai Piramal Pharmaceuticals Ltd. (SPPL) which has been merged with the assessee. The AO disallowed the same.

81. It is again brought to the notice of the Bench that this issue has already been decided in assessee's own case in ITA No.5471/M/2017 for A.Y. 2008-09 decided on 30.07.2018 by upholding the findings returned by the Ld. CIT(A) in favour of the assessee.

82. We have perused the order (supra) passed by the Tribunal which is on identical facts and operative part thereof is extracted as under for ready perusal:

> *"64. On a careful reading of the aforesaid extracted portion from the judgment of the Hon'ble Jurisdictional High Court, it is very much clear that while examining the allowability of identical deduction claimed by SPPL the Tribunal has allowed it claim by holding that trade mark is not alien to the patent right as there is a direct link between patent right and trade mark. Thus, the assessee is eligible to*

claim deduction under section 35A of the Act. Alternatively, the Tribunal also held that even if the assessee's claim of deduction under section 35A of the Act is not allowable, still the deduction claimed has to be allowed under section 37 of the Act in view of the judgment of the Apex Court in Alembic Chemicals Works Co. Ltd. v/s CIT. [1988] 177 ITR 377 (SC). 167 167 45 M/s. Piramal Enterprises Ltd. When the appeal of the Revenue on the disputed issue came up before the Hon'ble Jurisdictional High Court, the Revenue being conscious of the fact that if assessee's claim is allowed under section 37 of the Act then the entire amount of` 34 crore has to be allowed in one-go, therefore, the Revenue would be in a disadvantageous position, did not press its appeal on the issue of allowability of claim under section 35A of the Act. Therefore, considering the fact that in the preceding assessment years assessee's claim of deduction under section 35A of the Act has been allowed, applying the rule of consistency also assessee's claim of deduction in the impugned assessment year cannot be disallowed. Therefore, we uphold the decision of the learned Commissioner (Appeals) on this issue by dismissing the ground raised by the Revenue." (Underlined for Emphasis).

83. So in view of the matter we are of the considered view that the Ld. CIT(A) has rightly allowed the claim of deduction made by the assessee under section 35A of the Act. Accordingly, ground Nos.3 & 4 are decided against the Revenue.

Ground No.5

84. The Revenue by raising ground No.5 challenged the findings returned by the Ld. CIT(A) qua deduction under section 80HHC for the purpose of section 115JB to be worked out on the basis of adjusted book profit following the decision of Special Bench of the Tribunal in case of DCIT vs. Syncom Formulations (I) Ltd. 106 ITD 193. Special Bench of the Tribunal in the case (supra) while allowing the deduction under section 115JB held that deduction under section 80HHC should be based on amount eligible as per books of account and not based on amount of deduction under section 80HHC under chapter VI-a while computing normal income. This issue has already been decided in favour of the

assessee in its own case for A.Y. 2002-03, 2003-04 & 2004-05. So in view of the matter we find no illegality or perversity in the impugned findings returned by the Ld. CIT(A), hence ground No.5 raised by the Revenue is hereby dismissed.

85. In view of what has been discussed above, appeal bearing ITA No.3706/M/2010 filed by the assessee is partly allowed and appeal bearing ITA No.5091/M/2010 filed by the Revenue is hereby dismissed.

Order pronounced in the open court on 11.01.2024.

Sd/-	**Sd/-**
(S RIFAUR RAHMAN)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 11.01.2024.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.