IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "I" BENCH AHMEDABAD

BEFORE SHRI PRAMOD KUMAR, ACCOUNTANT MEMBER,
AND SHRI S. S. GODARA, JUDICIAL MEMBER.

ITA Nos. 1117/Ahd/2012 & 848/Ahd/2016
(Assessment Years : 2004-05 & 2011-12)

M/s. Cadila Pharmaceuticals Ltd.
708, Cadila Corporate Campus,
Sarkhej-Dholka Road, Bhat,
Ahmedabad-382210 Appellant

Vs.

DCIT,
Range-1/Circle-1(1)(2), Ahmedabad Respondent

&

ITA No. 918/Ahd/2016
(Assessment Year : 2011-12)

DCIT,
Circle-1(1)(2), Ahmedabad Appellant

Vs.

M/s. Cadila Pharmaceuticals Ltd.
Cadila Corporate Campus,
Sarkhej Dholka Road,
Bhat, Ahmedabad-382210 Respondent

PAN: AAACC6251E

आवेदक की ओर से/By Assessee	: Shri S. N. Soparkar with Bandish Soparkar & Parin Shah, A.R.
राजस्व की ओर से/By Revenue	: Shri O. P. Sharma, CIT. DR.
सुनवाई की तारीख/Date of Hearing	: 15.06.2017
घोषणा की तारीख/Date of Pronouncement	: 11.09.2017

ORDER

PER S. S. GODARA, JUDICIAL MEMBER

This batch of three appeals pertains to assessment years 2004-05 & 2011-12. Former assessment year 2004-05 involves assessee's appeal ITA No. 1117/Ahd/2012 preferred against the CIT(A)-6, Ahmadabad's order dated 02.03.2012 in case no. CIT(A)-VI/DCIT.Cir.1/91/07-08, in proceedings u/s.143(3) of the Income Tax Act, 1961, in short 'the Act'. Latter assessment year 2011-12 contains assessee's and Revenue's cross appeals ITA Nos. 848 & 918/Ahd/2016 arising from the DCIT, Circle-1(1)(2), Ahmedabad's assessment order dated 16.02.2016 involving proceedings u/s.143(3) r.w.s. 144C(13) of the Act.

We proceed assessment year-wise for the sake of convenience and brevity.

Assessment Year 2004-05 (Assessee's appeal ITA No. 117/Ahd/2012)

2. The assessee's first substantive ground pleads that both the lower authorities have erred in law as well as on facts in disallowing its Section 80HHC deduction claim of Rs.18,85,093/-. There is no dispute that the Assessing Officer as well as the CIT(A) reject the above deduction claim by placing reliance upon legislative amendment in Section 80HHC by the

Taxation Laws (Amendment) Act, 2005 with retrospective effect from 01.04.1998 inserting second to fourth proviso followed by fifth proviso thereto with retrospective effect from 01.04.1992 for re-working of the above deduction alongwith similar corresponding amendments in Section 28 of the Act by way of clauses (iiid) and (iiie) therein. The Assessing Officer's assessment order dated 22.12.2006 made the impugned disallowance for the reason that assessee's profits in question stated a negative figure.

3. The CIT(A) affirms Assessing Officer's action as under:

> *"3.3 I have considered the facts of the case; assessment order and appellant's submission. Assessing Officer disallowed appellant's claim of deduction under section 80HHC on the ground that after reducing DEPB income, the export profits were negative and hence no deduction was allowable.* ***It is not in dispute that appellant had negative profit of business if DEPB income etc is reduced****. On DEPB income, as per the amended provisions of section 80 HHC, the deduction is allowable only if the export turnover is less than RS 10 crores. If the turnover exceeds RS 10 crores then two conditions as mentioned in the 4th proviso to section 80 HHC (3) are to be fulfilled. In the case of appellant, these conditions are not fulfilled and therefore appellant is not entitled to claim deduction under section 80 HHC on DEPB and related income. Since amendment to section 80 HHC was made with a retrospective effect, the said amendment is applicable to this assessment year also. Considering this, assessing officer is justified in not allowing deduction under section 80 HHC on DEPB and other income. This ground is dismissed."*

4. Heard both sides. Relevant finding perused. It emerges first of all from the CIT(A) above extracted findings that he has considered assessee's DEPB income in computing Section 80HHC deduction without taking into account net profit element therein. His conclusion therefore goes contrary to hon'ble apex court's decision in Topman Exports case (2012) 342 ITR 49 (SC) holding the field till date that only the net profit component is to be taken as income. It further emerges that hon'ble jurisdictional high court's judgment in Avani Exports vs. CIT (2012) 348 ITR 319 (Gujarat) has

quashed retrospective operation of the above Section 80HHC amendments (supra) inserting two clauses as unconstitutional. We are informed that hon'ble apex court has upheld the same in Civil Appeal No. 9273/2013. We therefore direct the Assessing Officer to finalize assessee's deduction claim u/s.80HHC afresh thereby computing the same as per law after affording it adequate opportunity of hearing. This first substantive ground is accepted for statistical purposes.

5. We move on to assessee's second substantive ground now seeking to delete prior period expenditure disallowance of Rs.10,83,885/- as upheld in lower appellate proceedings. The said amount comprises of various heads of advertisement, processing fees, sample fees, membership subscription, maintenance, finished goods purchases, travelling charges, research and other expenses. The assessee pleaded to have debited the same in the relevant previous year only after settling all disputed issues pertaining thereto. Case file also indicates the very factual position. The Assessing Officer's view was that the assessee's mercantile system of accounting would not permit such a course of action. He therefore invoked the impugned disallowance.

6. The CIT(A) upholds Assessing Officer's action as under:

> *"5.3 I have considered the facts of the case; assessment order and appellant's submission. Prior period expenses are allowable in the year in which the same are crystallized. Assessing Officer allowed opportunities to the appellant to give details of prior period expenses and to prove as to how these expenses were crystalized during the year. Appellant has not given details to the AO. No such details were filed in the appeal hearing also. Only mention of certain items of expenses is there. In absence of details and vouchers etc, one cannot reach to the conclusion that these expenses were crystallised during the year.* ***It is not at all in dispute that only those expenses which were crystallised during the current year are allowable but onus to prove that prior period expenses were crystallised during the year is on the appellant because appellant has the details and not the Department.*** *In the absence of details of prior period*

expenses, simple mention of the nature of these expenses will not serve the purpose.

The decisions relied upon by the appellant clearly indicate that only those expenses which are crystallized during the year are to be allowed. Therefore there is no dispute over this. In the absence of any evidence to prove that these expenses were crystallized during the year, I find no reason to interfere with the AO's order.

Appellant's argument of reducing prior period income from these expenses is not correct because the nature of income and expenses are different and the same cannot be netted. Whereas only current year's expense are allowed under section 37 (1) of IT act, prior period expenses not crystallized during the year are not allowable. As regards prior period income, if appellant wanted the same to be excluded from this year's income, it should have given details in this regard. In absence of necessary details and evidences, the prior period expenses are not allowable and similarly these cannot be set off against prior period income. This ground is therefore rejected."

7. We have heard rival submissions. Both the lower authorities are fair enough in not disputing assessee's basic plea that it had received the impugned bills only in the relevant previous year. The assessee's case therefore is that all the said expenses have crystallized in the impugned assessment year. The Assessing Officer holds that there is no such evidence of crystallization of the expenses in question. We observe in these peculiar facts that the assessee could not have paid or claimed the impugned bills without receiving the same from its payees. Non receipt of the corresponding earlier assessment years forms a sufficient reason on assessee's part in not raising its claim in earlier years. Both the lower authorities admittedly do not doubt genuineness of the above expenses. There is further no denial of the fact that the assessee has all along been taxed at uniform rate in said earlier as well as in the impugned assessment year. Hon'ble jurisdictional high court's decision in Tax appeal No. 566/2016 PCIT vs. Adani Enterprises holds that such prior period expenses ought not to be disallowed if an assessee is assessed at the same rate in the two sets of assessment years. We adopt the same analogy herein as well to

delete the impugned disallowance. This second substantive ground is therefore accepted.

8. The assessee's third substantive ground seeks to delete transfer pricing adjustment addition of Rs.38,14,000/- as proposed in the transfer pricing officer "TPO"s order dated 31.05.2006 and made in an assessment order dated 22.12.2006 as affirmed in lower appellate proceedings. The assessee had admittedly sold formulations and hospital product to its Kenya based Associate Enterprise. The authorities below noticed it to have charged average profit mark up of 16.57% in said Kenyan sales than @ 37.53% in case of unrelated party sales in Uganda and Congo. The assessee had applied the transactional net margin method "TNMM" in computing its PLI . The TPO however rejected the same. He applied cost plus method. He then adopted average PLI @37.53% to arrive at the impugned arm's length adjustment of Rs.38.14lacs as affirmed right upto lower appellate proceedings.

9. The assessee's only plea before us is that this tribunal's order in preceding two assessment years 2002-03 & 2003-04 has remitted the very issue back to the CIT(A) for a reasoned adjudication as per law. The Revenue fails to indicate any distinction in the impugned assessment year. This is further not its case that the above issue remitted back to the CIT(A) does not involve issue of assessee's ALP in its Kenyan sales. Learned Departmental Representative's sole plea is that the lower authorities admittedly passed their respective speaking order than non speaking one in said earlier assessment year. We find that much water has flown down the stream as the instant issue does carry all ramifications arising out of the corresponding adjudication in said earlier assessment years. We thus adopt the very course of action herein as well to restore the instant issue back to

the Assessing Officer for afresh decision as finalized in preceding two assessment years. We are well conscious of the fact that our earlier remand order had restored the impugned ALP issue to the CIT(A). We however feel that the Assessing Officer needs to re-adjudicate the issue instead of the CIT(A) to avoid multiplicity of proceedings before the assessing authority and the CIT(A) since we have already restored first substantive ground hereinabove to former authority only. This substantive ground is therefore taken as accepted for statistical purposes.

10. Mr. Soparkar invites our attention to assessee's fourth substantive ground challenging correctness of net of depreciation in respect of foreign exchange laws of Rs.42,66,137/-. He is very fair in informing us that the above co-ordinate bench decision in ITA No.1440/Ahd/2006 decided on 27.04.2012 for assessment year 2002-03(supra) has already upheld the CIT(A)'s action affirming an identical disallowance. We therefore adopt judicial consistency to reject assessee's instant substantive ground.

11. The assessee's fifth substantive ground avers that the CIT(A) has erred in law and on facts in confirming Assessing Officer's action disallowing Section 35(2AB) deduction claim of Rs.5,34,000/-. We notice in Form no. 35 that the assessee had raised its corresponding ground no.8 to this effect in lower appellate proceedings. The CIT(A) observes in para 9 page 24 that it did not press for its above corresponding substantive ground. The assessee's pleadings in the instant appeal nowhere rebut this factual position. We therefore find no reason to adjudicate the instant issue as the assessee had itself conceded its grievance in course of lower appellate proceedings. This substantive ground is therefore rejected.

12. The assessee's last substantive ground seeks to allow Section 80G deduction claim of Rs.3,50,000/- in both the lower proceedings on the ground that it did not file the relevant receipts of donations as well as their nexus with its business as stipulated u/s.31of the Act. The very factual position continues herein as well. We therefore reject assessee's instant last substantive ground. Its appeal ITA No.1117/Ahd/2012 is partly accepted.

Assessment year 2011-12 (assessee's and Revenue's cross appeals ITA Nos. 848 & 918/Ahd/2016

13. We come to assessee's appeal. Its first grievance therein challenges upward transfer pricing adjustment of Rs.60,83,440/- pertaining to corporate guarantee fee; as made by the TPO and affirmed in dispute resolution penal; "DRP"s directions. The said lower authorities hold that the assessee ought to have charged @1.24% on corporate guarantee amount of Rs.49,06,00,000/-. The assessee admittedly had provided the corporate guarantee in question to its associate enterprise in earlier assessment years. There is no quarrel that relevant factual backdrop remains the same in the impugned assessment year as it was in preceding assessment year 2010-11. Both the lower authorities make the impugned adjustment by drawing support from their respective orders in said earlier assessment year. Case file indicates that a co-ordinate bench in assessee's appeal itself ITA No.694/Ahd/2015 for assessment year 2010-11 decided on 03.03.2017 has already deleted the said corporate guarantee adjustment after concluding that the same is not an international transaction u/s.92B of the Act. Learned Departmental Representative fails to indicate any distinction on facts or law in the impugned assessment year. We therefore adopt the very

reasoning herein as well to delete the impugned corporate guarantee adjustment of Rs.60,83,440/-.

14. The assessee's second substantive ground challenges Section 36(1)(iii) interest disallowance of Rs.1,68,88,558/- as made by both the lower authorities. The assessee's balance sheet schedule 10 revealed it to have advanced a gross amount of Rs.5,40,74,507/- to its nine domestic and overseas sister concerns namely M/s. Casil Health Products Ltd., CPL Infrastructure Ltd., Apollo Hospitals International Ltd., Kadera Yakuhin Ltd., IRM Enterprise Pvt. Ltd., SOHL (UK), Cadila Pharmaceuticals (Ethopia) PLC, CPL Holdings Pvt. Ltd. and CPL Agro Products Ltd. The Assessing Officer observed in assessment order that "it may be true that the nature of advances are strategic investments for the purpose of job work or any other purposes; nonetheless, it is also true that certain amount has remained outstanding during the year. In essence, the accounts of all these associate companies in the books of the assessee is a combined account of loans and advances". The Assessing Officer further took note of the fact that assessee's interest expenditure in relevant previous year reads a figure of Rs.40,10,60,348/-. We notice in this factual backdrop that a co-ordinate bench has followed various judicial precedents CIT vs. Raghuvir Synthetics (2013) 354 ITR 222 (Guj), CIT vs. Dalmia Cements Pvt. Ltd. (2002) 254 ITR 377 (Delhi), S A Builders Ltd. vs. CIT (2007) 288 ITR 1(SC) to delete identical disallowance(s) in assessment years 2006-07 & 2007-08. Hon'ble jurisdictional high court has upheld the same in Tax Appeal no. 39/2015 decided on 23.01.2015. The Revenue fails to dispute all the above facts as well as legal developments. We therefore conclude that both the lower authorities have erred in invoking the impugned disallowance of interest in assessee's strategic interest free advances made

to its sister concerns. This second substantive ground is accordingly accepted.

15. The assessee's third substantive ground seeks to delete Section 35(2AB) deduction disallowance. The Assessing Officer had disallowed an amount of Rs.6,53,96,880/- in draft assessment order. The DRP restricts the same to Rs.4,59,11,880/-. The Revenue's corresponding second substantive ground in its cross appeal ITA No.918/Ahd/2016 seeks to revive the remaining disallowance as well to the tune of Rs.1,94,85,000/- pertaining to clinical trial expenditure incurred outside the inhouse facility in question. We find that the Revenue's instant grievance has no merit as the assessee has already succeeded on the very issue before hon'ble jurisdictional high court in its own case Tax Appeal no. 39/2015 upholding tribunal's order deleting identical disallowance in ITA No.1146/Ahd/2011 for assessment year 2006-07. Revenue's second substantive ground is therefore rejected.

16. We now advert to assessee's grievance. It had claimed total weighted deduction of Rs.25,47,35,880/-. The Assessing Officer restricted the said claim to that approved by the "DSIR" to the extent of Rs.18,93,39,000/- only. All this resulted in disallowance of Rs.6,53,96,880/- being made in assessment order.

17. Case file indicates that the DRP partly accepts assessee's arguments as follows:

> ***"7.1 <u>Assessee's Submission:</u>***
>
> *7.1.1 The Assessee has not advanced any specific arguments on this issue. It reiterated submissions dated 15.02.2015 vide point no 18 and point no 21 and*

dated 16.02.2015 vide point no 21, before the AO and furnished the revised reconciliation in this regard as under:

Annexure No	***Particular***	***Amount. Rs***	***Comment***
1	*Weighted Deduction for Capital Expenditure as per Auditor's Certificate in Appendix II To Annexure IV as per DSIR Guidelines*	*79,30,754*	
2	*Weighted Deduction for Capital Expenditure approved as per Form 3CL*	*77,11,000*	
3=(l-2)	*Difference not approved in Form 3CLby DSIR*	*2,19,764*	
4	*Weighted Deduction for Revenue Expenditure as per Auditor's Certificate in Appendix II To Annexure IV as per DSIR Guidelines (Capital Exp + Revenue Exp)*	*25,12,87,843*	
5	*Weighted Deduction for Revenue Expenditure approved as per Form 3CL*	*18,93,38,930*	
6	*Clinical Trial Expenditure approved as per Form 3CL*	*1,94,85,000*	*"Claimed Without prejudice" Clinical Trial Conducted outside India is eligible for deduction u/s 35(2AB)as per assessee's own case (Cadila Pharma VS ACIT (2012) 147 TTJ 49(Ahd)*
7=(4-5-6)	*Difference not approved in Form 3CL by DSIR*	*4,24,63,913*	
8=(2+5+6)	*Weighted Deduction for Capital & Revenue Expenditure approved u/s 35(2AB) as per Form 3CL including expenditure incurred in Clinical Trial Shown Separately In Form 3CL*	*20,88,23,930*	
9	*Weighted Deduction for Revenue & Capital Expenditure claimed u/s 35(2AB) in Income Tax Return of FY 2010-11 (Net claimed after reducing Income from CRO)*	*26,26,66,644*	
10=(9--8)	*Difference*	*5,38,42,714*	
11	*Less:Depreciation claimed on Plant & Machinery for which the Assessee Company has offered to tax an amount of Rs.10,53,64,250/- in AY 2009-10. These assets continue to be used in the normal course of business hence are eligible to depredation u/s 32. The Assessee Company is eligible to depreciation on Written Down Value of Rs.7,02,42,834/- being the value on the date of change of use.*	*1,05,36,425*	*The Assessee Company hereby attaches the copy of 3CL issued by the DSIR reducing the weighted claim in AY 2009- 10 for the amount of Rs. 10,53,64,250/-Submitted vide Annexure 27 in Reply dated 15.02.2015*
12	*Plus: Depreciation offered to tax being incorrect amount claimed in Return*	*34,48,037*	
13=(10-11+12)	*Difference To be Disallowed In The Assessment (As Per Form 3CL Issued By The DSIR)*	***4,67,54,326***	

7.1.2 Assessee's submissions are on the following lines:

(i) The assessee has not worked out any disallowance of Rs. 4,67,54,326/-. It only sought to provide reconciliation table between the claim as per the return of income and the amount as approved by the DSIR authority.

(ii) The issue relating to the amount spent on the clinical trial expenses was decided in favour of the assessee by the Hon'ble ITAT, Ahmedabad in assessee's own case for A.Y. 2006-07. The assessee further mentioned that the Departmental appeal in that case was also dismissed by the High Court vide order dated 23.01.2015.

7.2 Discussion and Directions of DRP:

7.2.1 The DRP has considered the submissions of the assessee. The assessee in this revised reconciliation table itself worked out the "difference to be disallowed in the assessment (as per Form 3CL issued by DSIR)" Rs. 4,67,54,326/-. Therefore the addition proposed by AO is confirmed to this extent.

7.2.2 The issue on account of amount incurred on the clinical trial expenditure has been decided by the Hon'ble ITAT, Ahmedabad in favour of the assessee in its own case. Further appeal before Hon'ble Gujarat High Court has also been decided in favour of assessee. The relevant part is reproduced below:

"The question of law involved was

(A) Whether the appellate tribunal has substantially erred in law in holding that the expenses incurred outside the approved R &D facility are also eligible for weighted deduction in contravention of the provisions of Section 35(2AB) whereby only the expenditure on in-house research at approved R&D facility qualifies for weighted deduction?"

7.2.3 The Hon'ble Gujarat High Court dealt with the issue as under:

"On question (A), discussion by the 'tribunal is from paragraphs 10, 11 and 11.1, which is reproduced herein below:-

10. Ground NO. 5 is against the disallowance of the expenses for scientific research u/s 35(2AB) of the Act amounting to Rs. 3,59,500/-. The ld. Counsel for the assessee submitted that the AO disallowed the expenditure on the basis that the clinical trial expenses was not within the In-house Research and Development Facility as approved by the prescribed Authority. The ld. CIT(A) confirmed the disallowance made by the AO on the basis that the condition allowing of weighted expenditure is that the In-house research should have been made. The Id, Counsel for the assesses relied on the judgement of Hon'ble Gujarat High Court rendered in the case of CIT vs. Cadila Healthcare Ltd. reported at (2013) 31 taxmann.com 300 (Guj). The Id. Counsel for the assessee submitted that the issue is squarely covered by the judgment of Hon'ble High Court of Gujarat in the case of CIT vs. Cadila Healthcare Ltd. (supra).

11. We have heard the rival submission, perused the material available on record and gone through the orders of the authorities below. The Hon 'ble High Court of Gujarat in the case of CIT vs. Cadila Healthcare Ltd. (supra) has held as under:-

"11. Revenue has also suggested following question:
"D. Whether the Appellate Tribunal has substantially erred in holding that the expenses incurred outside the approved R&D facility would also get weighted deduction based on the work under "on in house" interpreting contradictory to the finding of coordinate bench in Concept Pharmaceuticals Ltd v. ACIT (ITAT, Mum) reported at 43 SOT 423?"

12. We may record that question £' in the appeal memo is an additional question which has an element of above noted question. We have, therefore, not separately

reproduced the same in this order. The issue is whether the assessee who has incurred expenditure for scientific research, which was not in the in-home facility, could be covered for deduction under section 35(2AB) of the Income Tax Act, 1961. "

11.1 The Hon'ble High Court- of Gujarat after examining the entire issue, came to the conclusion that the Tribunal committed no error. Respectfully following the judgement of Jurisdictional High Court in the- case of CIT vs. Cadila Healthcare Ltd. (supra), we hereby direct the AO to follow the claim of the assessee. Thus, this ground of assessee's appeal is allowed.

4. The aforesaid shows that the Tribunal for allowing this particular ground/ question in favour of the assessee, has relied upon the decision of this Court in the case of CIT vs. Cadila Healthcare Limited, reported in (2013) 31 Taxmann.com 300 (Gujarat). We find that as the question is already covered by the said decision of this Court, such question "A" would not arise being substantial question of law to be considered in the present appeal, as canvassed."

7.2.4 In view of the above, the AO is directed to delete the proposed disallowance of Rs. 1,94,85,000/-."

18. Heard both the learned representatives. Relevant findings perused. It is evident that the DRP has worked out the impugned disallowance merely because the assessee has mentioned in its reconciliation an amount of Rs.4,67,54,326/- is to be disallowed as per DSIR's form 3CL. There is therefore no independent adjudication. It emerges that the assessee's endeavor before the DRP was to appraise it about DSIR's form 3CL instead of suo mottu making the impugned disallowance. We notice in this factual backdrop that a co-ordinate bench in assessee's case itself ITA No.383/Ahd/012 decided on 04.01.2017 follows tribunal's decision in ITA No.3569/Ahd/2004 ACIT vs. Torrent pharmaceuticals in holding that once an assessing authority accepts revenue expenditure claim regarding an amount spent on clinical trial/research & development, the very sum is eligible for the impugned weighted deduction as well since there is no stipulation incorporated in the Act that the same would be allowable only to the extent of relevant figures stated in Form no. 3CL . This is admittedly

not the Revenue's case that the assessee has not incurred the impugned expenditure for the above specified purpose u/s.35(2AB) of the Act. We therefore draw support from the above co-ordinate bench finding in assessee's appeal for assessment year 2007-08 for directing the Assessing Officer to delete the impugned disallowance. This substantive ground is accordingly accepted.

19. The assessee's fourth substantive ground challenges both the lower authorities' action disallowing a sum of Rs.55,64,491/- u/s.14A in relation to exempt income of Rs.5,808/- from dividends. It further seeks to raise an additional ground to withdraw even suo mottu disallowance of Rs.2,82,07,492/- since having sufficient interest free funds. The same is admitted as it does not require any additional evidence. Relevant facts are already on record. We therefore reject Revenue's objections to admission of above additional ground.

20. Both the learned representatives inform us very fairly that a co-ordinate bench in assessment year 2007-08 has already restricted an identical disallowance to the extent of exempt income amount. We therefore follow the very course of action herein as well to restrict the impugned disallowance to Rs.5,808/- only. The assessee's additional substantive ground as well as main ground pleaded herein partly succeed.

21. The assessee's fifth substantive ground challenges Section 80IB deduction disallowance of Rs.16,34,58,692/- out of total claim of Rs.53,25,79,553/-; as made by the lower authorities. The above disallowance figure involves excise duty refund amount of Rs.8,12,71,702/-. The DRP quoted hon'ble apex court's decision in Liberty India vs. CIT (2009) 317 ITR 218 in concluding the above excise

refund to be not an income derived from the eligible industrial undertaking. We find that earlier co-ordinate bench in assessment year 2007-08(supra) had followed hon'ble apex court's recent decision in CIT vs. Meghalaya Steels Ltd. Civil Appeal no 7622/2014 in holding that such a refund by way of an incentive subsidy results in reimbursement of cost of production as covered u/s.28 of the Act. The Revenue fails to rebut this factual and legal position. We therefore treat assessee's above excise refund component to be an income eligible for Section 80IB deduction.

22. Next comes latter component of allocation of research and development expenses by both the lower authorities in proportion to turn over in Jammu unit amounting to Rs.8,21,86,990/-. The assessee's total research and development expenditure reads a figure of Rs.32,27,73,501/- as incurred on inhouse R&D relating to various products like bulk drugs, formulations and agriculture related research. The Assessing Officer observed that results of its research were very well available as a whole while including its Jammu unit since the assessee had clarified the above expenditure to be not pertaining any particular unit. The Assessing Officer thereafter adopted turnover formula to allocate the impugned expenditure .

23. The DRP affirms the above allocation as under;

> *"11.2.3 Regarding the allocation of R&D expenditure of Rs 8,21,86,990 on turnover basis, the assessee has merely made an assertions that Common expenses have been allocated based on the consumption of material/services for operations of the Jammu Plant and the same have been duly scrutinized and verified by the Auditors and found to be correct and in compliance with the Accounting principles, whereas the assessee is bound to furnish necessary evidence and documents before the Assessing officer to show that common expenses have been allocated proportionately for the purpose of claiming deduction u/s 80IB. The onus was on assessee. However the assessee has not discharged its onus. The assessee has allocated the entire expenditure on R&D of Rs 32.27 crore to units other than J&K unit though as pointed out by the AO*

the results of the research are available to J&K unit also. In case of Nitco Tiles 30 SOT 47 Hon'ble ITAT Mumbai observed as under:

> *Provisions of s. 80-IA(5) are distinct, deemed and overriding provisions and they, m the combination of s. 80-IB(1), advocate for special computation of 'profits and gains of the eligible business' in general and for considering all the expenses, both direct and indirect, among all the ongoing projects, if not exclusive against the profits and gains of the eligible business, the only source of income of the assessee. Further, the provisions of s. 80-IA/80-IB do not encourage the disclosure of the profits of the eligible business more than the ordinary profits. The provisions of s. 80-IB(1) read with the deemed provisions of sub-s. (5) (erstwhile sub-s. (7) of s. 80-IA with its overriding application, prescribe for the special model manner of computation of the profits and gains of the eligible business, which must be computed as if it the only source of income. When such computation is undertaken as per the same, all the expenses of the business including the indirect or common or head office expenses have to be booked to all the ongoing projects, if not to the s. 80-*IB *projects exclusively.—*

11.2.4 In view of this, the DRP is of the considered opinion that no interference should be made on the addition proposed by the AO/TPO on this ground. The objection raised by the assessee is rejected."

24. We have heard both the parties at length. The assessee admittedly has three production divisions at Jammu, Ankleshwar and Dholka; respectively. Case records at page 396 indicate the same to be operating exclusively for formulation (domestic sales), bulk drugs (domestic and export sales) and formulations (domestic and international sales); respectively. The assessee pleaded before the DRP at page 409 that it had not done any research and development for any of the formulation product manufactured in Jammu unit in relevant previous year. The same has neither been specifically rebutted nor accepted in DRP's directions. Nor is there any specific material quoted to disturb assessee's accounts separately maintaining each and every minute detail pertaining to these three units in question. It thus emerges that the authorities below have adopted adhocism in applying the above turnover formula for allocating the impugned expenditure. Hon'ble Bombay high court's decision in Zhandu Pharmaceutical Works Ltd. vs. CIT (2013) 350 ITR 366 (Bom.) deletes

similar disallowance in absence of non establishment of any nexus between R&D facilities and other units. We find that the authorities below have nowhere arrived at such a nexus in instant case as well. We therefore delete the impugned allocation by adopting the above discussed reasoning. The assessee succeeds in its substantive ground.

25. The assessee's next substantive ground seeks to delete foreign currency loss of Rs.25,39,60,000/- as disallowed by the lower authorities to be in the nature of speculation loss. The Assessing Officer as well as the DRP invoke Section 43(5) of the Act to conclude that the above loss is speculative instead of business loss since not involving any actual delivery therein. We notice that the DRP's elaborately discusses the instant issue as under:

> ***"12 Ground No. 8:***
>
> *The Learned. Assessing Officer erred in disallowing foreign currency loss of Rs.25,39,60,000/- treating the same as speculation loss.*
>
> ***12.1 AO/TPO's Findings***
>
> *12.1.1 The assessee had entered into two Put Call contracts with SBI where underlying exposure for export turnover was 2 million USD in case the dollar rate is more than Rs/$. AO has found that if the assessee fulfills the conditions mentioned in the contract, it gets benefit in multiple of 1 million USD. When it fails to fulfill the conditions, it suffers losses in multiple of 2 million USD hence he held that such an activity, can never be called as hedging and is purely speculative in nature.*
>
> *12.1.2 The AO further found that as per the copies of export bill payment advice obtained from the 2 banks Corporation Bank and Bank of Baroda, where the assessee had submitted these bills, the assessee has booked each and every export bill at the forward rate of exchange for the maturity/due date of export documents thus that the bank had remitted the amount which includes premium/gain as on the date of remittance i.e. along with the foreign currency gain/loss.*
>
> *12.1.3 The AO thus concluded that the loss incurred by the assessee is in 'Currency Swap loss' which is a derivative loss and this loss has been incurred on account of hedging of US Dollars loan, wherein dollar loan is the underlying*

*asset. He further observed that the currency swap made by the assessee was by way of 'over the counter' contracts entered into with the banks and settled on maturity by issue of debit/credit advice by the banks. Therefore as per explanation to clause (d) of section 4*3(5) of the Act, was not an eligible transaction, and hence speculative loss' not allowable as business expenditure

> *"The assessing officer thus disallowed foreign currency loss of Rs 25,39,60,000/- treating the same as speculation loss".*

12.2 <u>Assessee's Submission:</u>

12.2.1 The Assessee has submitted that it has earned a foreign exchange gain of Rs.1,49,17,753/-on realization of export sales and the same has been offered to tax during the year under assessment and apart from the aforesaid Foreign Exchange Gain, the Assessee Company entered into a Forex Contract with the State Bank of India based on its total foreign currency exposure in the Import and Export Transactions. The assessee has claimed that the said contract has been entered into in compliance with the RBI guidelines and it is in nature of hedging to guard against the loss on account of Foreign Currency rate fluctuation. The claim of the assessee is that the Assessee has devised a Risk Management Policy for mitigating the risk arising out of fluctuation in Foreign Currency transactions which is duly approved by its Board of Directors and it was the requirement of the Reserve Bank of India as well as Corporate Guidelines wherein it was made mandatory for all companies to have Foreign Exchange Risk Management Policy in place. The assessee has submitted the following details in this regard:

Summary explaining Exports and Foreign Currency Fluctuation Exposure Coverage

No	Particulars	Amount	Annexures
A	Formulation Export (FSBU)	1,17,64,19,250	Statement attached vide Annexure 6 A
B	Bulk Drug Export (CSBU)	1,08,11,08,935	Statement attached vide Annexure 6 B
(A+B)	Total	**2,25,75,28,185**	
A	Lodgment of Bulk Drug Export Documents (CSBU)- Bank Of Baroda	1,23,71,57,417	Lodgment Certificate attached Vide Annexure 6 C
B	Lodgment of Formulation Export Documents (FSBU)-Corporation Bank	97,90,51,235	Lodgment Certificate attached Vide Annexure 6 D
(A+B)	Total Lodgment value during the yearjAs per the certificates from respective Bank) All lodgments have taken place with above banks as when export have taken place i.e throughout the months over twelve months	**2,21,62,08,652**	
	Export Exposure SBI per Year (4 Million USD per Month'12 Month),this exposures have taken place at the end of each month thus hedging over the above operations of the assessee Company.	**1,96,80,00,000**	Copy of the Bank statement of SBI wherein respective debits has been made vide Annexure 5

12.2.2 The assessee submitted that its Foreign Currency Fluctuation exposure on account of Forex Contract is in line with its Exports Turnover and Export Realization and claimed that it has not engaged in any kind of speculative transaction and the fluctuation loss has incurred during the course of business which is allowable as deductible expenditure under section 37 of the Income Tax Act.

12.2.3 The assessee further claimed that fluctuation loss or gain incurred by it falls under the provisions of clause (a) of Section 43(5) which reads as under:

> *"Section 43 (5) [24]"speculative transaction" [25] means a transaction in which a contract for the purchase or sale of any commodity[25], including stocks and shares[25], is periodically or ultimately[25] settled[25] otherwise than by the actual delivery[25] or transfer of the commodity or scrips:*
> ***Provided** that for the purposes of this clause—*
> *(a) a contract in respect of raw materials or merchandise entered into by a person in the course of his manufacturing or merchanting business to guard against loss through future price fluctuations in respect of his contracts for actual delivery of goods manufactured by him or merchandise sold by him; or*
> …….
> …….
> *shall not be deemed to be a speculative transaction."*

12.2.4 The assessee thus submitted that the fluctuation loss or gain arising out of foreign currency transactions have arisen during the course of Exports business for which lodgments to the tune of Rs.221.62 Crores as against the total exports of Rs.225.75 Crores (with FOB value of Rs.210.80 Crores) have been placed with the Bank of Baroda and Corporation Bank as stated above in the statement shared above, which shows that loss on foreign currency fluctuation has been incurred during the course of business as prescribed under the provisions of Clause (a) to Section 43(5), hence it should be granted as business expenditure.

12.3 Discussion and Directions of DRP:

12.3.1 The DRP has considered the submissions of the assessee company on this issue and the legal position under the I.T. Act 1961. The provisions of clause (a) of Section 43(5) reads as under:

> *"Section 43 (5) [24]"speculative transaction" [25] means a transaction in which a contract[25] for the purchase or sale of any commodity[25], including stocks and shares[25], is periodically or ultimately[25] settle[25] otherwise than by the actual delivery[25] or transfer of the commodity or scrips:*
> ***Provided** that for the purposes of this clause—*
> *(a) a contract in respect of raw materials or merchandise entered into by a person in the course of his manufacturing or merchanting business to guard against loss through future price fluctuations in respect of his contracts for actual delivery of goods manufactured by him or merchandise sold by him:*
> *or*

12.3.2 It is apparent from the plain reading of the above clause that where a contract[25] for the purchase or sale of any commodity[25] is settled[25] otherwise than by the actual delivery[25] or transfer of the commodity, It shall be treated as speculative transaction. The AO has clearly brought on record that the copies of

export bill payment advice obtained from the 2 banks Corporation Bank and Bank of Baroda, where the assessee had submitted these bills, shows that the assessee has booked each and every export bill at the forward rate of exchange for the maturity/due date of export documents and that the bank had remitted the amount which includes premium/gain as on the date of remittance i.e. along with the foreign currency gain/loss. He has clearly brought on record the fact that the loss has occurred on account of an independent Put Call contracts with SBI where underlying exposure for export turnover was 2 million USD which was not dependent on actual delivery[25] or transfer of the commodity. Therefore the plea of the assessee that foreign currency fluctuation has ben incurred during the course of business as prescribed under the provisions of Clause (a) to Section 43(5), hence it should be granted as business expenditure, can not be accepted.

12.3.3 The objection raised by the assessee is thus rejected."

26. We have heard rival submissions. The assessee's case throughout has been that it had entered into a forex contract with the State Bank of India on the basis of its foreign currency exposure in import/export transactions with public sector banks to cover fluctuation risk upto Rs.200crores. One of the bank namely Bank of Baroda is stated to have issued a certificate dated 12.02.2015 claiming realization of Rs.123,71,57,417/- which could be realized to the tune of Rs.111,72,18,092/- as on 31.03.2011. Its SBI contract enabled it to book losses against the above unrealized bills. Lower authorities as well as learned Departmental Representative do not rebut this factual position. The assessee claims to have been inter alia recording its sales to overseas clients on the day of transaction in its books in indian currency at the rate prevailing on the very day, it would lodge conversion claim upon payment of its consideration money by said customers, this currency settlement took time after lodgment to be realized resulting in fluctuation loss as is the case herein. We notice in this backdrop that hon'ble jurisdictional high court's decision in CIT vs. Friends & Friends Shipping Pvt. Ltd. (2013) 35 taxmann.com 553 (Guj) holds losses arising from similar foreign exchange contracts to be business losses than speculative ones. Their lordships

conclude that such exchange transactions are hedging transactions instead of being speculative transactions in nature. Next comes hon'ble Bombay high court's decision in CIT vs. D. Chetan & Co. (2016) 75 taxmann.com 300 (Bom.) holding that forward contracts in the nature of hedging transactions in course of normal import export activities to cover up losses on account of foreign exchange valuation difference results in business losses and not speculative one. We find that hon'ble jurisdictional high court's decision in Pankaj Oil Mills vs. CIT (1978) 115 ITR 824 (Guj) (Full Bench) also holds inter alia that hedging contracts; in order to be out of speculative transactions, must be in respect of raw materials only in manufacturers' cases though they could be both with regard to sales and purchases, such hedging contracts need not succeed the contract for sale and actual delivery of goods manufactured, but the latter could be subsequently entered into within reasonable time not exceeding the relevant assessment year in normal circumstances and such transactions should not exceed the total stock of the raw material or merchandise on hand including existing stocks as well as that acquired under the firms contract of purchases in order to be genuine and valid hedging contract of sales; respectively. Learned Departmental Representative fails to indicate any distinction therein vis-à-vis those involved in the instant adjudication. We therefore direct the Assessing Officer to delete the impugned disallowance.

27. The assessee's last substantive ground seeks to reverse the Assessing Officer as well as DRP's action disallowing its sales promotion expenditure of Rs.10,89,29,928/- u/s. 37(1) of the Act. We deem it appropriate at this stage to reproduce learned DRP's discussion as under:

> *"13.2.1 The DRP has considered the submissions of the assessee company on this issue, the legal position under the I.T. Act 1961.*

13.2.2 In this regard, reference may be made to the CBDT's Circular No. 5/2012 dated 1 Aug 2012, which clearly states that freebies in the nature of gift, travel facility, hospitality, cash or monetary grant received by medical practitioners and their professional associations from the pharmaceutical and allied health sector are to be disallowed under the Explanation to Section 37(1) of the I.T. Act 1961. The content of the Board's Circular being clearly applicable is reproduced below: -

"CIRCULAR NO. 5/2012, DT. 1ST A UGUST, 2012
Inadtnissibility of expenses incurred in providing freebees to medical practitioner by pharmaceutical and allied health sector industry
01/08/2012
Business Expenditure
SECTION 37(1),

It has been brought to the notice of the 'Board that some pharmaceutical and allied health sector Industries are providing freebees (freebies) to medical practitioners and their professional associations in violation of the regulations issued by Medical Council of India (the 'Council') which is a regulatory body constituted under the Medical Council Act, 1956.

2. The council in exercise of its statutory powers amended the Indian Medical Council (Professional Etiquette and Ethics) Regulations, 2002 (the regulations) on 10-12-2009 imposing a prohibition on the medical practitioner and their professional associations from taking any Gift, "Travel facility, Hospitality, Cash or monetary grant from the pharmaceutical and allied health sector Industries.

3. Section 37(1) of Income Tax Act provides for deduction of any revenue expenditure (other than those failing under sections 30 to 36) from the business Income if such expense is laid out/ expended wholly or exclusively for the purpose of business or profession. However, the explanation appended to this sub-section denies claim of airy such expense, if the same has been incurred for a purpose which is either an offence or prohibited by law.
Thus, the claim of any expense incurred in providing above mentioned or similar freebees in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 shall be inadmissible under section 37(1) of the Income Tax Act being an expense prohibited by the law. This disallowance shall he made in the hands of such pharmaceutical or allied health sector Industries or other assessee which is provided aforesaid freebees and claimed it as a deductible expense in its accounts against

4. If it also clarified that the sum equivalent to value of freebees enjoyed by the aforesaid medical practitioner or professional associations is also taxable as business income or income from other sources as the case may be depending on the facts of each case. The Assessing Officers of such medical practitioner or professional associations should examine the same and take an appropriate action.

This may be brought to the notice of all the officers of the charge for necessary action.

13.2.3 The assessee has submitted that a circular beneficial to the assessee will be applicable retrospectively, while an oppressive circular will be made operational prospectively and in absence of any specific mention of its effective date of application, the circular is effective from its date of issue i.e. from the financial year 2012-13 relevant to the A.Y.2013-14. The argument of the assessee is not acceptable as Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the regulations) on 10-12-2009 which forms the basis of the disallowance by the AO was very much in existence during the year. The claim of deduction by the assessee is determined on the basis of provisions of the Income Tax Act and not on the basis of the Circular issued by the board. The Circular is merely clarificatory in nature.

13.2.4 As regards the claim of deduction by the assessee the panel finds that the assessee was asked to submit supporting evidence by the assessee vide order sheet entry, and it made a detailed submission before the AO to justify the claim of expenditure and further furnished the following details:

Particulars	***Total Amount Rs.***	***Nature of Expense***
Expenditure related to Business Conference	*10,19,12,419*	*Expenditure incurred on Employees, Speakers & Faculties for attending business related conferences and seminars. This also includes expenses incurred for conferences for skill up-gradation workshops hence the same is beyond the scope of Circular 5/2012 dated 1st August 2012. Considering large volume of the transactions we have furnished the sample evidences vide submission dated 16.03.2015 in Annexure -A-I thereof.*
Honorarium to Doctors	*70,17,509*	*Expenses have been incurred towards Honorariums for Post Market, Surveillance, which is not subject to any violation under clause 6.8.1 (g) of the Medical Council of India Regulations 2009*

13.2.5 The details furnished as above shows that the expenditure has been incurred on employees, speakers & faculties for attending business related conferences and seminars, which also includes expenses for skill upgradation workshop, and further for post market surveillance. However the facts that clearly emerge from the assessment order are that the assessee failed to submit supporting evidence to support the claim before the AO inspite of repeated

opportunity. It is observed again that the assessee has not provided the details of these speakers, the therapeutic field they are working in, their research and publication. Therefore the claim of the assessee that they were paid honorarium for post market research does not emerge from the evidence produced by the assessee. Further, they are prohibited to attend international conferences on behalf of the Applicant by virtue of clause per 6.8.1 (g) of the IMC guidelines which states as under:

> *(b) Travel facilities: A medical practitioner shall not accept any travel facility inside the country or outside, including rail, air, ship, cruise tickets, paid vacations etc. from any pharmaceutical or allied healthcare industry or their representatives for self and family members for vacation or for attending conferences, seminars, workshops, CME programme etc as a delegate.*

13.2.6 Here, the clause 6.8.1(g) of the IMC Guidelines also becomes relevant again which states as under:

> *(g) Affiliation: A medical practitioner may work for pharmaceutical and allied healthcare industries in advisory capacities, as consultants, as researchers, as treating doctors or in any other professional capacity. ,*

13.2.7 The assessee is engaged in Manufacturing and trading of drugs and pharmaceuticals. The assessee could have engaged the doctors as consultants, as researchers, as treating doctors or in any other professional capacity for its business. The doctors have not been engaged for any of the purpose specified. Therefore the claim of the assessee is not bonafide and hence rejected.

13.2.8 The Hon'ble High Court of Karnataka in the case of J.K.Panthaki & Co. Vs. ITO reported in(2012) 246 CTR 0059 : (2011) 64 DTR 0283 : (2012) 344 ITR 0329 has held that if the assessee commits an offence under any law in the course of his business and incurs expenditure for any purpose in connection with the said offence, the said amount is not deductible under Section 37 of the I.T. Act 1961. The relevant excerpts of the judgment are reproduced here under:-

> *"The commission said to have been paid is not compensation to the directors of the company for any service rendered to the assessee. From the undisputed facts it is clear that a higher amount was agreed to be paid for performing the contract. Subsequently, the consideration for the contract was reduced. However, before the said reeducation in cost, the assessee had been paid the entire cost of the contract. If the construction cost was reduced the excess amount received had to be returned. The assessee should have returned the said money to the person who paid it i.e., the company. Therefore, payment by the assessee is of an amount legally liable to be returned to the company. Instead of returning to the company, same may be taken as returned to directors for/on behalf of the company. Therefore, in law, the assessee was legally bound to restore the difference in price to the person who paid the said amount. Therefore what is repaid by the assessee cannot be construed as commission at all,*

as contended by him. It is a case of return of the advantage which he obtained under the contract, to the person who is lawfully entitled to the same. Instead of restoring the advantage to the company which paid him the amount, he has repaid the said amount to the directors of the company. The said payment is not made for any services rendered by them. Therefore, the said amount cannot be construed as commission or expenditure incurred under s. 37 so as to be eligible for being deducted in arriving at income of the assessee under the bead 'Profits and gains of business or profession', because it is not an expenditure laid down or expended fully and exclusively for the purpose of business.

(Para 18)

Yet another way of looking at things is, there is a clear case of collusion between the directors of the company and the assessee. In the tender which is floated, they have submitted prices which are higher than the normal price. Accordingly payment is made. After awarding the contract, they have reduced the price and agreed to receive the difference of price in their name. The assessee has obliged them. It is obvious that it is a kick back or bribe. It is an illegal gratification. It is a scheme adopted to siphon out the money belonging to the company. They want to lend respectability to it by calling it as a 'commission'. Therefore, seen from any angle, it cannot be construed as an expenditure at all, let alone commission.

(Para 19)

The Explanation to s. 37 declares that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure. The word offence has not been defined under the Act, However, Chapter XXII *deals with offences and prosecutions. It refers to various sections under the Act and non-compliance with those provisions are punishable with punishment 'as prescribed therein. Willful attempt to evade tax is an offence under the Act. The word 'offence' has to be understood in the context of an offence generally under any Act. It follows that if the assessee commits an offence under any law in the course of his business and incurs expenditure for any purpose in connection with the said offence, the said amount is not deductible under s. 37. No expense which is paid by way of penalty for a breach of the law can be said to be an amount wholly and exclusively laid for the purpose of the business. Anything done which is an infraction of the law and is visited with a penalty cannot on grounds of public policy be said to be a commercial expense for the purpose of a business or a disbursement made for the purposes of earning the profits of such business. Penalties which are incurred for infraction of the law are not a normal incident of business and they fall on the assessee in some character other than that of a trader. A. penalty cannot be regarded as an expenditure wholly and exclusively laid for the purpose of the business.*

(Paras 35 & 36)

Infraction of the law is not a normal incident of business. Only such disbursements can be deducted as are really incidental to the business

itself. They cannot be deducted if they fall on the assessee in some character other than that of a trader. It is well settled that contracts which are prohibited by statute, the prohibition being either express or implied, would be illegal and unenforceable if they are entered into in contravention of the statute. When a contract is expressly or by implication forbidden by statute, no Court will lend its assistance to give effect to such contract. A distinction is sometimes made between contracts entered into with the object of committing an illegal act and contracts expressly or impliedly prohibited by statute. The distinction is that in the former class one has only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract. In the latter class, one has to consider not what act the statute prohibits, but what contracts it prohibits. Any agreement which tends to be injurious to the public or against the public good is invalidated on the ground of public policy. The question whether a particular agreement is contrary to public policy is a question of law, to be determined like any other question of law by the proper application of legal principles and prior decisions. Contention that if what is paid by way of commission is held to be bribe, it is only receipt of bribe or payment of bribe to a public servant which is an offence and it is not an offence if paid or received by a person other than public servant, and therefore it does not fall within the mischief of the Explanation to s. 37 is not sustainable. The consideration or object of an agreement is lawful unless the Court regards it as immoral or opposed to public policy. If the consideration or object of an agreement is unlawful, then the said agreement is void. Then the said agreement is not enforceable by law. Illustration (j) to s. 23 of the Contract Act, brings home the point explicitly, therefore, under the Indian law an agreement to pay illegal gratification is expressly declared as immoral and consequently such an agreement is void and not enforceable. It is not the Judge or the Court which is declaring such act as immoral. The law declares it as immoral. Though law is different from morality, in the case of illegal gratification payable under an agreement there is convergence of views. There are laws in the country expressly declaring payment of bribe and receipt of bribe by public servants as an offence and punishable under the criminal law of the country. The civil law has wider application and it declares that such payment of bribe is immoral and the agreement is void ab initio. In this context the phrase "prohibited by law" used in the Explanation to s. 37, has wider connotation. It includes expenditure incurred by way of payment of bribe, although it is laid out or expended wholly or exclusively for the purpose of business. As the Indian laws declare such agreements as void, it is unenforceable. The doctrine or rule of pan delicto is the embodiment of the principle that the Courts will refuse to enforce an illegal agreement at the instance of a person who is himself a party to an illegality or fraud. It is a maxim of law, established, not for the benefit of either of the parties to the litigation, but is founded on the principles of public policy, which will not assist a party who has paid over money, or handed over property, in pursuance of an illegal or immoral contract, to recover it back; for 'the Courts will not assist an illegal transaction in any respect'. The maxim is therefore, intimately

connected with the more comprehensive rule of law, ex turpi causa non oritur actio, on account of which no Court will allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, and the maxim may be said to be a branch of that comprehensive rule. If he requires aid from the illegal transaction to establish his case, the Court will not entertain his claim.

(Paras 38, 39 & 41 to 43)

In the present day context, the malady of corruption is entering into all the vital organs of the society and situation has reached where these illegal acts have been accepted as a normal practice and the attempt to prevent, let alone eradicate corruption, is beyond reach. If the Courts were to accord their approval to such transactions, that would be the end of the rule oj law and amounts to upholding immoral actions by law Courts. Such an action gets credibility and respect and it will be perpetuated with the support of the Court orders. When receipt of bribe and payment of bribe by public servants is held to be an offence and the Parliament has passed legislation for preventing the same, merely because those laws are not applicable to private persons, it cannot be said that it is moral, deceiving or paying bribe is a crime. Persons indulging in the same cannot be protected by law Courts. The Courts cannot extend their aid to uphold such transactions. In that view of the matter, even if it is not an offence as contended certainly, it is immoral and it causes injury to public and therefore the expenditure incurred in such immoral acts cannot be construed as expenditure incurred for the purpose of profits and gains of business or profession and the benefit of deduction or allowance under the Parliamentary legislation cannot be extended to such persons or to such expenditure. Such a question would fall within the Explanation-of s. 37 and is not deductible under s. 37.— J.K Panthaki & Co. vs. ITO (2011) 57 DTR (Bang) (Trib) 233 : (2011) 139 TTJ (Bang) 337 ***affirmed."*** **(Para 45)**

13.2.9 In view of the discussion as above, the objection raised by the assessee is rejected."

28. We have heard both the parties. Mr. Soparkar is very fair in pointing out at the outset that this tribunal's decision in ACIT vs. Liva Healthcare Ltd. 161 ITD 63 (Mum) upholding such a disallowance in case of pharmaceutical companies offering free samples to doctor post introduction of the relevant product in market after establishing end use; is hit by Section 37(1) explanation. He however refers to another co-ordinate bench decision in Macleods Pharmaceuticals Ltd. vs. ACIT (2016) 161 ITD 291 (Mum) holding that the above Board's circular dated 01.08.2012 would not have any retrospective effect since not operating in assessment years 2010-

11. He further quotes another co-ordinate bench decision in DCIT vs. PHL Pharma Pvt. Ltd. (2017) 184 TTJ 1(Mum) distinguishing the above case law in Revenue's favour whilst deleting an identical disallowance on the ground that such business promotion expenses are allowable as business expenditure not hit u/s. 37(1) explanation. We afforded ample rebuttal opportunity to the Revenue. Learned Departmental Representative fails to indicate any distinguishing features therein. We find that the above latter co-ordinate bench has elaborately discussed all case laws, IMC regulations as well as Board's circular in deciding the issue. We therefore adopt the very reasoning herein as well to delete the impugned disallowance. The assessee succeeds in its instant substantive ground. Its appeal ITA No.848/Ahd/2016 is partly accepted.

29. This leaves us with Revenue's cross appeal ITA No.918/Ahd/2016. Its first substantive ground pleads that the DRP has erred in holding that the assessee is entitled for adjustment under transfer pricing provision against Section 36(1)(iii) disallowance qua interest towards SOHL (supra). Its case is that the Assessing Officer had not made any such disallowance. Mr. Soparkar takes us to case records prima facie indicating no such relief. We further are of the view that the instant issue is rendered academic since we have deleted Section 36(1)(iii) disallowance itself in assessee's appeal in preceding paragraphs. We therefore reject Revenue's first substantive ground to be devoid of merit.

30. The Revenue's second substantive ground seeking to revive disallowance of Rs.1,94,85,000/- pertaining to clinical trial expenditure outside in-house facility already stands declined alongwith assessee's corresponding substantive ground in preceding paragraphs.

31. The Revenue's third substantive ground seeks to revive product registration expenditure disallowance of Rs.3,65,93,107/- treated as capital in nature in assessment and revenue expenditure in DRP's directions. The assessee points out that a co-ordinate bench in its appeal ITA No.1518/Ahd/2011 has already decided the issue against the Revenue in assessment year 2006-07 as approved in hon'ble jurisdictional high court' decision in Tax Appeal no.40 of 2015. This clinching plea goes unrebutted from Revenue side. We therefore affirm DRP's directions under challenge pertaining to the instant substantive ground. The Revenue's appeal ITA No.918/Ahd/2016 fails.

32. The assessee's two appeals ITA Nos. 1117/Ahd/2012 & 848/Ahd/2016 are partly allowed. The Revenue's appeal ITA No.918/Ahd/2016 is dismissed.

[Pronounced in the open Court on this the 11th day of September, 2017.]

Sd/-	Sd/-
(PRAMOD KUMAR)	(S. S. GODARA)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Ahmedabad: Dated 11/09/2017

True Copy

S.K.SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।