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

BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER)
AND
MS. PADMAVATHY S. (ACCOUNTANT MEMBER)

I.T.A. No.5431/Mum/2011
(Assessment year 2001-02)

Hindustan Unilever Limited Hindustan Lever House 165/166 Backbay Reclamation Mumbai-400 020 **PAN : AACH1004N**	vs	Addl.Commissioner of Income-tax-1(1), Mumbai Aayakar Bhavan M.K. Road, Mumbai-400 020
APPELLANT		**RESPONDENT**

I.T.A. No.5549/Mum/2011
(Assessment year 2001-02)

The Assistant Commissioner of Income-tax-1(1), Mumbai Room No.579, Aayakar Bhavan M.K. Road, Mumbai-400 020	vs	Hindustan Unilever Limited Hindustan Lever House 165/166 Backbay Reclamation Mumbai-400 020 **PAN : AACH1004N**
APPELLANT		**RESPONDENT**

Assessee represented by	Shri Nishant Thakkar, Ms Jasmin Amalsadwala
Department represented by	Ms. Madhu Malti Ghosh, CIT dr

Date of hearing	01-08-2023
Date of pronouncement	18-08-2023

O R D E R

PER : MS PADMAVATHY S. (AM)

These cross appeals by the assessee and the Revenue are against the order of the Commissioner of Income-tax (Appeals)-1, Mumbai dated 01/03/2011 for A.Y. 2001-02.

2. The assessee is a company engaged in the manufacture, trading and marketing (including export) of fast moving consumer goods (FMC goods). For the year under consideration, the assessee filed a return of income on 31/10/2001 declaring a total income of Rs.830,19,95,740/-. The case was selected for scrutiny and statutory notices were duly served on the assessee. The Assessing Officer completed the assessment assessing the income at Rs.948,46,19,890/- after making various disallowances / additions. Aggrieved, the assessee filed further appeal before the CIT(A) in which the CIT(A) gave partial relief. Against the order of the CIT(A) both the assessee and the Revenue are in appeal before the Tribunal raising various grounds contending the following issues:- **Assessee**

*(1) Disallowance of travelling expenditure relating to foreign travel in respect of spouses who accompanied some of the company employees or official tour.(**Ground 1)***

*(2) Deduction under section 80I / 80IB (**Grounds 2 – 2.1 to 2.3)***

*(3) Allocation of expenditure to individual units in respect of deduction u/s 80IB (**Ground 3)***

*(4) Deduction under section 80IB in respect of tea unit at Dharwad (**Ground 4 – 4.1 to 4.2)***

*(5) Allocating research expenses whilst determining the profits and gains derived from industrial undertaking eligible for deduction u/s 80IB (**Ground 5- 5.1)***

*(6) Allocating interest expenses whilst determining the profits and gains derived from industrial undertaking eligible for deduction u/ 80IB. (**Ground 6- 6.1**)*

*(7) Deduction under section 80HHC - scrap sales / sale of miscellaneous products is required to be included in total turnover for the purpose of computing deduction under sec 80HHC (**Ground 7- 7.1)***

*(8) Excluding 90% certain incomes for the purpose of allowing deduction u/s 80HHC (**Ground 8- 8.1 & 8.2)***

*(9) Unrealised sales proceeds till 30.09.2001 reduced from turnover (**Ground 9- 9.1)***

*(10) Loss on export of traded goods to be reduced from profits for the purpose of computing deduction under section 80HHC (**Ground 10 – 10.1 to 10.3)***
*(11) Provision for retirement pension payable to the employees(**Ground 11)***
*(12) Increasing value of closing stock of raw materials and packing materials unutilized balance of Modvat as on 31.03.2001 (**Ground12)** (13) Reduction in exemption u/s 10B in respect of miscellaneous income. (**Ground 13 - 13.1)***

*(14) Disallowance of exemption u/s 10B in respect of internal transfer included in sales (**Grounds 14 - 14.1)***

(15) Treatment of legal cost incurred in respect of merger of erstwhile

*Industrial Perfumes Limited as capital expenditure (**Grounds 15 - 15.1)***

*(16) Disallowance of capital expenditure on Scientific research incurred at Hyderabad (**Grounds 16 - 16.1)***

*(17) Claim of cess on green leaf (**Ground 17 – 17.1 to 17.3)***

Revenue

*(1) Deleting addition of Rs.65,92,482 towards Membership Fees and Entrance to Club (**Ground 1)***

*(2) Deleting disallowance of Rs.38,92,129 towards rural development activities.(**Ground 2)***

*(3) Restoring the 14A disallowance to AO and directing to re-compute the disallowance as per immediate preceding year.(**Ground 3)***

*(4) Allowing the claim of deduction u/s 10B for Pune and Kidderpore Units.(**Grounds 4 - 4.1)***

I.T.A. No.5431/Mum/2011 – Assessee's appeal
Disallowance of travelling expenditure – Ground 1

3. This ground pertains to disallowance of travelling expenditure relating to foreign travel in respect of spouses who accompanied some of the company employees or official tour. The assessee debited a sum of Rs.41,35,481/- on account of foreign travel expenses of spouses of employees of the company and claimed it under the head „travelling and motor car expenses". The assessee submitted before the authorities below that the spouses have to sometime accompany the senior executives who were sent abroad to international educational institutions or to attend seminars or to work in Unilever companies on temporary posts abroad. The assessee, therefore, argued that expenses are incurred for the purposes of business and hence allowable. The Assessing Officer, however, did not agree with the same and relying on earlier year"s order disallowed the claim. On appeal, the Ld CIT(A), upheld the finding of the Assessing Officer, with regard to the disallowance. Further aggrieved, the assessee is in appeal before the Tribunal.

4. Before us, the Ld.AR for the assessee submitted that the issue stands decided in favour of the assessee by the Tribunal in assessee"s own case for A.Y. 2000-01 in ITA Nos.3951/Mum/2008 & 4033/Mum/2008 vide order dated

16/05/2023. The Ld.DR relied on the order of the lower authorities.

5. We heard the rival submissions, we find that the Tribunal in assessee"s own case for A.Y. 2000-01 (supra) has considered the identical issue and decided the issue in favour of the assessee by holding that :-

> *"5. During the course of appellate proceedings before us the ld. Counsel contended that such foreign travelling expenses is covered in favour of the assesse vide order of the ITAT, Mumbai in the case of assessee itself for assessment year 1998-99. He also referred the decision of Hon"ble Bombay High Court in the case of CIT Vs. Alfa Laval (I) Ltd. (2015) 149 taxman.com 29 (Bom) dated 15.07.2015. On the other hand, the ld. D.R supported the order of lower authorities.*

6. *With the assistance of ld. Representative we have perused the decision of ITAT vide ITA No. 2031/Mum/2004 for assessment year 1998-99 wherein the identical issue on similar fact has been adjudicated in favour of the assessee after referring the decision of the coordinate benches of the Tribunal in assesse"s own case for assessment year 1985-86 to assessment year 1997-98. Consistent with the view taken by the coordinate bench as referred above we allow the ground of appeal of the assessee."*

6. Considering that the coordinate bench has been taking a consistent view as given in the above decision we delete the disallowance made towards travel expenses. This ground of the assessee is allowed.

Deduction under section 80I / 80IB – Ground No.2 and 3

7. During the course of assessment, the AO noticed that the head office expenditure has not been proportionately allocated to the new units for which the deduction under section 80IB has been claimed. On query, the assessee explained that the common unallocated head office expenses are not at all related to the units concerned and these cannot be allocated while calculating profit derived from the new unit. However, according to the Assessing Officer, the expenditure incurred at the head office is for corporate advertising, EDP charges, incentives to promote, aid and benefit all the units concerned and therefore, head office expenses need to be

apportioned to ascertain the quantum of profit derived from an industrial undertaking. The Assessing Officer also stated that the issue has been considered in the earlier years and assessee‟s contention has not been accepted. On further appeal, the CIT(A) held that expenses of Chairman, Company Secretary, and public relation department, financial controller chief medical officer etc., need not be allocated while determining the profits under section 80IB by relying on the decision of the coordinate bench in assessee's own case for earlier years. The CIT upheld the allocation of all other expenses of the head office and directed the the Assessing Officer accordingly. In result the CIT(A) partly allowed this issue in favour of the assessee.

8. Before us, both the parties agreed that the issue is squarely covered by the decision of the Tribunal in assessee‟s own case for A.Y. 2000-01 (surpa) in which the Hon‟ble Tribunal has considered an exactly identical issue and held as under:-

> *"11. Heard both the sides and perused the material on record. Regarding claim of deduction, the ITAT vide ITA No. 2201/Mum/2004 for assessment year 1998-99 held that this issue has been decided by the coordinate bench of the Tribunal in assesse"s own case for the preceding assessment year 1985-86 to 1997-98, 2006-07 and AY 2009- 10 wherein the Tribunal has partly allowed the identical issue in favour of the assessee while adjudicating these appeals. Accordingly, the Tribunal has restored the issue back to the AO for de novo adjudication after considering the findings of the Tribunal in accordance with law. Similarly, taking consistent view we restored this issue to the file of the A.O for de novo adjudication as directed vide ITA No. 2201/Mum/2004. Accordingly, ground no. 2 & 3 are allowed for statistical purposes."*

9. Consistent with the above finding of the Tribunal we restore the issue to the file of the Assessing Officer for de novo adjudication with a direction to consider the findings of the Tribunal for preceding assessment years and decide in accordance with law after giving a reasonable opportunity of being heard / make submissions to the assessee. The assessee has raised a without prejudice ground (Ground No.3) to submit that if the common expenses of the head office is to be allocated then the common incomes credited to the P&L account should also be allocated. Since we have restored the issue of allocation of head office expenses to

the Assessing Officer for a denovo consideration, this ground has become academic and does not warrant separate adjudication.

Adjustment of brought forward loss/unabsorbed depreciation of tea unit in Dharwad for the purpose of 80IB – Ground 4

10. During the course of assessment the Assessing Officer noticed that brought forward loss pertaining to tea unit in Dharwad has not been adjusted against the profit. In this regard the assessee submitted that the unabsorbed depreciation / loss incurred by the industrial undertaking in earlier years have already been absorbed / set off against the income of the other undertakings / activities and cannot be once again reduced from the profits of the industrial undertaking for the purpose of determining deductions u/s 80IB for the current year. However the Assessing Officer relied on CBDT circular No.281 dated 22.09.1980 and rejected the claim of the assessee.

11. It is brought to our attention by the ld AR that that identical issue on similar facts was decided by the coordinate bench in assessee's own case (supra) for assessment year 2000-01 against the assessee.

12. We heard the parties and perused the order of the coordinate bench in assessee's own case for AY 2000-01 (supra) where it is held that –

14. Heard both the sides and perused the decision of ITAT in the case of the assessee itself for assessment year 1999-2000 vide ITA No. 1039/Mum/2005 wherein on the similar issue the appeal of the assessee was dismissed. The relevant part of the decision is reproduced as under:

> *"12. We have heard the rival contentions. This issue had travelled upto the Tribunal in the preceding assessment years (i.e. Assessment Years 1988-89 to 1991-92, 1996-97 and 1997-98. While deciding identical issues in appeal for the Assessment Year 1990-91 [ITA No. 4628 & 4658/Mum/2003, 08.02.2012] the Tribunal has held as under:*

37 Ground No.10 regarding setting off of loss of earlier years for deduction u/s 80I.

The Assessing Officer adjusted the earlier year's loss of the unit eligible for deduction u/s 80I and consequently the claim of deduction u/s 80I was not allowed in full as claimed by the assessee.

On appeal, the CIT(A) has referred sub.sec. (1) of sub sec (6) of sec. 80I and held that the profit has to be computed,, if the Haldia unit eligible for deduction u/s 80I was only undertaking.

38. We have heard the ld Sr counsel for the assessee as well as ld DR and considered the relevant material on record. At the outset, we note that this issue has been decided against the assessee by the Tribunal for the AY 88-89 & 89- 90. The Tribunal for the AY 89- 90 has adjudicated the issue in para 27.1 as under;

> *"27.1 After hearing both the parties, we find that this issue is also covered by the decision of Tribunal in assessment year 1988-89 (supra). In that year, the Revenue had relied on the judgment of Hon'ble Supreme Court in case of Synco Industries Ltd. vs. Assessing Officer (299 ITR 444), to argue that the brought forward losses and unabsorbed depreciation have to be adjusted before allowing claim of deduction u/s 80HH & 80I. The Tribunal distinguished the said case on the ground that brought forward losses/depreciation of the new unit had already been set off against other income of the assessee and nothing was brought forward either as loss or unabsorbed depreciation. Therefore, the Tribunal held that the deduction u/s 80HH has to be allowed without adjusting the brought forward losses/depreciation. However, in relation deduction u/s 80I, the Tribunal noted that in view of the specific provision of sec. 80I(6) as per which deduction u/s 80I has to be allowed on stand allone basis, treating the undertaking as the only source of income. Therefore, the Tribunal directed that brought forward losses and unabsorbed depreciation of the unit of the earlier years starting from the initial year has to be set off before allowing claim u/s 80I. Facts of this year are identical. Therefore, respectfully following the decision of Tribunal in assessment year 1988-89 (supra), we confirm the order of CIT(A) in relation to deduction u/s 80HH and set aside the order in relation to sec.80I on which the order of Assessing Officer is restored." Following the order of the Tribunal for the earlier years, we decide this issue against the assessee.*

13. In view of the specific provisions contained in Section 80IA(6) of the Act and the judgment of the Hon,,ble Supreme Court in the case of Synco Industries Ltd. vs. Assessing Officer: 299 ITR 444, this issue raised in Ground No. 3 to 3.2 were decided against the Appellant by the Tribunal in the above decision. Respectfully following the same, we decide the issue against the Assessee and confirm the order of CIT(A) on this issue. Ground No. 3 to 3.2 raised by the Assessee are dismissed. Following the decision of ITAT as referred supra this ground of appeal of the assesse stand dismissed.

13. Respectfully following the decision of the coordinate bench we dismiss the ground raised by the assessee with regard to set off of brought forward loss/unabsorbed depreciation of tea unit in Dharwad for the purpose of section 80IB.

Allocation of research & Development expenses and interest expenses and while determining the profits for the purpose of deduction under section 80IB – Ground No.5 & 6

14. The Assessing Officer during the course of assessment held that the outcome of the research expenditure is futuristic in nature in the manufacturing processes and product development of units that are eligible for deduction under section 80IB. Accordingly the Assessing Officer allocated the expenditure incurred on research and development while arriving at the profits eligible for deduction under section 80IB. The Assessing Officer similarly allocated the interest expenses to the unit for arriving at the profits for the purpose of deduction under section 80HHC. The CIT(A) upheld the allocation by stating that the expenditure incurred towards research and development benefits the assessee to the upliftment and progress of the products that are manufactured by the eligible units. The CIT(A) also rejected the submissions of the assessee that borrowed funds were not utilised for the

undertaking for the reason that the assessee did not submit any evidence for the claim.

15. The ld AR submitted that the coordinate bench in assessee's own case for AY 2006-07 (ITA No.7868/Mum/2010 dated 10.12.2012) has considered the similar issue where it is held that -

42. On the argument that the research & development activities carried out by the head office has enduring benefit to the units/industrial undertaking, the Hon'ble High Court also considered this argument and held as under:

> *"14. The submissions proceeds on an erroneous basis and does not take into consideration the facts of the case at all. As we noted earlier, in the present case, the said R & D activities were in relation to the new drugs. There is nothing to indicate that in the event of the assessee deciding to commercially exploit the benefits of the R & D work, the products would be manufactured by the said units. The fallacy in the submissions proceeds on the hypothetical basis that the said products would be manufactured by each of the units or any one of them.*
>
> *15. The fallacy also arises on account of an erroneous presumption that the benefit of any R & D activity can only be exploited by an enterprise utilizing the same in its manufacturing activities. That is not so. An enterprise can always assign the benefit thereof to a third party. It can always grant a licence in respect of any patent or design to a third party. In that event, the other units would not derive any benefit in respect thereof. The presumption of a nexus between the R & D activities and the units is not well founded".*

Respectfully following the same, we are of the opinion that the research expenditure cannot be allocated to the units claiming deduction unless it has a nexus. Therefore, AO is directed to exclude the same.

16. The ld AR also submitted that the above decision of the coordinate bench has been upheld by the Jurisdictional High Court in CIT vs Hindustan Unilever Ltd (2016) 72 taxmann.com 325 (Bombay).

17. We heard the parties and perused the material on record. We notice that the Hon'ble Bombay High Court in assessee's own case has considered the similar issue and upheld the decision of the coordinate bench (supra). The question of

law considered by the Hon'ble High Court and the relevant findings are as extracted below –

2. *Whether on facts and in circumstances of the case and in law the Tribunal was right in not allocating the research expenses and interest expenses to various units for calculating allowable deduction under Section 80IB and 80IC of the Act ?*

3. *Whether on facts and in circumstances of the case and in law the Tribunal was right in not allocating the research expenses and interest expenses for calculating allowable deduction/exemption under Section 10A and 10B of the Act on Pune Tea Export Unit and Khandla Unit ?*

4. *Regarding question No. 2 and 3 :*

(a) *We find that the impugned order of the Tribunal allowed the respondent - assessee's appeal before it by following a decision of this Court in Zandu Pharmaceuticals Works Ltd. v. CIT [2013] 350 ITR 366/213 Taxman 207/31 taxmann.com 191. The Tribunal while following the principle in this Court's order in Zandu Pharmaceuticals Works Ltd. (supra) held that so far as research and interest expenses are concerned, it can only be allowed to the extent it has nexus to the unit claiming the deduction. The grievance of the revenue before us is that the aforesaid decision would have no application to the present facts as it is distinguishable. However, besides stating the above nothing has been pointed out in support of its submission that the Zandu Pharmaceuticals Works Ltd. (supra) has no application.*

(b) *In the above view, as the impugned order of the Tribunal has followed the binding decision of this Court, question nos. 2 and 3 as formulated does not give rise to any substantial question of law. Thus not entertained.*

18. For the year under consideration, the revenue did not bring anything on record to show that there is a nexus between the expenditure incurred on research and development and interest expenses and the unit claiming the deduction under section 80IB. Therefore respectfully following the above decision of the jurisdictional High Court we hold that the said expenditure should be excluded while arriving at the profits and the Assessing Officer is directed accordingly.

Deduction under section 80HHC - Grounds 7 to 10

19. Through these grounds, the assessee is contending the action of the Assessing Officer in making certain inclusions and exclusions while allowing the claim of deduction under section 80HHC. The Assessing Officer during the course of assessment, included a sum of Rs.1,78,70,253/- to the total turnover towards sale of scrap/misc sales in order to compute deduction under section 80HHC. The Assessing Officer further considered the following items for the purpose of adopting 90% of the same for determining the profits of the business for deduction u/s 80HHC.

1	Interest received	Rs.213,26,70,370/-
2	Interest Refund Sight	Rs.1,66,000/-
3	Royalty	Rs.12,71,28,410/-
4	Income from Services rendered	Rs.46,52,91,000/-
5	Other Misc income	Rs.9,44,02,916/-
6	Compensation received	Rs.14,23,000/-
7	Processing charges	Rs.83,23,083/-

20. The Assessing Officer also denied deduction under section 80HHC in respect of unrealized export proceeds of Rs.45,87,281/- by stating that the deduction is available only to the extent of the proceeds actually realized in convertible foreign exchange. The Assessing Officer set off the loss reported by the assessee from export of trading goods from against profits from the manufacturing export turnover by relying on the decision of the Bombay High Court in the case of IPCA Laborataries Ltd (25 ITR 401).

21. The Ld.CIT(A), after considering the submissions of the assessee, decided the issue as under:-

(i) Regarding scrap sales, following the order of his predecessor, the Ld.CIT(A) decided the issue against the assessee and confirmed the order of the AO on this issue.

(ii) Regarding deduction of 90% out of various receipts like interest, etc. the AO"s action was upheld following the judgement of Hon"ble Bombay High Court in the case of Asian Stars Co Ltd 326 ITR 56 (Bom).

(iii) With regard to deduction u/s 80HHC on unrealised export profit of Rs.45,87,382/-, the Ld.CIT(A) held that the AO was justified in not allowing deduction on the unrealised export profit as the assessee has not taken the required permission from the CIT u/s 80HHC(2)(a).

(iv) In respect of loss from export, the Ld.CIT(A) held that the AO has correctly set off the loss against profit for the purpose of deduction u/s 80HHC in the light of the decision of the Hon"ble Bombay High Court in IPCA Laboratories Ltd which has been confirmed by the Hon"ble Apex Court in 266 ITR 521 (SC).

22. Aggrieved, the assessee is in further appeal before the Tribunal. At the time of hearing the Ld.AR submitted that all the above issues in relation to deduction u/s 80HHC have been decided by the Tribunal in assessee's own case for AY 200001 and therefore submitted that the issues stand covered by the decision of the Tribunal.

23. With regard to scrap sale / sale of miscellaneous products, the Tribunal vide order dated 16/05/2003 in ITA No.3951/Mum/2008 & ITA 4033/Mum/2008

for A.Y. 2000-01, has set aside the issue for fresh adjudication with the following observations:-

"16. The ld. Counsel submitted before us that identical issue on similar facts for assessment year 1998-99 vide ITA No. 2201/Mum/2004 after following the decision of the ITAT in the case of the assessee itself for assessment year 1991-92 to 1997-98 the issue was restored to the file of the A.O for de novo adjudication by the ITAT Mumbai. Following the decision of ITAT after taking consistent view we also set aside this issue to the file of the A.O to decide de novo as per the finding/ directions of the ITAT in preceding assessment year as supra and in accordance with law. Therefore, ground no. 6 of the assessee is allowed for statistical purposes."

24. Consistent with the above decision of the Tribunal, we restore this issue to the file of the Assessing Officer for de novo consideration after giving a reasonable opportunity of being heard.

25. With regard to exclusion of 90% of receipts such as, interest, interest on refund, royalty, services, misc. income, compensation, processing charges, we find that the Tribunal has partly allowed the ground for A.Y. 2000-01 by holding as under:-

"17. The ld. Counsel submitted that identical issue on similar facts has been adjudicated in favour of the assesse by the ITAT vide ITA No. 2201/Mum/2004. With the assistance of Ld. Representative we have perused the above referred decision of the ITAT wherein the issue of 90% reducing of gross interest received while computing deduction u/s M/s Hindustan Unilever ltd. Vs. ACIT, Range 1(1) 80HHC was decided in favour of the assesse after following the decision of the ITAT in the case of the assessee for AY 1995-96 to 1997-98. Thereafter, taking consistent view we restore this issue to the file of the AO to allow the claim of the assessee as directed supra by the ITAT in its decision on similar issue for preceding assessment years. Similarly vide ITAT order No. 2031/Mum/2004 for AY 1998-99 the issue related to reduction of 90% of Royalty from the profit and gains of business was decided in favour of the assessee after following the decision of the ITAT on this issue for AY 1995-96 to 1997-98. We also restore this issue to the file of the AO for allowing as per the direction of the ITAT given in the above

referred order. In respect of commission and other income the ld. Counsel submitted that ITAT vide ITA No. 1039/Mum/2005 for assessment year 1999-2000 has decided the issue against the assessee. Following the decision of the ITAT as referred supra we consider that 90% of the amount of commission and other income should be reduced from the amount of profit from the business while calculating profit of business for computing deduction u/s 80HHC of the Act. Therefore, this ground of appeal of the assessee is partly allowed for statistical purposes."

26. Respectfully following the above decision of the coordinate bench we restore the issue of reducing 90% interest and Royalty from the profits computed for the purpose of deduction under section 80HHC back to the file of the Assessing Officer with a direction to allow the claim of the assessee in accordance with the directions given by the Tribunal for AY 1995-96 to 1997-98 and 1998-99 after allowing reasonable opportunity of being heard.

27. With regard to the issue of deduction u/s 80HHC on unrealised export profit, we notice that the coordinate bench in assessee's own case for 2000-01, has restored the issue back to the Assessing Officer for a de novo consideration by relying on the order of the ITAT for assessment year 1998-99, 1992-93 and 199394. Accordingly for the year under consideration also the issue is remitted back to the Assessing Officer with similar directions. The assessee is directed to furnish the relevant details pertaining to the realisation of the export proceeds and coordinate with the proceedings.

28. We notice that the issue of loss of export of traded goods not to be reduced from the amount of profit for the purpose deduction u/s 80HHC, we notice that the issue is held against the assessee for AY 2000-01 by the coordinate

bench. The facts being identical for year under consideration, we dismiss ground of appeal filed by the assessee taking a consistent view on the issue.

Provision for retirement pension payable to employees – Ground No.11

29. The next issue pertains to provision for retirement pension payable to the employees. The assessee during the year under consideration has claimed an amount of Rs.46,41,43,000/- as deduction towards provision for retirement pension payable to its employees. The assessee claimed this deduction on the ground that retirement pension is contractual liability of the company to the specified categories of employees payable when they retire from the company. The provision made was claimed based on the actuarial valuation and that it is wholly and exclusively for the purpose of company‟s business and is fully deductible. For this proposition, the assessee relied on the decision of the Karnataka High Court in the case of CIT vs Karnataka Electricity Board 197 ITR 48 (Kar) and the judgement of the Hon‟ble Apex Court in the case of Metal Box Company of India vs Their Workman 73 ITR 53 (SC) and Sassoon David & Co Pvt Ltd vs CIT 118 ITR 261. The Assessing Officer however, found that though the assessee has made a provision of Rs.4641.43 lac in the P&L Account, the actual payment was Rs.1712.20 lac only. In view of this, the Assessing Officer asked the assessee to justify the claim of deduction. The assessee explained that the assessee company is a subsidiary of Unilever Plc, one of the largest transnational corporations and as per policy the retirement benefits for all the companies of the group are worked in the manner so that they can maintain their required standard of living after retirement. Due to inflation the amount of pension payable by superannuating fund maintained by the LIC is inadequate. Therefore, the company is making payment to its

employees under retirement pension plan by supplementing the amount payable by the LIC under approved superannuation fund. The Assessing Officer however, did not find force in the submissions of the assessee. He observed that the assessee has claimed liability on account of contribution for which a sinking fund must have the requisite approval u/s 36(1)(iv) or any contribution to the fund shall meet the provisions of se.40A(9). Referring to the provisions of sec.43B the Assessing Officer held that only the actual payment made is allowable. The Assessing Officer observed that such disallowance has been upheld by the CIT(A) for AYs 1991-92 & 1992-93. Accordingly he allowed the sum of Rs.1712.20 lac actually paid and disallowed the balance amount of Rs.2929.23 lac. On further appeal, the CIT(A) held that the provision made is not an ascertained liability and by relying on the decisions for earlier years by his predecessor dismissed the ground raised by the assessee. Further aggrieved, the assessee is in appeal before the Tribunal.

30. The Ld.AR for the assessee submitted that for A.Y. 2000-01, the Tribunal considered an exactly identical issue in ITA No.3951/Mum2008 and ITA No.4033/Mum/2008 in order dated 16/05/2023 and decided the issue in favour of the assessee. We observe that the co-ordinate bench, while deciding the issue in favour of the assessee, has decided the issue in the following manner:-

"20. The ld. Counsel submitted that similar issue on identical facts has been decided by the ITAT for assessment year 1998-99 in favour of the assessee vide ITA No. 2201/Mum/2004 after following the decision of ITAT in the assesse"s own case for assessment year 1993-94 to 1997- 98. Taking the consistent view after following the order of the ITAT we allow the appeal of the assessee."

31. We notice that the coordinate bench has been consistently holding this issue favour of the assessee and therefore respectfully following the earlier order of

the Tribunal, we decide the issue in favour of the assessee. This ground of the assessee is allowed.

Increasing value of closing stock of raw materials and packing materials unutilized balance of Modvat – Ground No.12

32. The Assessing Officer in the course of assessment proceedings increased the value of closing stock of the assessee by the amount Rs.30,98,25,002/- being unutilised Modvat. On appeal, the Ld.CIT(A) upheld the action of the Assessing Officer. Further aggrieved, the assessee is before the Tribunal.

33. The Ld.AR for the assessee before us contended that the issue is a recurring issue and the Tribunal in its latest order for A.Y. 2000-01 in ITA No.3951/Mum/2008 & ITA No.4033/Mum/2008 order dated 16/05/2023 restored the issue to the Assessing Officer with the following observations:-

22. The ld. Counsel submitted that ITAT in assessment year 2006-07 in assessee"s own case has restored the issue back to the file of the A.O. With the assistance of ld. Representatives we have perused the decision of the ITAT on the identical issue on similar facts for assessment year 1999-2000 vide ITA No. 1039/Mum/2005. The relevant part of the decision is reproduced as under:

60. Ground No. 12
12. The learned CIT(A) erred in increasing the value of closing stock of raw materials and packing materials by Rs.13,84,00,000/- representing unutilised balance of Modvat as on 31.3.99.

61. During the relevant previous year the Assessee accounted for purchase of raw material and packing materials on net of excise duty basis. The Assessing Officer increased the value of closing stock of raw material and packing materials by the unutilised balance in the Modvat Credit Account of INR.13,84,00,000/- as on 31.3.1999. The CIT(A) declined to grant any relief on this issue in appeal preferred by the Assessee. Therefore, the Assessee is in appeal before us on this issue.

62. We have considered rival submissions. Both the sides agree that identical issue has been remanded back to the file of Assessing Officer vide order dated 10.12.2012 passed in ITA No. 7868/Mum/2010 for the Assessment Year 2006-07. We note that the Assessee has taken a position that the accounting policy has been consistently been followed by the Tribunal. For the Assessment Year 2006-07, the Dispute Resolution had directed Assessing Officer to adjust the opening stock, purchases and the closing stock by considering all taxes/duties and shares and thereafter, make addition under section 145A of the Act in case there was any difference in the profits. With the same direction we remand this issue back to the file of Assessing Officer. The Assessee is directed to furnish necessary details and information to enable Assessing Officer to implement the directions. Accordingly, Ground No. 12 is disposed off as allowed for statistical purposes."

Following the decision of ITAT as referred supra we restore this issue to the file of the A.O for deciding afresh as directed in the findings of the ITAT in preceding assessment year as above. Therefore, this ground of appeal of the assessee is allowed for statistical purposes."

34. Consistent with the earlier order of the Tribunal, we restore the issue to the file of the Assessing Officer to decide afresh in line with the earlier years" direction. Ground 12 of the assessee is allowed for statistical purpose.

Reduction in exemption u/s 10B in respect of miscellaneous income(Ground No.13

35. During the course of assessment proceedings, the Assessing Officer noticed that assessee claimed exemption u/s 10B on the profit and gains from 100% of export oriented unit Etah amounting to Rs.5,03,65,774/- which included miscellaneous income of Rs.30,361. The assessee submitted that the miscellaneous income consists of realisation from scrap sale which is derived from the industrial undertaking. Therefore it was submitted that the said income should be eligible for deduction under section 10B. The Assessing Officer disallowed the said amount for the purpose of claiming exemption under section 10B. The CIT(A) upheld the disallowance by holding that sale

of scrap is not generated by production or sale of any article or thing and therefore cannot be part of the profit eligible for deduction under section 10B.

36. The Ld.AR for the assessee before us submitted that identical issue was decided by the Tribunal for the earlier assessment year 2000-01 vide order in ITA No.3951/Mum/2008 & ITA No.4033/Mum/2008 order dated 16/05/2023 and the issue was restored to the file of the Assessing Officer for fresh consideration with the following observations:-

"26. During the course of appellate proceedings before us the ld. Counsel placed reliance on the decision of CIT. Hewlett Packard Global Soft Ltd. 87 taxcom.182 (Kar) & GE BE P. Ltd. Vs. ACIT 49 taxman.com 348 (Kar). The ld. Counsel also submitted that ITAT in assessment year 1999-2000 vide ITA No. 1039/Mum/2005 has restored the issue to the file of the A.O for adjudicating afresh. We have perused the above referred order of the ITAT and found that the similar issue on identical facts has been restored back to the file of the A.O for deciding afresh as per provisions of Sec. 10B applicable at the relevant time after giving the assessee reasonable opportunity of being heard. Accordingly, we restore this issue to the file of the A.O for deciding afresh as per the direction of the ITAT given at para 69 of the above referred order. Therefore this ground of appeal is allowed for statistical purposes."

37. The facts being identical, consistent with the earlier decision of the Tribunal, we restore the issue to the file of the Assessing Officer for fresh consideration as per the directions of the Tribunal issued earlier.

Disallowance of exemption under section 10B in respect of internal transfer - Ground 14

38. In the computation of income, the assessee had claimed an amount of Rs.8,78,95,659/- as exempt under section 10B in respect of its industrial undertaking at Chorwad. The Assessing Officer noticed that the sales of the

unit includes internal transfer of Rs.29,91,890/- and in this regard called on the assessee to explain why the said amount cannot be excluded for determining the profits of the unit for the purpose of exemption under section 10B. The assessee submitted that during the relevant previous year, the assessee had set up a 100% export oriented unit (EOU) in Chorwad for manufacture of crab sticks. The raw material for manufacture of crab sticks is the fish paste manufactured at the existing EOU at Chorwad. The assessee further submitted that the crab stick manufactured at the newly set up EOU is meant for export and, therefore, the fish paste which has been transferred from the existing EOU is actually being exported after it is further processed and converted into crap sticks. The assessee, therefore, submitted that the basic raw material with which article or thing manufactured at an EOU should be exported is being fulfilled and deduction under section 10B has been rightly claimed. The Assessing Officer did not accept the submissions of the assessee and rejected the amount shown under internal transfer by excluding the said amount from the sales and the corresponding expenditure of Rs.25,69,902/-. The Assessing Officer accordingly did not allow claim of exemption under section 10B to the extent of net difference of Rs.2,35,988/-. On further appeal, the CIT(A) upheld the decision of the Assessing Officer.

39. The Ld.AR submitted that the amount claimed as exempt under section 10B includes the inter unit transfer between one EOU to another EOU which is deemed export. The Ld.AR relied on the decision of the Karnataka High Court in the case of Granite Mart Ltd vs ITO (2020) 121 taxmann.com 168 (Kar). The Ld.AR also submitted that since it is an inter unit transfer for which exemption under section 10B is claimed, it is tax neutral at the entity level.

40. The Ld.DR relied on the order of the lower authority.

41. We notice that during the year, the assessee has transferred fish paste which is the raw material for manufacturing crab sticks for an amount of Rs.29,91,890/- among the EOUs at Chorwad. The assessee claimed exemption under section 10B towards the transfer for the fish paste making unit on the ground that the crab stick making EOU has ultimately used this raw material for export and therefore, the basic criteria that the article or thing manufactured at an EOU should be exported is being fulfilled. The lower authorities rejected the claim for the reason that the internal transfer included in the sales has no relevance to the export profits of the assessee. Accordingly, the assessee was denied the benefit of section 10B to the extent of Rs.2,35,988/-. With regard to whether the transfer from one export unit to another can be considered as deemed export for the purpose of section 10B, we notice that the issue has been considered by Hon‟ble Karnataka High Court in the case of Granite Mart Ltd vs ITO (supra) where the question of law raised and the decision of the Hon‟ble High Court is extracted as below:-

(i) Whether the Tribunal was justified in law in holding that the exports made through third parties and inter unit transfers are not entitled for deduction under section 10B of the Act on the facts and circumstances of the case and consequently gave a perverse finding?

"12. Thus, from perusal of section 10A of the Act, it is evident that the intention of the legislature is to encourage establishment of export oriented industries with the object of receiving convertible foreign exchange. In order to claim deduction under section 10A of the Act, the conditions laid down under section 10A(2) have to be complied with. It is pertinent to mention here that in International Stones India (P.) Ltd. case (supra), a division bench of this court has held that a narrow and pedantic approach cannot be applied in

construing the words "bv an undertaking" and restricting the benefit under section 10B of the Act only in respect of direct export of such goods manufactured by such units. The deemed export by the assessee undertaking even through third party who has exported such goods to foreign country and has fetched foreign currency for India still remains a deemed export in the hands of the assessee undertaking also. The aforesaid decision was proved by another division bench of this court in the case of Metal Closures Steel Ltd. (supra), which has been affirmed by the Supreme Court. In view of aforesaid enunciation of law, it is evident that the appellant is entitled to benefit of deduction under section 10B of the Act in respect of export made to third parties and inter unit transfers. So far as submission made by learned counsel for the revenue that the matter requires factual adjudication and therefore, should be remitted is concerned, suffice it to say that there were in all approximately 40 parties with whom the appellant had entered into 398 transactions. Out of the aforesaid 2 parties, the Assessing Officer had examined 2 of the major parties viz., S.K. International, New Delhi and M/s Glittek Granites Ltd., who had stated before the Assessing Officer that they had not claimed any exemption. Under Rule 16E of the Income-tax Rules, 1962. The report of an accountant which is required to be furnished by the assessee along with the return of income, under sub-section (5) of section 10B shall be in Form No. 56G. The aforesaid report has been furnished by the appellants and it is not the case of the revenue the appellants have not furnished the aforesaid report. Besides this, it is pertinent to mention here that the question of duplications in the fact situation of the case does not arise as each person can claim only on the value addition by him and the presumption that there can be duplication is contrary to the principle of computation of the income under the Act.

In view of the preceding analysis, the substantial questions of law are answered in favour of the assessee and against the revenue. In the result the order passed by the Income-tax Appellate Tribunal as well as the Commissioner of Income-tax (Appeals) insofar as it disallows the claim of the appellant with regard to transactions through third parties and interunit transfers is hereby quashed and the assessee is held entitled to the benefit of deduction under section 10B of the Act in respect of third parties and inter unit transfers as well. In the result, the appeals are allowed."

42. We notice that the issue in assessee"s case is similar to the one considered by the Hon"ble High Court in the above case. Accordingly, respectfully following the above decision, we hold that the amount of internal transfer

between two EOUs of the assesse is to be considered for the purpose of arriving at the profit eligible for exemption under section 10B of the Act. It is also to be noted here that since the impugned amount is an internal transfer which is shown as sales in one EOU and as expenditure in the other EOU, there is merit in the contention that at entity level it is tax neutral. In view of the above discussion, we delete the addition made by the Assessing Officer denying the amount of internal transfer as claimed under 10B of the Act.

Treatment of legal cost incurred in respect of merger of erstwhile Industrial Perfumes Limited as capital expenditure – Ground No.15

43. The assessee had claimed a sum of Rs.6,63,778/- as legal expenses incurred towards amalgamation of M/s.Industrial Perfumes Ltd. The Assessing Officer disallowed this expenditure for the reason that the same does not pertain to the year under consideration and also for the reason that it is capital in nature. The CIT(A) upheld the disallowance by relying on the orders of his predecessor.

44. The Ld.AR for the assessee submitted that for A.Y. 2000-01, the Tribunal considered an exactly identical issue in ITA No.3951/Mum2008 and ITA No.4033/Mum/2008 in order dated 16/05/2023 and decided the issue in favour of the assessee. We observe that the co-ordinate bench, while deciding the issue in favour of the assessee, has decided the issue in the following manner:-

29. During the course of appellate proceedings before us the ld. Counsel contended that allowability of such expenditure are to be considered as per provision of Sec. 35DD of the Act.

30. We consider that the claim of the assesse regarding allowability of the expenditure as per the provisions of Sec. 35DD of the Act is required to be examined by the A.O on the basis of relevant material after providing opportunity to the assessee. Therefore, this ground of appeal of the assessee is restored to the file of the A.O for deciding afresh as directed above. Accordingly, this ground of appeal is allowed for statistical purpose.

The facts being identical, consistent with the earlier decision of the Tribunal, we restore the issue to the file of the Assessing Officer for fresh consideration as per the directions of the Tribunal issued earlier

Disallowance of capital expenditure on scientific research incurred at Hyderabad - Ground No.16

45. The Assessing Officer, during the course of assessment noticed that assessee had claimed an amount of Rs.3,20,55,971/- as capital expenditure on scientific research and called on the assessee to furnish the evidence that all research centres met the conditions laid down under section 35. The Assessing Officer disallowed the expenditure of Rs.1,08,188/- claimed as incurred towards capital expenditure at Hyderabad unit for the reason that certificate of renewal of the R&D unit at Hyderabad was not submitted. The CIT(A) upheld the disallowance made by the Assessing Officer.

46. The Ld.AR in this regard submitted that the lower authorities have proceeded based on the incorrect assumption that the assessee has claimed deduction towards scientific expenditure under section 35(1)(ii) whereas the assessee has claimed expenditure under section 35(2)(ia) of the Act. The Ld.AR further submitted that it is only as per the provisions of section 35(1)(ii), that the approval of the R&D Centres had to be submitted and since the assessee

has claimed deduction under section 35(2)(ia), there was no such requirement. In this regard, the Ld.AR drew our attention to the relevant clause (clause 15(b)) of the Tax Audit Report for the relevant assessment year where the impugned amount has been claimed as a deduction under section 35(2)(ia). Accordingly, the Ld.AR submitted that the lower authorities erred in disallowing the expenditure under the wrong presumption that the assessee has claimed deduction under section 35(1)(ii) and, therefore, the disallowance is not tenable.

47. We heard the parties and perused the material available on record. We notice from the tax audit report that the assessee has claimed the deduction under section 35(2)(ia) towards scientific expenditure and not under section 35(1)(ii) as held by the lower authorities. In this connection it is relevant to look at the provisions of section 35(2)(ia)

Expenditure on scientific research.

[36] ***35.*** *(1) ******

*(i) ****

*(ii) ****

*(iii) ****

(iv) in respect of any expenditure of a capital nature on scientific research related to the business carried on by the assessee, such deduction as may be admissible under the provisions of sub-section (2) :

(2) For the purposes of clause (iv) of sub-section (1),—

[52] *[(i) ******

(ia) in a case where such capital expenditure is incurred after the 31st day of March, 1967, the whole of such capital expenditure incurred in any previous year [53]*shall be deducted for that previous year :]*

*54 [**Provided** that no deduction shall be admissible under this clause in respect of any expenditure incurred on the acquisition of any land, whether the land is acquired as such or as part of any property, after the 29th day of February, 1984.]*

55 [Explanation 1].—Where any capital expenditure has been incurred before the commencement of the business, the aggregate of the expenditure so incurred within the three years immediately preceding the commencement of the

business shall be deemed to have been incurred in the previous year in which the business is commenced.

56 [Explanation 2.—For the purposes of this clause,—

(a) "land" includes any interest in land ; and

(b) the acquisition of any land shall be deemed to have been made by the assessee on the date on which the instrument of transfer of such land to him has been registered under the Registration Act, 1908 (16 of 1908), or where he has taken or retained the possession of such land or any part thereof in part performance of a contract of the nature referred to in section 53A [57] of the Transfer of Property Act, 1882 (4 of 1882), the date on which he has so taken or retained possession of such land or part ;]

48. From the plain reading of the above provisions it is clear that there is no approval required for claiming deduction under section 35(2)(ia). The lower authorities have denied the expenditure by considering incorrect section stating that the assessee has not fulfilled the requirement. The lower authorities have not examined the merits of the issues to verify whether the assessee's claim is allowable under section 35(2)(ia). Therefore we remit the issue back to the Assessing Officer for a fresh consideration of the claim made by the assessee under the correct section i.e.35(2)(ia). The assessee is directed to submit the relevant details as may be called for and cooperate with the proceedings. It is ordered accordingly.

Disallowance of cess on green leaf- Ground No.17

49. In the computation of income, assessee has shown profit from plantation pertaining to Plantation Tea Estate India (TEI) at Rs.16,97,88,000/- and Doom Dooma India (DDI) division at a loss of Rs.2,58,56,000/-. The assessee has computed income from manufacturing of tea in accordance with section 29 read with Rule 8 of the Income-tax Rules, 1962. The Assessing Officer noticed from the said computation that the assessee has allocated cess on agriculture in the ratio of 60:40 towards agriculture and business. Accordingly the assessee has claimed 40% as

business expenditure. The Assessing Officer called on the assesse to state as to why the entire cess amount cannot be considered towards computation of agricultural income as the same relates to agricultural income. The assessee in this regard made the following submissions:-

"Manufacture / Production of tea at Plantations / tea gardens broadly involve: steps from growing 7 cultivation of tea bushes to plucking of tea leaves to manufacture / production of tea at factories which are normally situated within the tea garden steps involve various expenses, some of which can be directly attributed to growing / cultivation of tea and some could be attributed to manufacture / production of tea at factories. There are certain other expenses which cannot be directly identified t growing / cultivation of tea leaves or production of tea. Similarly, the revenue a sale of tea at auctions, however, it is not possible to bifurcate the revenue into attributable to growing / cultivation of tea and to manufacture / production Therefore, in order to overcome this difficulty in determination of income attributable to growing / cultivation of tea leaves and that attributable to manufacture / pro of tea, the legislature has provided that the composite income should be split ratio of 40 : 60, whereby 40% is attributable to production of tea and is charge tax under the Income-tax Act and 60% is treated as agricultural income, w exempted under the Income-tax Act, but is chargeable to Agricultural Income-tax submitted that having adopted Rule 8 as the basis for determination of income cultivation/growing and manufacture / production of tea, it is improper to thereafter start determining income by actually identifying expenses to growing activity manufacturing activity.

Since cess on green leaf of Rs. 1,18,07,344/- incurred at DDI Division is a part of total expenditure incurred during the course of growing / cultivation to manufacture / production of tea and since income is determined under rule 8, no separate adjustment ought to be made for this single item of expenditure.

In this connection, we would like to draw your kind attention to the judgment the ITAT, Kolkata 'D' Bench in the case of Bishnauth Tea Co. Ltd. vs. Joint Commission Income-tax, [2002] 77 TTJ 45 - (Copy enclosed - ***Annexure*** *A) wherein the ITAT has referred to and distinguished the decision of the Gauhati High Court in Jorehaut G Ltd. vs. Agrl. ITO [1997] 226 ITR 622. The Tribunal has examined the provisions of Rule 8 and the other relevant provisions of the Income-tax Act and has also referred to decisions of the Supreme Court in Tata Tea Ltd. v. State of West Bengal, [1988] :it" ITR 18, Assam Company Ltd. & Anr. Vs. State of Assam & Ors [2001] 248 ITR 567.*

In view of the above, it is submitted that the cess on green leaf is an expenditure incurred while growing and manufacture of tea and ought to be apportioned in terms of the provisions of Rule 8."

50. The Assessing Officer however denied the claim of the assessee by relying on the decision of the Guwahati High Court in the case of Jorhaut Group Ltd vs Agricultural ITO 226 ITR 622 (Gau). Accordingly, the Assessing Officer disallowed an amount of Rs.47,22,938/- being 40% of the total expenditure claimed by the assessee as business expenditure. The CIT(A) on further appeal upheld the disallowance.

51. The Ld.AR in this regard submitted that assessee‟s case is covered by the decision of the Calcutta High Court in assessee‟s own case. The Ld.AR further submitted that the Hon‟ble Calcutta High Court while considering the issue has also distinguished the decision of the Hon‟ble Guwahati High Court in the case of Jorhaut Group Ltd (supra) which is relied on by the revenue. The Ld.DR relied on the order of the lower authorities.

52. We heard the parties and perused the material on record. We notice that the impugned issue has been a subject matter of appeal before the Hon'ble Calcutta High Court in assessee‟s own case where the question of law raised and the decision are as extracted below:-

"(a) Whether in computing the composite income derived from sale of tea grown and manufactured by the assessee Cess payable under the Assam Agricultural Income-tax Act on green tea leaves is allowable as a business expenditure in computing the composite income under Rule 8 of the Income-tax Rules, 1962?

"8. After hearing the learned counsel for the parties and after going through the materials on record, we find that the question, whether the amount of Cess paid by an assessee under the Assam Agricultural Incometax Act on green tea leaf is allowable as a "business expenditure" in computing the composite income under rule 8 of the Income-tax Rules, 1962, has already "been decided by a Division Bench of this Court in the case of CIT v. A.F.T. Industries Ltd, [2004] 270 1TR 167/141 Taxman 433 and it has been held that the amount of Cess so payable is deductible.

9. We, therefore, find that there was no justification of invoking section 263 of the Income-tax Act for reopening of the assessment on the basis of a proposal given by the Assessing Officer himself after passing of the order of the assessment on the basis of the precedent of Gauhati High Court which has not been approved by a Division Bench of our High Court.

10. We, therefore, set aside the order passed by the Commissioner of Income-tax under section 263 of the Act which has been affirmed by the Tribunal below and direct the Assessing Officer to act accordingly. The appeal is, thus, allowed."

53. We further notice that the Hon"ble jurisdictional High Court in assessee"s own case has held that –

***"19.** On the issue of allocation of cess on green leaves, we are in agreement with the view which has been taken by the Tribunal. Rule 8 of the Income Tax Rules, 1962 stipulates that income derived from the sale of tea grown and manufactured by the seller in India shall be computed as if it were income derived from business, and forty per cent of such income shall be deemed to be income liable to tax. Rule 8 provides for a legal fiction for determining what part of the income of an assessee, who engages in the growing of tea leaves and the manufacture of tea, would be regarded as being attributable to income from the manufacturing operations and liable to tax. As a result of the fiction brought in by Rule 8, the entire income which is derived from the sale of tea grown and manufactured by the seller is required to be computed, in the first instance, as if it is an income derived from business. 40% of the income which is so derived, is then deemed to be income which is liable to tax. The expenditure which was incurred by the assessee on the payment of cess on green leaves, is expenditure which is liable to be taken into account in computing the income of the assessee from the business. As a matter of fact, this view has been taken by the Calcutta High Court in Income Tax Appeal*

193 of 2002 decided in the case of the assessee itself on 4 February 2011. One of the questions which was formulated for the decision of the Calcutta High Court was to the following effect:

> *"Whether in computing the composite income derived from sale of tea grown and manufactured by the assessee cess payable under the Assam Agricultural Income Tax Act on green tea leaves is allowable as ; business expenditure in computing the composite income under Rule of the Income Tax Rules, 1962?"*

The Division Bench of the Calcutta High Court relied upon the decision in CIT v. AFT Industries Ltd. [2004 270 ITR 167 / 141 Taxman 433 , and held that the amount of cess so payable was deductible. In view of th fact that the decision of the Calcutta High Court holds the field now in so far as the assessee is concerned, w do not find any merit in the challenge which has been advanced on behalf of the Revenue to that aspect of the order passed by the Tribunal. "

54. Respectfully following the above judicial pronouncements, we direct the Assessing Officer to delete the disallowance made in this regard. This ground is allowed in favour of the assessee.

55. The assessee has also raised an additional ground, which reads as under:-

> *"On the facts and in the circumstances of the case and in law, the assessing officer ought to have held that the levy of the dividend distribution tax u/s 115-O of the Income-tax Act 1961, on payment of the dividend to non-resident shareholders should be at the rate specified in the relevant article dealing with taxability of dividends in the agreement of Double taxation Avoidance Agreement (DTAA) between India and the country of residence of the non-resident shareholders and ought to have consequently granted a refund for the tax paid in excess thereof."*

56. We heard both the parties with regard to the admission of the additional ground. We notice that the additional grounds raised are pure legal issue, which does not require investigation of new facts. Hence, placing reliance on the judgment of the Hon"ble Apex Court in the case of National Thermal Power Co. Ltd. v. CIT (1998) 229 ITR 383 (SC), we admit the additional grounds.

57. The ld AR fairy conceded that the issue is now covered by the decision of the special bench in the case of DCIT vs Total Oil India (P.) Ltd. [2023] 149 taxmann.com 332 (Mumbai - Trib.) (SB) where it is held that –

83. For the reasons give above, we hold that where dividend is declared, distributed or paid by a domestic company to a non-resident shareholder(s), which attracts Additional Income-tax (Tax on Distributed Profits) referred to in sec.115-O of the Act, such additional income tax payable by the domestic company shall be at the rate mentioned in section 115-O of the Act and not at the rate of tax applicable to the non-resident shareholder(s) as specified in the relevant DTAA with reference to such dividend income. Nevertheless, we are conscious of the sovereign's prerogative to extend the treaty protection to domestic companies paying dividend distribution tax through the mechanism of DTAAs. Thus, wherever the Contracting States to a tax treaty intend to extend the treaty protection to the domestic company paying dividend distribution tax, only then, the domestic company can claim benefit of the DTAA, if any. Thus, the question before the Special Bench is answered, accordingly.

58. In view of the above decision the addition ground of the assessee is dismissed.

ITA No.5549/Mum/2011 (Revenue's appeal)

Deletion of addition towards Membership Fees and Entrance to Club – Ground No.1

59. The Assessing Officer disallowed 50% of the expenditure claimed by the assessee as incurred towards Membership Fees and Entrance as expenditure incurred for non-business purposes by relying on earlier year decision. The CIT(A) deleted the disallowance by placing reliance on the decision of the Hon"ble Bombay High Court judgement in Otis Elevators reported in 195 ITR 685 (Bom).

60. Upon hearing the parties, we find that the issue is covered by the earlier decision of the Tribunal for the Assessment Year 2000-01 in ITA No. Nos. 3951 & 4033/Mum/2008 order dated 16/05/2023 whereby the Tribunal dismissed the ground of the revenue by observing as under:-

> "38. We have perused the decision of ITAT Mumbai in the case of the assessee itself vide ITA No. 1039/Mum/2005. At para 57-58 of the said order held that this is a recurring issue which has been decided in favour of the assessee for the preceding assessment years 1986-87 to 1993-93 and from A.Y. 1995-96 to 199697. Taking consistent view following the decision of ITAT as referred supra, this ground of appeal of the revenue stand dismissed."

61. Facts and circumstances being identical, following the earlier decisions of the Tribunal, we dismiss the ground raised by the Revenue.

Deleting disallowance towards Rural development activities – Ground No.2

62. Through this ground the revenue agitates the deletion of disallowance of Rs.38,92,129/- towards rural development activities. The brief facts are that in the course of assessment proceedings, the AO noticed that the assessee has claimed expenditure of Rs.38,92,129/- towards rural development activities. The assessee explained that the expenditure was incurred on rural development work and rural training of its management employees. The company is engaged in agri products and agri inputs business. The expenditure so incurred on rural development activities enable the company to carry on the said business more effectively. The expenditure includes the cost of rural training of the executives. It was claimed that the large portion of the company's sales are in rural market and the trainees recruited by the company are sent to Etah and Buldanha district to acquaint them with the rural market. However the AO did not accept the explanation of the assessee. The AO held

that in the earlier year including 1999-00, similar claims were made by the assessee which was allowed as deduction in view of the specific relief envisages u/s. 35C & 35CC. The Assessing Officer further held that the said sections have been amended with effect from 1.4.1989 whereby the legislature has withdrawn the specific concession. Accordingly, the AO disallowed the expenditure. On appeal, the Ld.CIT(A) allowed the ground of the assessee with the following observations:-

"8.3 I have considered the A.O.'s order as well as the appellant's A/R submission. Having considered both, I find that the AO has disallowed the amount only on the ground that the specific deduction available u/s 35CC has been withdrawn and not available for this year. However, allowability of the expenditure, like any other expenditure, can be considered u/s. 37. There is no dispute that the appellant company manufactures a large number of products which are sold all over India including the rural areas. If the executives of the company are sent to the rural areas to acquaint themselves with the conditions there, the experiment will be beneficial to the business interest of the company and as such, any expenditure incurred therein will be an expenditure incurred for the purpose of business. So, the issue is to find out the details of the expenditure incurred. Since my predecessors in earlier years have accepted such expenditure on rural development, I am inclined to follow my predecessors in the absence of any evidence to the contrary. Under these circumstances, the AO is directed to allow the expenditure claimed under this head. Thus, this ground of appeal is accordingly allowed."

63. The ld AR brought to our attention that the issue stands covered by the earlier decision o the Tribunal for A.Y. 2000-01 (supra) wherein it was held as under:

"41. Heard the rival contentions and perused the material on record. The ITAT Mumbai in the case of the assessee itself vide ITA No. 2201/Mum/2004 for A.Y. 1998-99 has decided the similar issue as per para 46 of the order after following the ITAT decision for A.Y. 1989-90 to 1997-98. Being a recurring issue after following the decision of ITAT as supra this ground of appeal of revenue stand dismissed."

64. Facts and circumstances being identical, respectfully following the earlier decision of the Tribunal, we uphold the order of the Ld.CIT(A) and dismiss the ground raised by the revenue.

Restoring disallowance under section 14A for re-computation – Ground No.3

65. The AO during the course of assessment noticed that the assessee has claimed dividend income u/s. 10(33) of the Act at Rs.49,09,58,845/- and interest on tax free bonds_of Rs.2,13,83,630/- as exempt u/s. 10(15) of the Act as exempt from tax. During the course of proceedings, the assessee was asked to explain as to why expenses incurred towards earning this income may not be determined and disallowed u/s. 14A of the Act. The assessee submitted that the dividend income is primarily from shares of subsidiary companies and that these investments were made from time to time out of the surplus funds generated from business operations. The assessee further submitted that the exempt income earning investments constitute only 20% of total investment and that the assessee has not incurred any expense towards earning the exempt income.

66. The Assessing Officer, however, did not agree with the contentions of the assessee and made the impugned disallowance by observing as under:-

"7.2 I have considered the above submissions of the assessee and find that in the ear assessments including the A.Y. 2000-2001, expenditure towards earning the above income been determined and allocated and disallowed u/s. I4A of the Act, and for determining above disallowance, ratio of cost of the shares and securities on which tax free dividend interest received over the total assets of the company to the interest cost has been applied. In view of the same and insertion of section 14A under the Income-tax Act with retrospective from 1-4-1962 and explanatory provision relating to finance bill, 2001, expenses incurred to extent of earning exempt income is to be disallowed, and wherever such expenses are not available, the same is to be ascertained. In this regard, I apply the ratio of the decision in case of Consolidated Coffee Ltd. vs. State of Karnataka (2002) 176 CTR 98 (SC) where it has been held that in the absence of all the relevant particulars,

apportionment of expenses towards agricultural and non-agricultural income was justified."

67. Aggrieved, assessee carried the matter before the CIT(A). The Ld.CIT(A), by following the judgement of the Hon"ble jurisdictional High Court in the case of Godrej & Boyce Mfg. Co. Ltd vs DCIT (supra) restored the issue to the file of the Assessing Officer with a direction to provide reasonable opportunity to the assessee and work out the total expenditure i.e. direct or indirect both in relation to exempt income and make the disallowance in accordance to the decision of jurisdictional High Court.

68. We heard the rival submissions. During the course of hearing the ld AR drew our attention to the submission made before the Assessing Officer (Annexure C to letter dated 20.12.2003) to substantiate that own funds of the assessee are more than the investments. On perusal of the same we notice that own funds of the assessee as at 31.03.2001 stands at Rs. 2,042.06 crores and dividend earning investments stands at Rs.332 crores. Therefore we see merit in the contention that no disallowance is warranted towards borrowing cost. With regard to disallowance of indirect expenses we notice that in A.Y. 2000-01, the co-ordinate bench of the Tribunal considered an identical issue and held that an amount of 0.5% on the income claimed as exempt would be reasonable to consider as expenditure incurred for earning exempt income under section 14A. The facts and circumstances for the year under consideration being identical, we direct the Assessing Officer to work out the disallowances at 0.5% of the income claimed exempt. This ground contended by the assessee is partly allowed.

Allowing deduction under section 10B for Pune & Kidderpur units – Ground No. 4

69. The assessee had acquired the tea export business of Lipton India Exports Ltd (LIEL) with effect from 01/04/2000. Business comprised of certain industrial undertaking which included EOUs at Pune and Kidderpur which commenced the commercial production in financial years 1992-93 and 1997-98, respectively. LIEL had claimed exemption under section 10B in respect of profits derived by these EOUs. After the acquisition of business by the assessee, the assessee claimed exemption under section 10B with respect to these EOUs for the unexpired period. The Assessing Officer held that the assessee cannot claim exemption under section 10B with respect to these units as per the Explanation to sub section (9) which is inserted to section 10B Inserted by the Finance Act, 2001, w.e.f. 1-4-2001. The assessee preferred further appeal before the CIT(A). The CIT(A) allowed the claim of the assessee on the ground that Explanation to sub section (9) of section 10B provides that the section is not applicable to companies in which public are substantially interested. Since the assessee as well as LIEL are companies in which public are substantially interested, the CIT(A) held that the Assessing Officer has incorrectly applied the provisions of section 10B(9).

70. In this regard, the Ld.AR submitted that sub section (9) is omitted by the Finance Act, 2003 without any saving clause and, therefore, the disallowance made by the Assessing Officer by invoking sub section (9) is no longer valid. The Ld.AR submitted that when a section is omitted without any saving clause, then it has to be taken that the section never existed and accordingly, the disallowance made is not tenable. The Ld.AR in this regard relied on the

decision of the Hon‟ble Karnataka High Court in the case of GE Thermometrics India Pvt. Ltd

(ITA No.876 of 2008 C/W ITA No.877 of 2008) judgement dated 25th November, 2014 for A.Y. 2002-03. The Ld.AR submitted that in the above decision, the Hon‟ble Karnataka High Court has held that sub section (9) of section 10B is not applicable to the assessee for A.Y. 2002-03 which is prior to the Finance Act, 2003 which omitted the said sub section (9). The Ld.AR therefore submitted that in assessee‟s case for A.Y. 2001-02, the ratio laid down by the Hon‟ble Karnataka High Court is squarely applicable.

71. The Ld.DR, on the other hand, submitted that the CIT(A) is not correct in deleting the disallowance and supported the order of the AO.

72. We heard the parties and perused the material on record. We notice that the Hon‟ble Karnataka High Court in the case of GE Thermometrics India Pvt. Ltd (supra) has considered a similar issue in which the question of law raised and the decision of the Hon'ble High Court is as extracted below-

“Whether the Tribunal was correct in holding that in view of the omission of sub section (9) to Section 10B of the Act, w.e.f. 01.04.2004, it should be understood that the said section never existed in the statute book and therefore the benefit claimed by the assessee u/s 10B should be allowed?”

“8. Admittedly, in the instant case, there is no saving clause or provision introduced by way of an amendment while omitting nub-section (9) of Section 10B. Therefore, once the aforesaid section is omitted from the statute book, the result is it had never been passed and be considered as a law that never exists and therefore, when the assessment orders were passed in 2006, the Assessing Officer was not justified in taking note of a provision which was not in the statute book and denying benefit to the assessee. The whole object of

such omission is to extend the benefit under Section 10B of the Act irrespective of the fact whether during the period to which they are entitled to the benefit, the ownership continues with the original assessee or it is transferred to another person. Benefit is to the undertaking and not to the person who is running the business. We do not see any merit in these appeals. The substantial question of law is answered in favour of the assessee and against the revnue. Accordingly, the appeals are dismissed."

73. Respectfully following the above decision of the Hon"ble Karnataka High Court, we hold that the assessee is entitled for claiming deduction with respect to the EOUs acquired from LIEL for the unexpired period since sub section (9) is omitted without saving clause, and therefore, is not applicable in assessee"s case. Even otherwise, Explanation (1) to sub section (9) of section 10B states that the sub-section is not applicable to companies in which public are substantially interested. The assessee and LIEL being companies in which public are substantially interested, the Assessing Officer is not correct in making the disallowance by applying sub section (9) of section 10B. This ground of the Revenue is dismissed.

74. In the result, both the appeal of the assessee and the revenue are partly allowed.

Order pronounced in the open court on 18/08/2023.

Sd/-	**sd/-**
(VIKAS AWASTHY) JUDICIAL MEMBER	**(PADMAVATHY S) ACCOUNTANT MEMBER**

Mumbai, Dt : 18th August, 2023
Pavanan

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

1. अीिि ार्थी/The Appellant

, 2. प्रतिवादी/ The Respondent.

3. आयकर आयुक्त CIT

4. तवभागीय प्रतितिति, आय.अी.अति., मुबंई/DR, ITAT, Mumbai

6. गार्ड फाइि/Guard file.

BY ORDER,

//True Copy//

Asstt. Registrar / Senior Private Secretary**,**

ITAT, Mumbai