IN THE INCOME TAX APPELLATE TRIBUNAL
Mumbai "K" Bench, Mumbai.

Before Shri B.R. Baskaran (AM) & Shri Rahul Chaudhary (JM)

I.T.A. No. 1455/Mum/2020 (A.Y. 2014-15)
C.O. No. 31/Mum/2020 (A.Y. 2014-15)

ACIT (LTU-1) 29th Floor, Centre-1 World Trade Centre Cuffe Parade Mumbai-400 005.	Vs.	Glenmark Pharmaceuticals Ltd. Glenmark House, HDO Corporate Building Wing A,B,D, Sawant Marg, Chakala, Opp. Western Express Highway Andheri (E) Mumbai-400 099.
(Appellant)		(Respondent)

I.T.A. No. 575/Mum/2020 (A.Y. 2014-15)

Glenmark Pharmaceuticals Ltd. Glenmark House, HDO Corporate Building Wing A,B,D, Sawant Marg Chakala, Opp. Western Express Highway Andheri (E) Mumbai-400 099.	Vs.	ACIT (LTU-1) 29th Floor, Centre-1 World Trade Centre Cuffe Parade Mumbai-400 005.
(Appellant)		(Respondent)

PAN : AAACG2207L

Assessee by	Shri Vijay Mehta & Shri Jay Modi
Department by	Shri P Kumar & Shri Ashok Kumar Amastha
Date of Hearing	03.11.2023
Date of Pronouncement	01.02.2024

<u>O R D E R</u>

Per B.R.Baskaran (AM) :-

The assessee has filed appeal for AY 2014-15. The revenue has filed appeal and cross objection for the very same year. All of them are directed against the order passed by Ld CIT(A)-56, Mumbai and they are being disposed of by this common order, for the sake of convenience.

2. At the time of hearing, the Ld A.R did not press Ground no. 1(b) relating to transfer pricing adjustment made in respect of export to Glenmark Thailand due to smallness of amount. The assessee also did not press ground no.3 pertaining to the addition of Rs.5.70 crores, which relate to allocation of R & D expenses to units eligible u/s 80IC/80IE of the Act. Accordingly, the grounds relating to the above said issues are dismissed as not pressed.

3. The remaining grounds urged by the assessee give rise to the following issues:-

(a) Addition on account of Transfer pricing adjustment

(i) in respect of export to Glenmark South Africa
(ii) in respect of export to Mexico

(b) Disallowance of weighted deduction claimed u/s 35(2AB) of the Act.

(c) Allocation of interest expenses of Rs.7.37 crores to units eligible u/s 80IC/80IE of the Act.

(d) Disallowance of sales promotion expenses of Rs.30.37 crores u/s 37(1) of the Act.

(e) Disallowance of Investment Allowance of Rs.16.51 crores u/s 32AC of the Act.

4. The revenue is in appeal on the following issues:-

(a) Relief granted in respect of transfer pricing adjustment made in respect of Corporate Guarantee.

(b) Relief granted in respect of deduction claimed u/s 35(2AB) of the Act.

(c) Relief granted in respect of allocation of R & D Expenditure.

(d) Partial relief granted in respect of allocation of interest expenditure.

(e) Relief granted in respect of addition made u/s 14A of the Act.

5. The Cross objection filed by the revenue is objecting to the observation made by Ld CIT(A) that the reason for disallowance u/s 37(1) based on MCI guidelines and CBDT Circular 5 of 2012 does not subsist for the disallowance of sales promotion expenses.

6. It can be noticed that certain issues are common in the appeals of both the parties. Accordingly, they are disposed of together.

7. The facts relating to the case are stated in brief. The activities of the assessee are described as under by the Transfer pricing officer (TPO):-

> "The assessee is the ultimate holding company of the Glenmark Group. It is a Research led Global, fully integrated pharma company head quartered in Mumbai, incorporated in 1977, and engaged in the business of manufacturing and marketing of formulations in India. Globally it enjoys diversified presence in regulated and developing international market. Post Restructuring in 2008, the company now focuses on manufacturing and marketing FDF. The specialty business comprising branded generics and R & D is part of the assessee."

Since the assessee had entered into international transactions, the AO referred the matter of determination of Arms Length Price of the same to the TPO, who proposed additions by way of transfer pricing adjustment. Hence the AO passed the draft assessment order making additions on account of transfer pricing adjustments and also various other additions. Since the assessee did not prefer to object the draft assessment order before Ld Dispute Resolution Panel, the AO passed the final assessment order. The

appeal filed by the assessee before Ld CIT(A) was partly allowed. Hence both the parties have filed appeal on the issues stated above.

8. We shall first take up the appeal of the assessee, in which the common issues shall be adjudicated together. The first issue urged by the assessee relates to the transfer pricing adjustment made in respect of goods Exported to the Associated Enterprises (AE) located in South Africa and Mexico.

8.1 The assessee had entered international transactions in the nature of export of goods (formulations) to its Associated Enterprises located in 12 Countries. Besides it had exported R & D services to Switzerland, imported formulations from Argentina. In the Transfer pricing study, the assessee had selected AEs as 'Tested party" and TNM method as most appropriate method. After examining the transfer pricing study of the assessee, the TPO took the view that the transfer pricing study of the assessee is not proper and accordingly, he did not accept the same. Hence, he asked the assessee to benchmark the international transactions by taking the "assessee" itself as tested party and adopting internal TNM method as most appropriate method.

8.2 The OP/OC of Formulations, both domestic and Export sales made to non-AEs was 10.86% and the same was adopted as ALP margin by TPO. The TPO accepted ALP of all transactions of exports to various Countries except the exports made to South Africa, Thailand and Mexico. In this appeal, we are concerned with the exports made to South Africa and Mexico. The OP/OC of exports made to South Africa and Mexico was 3.85% and (-) 3.02% respectively, which was below the ALP rate of 10.86%. The assessee offered certain explanations with regard to low profit/loss earned/incurred in the above two countries. It was also submitted that the TPO had accepted 'Associated Enterprises' as tested party in the preceding two assessment years and hence, under the principles of consistency, the said methodology should not be disturbed. The assessee also relied upon the decision

rendered by Hon'ble Supreme Court in the case of Radhasoami Satsang (1992 AIR 377) in support of the Principle of Consistency.

8.3 But the TPO did not accept the same. The TPO expressed the view that the companies have different financial year ending cannot be considered to be comparable. He further expressed the view that the companies having different format and non-availability of Balance Sheet, not having proper figure of RPT and unclear description of function are not reliable. Accordingly, the AO held that the AEs cannot be treated as tested parties. Accordingly, the TPO held that ALP of margin should be taken as the rate of 10.86% earned on sale to non-AEs both in domestic and Export market. Accordingly, he made transfer pricing adjustment of Rs.1,37,66,503/- and Rs.63,09,494/- respectively for the exports made to South Africa and Mexico.

8.4 The Ld CIT(A) agreed with the views expressed by TPO. With regard to the Principle of Consistency, the Ld CIT(A) held that the decision of TPO is based on facts applicable to the year. He also pointed out that the fact that the AEs are different accounting years is a significant defect. Accordingly, he confirmed the transfer pricing adjustment made by the TPO.

8.5 We heard the parties on this issue and perused the record. There is no dispute that the foreign AEs were accepted as tested parties by the TPO in the preceding two years. During the year under consideration, the TPO did not accept associated enterprises as tested party for the following reasons:-

(a) The financial year of the companies having foreign jurisdiction did not match with the financial year of the assessee herein.

(b) Due to use of database which have their own format and non-availability of Balance Sheet, financials containing proper figure of RPT and description of function, data base are not reliable.

8.6 It is the submission of Ld A.R that the foreign AEs of the assessee are engaged in the business of distribution of assessee's formulation products. It is quite usual for any enterprise that the new branches will incur losses in the initial years, when new markets are explored. Once inroads are made into the local market, then the new branch will start making profits. He submitted that the AEs located in 9 Countries are making good profits. The Glenmark, Mexico has started operation during the year under consideration only. The Glenmark, South Africa is in its initial stages and making efforts to penetrate the local market. Since both these AEs are new in their respective Geographical jurisdictions, they have to incur huge expenditure to make inroads into the local market. Further, it is known to everyone that the turnover will be low during the initial years and it would take some years to break-even. Till that time, they are bound to incur huge losses in their initial years of operation. The Ld A.R submitted that, because of this peculiar situation, the assessee has selected both the foreign AEs as tested parties and compared their profitability with the profitability of foreign comparable companies. Since the AEs are buying products from the assessee company, their profitability would increase, if the assessee sells products to them at lower rates. If the assessee sells at higher prices, then their profitability will fall. Hence, for the purpose of transfer pricing provisions qua the assessee, the AEs should earn profit less than the profitability of comparable companies, which would mean that the assessee has not under invoiced its products, i.e., the sale to AEs is at arms length. It is the submission of Ld A.R, this methodology was adopted by the assessee to determine the ALP of various AEs in the earlier years and the same has been accepted in the preceding years.

8.7 The ld A.R submitted that, if the issue is approached in this way, what is required to be seen is whether the assessee has made profits from export of goods to its AEs and whether the profitability of AEs was less than that of the comparable companies. The Ld A.R submitted that the data relating to

the above said two AEs corresponds to the above said approach. The relevant details are tabulated as under:-

(A) Glenmark, South Africa:- **(Rs. In lacs)**

S.No.	Particulars	AY 2013-14	AY 2014-15
1	Exports by assessee	1495.18	2038.25
2	Gross profit earned by assessee	139.94	273.04
3	Gross margin earned by assesse	9.36%	13.40%
4	Margin earned by GPL, SA	-3.98%	-36.44%
5	Operating margin range of comparables	1.78% to 12.41%	2.12% to 9.54%
6	Mean Operating margin of comparables	8.20%	8.10%
7	Operating margin earned by assessee on export of goods to AE (OP/TC)	0.07%	3.85%

(B) Glenmark, Mexico **(Rs. In lacs)**

S.No.	Particulars	AY 2014-15	AY 2015-16	AY 2016-17
1	Exports by assessee	440.72	1649.10	1210.61
2	Gross profit earned by assessee	28.97	586.11	346.41
3	Gross margin earned by assesse	6.57%	35.54%	28.61%
4	Margin earned by GPL, SA	-117.73%	-48.59%	-15.25%
5	Operating margin range of comparables	1.88% to 4.33%/3.38%	1.89% to 3.11%	1.61% to 3.16%
6	Mean Operating margin of comparables	-3.02%	37.39%	23.37%
7	Operating margin earned by assessee on export of goods to AE (OP/TC)	0.07%	3.85%	

Accordingly, the Ld A.R contended that the international transactions of export of goods to its AEs located in South Africa and Mexico should be considered to be at arms length.

8.8 We have heard Ld D.R and perused the record. We may refer to the provisions of Rule 10B(2) which reads as under:-

> "(2) For the purposes of sub-rule (1), the comparability of an international transaction [*or a specified domestic transaction*] with an uncontrolled transaction shall be judged with reference to the following, namely:—
>
> (*a*) the specific characteristics of the property transferred or services provided in either transaction;
>
> (*b*) the functions performed, taking into account assets employed or to be employed and the risks assumed, by the respective parties to the transactions;
>
> (*c*) the contractual terms (whether or not such terms are formal or in writing) of the transactions which lay down explicitly or implicitly how the responsibilities, risks and benefits are to be divided between the respective parties to the transactions;
>
> (*d*) conditions prevailing in the markets in which the respective parties to the transactions operate, including the geographical location and size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of competition and whether the markets are wholesale or retail."

In the facts of the present case, we are of the view that clause (d) of the above said Rule 10B(2) is applicable. As per Rule 10B(2), the factors such as, the market conditions of the concerned regions, their geographical location, size of markets, level of competition etc cannot be ignored. It is stated that the operations of Glenmark, Mexico has been started only during the year under consideration and the operations of Glenmark South Africa are in its initial years. Since both these AEs are in their initial years of operations, their respective profitability will be lower than the comparable companies in their respective region, since the AEs have to incur huge expenditure on marketing of products, while the comparable companies are established players. As noticed by us earlier, so far the assessee herein is concerned and qua the transfer pricing provisions, what is required to be seen is whether the price realized on export of products to their AEs is at arms length or not. Further,

the fact the profitability of AEs is lower than the profitability of comparable companies, would also show that the assessee has not under invoiced the sales. In the instant case, the details extracted in the table above matches with the above said criteria. Since the comparable companies selected in the respective Geographical locations are established players, the profit ratio of comparable companies are to required to be considered only to show that the profit ratio of the assessee was lower than their profit ratio. In this view of the matter, the difference in accounting period may not be that much relevant.

8.9 We have noticed that the above said methodology adopted by the assessee has been accepted by the TPO in the earlier years. Further, the table above would show that the profitability of the assessee in exporting products to these two AEs is increasing year after year. Under these set of facts and in the facts and circumstances of the case, we are of the view that there is no reason to ignore transfer pricing study conducted by the assessee should be accepted. Accordingly, we set aside the order passed by Ld CIT(A) and direct the AO to delete the transfer pricing adjustment made in respect of exports made to M/s Glenmark, South Africa and M/s Glenmark, Mexico.

9. The next issue relates to the deduction claimed u/s 35(2AB) of the Act. This is a common issue urged in appeal before us by both the parties.

9.1 The facts relating to this issue are that the assessee had claimed deduction of Rs.85.38 crores u/s 35(2AB) of the Act, being 200% of R & D expenses incurred by it. The AO noticed that the DSIR has not approved expenses to the extent of Rs.11.43 crores. Hence the AO took the view that the expenses, which are not approved by DSIR, are not eligible for deduction u/s 35(2AB) of the Act. Accordingly, he rejected the claim u/s 35(2AB) of the Act, but allowed the same u/s 37(1) of the Act. U/s 35(2AB), the assessee is eligible for deduction of 200% of R & D expenses incurred. Hence, the said

action of AO resulted in denial of weighted deduction, meaning, the AO made addition of Rs.11.43 crores.

9.2 The AO also noticed that the assessee has done R & D works on contract basis for M/s Glenmark Pharmaceuticals, SA (GPSA). It incurred a sum of Rs.58.10 crores as expenditure and received revenue of Rs.83.10 crores from GPSA. While computing deduction u/s 35(2AB) of the Act, the assessee reduced the cost of Rs.58.10 crores from R & D expenses. However, the AO took the view the revenue of Rs.83.10 crores should have been reduced from R & D expenses while claiming deduction u/s 35(2AB) of the Act. Accordingly, the AO reduced Rs.83.10 crores and accordingly computed deduction u/s 35(2AB) of the Act. The same resulted in an addition of Rs.25.00 crores. Thus, the AO disallowed a sum of Rs.36.44 crores against the claim made u/s 35(2AB) of the Act.

9.3 The Ld CIT(A) noticed that the entire R & D Expenses has been held to be allowable u/s 35(2AB) of the Act by the Mumbai Tribunal in the asssesee's own case in AY 2013-14, even if the relevant expenses were not approved by DSIR. Accordingly, the Ld CIT(A) held that the assessee is eligible for deduction u/s 35(2AB) of the Act in respect of entire amount of R & D expenses. However, the Ld CIT(A) took the view that the AO has not examined factual aspects relating to R & D expenses incurred and accordingly restored the issue to the file of AO for the limited purpose of examining the expenses and deciding the eligible amount of deduction. The revenue is aggrieved with the relief granted to the assessee. However, the assessee is aggrieved by the decision of Ld CIT(A) in restoring the issue to the file of AO for examining the expenses.

9.4 With regard to the dispute as to whether the cost of contract R & D expenses or contract revenue should be deducted from R & D expenses for the purposes of computing deduction u/s 35(2AB) of the Act, the Ld CIT(A)

noticed that the Mumbai bench of Tribunal has held in the case of ACIT vs. Wokhardt Ltd (ITA No.71/Mum/2007) that the income arising from contract R & D expenses should not be reduced. In support of this proposition, the assessee also placed reliance on the decision rendered by Hon'ble Karnataka High Court in the case of Microlabs Ltd (2016)(383 ITR 490)(Kar), wherein also identical view has been expressed. The Ld CIT(A) also noticed that the Ld CIT had initiated revision proceedings in the case of the assessee in AY 2012-13 for excluding revenue from R & D expenses. The Tribunal had set aside the revision order so passed by Ld CIT. Accordingly, the Ld CIT(A) held that only cost of Contract R & D expenses should be reduced for the purpose of computing deduction u/s 35(2AB) of the Act. The revenue is aggrieved.

9.5 We heard the parties on this issue and perused the record. With regard to the first issue of exclusion of expenses not approved by DSIR for the purpose of computing deduction u/s 35(2AB) of the Act, we notice that similar issue has been decided in favour of the assessee in the assessee's own case in AY 2013-14. We also notice that the Rule 6(7A), which requires approval of expenses also by DSIR has been brought into the statute w.e.f. 1.7.2016 and hence the same will not apply to AY 2014-15. With regard to the second issue relating to deduction of contract revenue, we notice that the said issue has also been decided in favour of the assessee by Hon'ble Karnataka High Court in the case of Microlabs Ltd (supra) and by Mumbai bench of Tribunal in the case of Wokhardt Ltd (supra). Since the ld CIT(A) has decided both these issues following the above said decisions, we do not find any reason to interfere with his order on both these issues.

9.6 With regard to the direction of Ld CIT(A) to verify the R & D expenses, it is the contention of the assessee that the AO did not question the nature of expenses at all in the assessment order, i.e., the AO has accepted the nature of expenses as R & D expenses. The AO has allowed expenses u/s 37(1) of the Act, but disallowed only weighted deduction due to non-availability of

approval from DSIR. Accordingly, it is contended that there was no requirement to restore the issue to the file of AO for examining the expenses. On a perusal of the assessment order, we find the above said contentions of the assessee to be correct. It is not the case of the AO as to whether the R & D expenses claimed by the assessee would fall under the category of Research & Development expenses or not. Thus, we notice that the Ld CIT(A) has rendered his decision on a non-existing issue. Accordingly, we cancel the above said direction given by Ld CIT(A).

10. Next issue relates to allocation of interest expenses to the units eligible for deduction under section 80IC/81E of the Act. This is also a common issue arising in the appeals of both the parties.

10.1 The assessee has set up various undertakings in different states. Four of its units, viz., Baddi unit (Baddi-I), Solan unit (Baddi-II), Buddi-III unit and Sikkim unit are eligible for deduction u/s 80IC/80IE of the Act. The AO noticed that the assessee has incurred interest expenses of Rs.6.43 crores in Head office and it has been allocated to 'Baddi-III' unit only. The Assessing Officer took the view that the funds available with Head Office is general pool of funds, i.e., included both own funds and borrowed funds. The AO took the view that these units are using funds from head office, the interest expenses should be allocated to all the four units in the ratio of Sales. If the interest expenses is so allocated, then the profits of these units will get reduced, in which case, the quantum of deduction u/s 80IC/80IE shall also come down. The same will result in increase of total income.

10.2 However, the assessee contended that the 3 units, viz., Baddi unit (Baddi-I), Solan unit (Baddi-II), and Sikkim unit have been established long back and they have got sufficient own funds, i.e, they do not use funds of Head office. It was submitted that these units, on the contrary, have given funds to the Head office. The Assessing Officer, however, did not accept the

contentions of the assessee. Accordingly, he allocated interest expenses to all the four units in the ratio of sales, which resulted in enhancement of income by 7.37 crores.

10.3 The learned CIT(A) noticed that an identical addition was made by the AO in the preceding years and the said issue has been decided in favour of the assessee by the Tribunal in assessee's own case in A.Y. 2010-11 to 2013-14. However, the learned CIT(A) took the view factual aspects relating to this issue require verification. Accordingly, the Ld CIT(A) restored the issue to the file of the Assessing Officer for the limited purpose of verifying that the eligible unit had sufficient accumulated profits and did not use borrowed funds. The Revenue is aggrieved by the relief granted by the learned CIT(A) and the assessee is aggrieved by the decision of Ld CIT(A) in restoring the matter to the file of the Assessing Officer for carrying out verification.

10.4 We heard the parties and perused the record. We noticed that the Assessing Officer has allocated interest expenditure to the units on the generalized reasoning that the said units would be using funds by the head office. The learned CIT(A) has noticed that the Tribunal has considered an identical issue in the assessee's own case in A.Y. 2010-11 (ITA No. 1654/Mum/2016 dated 1.2.2019), wherein a factual finding has been given by the Tribunal that the Buddy unit (Baddi-I) and Solan unit (Baddi-II) did borrow loan and they have used their Reserves and surplus only. It is pertinent to note that the AO had allocated interest expenses to these two units only in that year. It was also noticed by the Tribunal that both these units have, in turn, given funds to the Head Office. Accordingly, the Tribunal has deleted the identical addition made by the AO in AY 2010-11. The learned CIT(A), following the above said decision of Tribunal, has held that the interest disallowance is not called, when the loan funds of Head Office were not used. However, from verifying the factual aspects, i.e., whether the

loan funds have been used or not, the learned CIT(A) restored the matter to the file of the Assessing Officer.

10.5 There should not be any dispute that the question of allocation of interest expenditure incurred by the Head office to various units would arise, only if the funds of head office have been utilized by those units. It is the contention of the assessee that it has furnished the financial statements of the various units before the AO, which would show that they were having enough Reserves and Surplus. It is also stated that these units have not taken money from the Head office. All these facts are very much visible from the financial statements filed before AO/CIT(A). Accordingly, it was contended that there was no necessity to allocate interest expenses and also to restore the issue again for verification of these factual aspects again.

10.6 We notice that the assessee has furnished the Balance-sheet of Buddy I unit at page No. 238 to 252 of the paper book, Solan unit (Baddi-II) at pages 253 to 267 of paper book and Sikkim unit at page No. 284 to 294 of the paper book. On a Perusal of the balance-sheets of these three units, we notice that they have sufficient Reserves and surplus. Further, they have not taken any amount either from Head office. These units did not borrow money from other persons also. On the contrary, the Balance Sheets would show these units have given money to the Head office. These details are tabulated below:-

(Rs. In crores)

PARTICULARS	Baddi-I Rs.	Solan (Baddi-II) Rs.	Sikkim Rs.
Reserves & Surplus	1219.38	645.85	186.98
(Amount given to HO)	(963.86)	(495.68)	(59.33)

Since these units have not taken money from Head office, the question of allocating interest expenses of the HO to these units will not arise. Hence, the reasoning given by the AO would fail in respect of these three units. Hence there is not necessity to allocate interest expenditure of Head office to the above said two units. Since all the facts are already available on record, there was no necessity for the Ld CIT(A) to restore the issue again for verification of factual aspects. Accordingly we modify the order passed the learned CIT(A) on this issue and direct the AO to delete the allocation of interest expenses made to these three units.

11. The next issue urged by the assessee relates to the disallowance of Sales Promotion Expenses in the form of freebies to doctors and medical professionals u/s 37(1) of the Act. The assessee had claimed sales promotion expenses of Rs.392.87 crores. The AO proposed to disallow the expenses which are in violation of Medical Council Regulations, as they will be covered by the Explanation to sec.37(1) of the Act. The Explanation to sec. 37(1) states that the expenses incurred for a purpose which is either an offence or prohibited by law is not allowable as deduction. In this regard, the AO also took support of the Circular No.5/2012 dated 01-08-2012 issued by CBDT.

11.1 In response thereto, the assessee furnished break-up details of sales promotion expenses, which have been extracted at pages 30 & 31 of the assessment order. The assessee submitted that the expenses incurred by it would not be covered by the regulations of the Council. The AO, however, did not accept the same. He noticed that the expenses covered by the medical council regulations in AY 2010-11 and 2011-12 have been disallowed. He noticed that the disallowance made in the assessment year 2011-12 worked out to 1.32% of the turnover of that year. Applying the same rate on the turnover of current year (Rs.2300.90 crores), the AO disallowed a sum of Rs.30,37,19,347/- u/s 37(1) of the Act. Since the sales promotion expenses have been allocated by the assessee to various units

eligible for deduction u/s 80IC/80IE of the Act, the AO allocated the above said disallowance also to those units and accordingly reduced the profit eligible for deduction under those sections.

11.2 Before Ld CIT(A), the assessee relied upon the decision rendered by the Tribunal in the assessee's own case in AY 2013-14, wherein the Tribunal had deleted the addition following the decision rendered by the co-ordinate bench in the case of PHL Pharma P Ltd (2017)(49 CCH 124)(Mum). The Ld CIT(A) in principle agreed with the same. However, he took the view that it is open to decide whether the expenses is wholly and exclusively incurred for the business and the accounts are correct and complete. Accordingly, he examined the vouchers and supporting documents relating to the claim of Sales promotion expenses. He noticed that major expenses have been incurred on food and beverages, travel and hotel accommodation. He noticed that the expenses on medical literature, actual direct medical service, expenses on medical camps are minimal. He also noticed that the conference expenses itself cost Rs.27.91 crores of which actual medical component was minimal. Accordingly, the Ld CIT(A) took the view that all the expenses cannot be considered to have been incurred for business purposes. In this view of the matter, the Ld CIT(A) held that the disallowance of Rs.30.37 crores made by the AO is reasonable, as the same constitutes only 7.70% of the sales promotion expenses claimed by the assessee.

11.3 The contentions of the assessee in this regard are given as under in the written submissions: -

> "30) At the outset, it is submitted that expenses incurred as freebies given to doctors are not allowable as deduction u/s. 37 of the Act in view of the judgment of the Hon'ble Supreme Court in the case of Apex Laboratories v. CIT (442 ITR 1). However, on perusal of the chart reproduced on pg nos. 30 and 31 of the order, it is evident that there are certain expenses which are in the nature of routine business expenses and not in the nature of freebies given to doctors or in violation of MCI guidelines. Eg: expenditure on sales promotion prints/literatures, customer relationship management, man power- cost for export

marketing, travelling of directors and staff, etc. The details of the same are as under:

Sr. No.	Particulars	Amount
1.	Export promotion expenses	22,47,27,539
2.	Sales promotion prints/ literatures	33,45,42,890
3.	Export expenses-Others	10,44,37,593
4.	Internal workshop expense	2,40,94,906
5.	Man power cost - Export marketing	21,17,61,608
6.	Man power expenses - Export marketing	5,59,37,133
7.	Product registration export	21,02,57,864
8.	Foreign travelling expenses directors	47,41,396
9.	Filed staff travelling expenses	67,33,85,814
10.	Travel expenses- directors	8,24,893
11.	Advertisement and publicity	15,55,45,291
	Total (A)	200,02,56,927

It is submitted that as per the MCI Regulations 2002, a medical practitioner shall not accept individually any hospitality like hotel accommodation for self or family members under any pretext. It is further submitted that expenditure incurred for organizing conferences are not for a particular individual but large number of people hence, expenses incurred for organizing conference would not be in violation of MCI guidelines. The details of expenditure incurred on conferences (Pg no 31 of assessment order) are as under:

Sr. No.	Particulars	Amount
1.	Conference expenses	9,60,59,810
2.	Co-medical education expenses	10,91,83,066

3.	National International conference expenses	5,11,38,039
4.	Regional Conferences Expenses	2,27,98,449
	Total (B)	27,91,79,364

It is evident from the above that expenditures amounting to Rs. 227,94,36,291/- (200,02,56,927 + 27,91,79,364) are not in the nature of freebie given to doctors or in violation of MCI guidelines. The above expenditures are business expenditures incurred for employees and sales promotion which are allowable u/s. 37 of the Act.

31) It is submitted that since the above expenditures cannot be said to be incurred in violation of MCI guidelines, it is humbly prayed that the Assessing Officer may be directed to remove the above expenditure of Rs. 227,94,36,291/- while working out the total expenditure that could be considered in violation of MCI guidelines.

32) It is submitted that out of the balance expenditure of Rs. 164,93,43,639/-(392,87,79,930 - 227,94,36,291) there could be certain expenditure incurred on account of freebie paid to doctors or in violation of MCI guidelines. The CIT(A) has estimated the expenditure to be 7.7% of the total expenditure. It is submitted that the percentage adopted by the CIT(A) is on higher side. It is humbly prayed that reasonable percentage may be estimated on the balance expenditure of Rs. 164,93,43,6397- that could have been incurred on account of freebie paid to doctors and in violation of MCI guidelines."

The Ld A.R also invited our attention to the code conduct for doctors dated 10th December, 2009 issued by the Medical Council of India, wherein it is stated that "a medical practitioner shall not accept individually any hospitality like hotel accommodation for self and family members under any pretext". Accordingly, the Ld A.R submitted that the hospitality provided to doctors, who are participants of the medical conference, would not be hit by the above mentioned Code of conduct.

11.4 The Ld D.R submitted that the decision rendered by Hon'ble Supreme Court in the case of Apex Laboratories Ltd (supra) would override the decision relied upon by the Ld CIT(A). He submitted that the freebies given to

the doctors in violation of code of conduct issued by MCI shall be liable to be disallowed.

11.5 We have heard rival contentions and perused the record. We noticed earlier that the assessee has furnished break-up details of sales promotion expenses and the same is extracted by the AO at pages 30 & 31 of the assessment order. We notice that the AO did not examine those break-up details and did not pin point the expenses which can be considered as expenses incurred in violation of MCI guidelines. Instead, the AO has proceeded to disallow 1.32% of the total turnover, as the similar disallowance made out of Sales promotion expenses in AY 2011-12 worked out to same percentage. We notice that, in AY 2011-12, the assessee itself has admitted that it has incurred expenses on freebies to the doctors and the disallowance was on the basis of said admission. In this year, there is no such admission. Further, the AO has computed the disallowance on the total turnover, whereas, the issue is related to Sales promotion expenses and disallowance to be made as per the Explanation to sec.37(1) of the Act.

11.6 We notice that the Ld CIT(A) has adopted a completely different approach, which was not at all the case of the AO, i.e., the AO did not suspect that the sales promotion expenses have not been wholly and exclusively incurred for the purposes of business. In our view, the Ld CIT(A) has taken up a non-existing issue and proceeded to confirm the disallowance. In our view, the approach adopted by both tax authorities is not correct and accordingly set aside the same.

11.7 In the submissions made by the assessee before the Tribunal that the expenses incurred by it are not in the nature of freebies. Very same contentions have been made before the tax authorities. It is the contention of the assessee that the sales promotion expenses to the extent of 227,94,36,291/- (200,02,56,927 + 27,91,79,364) are not in the nature of freebies

given to doctors or in violation of MCI guidelines. Remaining expenditure is Rs.164.93 crores. There should not be any doubt that actual expenses incurred on freebies are required to be disallowed under section 37(1) of the Act. Accordingly we are of the view that this issue requires fresh examination at the end of the Assessing Officer. Accordingly we set aside the order of the learned CIT(A) passed on this issue and restore the same to the file of the Assessing Officer.

11.8 The amount so disallowed may be distributed between the eligible units and the deduction u/s 80IC/80IE may be computed accordingly.

12. The next issue relates to the disallowance of claim made u/s 32AC of the Act. Under the provisions of sec.32AC of the Act, a deduction @ 15% of the actual cost of new assets acquired and installed is allowable

(a) if the aggregate cost of new assets exceed one hundred crores of rupees and

(b) further they should have been acquired and installed after 31st Day of March, 2013 but before 1st day of April, 2015.

The assessee claimed deduction u/s 32AC of the Act during the year under consideration.

12.1 The facts relating to this issue are that the AO noticed that the assessee has claimed deduction on a value of Rs.110.07 crores, out of which a sum of Rs.81.35 crores has been transferred from opening balance of "Capital work in progress". The assessee had claimed a sum of Rs.16.51 crores as deduction u/s 32AC of the Act on the aggregate value of Rs.110.07 crores. The AO took the view that, as per the provisions of sec.32AC of the Act, the word "acquire" used therein should be interpreted as purchase of new asset. Accordingly he held that amount transferred from opening balance of 'Capital Work in Progress' amounting to Rs.81.35 crores cannot be considered as "acquired" by the assessee after 01.04.2013. Accordingly, the AO held that the assessee has not complied with the conditions prescribed in

sec. 32AC of the Act, since the aggregate value of assets acquired and installed after 1.4.2013 was less than the threshold limit of Rs.100 crores. Accordingly, the AO disallowed the claim of Rs.16.51 crores made by the assessee u/s 32AC of the Act. The Ld CIT(A) upheld the disallowance.

12.2 We notice that an identical issue has been examined by the co-ordinate bench in the case of Ultratech Cement Ltd vs. DCIT (ITA Nos. 1412, 1413, 2461 & 2462/Mum/2018 dated 14-12-2021 relating to AYs 2012-13, 2011-12, 2013-14 and 2014-15). The relevant portion of the order is extracted blow for the sake of convenience:-

> "223. Ground No.4 of the appeal filed by the assessee relates to disallowance of claim of investment allowance under section 32AC of the Act.
>
> 224. During the year under consideration, the assessee Company claimed in its original return filed u/s 139(1) an investment allowance u/s. 32AC of the IT Act on account of investment in plant and machinery.
>
> 225. The Finance Act, 2013 introduced a new section 32AC in the IT Act with effect from 1 April, 2014, which provides that a company, engaged in the business of manufacture or production of any article or thing, acquires and installs new asset amounting to Rs.100 crores or more, after the 31st day of March, 2013 but before the 1st day of April, 2015, then such company is entitled to an investment allowance of 15 percent of the investment in such new assets. The intention of the legislature was to provide incentive to the taxpayers making substantial investments in plant or machinery and thereby boost the manufacturing sector in the economy.
>
> 226. The assessee claimed the amount of Rs.3,43,97,11,256/- as deduction u/s. 32AC which includes Rs.248,65,65,041/- towards cost of components of plant or machinery lying as CWIP as on 1.4.2013 but aggregated and installed as 'plant' or 'machinery' during the FY 2013-14. Further an amount of Rs.8,32,42,289/- was claimed in respect of the assets which are eligible for depreciation at the rate of 100 per cent but installed and put to use for less than 180 days and hence depreciation was claimed to the extent of only 50% of its actual cost during the FY 2013-14.
>
> 227. The AO rejected the claim of the assessee on the following grounds:
>
> *"i. The word "and" signifies that both acquisition and installation of assets should be after 31/03/2013 and not merely the installation*

ii. The assets which are eligible for 100% depreciation even though put to use for less than 180 days are not eligible for investment allowance in view of provisions of section 32AC(4)(v)."

228. On further appeal, the LD CIT(A) has upheld the order of the AO with regard to deduction claimed in respect of cost of components of plant or machinery lying as Capital Work In Progress (CWIP) as on 1 April 2013 amounting to 248,65,65,041/- but allowed the claim amounting to Rs. 8,32,42,289/- with respect to assets which were eligible for depreciation at the rate of 100 per cent but installed and put to use for less than 180 days and hence claimed at 50%. The dispute therefore relates to only value of component of plant and machinery lying in capital work in progress as on 1st April 2013.

229. The learned AR submitted that assessee is entitled to deduction under section 32AC of the Act as:

i. The term 'plant' has to be read in the manner in which it is generally understood and accordingly, a plant can be said to have been acquired on or after 1st April 2013 since it came into existence only after all the machinery and components were assembled and commissioned together. The plant was brought into existence from the components lying in CWIP only after 1st April 2013 when it was assembled and installed. Thus, according to the AR of the assessee, plants were acquired and installed after 1st April 2013.

ii. The word "acquired and installed" has to be interpreted as "acquired or installed" since it is impossible to acquire and also install any plant or machinery valuing Rs.100 crores or more in a span of one year. Such a situation is not intended by the legislature and therefore the word "and" has to be read as "or" to arrive at the intended consequences.

230. The provisions of section 32AC is reproduced below for better understanding of the issue:

"32AC. (1) Where an assessee, being a company, engaged in the business of manufacture or production of any article or thing, acquires and installs new asset after the 31st day of March, 2013 but before the 1st day of April, 2015 and the aggregate amount of actual cost of such new assets exceeds one hundred crore rupees, then, there shall be allowed a deduction,-

(a) for the assessment year commencing on the 1st day of April, 2014, of a sum equal to fifteen per cent of the actual cost of new assets acquired and installed after the 31st day of March, 2013 but before the 1st day of April, 2014, if the aggregate amount of actual cost of such new assets exceeds one hundred crore rupees; and

(b) for the assessment year commencing on the 1st day of April, 2015, of a sum equal to fifteen per cent of the actual cost of new assets acquired and installed after the 31st day of March, 2013 but before the 1st day of April,

2015, as reduced by the amount of deduction allowed, if any, under clause (a).

(1A) Where an assessee, being a company, engaged in the business of manufacture or production of any article or thing, acquires and installs new assets and the amount of actual cost of such new assets acquired and installed during any previous year exceeds twenty-five crore rupees, then, there shall be allowed a deduction of a sum equal to fifteen per cent of the actual cost of such new assets for the assessment year relevant to that previous year:

Provided that no deduction under this sub-section shall be allowed for the assessment year commencing on the 1st day of April, 2015 to the assessee, which is eligible to claim deduction under sub-section (1) for the said assessment year.

(1B) No deduction under sub-section (1A) shall be allowed for any assessment year commencing on or after the 1st day of April, 2018.............................."

231. The intention behind introduction of section 32AC can be discerned from the speech of the Hon'ble Finance Minister while presenting the Finance Bill 2013, wherein the Hon'ble Minister stated as under: "New Investments

59. To attract new investment and to quicken the implementation of projects, I propose to introduce an investment allowance for new high value investments. A company investing `100 crore or more in plant and machinery during the period 1.4.2013 to 31.3.2015 will be entitled to deduct an investment allowance of 15 percent of the investment. This will be in addition to the current rates of depreciation. There will be enormous spill-over benefits to small and medium enterprises."

Thus, the intention behind introduction of section 32AC and provide investment allowance was to attract new investment as well as to quicken the implementation of projects.

232. The explanation regarding introduction of this new section in the Memorandum explaining the provisions of the Finance Bill, 2013 was stated under the head **"Measures to Promote Socio-Economic Growth"** and the opening portion of the relevant clause of the Memorandum read as under:

"Incentive for acquisition and installation of new plant or machinery by manufacturing company"

In order to encourage substantial investment in plant and machinery, it is proposed to insert a new section 32AC in the income tax Act...." [clause 5].

233. It is also worth noting that section 32AC was further amended by Finance Act, 2014 whereby subsection (1A) was introduced with effect

from 1 April 2015. The relevant extract of the budget Speech 2014 in respect of such amendment is reproduced below:

"198. The manufacturing sector is of paramount importance for the growth of our economy. This sector has multiplier effect on creation of jobs. Last year, an incentive in the form of investment allowance to a manufacturing company that invests more than Rs.100 Crore in plant and machinery during the period from 01.04.2013 to 31.03.2015 was announced. Considering the need to incentivize smaller entrepreneurs, I propose to provide investment allowance at the rate of 15 percent to a manufacturing company that invests more than Rs.25 Crore in any year in new plant and machinery. This benefit will be available for three years i.e. for investments up to 31.03.2017. The Scheme announced last year will continue to operate in parallel till 31.03.2015."

234. The memorandum explaining the provision of Finance (No.2) Bill, 2014 in respect of the aforesaid amendment stated as under:-

"FINANCE (No. 2) BILL, 2014

PROVISIONS RELATING TO DIRECT TAXES

Investment Allowance to a Manufacturing Company

In order to encourage the companies engaged in the business of manufacture or production of an article or thing to invest substantial amount in acquisition and installation of new plant and machinery, Finance Act, 2013 inserted section 32AC in the Act to provide that where an assessee, being a company, is engaged in the business of manufacture of an article or thing and invests a sum of more than Rs.100 crores in new assets (plant and machinery) during the period beginning from 1st April, 2013 and ending on 31st March, 2015, then the assessee shall be allowed a deduction of 15% of cost of new assets for assessment years 2014-15 and 2015-16.

As growth of the manufacturing sector is crucial for employment generation and development of an economy, it is proposed to extend the deduction available under section 32AC of the Act for investment made in plant and machinery up to 31.03.2017. Further, in order to simplify the existing provisions of section 32AC of the Act and also to make medium size investments in plant and machinery eligible for deduction, it is also proposed that the deduction under section 32AC of the Act shall be allowed if the company on or after 1st April, 2014 invests more than Rs.25 crores in plant and machinery in a previous year. It is also proposed that the assessee who is eligible to claim deduction under the existing combined threshold limit of Rs.100 crores for investment made in previous years 2013-14 and 2014- 15 shall continue to be eligible to claim deduction under the existing provisions contained in sub-section (1) of section 32AC even if its investment in the year 2014-15 is below the proposed new threshold limit of investment of Rs. 25 crores during the previous year. [Clause 11]"

235. The Finance Minister's Speech and the Explanatory Memorandum, at the time of introduction of the incentive in 2013 as well as while extending the benefit w.e.f. 1 April, 2015, stressed on the term "investment" in new "plant" or "machinery". The intention was to give impetus to the manufacturing sector making substantial investment including in the stalled projects.

236. The term 'acquire' used in section 32AC has to be read in conjunction with the term 'assets', i.e. 'plant' or 'machinery', and not in isolation. A new 'plant' or 'machinery' can be said to have been acquired when the individual components of the plants are aggregated and installed together so that the resulting equipment takes the character of 'plant' or 'machinery' as is generally understood. "Acquisition" of plant or machinery cannot be read to mean mere purchase/ownership/possession of individual items or components of a plant or machinery. Restricting the meaning of acquisition of plant or machinery to mere purchase of individual components of 'plant' in piecemeal, which are accounted under the head 'Capital Work-in-Progress' will give absurd results not intended by the legislature.

237. The assessee is the largest cement manufacturer in the country having plants across various location in India. Huge plant and machineries are required for the manufacturing of cement. These plants are in the nature of complex machineries. Various components purchased by the assessee are to be assembled and commissioned together which takes substantial amount of time given the complexity, size and nature of the machinery/ project/ plant required for the business. The sheer size of various plants/ machineries constructed and put to use during the year is evident from the fact that as on 1 April 2013, the capital work-in-progress of the assessee was Rs.1,657 crores and to convert them into plant, additional purchase of individual components worth Rs.635 crores was made during the year. Unless and until the machinery are assembled and commissioned together, the plant does not come into existence. Therefore, the meaning of word "acquisition" will have to be considered in light of the nature of various plants the assessee was constructing. The plant is acquired only when all the components of machinery are assembled and commissioned together.

238. In this regard it is worth noting the first proviso to sub-section (1A) of section 32AC. It is provided **that where installation of the new assets are in a year other than the year of acquisition, the deduction under this sub-section shall be allowed in the year in which new assets are installed**. This amendment was brought by the Finance Act, 2016. We are of the view that the intention of the legislature was to cure the discrepancy in the provision and to obviate the unintended hardship faced by the taxpayers in completing both the condition of "acquisition" and "installation" in the same year. Therefore, such proviso being curative in nature must apply retrospectively.

239. An analogy can also be drawn from the second proviso to section 32(1) which restricts the claim of depreciation to 50% in case of assets

"acquired during the previous year" and "put to use" for a period of less than 180 days in that previous year. The provisions of second proviso are reproduced as under:

"Provided further that where an asset referred to in clause (i) or clause (ii) or clause (iia) or the first proviso to clause (iia), as the case may be, is acquired by the assessee during the previous year and is put to use for the purposes of business or profession for a period of less than one hundred and eighty days in that previous year, the deduction under this sub-section in respect of such asset shall be restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under clause (i) or clause (ii) or clause (iia), as the case may be".

240. For the purpose of second proviso to section 32, the plant is considered as "acquired" only after all the machines and components are assembled and commissioned together and the plant is ready for use. The Revenue has never allowed depreciation on any individual component of plant/machineries acquired before the previous year since the process of assembling and commissioning was completed during the year. The claim of depreciation commences only from the day the plant is fully installed including on the value of component lying in capital work in progress but capitalised as plant and machinery on completion of installation. Thus, the meaning of the term "acquired" used in section 32 is considered as fulfilled only when the plant/machinery is "installed". The language used in section 32AC being similar to the language used in second proviso to section 32(1), we must give the same interpretation.

241. We further note that the issue relating to availability of additional depreciation under section 32(1)(iia) wherein the phrase used is "acquired and installed after the 31st day of March" has been subject matter of litigation. The Coordinate Bench of this Tribunal in the case of **Euro Pratik Ispat Pvt. Ltd. vs. ACIT (ITA No. 1682/Mum/2011)** has observed as under :

"In our opinion machinery was installed in the AY under appeal, though acquisition of the P&M had started in earlier year AY. Till a machine is not assembled in a manner that it could be used to manufacture, it cannot be held that it had been installed. Mere purchasing or shifting it to factory premises is not enough. Assessee had claimed additional depreciation @ 10%, as the P&M had worked for a period less than one year. It is a common phenomenon that in big projects, installation of machinery takes very long time because of the sheer volume of the work to be carried out. If an assessee is not successful in installing P&M in one year and carries forward the installation work in subsequent year / years it cannot be denied any benefit on the ground that it had acquired the P&M in earlier year. The intent of the legislature was to attract investment, so in our opinion the section can be termed as benevolent provision. In the case under consideration production started from 01.01.2006. Before that fabrication and completion of P& M was going on. Treatment given by the assessee in the books of accounts to the P&M was in accordance with the Accounting Standards (AS) and the AO has

not denied the fact that the assessee was following AS. Therefore, in our opinion, assessee was entitled to claim additional depreciation @10%."

242. Again, the Coordinate Bench of this Tribunal in the case of **JCIT vs. Lotus Energy (India) Ltd [2016] 68 taxmann.com 364** upheld the view of the taxpayer to allow additional depreciation in the year of installation. It was observed as under:

"10. We have heard the rival contentions and also perused the material available on record. We have observed that Section 32(1)(iia) of the Act was amended by Finance Act, 2005. It is stated in the Memorandum to the Finance Bill 2005 that the provisions are amended in order to encourage new investment, the initial depreciation on new machinery and plant was proposed to be increased to 20 per cent from the existing level of 15 percent and consequently the initial depreciation will be available to all new plant and machineries except those referred to in the proviso to the clause (iia) of section 32 of the Act. The requirement of creating a minimum increase of 10 percent in installed capacity for availing the initial depreciation is also proposed to be eliminated. We have also observed that section 32(1)(iia) of the Act stipulates that new machinery and plant should be acquired and installed after 31-3-2005 by an tax-payer and a further sum equal to twenty percent of the actual cost of such machinery or plant shall be allowed as deduction. Provisions of Section 32(1)(ii) of the Act are a piece of beneficial legislation being incentive provision is a piece of beneficial legislation is to be liberally construed to grant the benefit to the tax-payer to fulfill the mandate of legislation which is to promote investment in business of manufacturing or production of any article or thing or in the business of generation or generation or distribution of power, rather than in the manner which may frustrate the object. Reference can be drawn to the following observations of Hon'ble Supreme Court in the case of Bajaj Tempo Ltd. v. CIT [1992] 196 ITR 188 (SC): "The provision in a taxing statute granting incentives for promoting growth and development should be construed liberally; since the provision for promoting economic growth has to be interpreted liberally, restrictions on it too has to be construed so as to advance the objective of the provisions and not to frustrate it."

"The words used u/s 32(1)(iia) of the Act are 'acquired and installed' after 31st day of March 2005. The assessee company did purchased new machineries and plant prior to 31-03-2005 as well after 31-03-2005 for the coke production plant being set up by the assessee company but the installation of the entire new plant and machineries as an integrated activity for setting up industrial project for coke production plant which started in financial year 2004-05 were completed after 31- 03-2005 and commercial production of the new coke production plant being set up by the assessee company started in April 2005 i.e. in financial year 2005-06 when the new coke production plant set up by the assessee company became operational, which is an admitted position by the Revenue. The assessee company was incorporated on 2nd September 2004 i.e. in the financial year 2004-05, and was engaged in setting up new industrial unit being coke production plant for the setting up of which new plant and machineries were acquired by the

assessee company starting from financial year 2004-05, which process of acquiring plant and machineries also continued in the financial year 2005-06 as an integrated activity with the sole and common objective for setting up new industrial unit of coke production plant and finally concluded with the completion of installation of the said new plant and machineries in April 2005 and commencement of the commercial production of LAM coke in April 2005 i.e. financial year 2005-06 when new coke production plant became operational. Once a new industrial project is initiated by an enterprise to be set up, then the entire composite plant and machineries which are acquired and installed are an integrated activities as the said plant and machineries can only function when they are integrated together as per technical requirements and specifications which can there-after lead to successful commissioning of the project to produce or manufacture the desired products/articles. The plant and machineries so acquired cannot be visualized and seen in the individual and itemized context as they are in-capable of production or manufacture of desired products/articles unless these itemized plant and machineries are integrated together as per technical requirements and specifications to achieve the manufacturing or production of desired products. Since, the assessee company was engaged in setting up new coke production plant which activity of setting up new industrial unit started in financial year 2004 - 05 and concluded in financial year 2005-06, the entire set of new machineries and plant were acquired by the assessee company as an integrated activity with the sole and common objective towards the setting up of new coke production plant which was carried out in financial year 2004-05 and in financial year 2005- 06, with the installation of said new plant and machineries getting completed in April 2005 with the commencement of commercial production of LAM coke in April 2005 when the said new plant became operational and acquisition of said machineries and plant cannot be seen and visualized in itemized manner as unless these new plant and machineries are integrated together they will not achieve the desired results. The assessee company has finally installed the entire new plant and machineries in April 2005 i.e. after 31-3-2005 and assessee company is entitled to the benefit u/s 32(1)(iia) of the Act for claiming additional depreciation in the impugned assessment year because what is relevant is that new machineries and plant which were acquired before 31-03-2005 and also post 31-03-2005 were all purchased as an integrated activity connected with the common and sole objective directed towards activity of the assessee company to set up new coke production plant which become operational in financial year 2005-06 with completion of installation of these new plant and machineries in April 2005 when all these machineries and plant were put to use after installation with start of commencement of commercial production of LAM coke in April 2005 when the new coke production plant become operational and their acquisition which concluded in financial year 2005-06 is to be seen in composite manner rather than in itemized manner as in an itemized capacity said new plant and machineries are not capable of producing the desired articles/products being LAM coke. It is pertinent to mention that on perusal of the Balance Sheet for financial year 2004-05 and 2005-06 (placed in paper book) will reveal that the assessee company has purchased new plant and machinery in financial year 2004-05 which is undisputed and the same was shown in the Balance Sheet as at 31-

03- 2005 under the head 'Capital Work in Progress' and the same was capitalized in financial year 2005- 06 along with those new plant and machineries which were acquired in financial year 2005-06 and the assessee company has not claimed any depreciation in the financial year 2004-05 on these new plant and machineries so acquired in financial year 2004- 05. Thus, acquisition of the entire set of new machineries and plant whether acquired prior to or post 31-03-2005 was an integrated event in the chain of activity undertaken with common and sole goal of setting up new coke production plant by the assessee company which process got completed in April 2005 i.e. financial year 2005-06 with the completion of installation of the entire new machineries and plant as composite, so acquired by the assessee company whether pre or post 31-03-2005 with the commencement of the production of coke production plant becoming operational in April 2005. We find that the conditions as stipulated u/s 32(1)(iia) of the Act are duly complied with by the assessee company and the assessee company cannot be denied the benefit of the claim of additional depreciation merely because new plant and machinery was acquired partly prior to 31-3-2005 and partly post 31-03-2005 as the entire activity of acquisition of new plant and machinery was an integrated and composite activity in the chain of events with the common and sole objective of setting up new coke production plant by the assessee company, as the installation of new machinery and plant which started in financial year 2004-05 got completed after 31-3-2005 with the commencement of commercial production starting in financial year 2005- 06 i.e. post 31-03-2005 with the plant becoming operational. Thus, in our considered view, the assessee company is entitled for claim of additional depreciation u/s 32(1)(iia) of the Act amounting to Rs.83,55,387/- during the assessment year 2006-07."

243. The Hon'ble Gujarat High Court in the case of **PCIT vs. IDMC Ltd. [2017] 393 ITR 441** also took a similar view on the issue and has observed as under:

"Applying law laid down by the Supreme Court in various decisions to the facts of the case on hand, if the submission on behalf of the revenue is accepted, it will lead to an absurd and unjust result and the purpose and object of granting the additional depreciation will be frustrated. If the contention on behalf of the revenue is accepted, in that case, the assessee shall never get the additional depreciation as provided under section 32(1)(iia). In the facts and circumstances of the case, the twin conditions of the acquired and installed shall never be satisfied in a year and therefore, the assessee shall never get any depreciation. The purpose and object of granting additional depreciation under section 32(1)(iia) is to encourage the industries by permitting the assessee setting up the new undertaking/ installation of new plant and machinery and to give a boost to the manufacturing sector by allowing additional depreciation deduction. Thus, as rightly held by the Tribunal the provisions of section 32(1)(iia) are required to be interpreted reasonably and purposively as the strict and literal reading of section 32(1)(iia) would lead to an absurd result denying the additional depreciation to the assessee though admittedly the assessee has installed new plant and machinery. Under the circumstances, no error has been

committed by the Tribunal in allowing the additional depreciation at the rate of 20 per cent on the plant and machinery installed by the assessee after 31-3-2005 i.e. the year under consideration."

244. As can be noted, the Hon'ble Gujarat High Court and the Hon'ble Bench of Coordinate Bench of this Tribunal have consistently taken a view that the twin condition of "acquired and installed" have to be read in the manner to give it a meaningful, reasonable and purposive interpretation. The twin condition can be said to have been satisfied on the day these huge plant and machineries are installed and become useful for production. Since, the language of section 32AC is similar to the language used in section 32(1)(iia), the ratio laid down in the above cases squarely applies to the facts of the instant case in the context of section 32AC.

245. The AR of the assessee also contended that if a strict interpretation is adopted for the word "and" used in the term "acquired and installed", to understand it in its normal grammatical sense, i.e. a conjunctive, then there may be a large number of instances where the assessee, even after making required investment in plant and machinery, would not be able to claim deduction under section 32AC of the Act. The assessee may invest in designs, plans, drawings, bottles, books, etc. which are considered as "plant" for the purpose of section 32 of the Act. If the interpretation of the Revenue is accepted that only plant acquired and installed is eligible for deduction under section 32AC of the Act then, it would lead to absurd results as the aforesaid assets which have been considered by the Supreme Court and the High Courts falling within the meaning of "plant" would not be eligible for deduction under section 32AC of the Act since the aforesaid assets are incapable of installation. Designs, plans, drawings, bottles, books, etc. by their very nature are not required to be installed and on their acquisition, they are ready to be put to use. Therefore, a manufacturer who is acquiring designs, drawings, plans which are considered as plant and machinery for the type of business they are in, will not be eligible to claim deduction under section 32AC since according to the Revenue the designs, drawing, plans are not installed by the assessee.

246. It is fairly well settled law that where the word "and" as is understood leads to unintended results, then it should be interpreted to mean "or". The Supreme Court in the case of CIT vs. Ram Kishan Dass 413 ITR 337 (2019) SC has held:

"Secondly, the alternate construction of the proviso is that the expression "and for any good and sufficient reason" should be read to mean "or for any good and sufficient reason". As a matter of statutory interpretation, it is well settled that the expression "and" can in a given context be read as "or" (see in this context Ishwar Singh Bindra v. State of UP AIR 1968 SC 1450). This submission was opposed on behalf of the assessee by urging that in the context of sub-section (2A), it has been held by this Court in Sahara India (Firm), Lucknow (supra) that the word "and" is used in the conjunctive sense. Undoubtedly the expression "and" in subsection (2A) has been held to the conjunctive, while delineating the circumstances on the basis of which an

opinion can be arrived at by the assessing officer. This would not necessarily furnish an index to how the expression "and" in the proviso to subsection (2C) should be construed. The interpretation of the expression must be based on the context in which it is used. In the proviso to sub-section (2C), the expression "and" is used in connection with the grant of an extension of time and not in the context of the formation of an opinion for ordering a special audit."

247. We are, therefore, inclined to accept the contention of the AR of the assessee that the words "acquired and installed" have to be read as "acquired or installed" to give effect to the intention of the legislature.

248. We refer to the decision in the case of **Jupiter Radios vs. DCIT [2017] 88 taxmann.com 93 (Delhi)** relied upon by the DR during the course of hearing. We have gone through the case but find no relevance to the issue before us. The Hon'ble Delhi High Court in that case was concerned with the issue relating to availability of development rebate/ allowance under section 32A/ 34(3) the language in which are not pari materia with the provisions of section 32AC of the Act. Secondly, the Court was not at all concerned with the interpretation of the words "acquired and installed" and the question before the High Court was whether the partnership firm can continue to claim deduction under section 34A/ 34(3) of the Act if the plant and machinery is given to a partner on his retirement from the firm during the statutory holding period of 8 years. Therefore, the aforesaid decision is not relevant to decide the issues involved in the present appeal.

249. In view of the above we have no hesitation to hold that the assessee is entitled to deduction u/s 32AC of the Act on the value of cost of components of plant or machinery lying as CWIP as on 1 April 2013 but installed during the financial year 2013-14. We therefore direct the AO to allow deduction as investment allowance u/s 32AC of the IT Act."

12.3 We notice that very same view has been expressed by co-ordinate benches in the following cases also:-

(a) DCIT vs. Reliance Industries Ltd (ITA No.2344/Mum/2019 dated 08-03-2022.)

(b) Nuclear Power Corporation vs. CIT (LTU) (ITA No. 4815/Mum/2018 dated 01-09-2021)

Accordingly, following the above said decisions, we hold that the actual cost of plant and machinery transferred during the year from Capital work in progress standing as on 01-04-2013 should also be considered for ascertaining the aggregate cost of assets acquired and installed during the year. In the instant case, the aggregate cost of assets transferred from

Capital work in progress and the purchased during the year has exceeded the threshold limit of Rs.100 crores. Hence, the deduction u/s 32AC of the Act claimed by the assessee is allowable. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to allow the deduction claimed by the assessee u/s 32AC of the Act.

13. We shall now take up the issues urged by the revenue. The first issue urged by the revenue relates to the relief granted in respect of transfer pricing adjustment made on Corporate Guarantee commission.

13.1 The assessee had provided guarantee in favour of its Swiss subsidiary named Glenmark Holding S.A – Switzerland. Most of the loans were availed by the above said subsidiary in the earlier years and brought forward during the year under consideration. During the year under consideration, some more loans were availed by the subsidiary. The assessee had also provided comfort guarantee to other AEs. The assessee charged 1% of loan amounts as guarantee fee. The assessee selected 'other method' as most appropriate method and adopted 'interest saved approach' for determining ALP of guarantee given. Under this method, the savings made by the subsidiary in the interest rate on account of guarantee given by the assessee is determined. The analysis carried out under 'interest saved approach' revealed that there is savings of 29.78 bps, 113.78 bps and 6.33 bps for 3 loans and NIL savings in respect of remaining loans. However, the average savings rate was less than the commission of 1% charged by the assessee. Accordingly, the assessee contended that the same is at arms length.

13.2 The TPO did not accept the workings given by the assessee. The TPO followed the decision taken in AY 2012-13 and took that the guarantee commission @ 2% for the fresh loans given to the subsidiaries by banks and @ 1.50% for the loans granted in the earlier years. Accordingly, he made transfer pricing adjustment of Rs.14.73 crores in respect of guarantee given

on behalf of Glenmark Holding S.A, Switzerland. In respect of comfort guarantee given to other subsidiaries also, the TPO adopted same rates and accordingly made transfer pricing adjustment of Rs.2.49 crores.

13.3 The Ld CIT(A) noticed that the Tribunal has accepted the rate of guarantee commission charged @ 1% to be at arms length in the assessee's own case in AY 2013-14. The Hon'ble High Court of Bombay has also upheld guarantee commission charged @ 0.53% in the assessee's own case in (ITA No.321 of 2013 dated 04-02-2015, ITA No.1302 of 2014 dated 02-02-2017 and ITA No.834 of 2016 dated 10-12-2018 relating to AY 2006-07, 2008-09 and 2009-10 respectively. Accordingly, the Ld CIT(A) deleted the transfer pricing adjustment made in respect of guarantee commission.

13.4 We heard the parties on this issue and perused the record. We notice that the Ld CIT(A) has followed the decisions rendered by the Hon'ble jurisdictional Bombay High Court and the Tribunal passed in the assessee's own case in an identical issue and accordingly deleted the transfer pricing adjustment made in respect of guarantee commission. Hence, we do not find any reason to interfere with the order passed by Ld CIT(A) on this issue.

14. The next issue urged by the revenue relates to the allocation of R & D expenses to the units eligible for deduction u/s 80IC/80IE of the Act. It is pertinent to note that the assessee did not press the corresponding ground raised by it. The AO had allocated R & D expenses to Mahape and Sinnar units and accordingly reduced the deduction allowable u/s 80IC/80IE of the Act. It is the submission of the assessee that it did not carry on any R & D activity in the above said two units and hence the R & D expenses were not allocated to these two units.

14.1 The Ld CIT(A) noticed that an identical issue has been remitted to the file of AO by the Tribunal in AY 2010-11. Following the same, the Ld CIT(A)

remitted this issue to the file of AO in order to verify as to whether any R & D activity was carried out at the above said two units. The revenue is aggrieved.

14.2 We noticed that the Ld CIT(A) has followed the decision taken by the Tribunal in the assessee's own case in AY 2010-11 and accordingly remitted this issue to the file of AO. In our view, no prejudice is caused to the revenue by the decision of Ld CIT(A), since the matter required factual verification. Accordingly, we uphold the order passed by Ld CIT(A) on this issue.

15. The Last issue urged by the revenue relates to the disallowance made u/s 14A of the Act. During the year under consideration, the assessee earned exempt dividend income and it disallowed 10% of dividend income u/s 14A of the Act, i.e., the assessee disallowed a sum of Rs.14,011, being 10% of exempt dividend income. Before the AO, the assessee agreed for disallowance of Rs.6,88,054/-. However, the assessing officer computed disallowance as per Rule 8D of I T Rules and disallowed a sum of Rs.11.82 crores, consisting of interest disallowance of Rs.7.14 crores and expenditure disallowance of Rs.4.68 crores. The AO adopted the same amount for adding u/s 115JB of the Act.

15.1 Before Ld CIT(A), the assessee took an additional ground contending that the disallowance u/s 14A should not exceed exempt income. In this regard, the assessee placed its reliance on the decision rendered by Hon'ble Delhi High Court in the cases of Joint Investment Pvt Ltd (372 ITR 694) and the decision rendered by the Tribunal in the case of Future Corporate Resources Ltd (ITA No.4658/Mum/2015 dated 26-07-2017). With regard to the addition made u/s 115JB of the Act, the assessee placed reliance on the decision rendered by Special bench of Tribunal in the case of ACIT vs. Vireet Investment Pvt Ltd (ITA 502/Del/2012). By placing reliance on the above said decision, the Ld CIT(A) held that the disallowance computed u/s 14A

should not be considered for computing book profit u/s 115JB of the Act. The revenue is aggrieved.

15.2 We heard the parties and perused the record. We notice that the Ld CIT(A) has followed the decision rendered by Hon'ble Delhi High Court and also by the co-ordinate bench in holding that the disallowance u/s 14A cannot exceed the exempt income. We notice that the Hon'ble Madras High Court has also expressed the very same view in the case of Principal Commissioner Of Income vs. M/s. Envestor Ventures Ltd (TCA No.1 of 2021 dated 18 January, 2021, wherein it was held as under:-

> "22. We, therefore, dispose of the present appeal by answering question of law in favour of the Assessee and against the Revenue and by holding that the disallowance under rule 8D of the IT Rules read with Section 14A of the Act can never exceed the exempted income earned by the assessee during the particular assessment year.."

Since the view expressed by Ld CIT(A) is consisted with the judicial decisions, we uphold the order passed by Ld CIT(A) on this issue.

16. The cross objection filed by the revenue is related to the disallowance of sales promotion expenses by invoking explanation to sec.37(1) of the Act. We have already dealt with this issue in the earlier paragraphs and hence no separate adjudication is required on this issue.

17. In the result, the appeal filed by the assessee is partly allowed. The appeal of the revenue and the cross objection filed by the revenue are dismissed.

Order pronounced on 01.02.2024.

Sd/-	Sd/-
(Rahul Chaudhary)	(B.R. Baskaran)
Judicial Member	Accountant Member

Mumbai.; Dated : 01/02/2024

Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai

PS