IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: 'C', NEW DELHI

BEFORE SHRI NK SAINI, VICE PRESIDENT
AND
SMT. BEENA A PILLAI, JUDICIAL MEMBER

ITA No. 7302/Del/17
A.Y.: 2011-12

ITA No. 1822/Del/18
A.Y.: 2013-14

ITA No. 1823/Del/18
A.Y.: 2014-15

ITA No. 2759/Del/18
A.Y.: 2013-14

ITA No. 2760/Del/18
A.Y.: 2014-15

Jubilant Biosys Ltd. Plot No.1A, Sector 16A G.B.Nagar Noida, UP PAN: AAACJ9445P	**vs**.	Dy.CIT, Circle – 1 Noida, UP

ITA 1824/Del/18
A.Y.:2012-13

ITA 1825/Del/18
A.Y.:2013-14

ITA 2757/Del/18
A.Y.: 2012-13

ITA 2758/Del/18
A.Y.:2013-14

Jubilant Chemsys Ltd. Plot No.1A, Sector 16A G.B.Nagar Noida, UP 201 301 PAN: AABCJ4392G	**vs**.	Dy.CIT, Circle – 1 Noida, UP

(Appellant) **(Respondent)**

Assessee by : Sh. KM Gupta, Adv.
Sh. Rishabh Malhotra, A.R.

Department by : Sh. Manish Gupta, CIT,DR.

Date of Hearing : 27/11/2018

Date of Pronouncement: 28/11/2018

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

Present appeals have been filed by assessee, against following orders passed by Ld.CIT(A), arising out of quantum and penalty proceedings:

S. No.	Assessee	ITA No./AY	Date of Impugned Order	Nature of Appeal
1.	Jubilant Biosis Ltd	7302/D/17 2011-12		Quantum appeal
2.	Jubilant Biosis Ltd	1822/D/18 2013-14		Quantum appeal
3.	Jubilant Biosis Ltd	1823/D/18 2014-15		Quantum appeal
4.	Jubilant Biosis Ltd	2759/D/18 2013-14		Penalty appeal
5.	Jubilant Biosis Ltd	2760/D/18 2014-15		Penalty appeal
6.	Jubilant Chemsys Ltd	1824/D/18 2012-13		Quantum appeal
7.	Jubilant Chemsys Ltd	1825/D/18 2013-14		Quantum appeal
8.	Jubilant Chemsys Ltd	2757/D/18 2012-13		Penalty appeal
9.	Jubilant Chemsys Ltd	2758/D/18 2013-14		Penalty appeal

At the outset, Ld.Counsel submitted that, all grounds raised by assessee in quantum proceedings and penalty proceedings are similar and identical. It has also been submitted that facts in all Assessment Years are similar. For sake of convenience, Ld. Counsel submitted that ITA No.7302/Del/2017 for A.Y. 2011-12

may be taken as lead appeal. Ld. DR did not object to the request by Ld.Counsel.

Grounds raised by assessee in ITA No.7302/Del/2017 are as under:

"1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) [CIT(A)] has grossly erred in directing the learned Assessing Officer [AO] to tax the entire gross receipts of Rs. 84,49,28,000 as the income of the appellant by disallowing entire revenue expenditure debited to Profit & Loss Account by holding it to be capital thereby making an enhancement to the income without giving any specific notice to the appellant as statutory required u/s 251(2) of the Income-tax Act, 1961 (Act) and for this reason alone the enhancement so made is illegal, bad in law and so, may be directed to be deleted.

2. The Ld CIT(A) erred on facts and in law in disallowing the entire expenditure of Rs. 102,52,32000/- debited to the Profit & Loss Account by allegedly holding it to be capital in nature, by completely ignoring the submission, facts and evidences submitted by the appellant in the course of proceedings under the Act and thereby, the disallowance / addition / enhancement so made is bad in law and hence, be kindly ordered to be deleted.

2.1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) [CIT(A)] has grossly erred in directing the learned Assessing Officer [AO] to disallow the entire revenue expenditure amounting to Rs. 102,52,32,000 incurred during the year by holding them as capital in nature and consequently directing the Ld. AO to tax entire gross receipts of Rs. 84,49,28,000 as taxable without appreciating that those were neither the subject matter of assessment nor the appellant had raised any ground to that effect, as such, it was beyond the jurisdiction of the Ld. CIT(A) to issue such direction.

2.2. The LD.CIT(A) had acted without jurisdiction when by an order sheet entry dated 08.03.2016, the CIT(A) directed the appellant to show cause why should the expenditure be not capitalized as research work is meant to create an enduring asset.

2.3. That the Ld. CIT(A) failed to appreciate that the appellant in an ordinary course of its business activity incurs such expenses on year to year basis and had been remunerated by its customer for such business activity under the contract.

2.4. The Ld. CIT(A) has failed to appreciate that in the absence of an assessment having been made in respect of the allowability of such expenses by the Ld. AO or being considered by Ld. AO in the order of assessment, the same was not the subject matter of appeal and was thus outside the scope of the provisions of Section 246A of the Act.

3. On the facts and in the circumstances of the case and in law, Ld.CIT(A) has grossly erred in making the aforesaid disallowance of revenue expenditure of Rs.102,52,32,000 (including depreciation and interest) and failed to appreciate that the appellant had produced complete information with regard to nature of expenditure incurred for earning income from various pharmaceuticals companies.

3.1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding the aforesaid expenditure to be capital in nature without appreciating that no enduring benefit accrues to the Appellant and also that no asset of enduring nature was created during the year under consideration.

3.2. The learned CIT(A) has erred in making the above disallowance on surmises, conjectures and in complete disregard to facts of the case, evidence and material placed on record, thus, the order passed by the Ld. CIT(A) suffers from perversity and is untenable in law.

4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that on account of appellant doing research for the third party namely, Eli Lilly & Co and ownership of such research work being vested with Eli Lilly &Co., the appellant was not entitled to deduction u/s 80IB(8A) of the Act without appreciating that Appellant stood approved by the Prescribed Authority under the provision of section 80IB(8A) of the Act and so was eligible and entitled to deduction u/s 80IB(8A) of the Act.

4.1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that in order to claim deduction u/s 80IB(8A) of the Act, ownership over the research is necessary as no such condition is either provided for nor could be impliedly read into the provisions of section 80IB(8A) of the Act.

5. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in upholding the disallowance of Rs.15,92,89,609 being held as expenditure of capital nature incurred towards sub-contracting the part of research contract to group company namely, Jubilant Chemsys Limited in the assessment order.

5.1. The Ld. CIT(A) in alternate also erred in upholding the order of the Ld. AO on the issue of disallowance of Rs.15,92,89,609 being incurred towards subcontracting the part of research contract to group company namely, Jubilant Chemsys Limited u/s 8oIB(i3) read with section 80IA(10) of the Act.

6. On the facts of the case and in law, the Ld. CIT(A) has grossly erred in directing the AO to charge interest while issuing the notice of demand under section 156 of the Act in pursuance to the order passed under section 250 of the Act.

7. On the facts of the case and in law, the Ld. CIT(A) has grossly erred in initiating the penalty proceedings under section 271(1)(c) of the Act.

That the above grounds of appeal are without prejudice to each other."

That the appellant reserves its right to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal.

2. Brief facts of the case are as under:(ITA No. 7302/D/17 AY 2011-12)

Ld.AO observed that assessee is engaged in business of scientific research and informatics services, for drug discovery units, based upon Insilco Solutions. It was observed that assessee provided discovery informatics products and services and collaborative drug services that include pre-clinical, in-vivo and formulation

services. It also provides Discovery Research Services, which is driven by concept of structure Directed Drug Design. It was observed by Ld.AO that assessee had claimed gross receipts of Rs.84,49,28,000/-, which included other income of Rs.19,58,000/-, against which expenditure amounting to Rs.102,52,32,000/-, showing loss of Rs.18,03,04,000/- was shown. Loss was worked out after adjusting depreciation and bonus paid for A.Y. 2010-11. Ld. AO also observed that assessee had approval from Department of Scientific & Industrial Research, and was entitled to claim deduction under section 80 IB (8A) of the Act.

Ld.AO thus called upon assessee to furnish relevant details in respect of claims made by assessee in its accounts and computation of income.

2.1. Ld.AO observed that during year under consideration Jubilant Biosys Ltd., had contract with M/s. Eli Lilly and Co, USA. Assessee had entered into a separate contract with Jubilant Chemsys (sister concern of assessee), for rendering services to M/s. Eli Lilly and Co. Ld.AO observed that contract entered into by Jubilant Biosys Ltd., with its sister concern, Jubilant Chemsys, was for rendering services to M/s. Eli Lilly and Co., and payment of research fee amounting to Rs.15,92,89,609/-has been made by Jubilant Biosys Ltd to Jubilant Chemsys.

2.2. It was also observed by Ld.AO that Jubilant Chemsys also rendered research services to M/s. Eli Lilly and Co., for which fees amounting to Rs.21,28,77,244/- was received.

2.3. Ld. AO concluded that sub-contract entered into by Jubilant Biosys Ltd. with its sister concern, Jubilant Chemsys,

for contract given by M/s. Eli Lilly and Co., are being diverted to a concern, which is showing profits and claiming deduction under section 80(IB)(8A), rather than showing income in hands of Jubilant Biosys Ltd., when it is running in losses. Ld.AO therefore taking into consideration provisions of Section 80IB(13) read with section 80IA(10) held that business between both concerns was so arranged that transaction had an effect of producing more profit in hands of Jubilant Chemsys than ordinary profits. He therefore made addition of Rs.15 92,89,609/, in hands of Jubilant Biosis Ltd. (being payment made by assessee to Jubilant Chemsys).

3. Aggrieved by order of Ld.AO, assessee preferred appeal before Ld.CIT (A).

3.1. During course of appellate proceedings Ld.CIT (A) issued show cause notice dated 08/03/16 on following issues:

(a) why work of company be treated as research when it is performing specified job work for its partners?

(b) Why deduction under section 80 IB (8), be allowed in case its income is positive?

(c) Why should expenditure be not capitalised as research work is meant to create enduring asset?

3.2. Assessee made various submissions vide reply dated 15/11/16. On considering the same Ld.CIT (A) enhanced addition of Rs.1,02,52,32,000/-, which includes addition made by Ld.AO amounting to Rs.15,92,89,609/-.

4. Aggrieved by order of Ld. CIT (A), assessee is in appeal before us now.

5. Ground Nos. 1-2.4 raised by assessee is in respect of validity of enhancement of income made by Ld.CIT (A) under section 251 (1) (a) of the Act.

5.1. Ld.Counsel submitted as under:

It was submitted that no enhancement notice has been issued and served on assessee by Ld.CIT(A) while invoking his power u/s 251(1)(1) of the Act. He submitted that power conferred with CIT(A) of enhancement of assessment has been granting reasonable opportunity of showing cause to assessee. Ld. Counsel submitted that Ld.CIT proceeded to issue directions which are detrimental to interest of assessee. It has been submitted that he could have enhanced only after issuing notice under sub-section (2) of section 251. Since no such notice was issued, order passed by Ld. CIT suffers from illegality.

Ld. Counsel submitted that notice issued by Ld. CIT (A) for enhancement of income, neither expenses as to why proposed disallowances are warranted nor any reason or justification is specified why expenses incurred by assessee should be treated as capital in nature. Further, law requires show cause notice to be issued under a specific provision of law and not as a correspondence. This shows that requirement of issuing a show-cause notice as per the provisions of section 251(2) of the Act is not met in light of Apex Court's ruling in case of *Metal Forgings & Anr vs Union of India & Ors [Appeal (civil) 2029-31 of 1995]*

He thus submitted that Ld. CIT (A) failed to discharge statutory obligations casted upon him by provisions of section 251(2) of the Act, hence addition made on the ground that revenue expenses were to be treated as capital in nature is liable to be deleted.

In addition to the above, Ld.Counsel submits that as specifically stated in the Grounds of Appeal, the expenditure amounting to INR 102,52,32,000/- was never in question and did not form subject matter of appeal nor assessee had raised any ground on same. Hence, enhancement of income by Ld. CIT(A) is illegal and invalid and beyond his powers. The Ld. CIT(A) cannot make enhancement on the issue which does not arise out of the order of assessment. He placed reliance on decision by coordinate bench of this Tribunal in case of *Ramesh Kumar Pabbi v. ACIT* (Refer Page 28-34 of the Case Law Compendium) has held as under:

"After considering the rival submissions, we are of the view that addition made by enhancement of commission expenses is wholly unjustified. In this case the Assessing Officer did not made disallowance out of commission expenses. The Ld. CIT (Appeals) has taken up the issue of commission expenses suo-moto in the appellate proceedings, therefore, the issue of commission did not arises out of the assessment proceedings. It is well settled law that Ld. CIT (A) was not empowered to enhance an income which is not matter of assessment. The issue is covered by aforesaid judgments relied upon by Ld.Counsel for the assessee. It is, therefore, clear that Ld. CIT(A) cannot touch upon an issue which does not arise from the order of the assessment and was outside the scope of the order of the assessment. Thus, the order of the CIT(A) cannot be sustained in law. This alone is sufficient to delete the entire addition."

5.2. On the contrary, Ld.Sr.DR submitted that under section 251, Ld.CIT(A) is not required to take approvals for issuing notice

of enhancement of assessment. The only requirement that needs to be fulfilled by Ld.CIT(A) is that assessee shall be offered reasonable opportunity to show cause against such enhancement. He further submitted that *Explanation* to sub clause (2) of section 251 of the Act, further envisages that Ld.CIT (A) to consider and decide any matter arising out of proceedings, in which order appealed against was passed, notwithstanding that, such matter was not raised before Ld.CIT (A) by assessee. Ld.Sr.DR thus placed reliance upon *Explanation* in support of, enhancement notice issued by Ld.CIT (A) on issues, which were not subject matter of appeal before Ld.CIT (A)

5.3. He placed reliance upon specific observation by *Hon'ble Supreme Court* in case of *Jute Corporation of India Ltd vs. CIT,* reported in *(1991) 187 ITR 68* wherein *Hon'ble Court* observed that, "*The Act does not contain any express provision debarring assessee from raising an additional ground in appeal and there is no provision in the Act placing restrictions on power of appellate authority in entertaining an additional ground in appeal. In the absence of any statutory provision, the general principle relating to amplitude of appellate authority is, power being co-terminus with that of Assessing Officer should normally be applicable."*

5.4. Ld.Sr DR submitted that ratio that emerges out of decisions relied upon by Ld.Counsel passed by *Hon'ble Supreme Court* and various *High Courts* is that, Ld.CIT (A) is not vested with powers of enhancement in respect of "new source" of "income", and assessment has to be confined to those items of income, which were subject matter of original assessment.

5.5. He submitted that all decisions are distinguishable factually, vis-a-vis present facts of case. Enhancement notice in present case has been issued by Ld.CIT(A) in relation to expenditure claimed by assessee for earning income, which was subject matter of assessment. He submitted that there is no "new source" of "income", which has been raised in notice issued to assessee for enhancement by Ld.CIT (A), and same deserves to be upheld.

6. We have perused submissions advanced by both sides in the light of the records placed before us.

7. At this juncture, we refer to following commentary by *Kanga and Palkhivala* on "*The Law and Practice of Income Tax" Vol-I Eighth Edition at page 1513*:

"Enhancement of assessment means increasing the amount of total income or tax. If the CIT (A) does not enhance the total income, but by means of reduction under one head and an increase under another head allows the assessment to remain the same or reduces it, he cannot be said to have enhanced the assessment merely because income under one head has been increased.[1]

Where the assessee's income has been assessed under more heads than one, even if the assessee's appeal is confined to the income assessed under only one of the heads, the CIT (A) may enhance the assessment, by increasing the amount assessed under another head of income, in respect of which the assessee has not appealed.[2] *The reason is that income tax is only one tax and the assessee, when he goes in appeal exposes the assessment as a whole to the scrutiny of the CIT (A).*[3] *However, the CIT (A) has no power to enhance the assessment by assessing new sources of income outside the subject matter of the*

assessment appealed against.[4] *The following propositions emerge from the judgment of Hon'ble Supreme Court in CIT vs. Shapoorji Pallonji* [5]*and CIT vs. Hardutroy Chamaria* [6]*:*

(i) the CIT (A) has no jurisdiction to travel beyond the subject matter of the assessment or beyond the record, ie the return of income and the assessment order; and his power of enhancement relates only to that income which has been subjected to the process of assessment.

(ii) The process of assessment includes not only taxing an income but also holding that a particular income is not taxable.

(iii) Therefore, the CIT (A) can tax the income which the AO had, expressly or by clear implication, considered and held to be not taxable-irrespective of the question whether the income falls under a head with regard to which an appeal has or has not been preferred. However, the CIT (A) cannot tax an items of income, the taxability of which had not been considered at all by the AO.[7]

Footnote details in respect of extract reproduced hereinabove are as under:

1. *CIT vs Namberumal* reported in *1 ITR 32; Gowri vs CIT 31 ITR 250;*
2. *Peareylal 10 ITR 239;*
3. *Narrondas vs. CIT 31 ITR 909 approved in CIT vs. Macmillan (SC) 33 ITR 182*
4. *Jagarnath vs. CIT 2 ITC 4, CIT vs. Nawaz 6 ITR 370; Gajalakshmi vs. CIT 22 ITR 502, 510; Narrondas vs. CIT 31 ITR 909; Sterling vs. ITO 99 ITR 236*

5. 44 ITR 891

6. 66 ITR 443

7. Sneh Lata vs. CIT 61 ITR 139, 143 (1), CIT vs. Jagdish 51 ITR 266 (2), Prabhudas vs. CIT 62 ITR 621(3), CIT vs. Chaganlal 148 ITR 7 (4), Lokenath vs. CIT 161 ITR 82 (5), CIT vs. Nirbheram 127 ITR 491 (6),

8. We also refer to decision of *Hon'ble Bombay High Court* in case of *Shapoorji Pallonji Mystery vs CIT (which has been affirmed by Hon'ble Supreme Court in 44 ITR 891, referred to herein above). Hon'ble Bombay High Court* clarified that "Source" of income would not mean "source" in sense of head of income as used in the Income Tax Act, but would mean a specific source from which a particular income/expenditure sprang or arose. *Hon'ble Court* held as under:

"Therefore, it is clear that what we meant by "source" was not source in the sense of head of income as used in the Income-tax Act. By "source" what we meant was the specific source from which a particular income sprang or arose.

The Supreme Court had to consider this judgment very recently and, with respect, it has approved of our judgment in Narrondas Manordas's case (supra) and it has itself deduced the principle which emerges from this judgment. In Commissioner of Income-tax v. McMillan & Co. [1958] 33 ITR 182 at page 193, their Lordships say that the language of section 31 was "wide enough to enable the Appellate Assistant Commissioner to 'correct the Income-tax Officer not only with regard to a matter which has been raised by the assessee but also with regard to a matter which has been considered by the Income-tax Officer and determined in the

course of the assessment.' "Then further on their Lordships quote the following passage from our judgment:

> *"It is clear that the Appellate Assistant Commissioner has been constituted a revising authority against the decisions of the Income-tax Officer; a revising authority not in the narrow sense of revising what is the subject-matter of the appeal, not in the sense of revising those matters about which the assessee makes a grievance, but a revising authority in the sense that once the appeal is before him he can revise not only the ultimate computation arrived at by the Income-tax Officer but he can revise every process which led to the ultimate computation or assessment. In other words, what he can revise is not merely the ultimate amount which is liable to tax, but he is entitled to revise the various decisions given by the Income-tax Officer in the course of the assessment and also the various incomes or deductions which came in for consideration of the Income-tax Officer."*

So the power of the Appellate Assistant Commissioner is confined to considering the matter which has been considered by the Income-tax Officer and determined in the course of the assessment; and "matter" is used, not in the sense of a head of income, but in the sense of a specific source of income. So the question that has to be asked when deciding whether the Appellate Assistant Commissioner has the power or not is : "Is this the matter which was considered and decided by the Income-tax Officer ?" If it was, irrespective of the nature of the appeal preferred by the assessee, the Appellate Assistant Commissioner would have the power to consider that matter. Now, it is clear on the record that the Income-tax Officer never considered this matter in the assessment year 1947-48. Strangely enough, as the record shows, he did consider it in the assessment year 1946-47 when it was unnecessary for him to consider it because the receipt did not fall in that assessment year; and the opinion then expressed by him was that this payment could not be treated as a business receipt. Now, if his successor had expressed the same opinion for

the assessment year 1947-48, then undoubtedly the Appellate Assistant Commissioner could have refused to accept that opinion and brought this amount to tax. In our opinion, therefore, it is clear that, under the circumstances of this case, the Appellate Assistant Commissioner was not competent to enhance the assessment of the assessee for the assessment year 1947-48 by a sum of Rs. 40,000."

Hon'ble Court hereinabove held enhancement notice to be invalid, for reason that, "receipt" that was considered for purposes of taxation in notice of enhancement issued by Ld. CIT (A), in aforestated case, did not fall in Assessment Year, that was under consideration and therefore amount did not form part of assessment record before Assessing Officer.

8.1. Similar is the view propounded by *Hon'ble Supreme Court* in case of *CIT vs. Rai Bahadur Hardutory Motilal Chamaria* reported in *66 ITR 443, Full Bench decision of Hon'ble Delhi High Court* in case of *CIT vs. Sardari Lal & Co reported in (2001) 251 ITR 864, decision of Hon'ble Delhi High Court in case of CIT vs. Union Tires, reported in (1999) 240 ITR 556.*

9. Now coming to facts of present case, it is observed that, in return of income, assessee declared income as per profit and loss account. Expenditure that has been added by Ld.CIT (A) under enhancement proceedings relate to business income declared by assessee. Admittedly, while arguing merits of case, Ld.Counsel vehemently submitted that expenditure disallowed by Ld.CIT (A) are in relation to, and inextricably linked with income, that has been offered to tax and considered in assessment proceedings by Ld.AO.

10. We are, therefore, of considered opinion that expenditure considered in notice of enhancement by Ld.CIT (A) had been subjected to the process of assessment. Merely because assessment order is silent about this item and there is no discussion thereupon, would not mean that Assessing Officer had not considered it. We draw our support from assessment order, wherein assessee was required to furnish details of expenses and receipt which were examined by Ld.AO on test check basis. Assessee has vide letter dated 24/01/14 placed at page 217-2 to 1 of paper book, wherein details of expenses has been submitted before Ld.AO.

10.1. We also find that following decisions relied upon by Ld. Counsel, are distinguishable on facts and are not applicable to present facts of the case:

- *decision of Hon'ble Supreme Court in case of CIT versus Excel industries Ltd reported in (2013) 38 Taxmann.com 100;*
- *decision of Hon'ble Allahabad High Court in case of Dr Shashi Kant Garg, reported in (2006) 152 Taxmann 308*

10.2. It has been urged in written submission by Ld. Cousnel that nonotice has been issued u/s 251(2) of the Act. However, Ld.Sr.DR placed on record before us today, copy of order sheet entry recorded during appellate proceedings dated 08.03.2006, where representative of assessee admits to acceptance of notice u/s 251(1). Relevant portion of order sheet entry is reproduced herein below:

Jubilant - Biosys
A.Y - 2011-12

8/3/2016. Shri S.K. Saneka, Ld appears & files paper book on the activities of company. He is asked to show cause

(i) why the said company be hitalled as research activity it is performing specific job work for the partner?

(ii) Why deduction u/s 80IB(8) be allowed inspite its income is possible in future?

(iii) Why should the expenditure be not capitalized as research work is meant to create an enduring asset.

Notice u/s 144(1)(a) of Act is issued case is adjourned to 21/3/2016.

Attested

(S. K. SRIVASTAVA)
आयकर आयुक्त (अपील)-1, नोएडा
Commissioner Income Tax(Appeals)-1, Noida

Received
8/3/2016

8/3/2016

Commissioner of Income Tax (Appeals-I) Noida

24/3/2016

Shri S.K. Saneka, Ld appears. He seeks direction to file reply to enhancement notice. Case is adjourned for 30/3/2016.

Received
21/03/16

21/3/2016

10.3. In view of afore stated discussions and analysis of background relating to issuance of notice of enhancement under section 251(1) of the Act, and applying ratio laid down by *Hon'ble Supreme Court* and various *High Court* to facts of present case, we are of considered opinion that, enhancement notice has been issued on an issue which was subject matter during assessment proceedings, details of which are already placed on record by assessee itself. We thus hold that Ld.CIT (A) has rightly exercised powers under section 251 (1) of the Act.

10.4. Accordingly Ground No. 1-2.4 raised by assessee stands dismissed.

11. Ground No. 3-3.2 is in respect of disallowance of expenditure amounting to Rs.102 52,32,000/- holding it to be capital in nature.

12. Ld.Counsel submitted that Ld.CIT(A) disallowed entire expenditure by holding that research activity carried on by assessee has resulted in enduring benefits to assessee. He submitted that while doing so, Ld.CIT(A) examined various definitions of the term "research" to arrive at the conclusion that the activity pertains to enhancement of cumulative knowledge of human civilisation and, therefore, cost of research done by assessee resulted in long and enduring benefit, which cannot be held as revenue expenditure. Ld.Counsel submitted that Ld. CIT (A) failed to appreciate that assessee is in the business of research and informatics services for drug discovery units based upon Insilco Solutions. It has been submitted that assessee provides discovery informatics products and services and collaborative drug services that include pre-clinical, in-vivo and

formulation services. He submitted by placing reliance upon agreement placed at page 109 of paper book that, services rendered are as per agreement, and upon termination of agreement all research materials, notes etc shall be property of Elly Lilly and Co**.** Ld.Counsel further submitted that on one hand assessing officer is accepting income offered by assessee received from research services rendered, and on other hand expenditure incurred for earning income has been totally disallowed. Placing reliance upon audited accounts placed in paper book Ld.Counsel submitted that breakup of expenditure incurred by assessee are as under:

Particulars	**Amount (Rs)**	**Remarks**
Cost of Services and Other Expenses (excluding subcontractor services)	64,98,47,000	S ch expenses were incurred owards: 1. Lab Chemicals and Spares Consumed; 2. Repairs and Maintenance of Plant and Machinery; 3. Salary, Wages, Bonus, Gratuity and Allowances, 4. Staff Welfare Expenses, 5. Advertisement Expenses, 6. Printing and Stationary Expenses, 7. Communication Expenses 8. Freight and Forwarding Expenses, 9. Office maintenance Expenses, 10. Contribution to Provident Fund and Other Funds etc. 11. Rates and taxes 12. Rent 13. Insurance 14. Vehicle and running maintenance 15. Staff recruitment and training 16. Software license fee 17. Finance charges 18. Misc. Expenses 19. Bad debts

Subcontractor Services	15,92,90,000	Such expenses were incurred towards sub-contracting of a part of research activities
Depreciation& Amortisation	8,27,41,000	Such expenses were incurred towards normal wear and tear of fixed assets
Interest	13,33,54,000	Such expenses were incurred towards unsecured loans borrowed by the Appellant
Total:	1,02,52,32,000	

13. He placed reliance upon decision of *Hon'ble Supreme Court* in case of *Bombay Steam Navigation Co (1953) (P.) Ltd., vs. CIT* reported in *(1965) 56 ITR 52.*

14. On the contrary, Ld. Sr.DR placed reliance upon the orders of authorities below.

15. We have perused submissions advanced by both sides in the light of records placed before us.

16. It is observed that, expenditure incurred by assessee is in its normal course of business. Further, it is also not disputed that assessee has been remunerated as per contract, under which assessee is required to incur expenditure. Ld. AO/CIT(A) did not dispute that expenditure has not been incurred for purposes of research activity carried on by assessee in its normal course of business. We draw our support from decision of *Hon'ble Supreme Court* in case of *Empire Jute Company Ltd vs. CIT* reported in *(1980) 124 ITR 1*, wherein *Hon'ble Court* laid down that test of enduring benefit cannot be applied blindly and mechanically without having regard to facts and circumstances of a given case. We also referred to Clause 5.1 of agreement at page 109 of paper

book, wherein assessee has to ensure that it is able to carry out its obligations under contract, wherein the ownership of inventions of research services under agreement was to be retained by Eli Lilly and not by assessee.

17. We are therefore are of considered opinion that assessee has to be granted benefit of expenditure incurred by it, incurred in due course of business activity.

18. Accordingly ground No. 3-3.2 raised by assessee stands allowed.

19. Ground No. 4-4.1 is in respect of deduction under section 80 IB (8A) of the Act being denied to assessee

20. Ld.Counsel submitted that assessee has been granted approval by Department of Scientific and Research, Ministry of Science and Technology under section 80 IB (8A) of the Act since A.Y. 2003-04. He placed reliance upon Certificates issued by authority which is placed at page 73-75 of paper book. Placing reliance upon auditor s certificate in form 10 CCB placed at page 222 to 230, Ld.Counsel submitted that assessee has an in-house research facility and is eligible for claim under section 35 of the Act. It is submitted that, assessee being certified to be engaged in business of research and development by a competent authority under the Act, it is eligible to claim deduction under section 80 IB (8A) at 100%.

21. On the contrary, Ld.Sr.DR placed reliance upon orders passed by authorities below.

22. We have perused submissions advanced by both sides in light of records placed before us.

23. From relevant documents placed in paper book relied upon by Ld.Counsel, it is an admitted fact that assessee has received approval from prescribed authority, which has been renewed from time to time. This clearly shows that assessee fulfils all required criteria to claim deduction under section 80 IB (8A) of the Act read with Rule 18 DA of Income Tax Rules, 1963. Further we do not find any requirement for assessee to own research conducted/carried out, in its ordinary course of business activity for claiming deduction. Similar view has been taken by following decisions as relied upon by Ld.Counsel:

i. Dy.CIT vs. Fortis Clinical Research Ltd. (2012) 27 taxmann.com 4 (Del ITAT)

ii. Quintiles Research (India) (P) Ltd. vs. DCIT (2016) 74 taxmann.com 228 (Guj. HC)

iii. Pro.CIT vs. B.A.Research India Ltd. (2016) 70 taxmann.com 268 (Guj. HC)

iv. Siro Clinpharm (P) Ltd. vs. DCIT (2014) 49 taxmann.com 62 (Mumbai ITAT)

24. We therefore, direct Ld. AO to grant deduction under section 80 IB (8A) of the Act as per law to assessee.

Accordingly Ground nos. 4 - 4.1 raised by assessee stands allowed.

25.Ground No. 5-5.1 is in respect of disallowance of payments made towards sub-contracting part of research work to the sister concern by invoking provisions of section 80 IB (13) read with ATI A (10) of the Act.

26. At the outset Ld.Counsel submitted that identical issues on similar facts and circumstances based on same agreement has

been decided by this Tribunal in assessee's own case for A.Y. 2008-09 and 2009-10 vide order dated 27/07/18 in ITA No. 3464 -3465/Del/2014 and 3466-3467/Del/2014, and decision of Tribunal in assessee's own case for A.Y. 2010-11 and 2011-12 vide order dated 12/09/18, a copy of which is placed before us at pages 1-20 of paper book.

27. Ld.CIT DR though opposed submissions advanced by Ld. Counsel, could not controvert the fact that issue decided by this Tribunal in assessee's own case for immediately preceding A.Y. were on identical facts and circumstances.

28. We have perused submissions and rival contentions of both sides based upon records placed before us We have also perused order passed by this Tribunal in assessee's own case for A.Y. 2008-09, 2009-10 and 2010-11 (supra).

29. It has also been observed that agreement based upon which, services has been rendered by Jubilant Biosys Ltd., to Jubilant Chemsys are also same. On perusal of assessment orders and records for immediately preceding A.Y. placed in the paper book before us it is observed that Ld.A.O., made similar addition in hands of assessees on similar facts and circumstances. We therefore do not find any reason to deviate from view taken by this Tribunal in assessee's own case for A.Y. 2008-09, 2009-10 and 2010-11 (supra). On careful perusal of order passed by this Tribunal, it is observed that the issue has been decided by observing as under:

"7.1. It has also been observed that agreement based upon which services has been rendered by Jubilant Biosys Ltd., to Jubilant Chemsys Ltd., are also same. On perusal of assessment orders

and records for immediately preceding assessment years placed in paper book before us, it is observed that Assessing Officer has made identical addition in hands of both assessees, on similar facts and circumstances. We, therefore, do not find any reason to deviate from the view taken by this Tribunal vide order dated 27.07.2018 in assessee's own case for Assessment Years 2008-09 and 2009-10 (supra). On careful perusal of the order passed by this Tribunal, it is observed that the issue has been decided by observing as under:

"6. A careful circumspection of the above provision deciphers that the Assessing Officer can discard the profit declared by an eligible assessee for the purposes of deduction under this section and adopt the amount of profit as he considers reasonable, if he finds that the course of business between two closely connected assessees has been so arranged which 'produces to the assessee more than ordinary profits which might be expected to arise in such eligible business. Thus, it is evident that a mere close connection between the two assessees is not conclusive for invoking the provisions of section 80IB(13) read with section 80IA(10). Rather, it is simply a starting point for unfolding if the assessee has shown more than normal profits in its hands so as to claim higher amount of deduction. The Assessing Officer is enabled to abandon the profit declared by the assessee and substitute it with a reasonable profit only on demonstrating that the arrangement between the two assessees is such that the assessee claiming deduction has been shown to have earned 'more than the ordinary profits which might be expected to arise in such eligible business. It is, therefore, essential that the Assessing Officer must

first positively illustrate that the profit declared by the assessee from the transaction with its connected concern is more than the one ordinarily earned from such transactions. The expression 'more than the ordinary profits' is a relative term which needs to be depicted with reference to the ordinary profits. If ordinary profit from a transaction is Rs.100/-, but, an assessee has shown to have earned profit of Rs.l10/- from such transaction because of its connection with, the other enterprise, then, it is the excess of Rs. 10/-, which can be disallowed. Ergo, in any event, the Assessing Officer needs to bring on record some material to indicate ordinary profit, which is then compared with the profit declared by the assessee resulting from its transactions with the connected assessee so as to trigger this provision.

7. When we advert to the facts of the instant case, it turns out that the Assessing Officer simply invoked the provisions of section 80IA(10) and disallowed deduction for the entire receipt of Rs.2.32 crore, without showing in any manner the ordinary profit which might have resulted if there had been no connection between the assessee and JB Page 67 of the paper book is a copy of invoice raised by the assessee on JB. This invoice is dated 31.05.2007. The description given in the invoice is '(P035) FTE Charges for service provided by 32 FTEs.' The unit rate has been given as USD 1 lac at page 133 of the paper book is another invoice which the assessee raised on Eli Lilly & Co., USA. Description given in the invoice is '(P035) FTE Charges for service provided by 32 FTEs' for USD 4166.6563 per unit and total of 1,33,333 USD.' In addition, there is another amount in the later invoice with the description 'Cost of chemicals" at USD 77446. Thus, it is manifest

that the total invoice value which the assessee raised on Eli Lilly & Co., USA, is for USD 2,10,779. Unlike 'cost of chemicals' received by the assessee from Eli Lilly & Co., which is in the nature of reimbursement, there is no corresponding amount in the invoice raised by the assessee on JB towards Reimbursement of cost of chemicals. The Id. CIT(A) has recorded on page 13 of the impugned order that the assessee also received 'Reimbursement for cost of chemicals' amounting to Rs.93,99,256/- from JB in relation to the Invoice raised on it. This finding has not been controverted by the Id. DR. Thus, in all, the assessee received Rs.3 27 crore from JB which comprises of Rs.2.32 crore towards Medicinal Chemistry Research services and Rs.93.99 lac towards 'reimbursement of cost of chemicals'. In percentage terms, reimbursement for chemicals constituted roughly 28% of the invoice which the assessee raised on JB and such percentage is 36% in the invoice raised by the assessee on Eli Lilly & Co., USA. If reimbursement on account of chemicals is removed from both the sets of invoices, what remains is that the assessee charged I lac USD from IB and for similar work, it charged ' 1,33,333 USD from Eli Lilly & Co., USA. Thus, it is proved that the rate charged by the assessee from JB for similar work is lower than the rate charged by it from Eli Lilly & Co., USA. In other words, the assessee has earned lower income from JB than it earned ordinarily from unrelated parties.

8. When we again come back to section 80IA(10), which has been invoked by the Assessing Officer, the tables get turned in the sense that the income earned by the assessee from its connected company, namely, JB is less than the ordinary profits, being, the amount charged by the assessee from Eli Lilly & Co., USA. Under

these circumstances, it becomes evident that the provisions of section 80IA(10) are not triggered. If we ignore this aspect, there is nothing in the assessment order to substantiate the claim of the Revenue that the assessee charged exorbitantly from JB so as to divert income from loss making JB to the assessee so as to enable it to claim higher deduction. In our considered opinion, that the Ld.CIT(A) took an unimpeachable view on the issue by deleting the addition of Rs.2.32 crore made by the Assessing Officer.

9. *In so far as the appeal of the Jubilant Biosys Ltd., is concerned, the grievance of the Revenue is to the effect that the ld. CIT(A) erred in allowing expenditure of Rs.2.32 crore for which payment was made to JC. The Assessing Officer, vide his order dated 29.12.2010 referred to the facts noted in the case of JC. Here also, he reproduced section 80IB(13) read with section 80IA(10) and, eventually, laid down that the course of business was arranged between JB and JC in such a way so as to produce more than ordinary profit in the hands of JC. He, therefore, disallowed payment made by the assessee to JC amounting to Rs.2.32 crore. The Id CIT(A) deleted the addition.*

10. *In view of our findings given in the case of JC by which we have upheld the impugned order in deleting the addition of Rs.2.32 crore, the consequential effect in the instant appeal is that such an expenditure has to be allowed as deduction in the hands of JB. We, therefore, uphold the impugned order.*

11. *In the result, both the appeals are dismissed."*

30. On the basis of above discussion and similarity of facts in year under consideration with immediately preceding A.Y. in

assessee's own case, we direct Ld. AO to grant deduction claimed by assessee as per law.

Accordingly Ground Nos. 5-5.1 raised by assessee stands allowed

ITA Nos: 1822 & 1823/Del/18 (A.Y. 2013-14 and 2014-15)

ITA 1824 & 1825/Del/18 (A.Y.2012-13 & 2013-14)

31. It has been submitted by Ld.Counsel that in all the other A.Ys under consideration before us in the case of jubilant Biosys and Jubilant Chemsys, similar notice has been issued for enhancement by Ld.CIT (A) and identical disallowances has been made relating to expenditure incurred by assessee for earning the income offered to tax as well as disallowance of deduction under section 80 IB (8A) and 80 IB (13) of the Act. He submitted that the factual background also remains same in respect of these appeals vis-a-vis the facts considered hereinabove in foregoing paragraphs. Ld.Counsel, thus placed reliance upon the submissions advanced by him in the foregoing paragraphs hereinabove.

32. Ld.Sr.DR on the contrary, placed reliance upon orders passed by authorities below in support of his contentions and reiterated argument reproduced hereinabove in respect of each ground.

33. We have perused submissions advanced by both sides in light of records placed before us. We also observe that, facts in respect of all other A.Ys under consideration are similar to the one that has been considered in detail hereinabove. The issues raised by assessee are also similar and identical.

34. We therefore following same observations and views taken hereinabove dismiss ground raised by assessee in respect of challenge against the issuance of notice under section 251 (1) by Ld.CIT(A), and allow other grounds relating to expenditure/deductions claimed by assessee.

In the result appeals filed by assessee in all the years under consideration before us stands partly allowed.

ITA Nos. 2759 & 2760/Del/18 (A.Y.-2013-14 & 2014-15)

ITA 2757 & 2758/Del/18 (A.Y.-2012-13 & 2013 14)

35. These are penalty appeals filed by assessee are in respect of levy of penalty under section 271 (1) of the Act on disallowance of expenditure made by Ld. CIT (A) in all years under consideration.

36. As we have deleted the addition made, penalty levied does not survive.

Accordingly grounds raised by assessee in penalty appeals stand allowed.

In the result penalty appeals filed by assessee stands allowed.

Order pronounced in the open court on 28/11/2018

Sd/-	Sd/-
(N.K. SAINI)	**(BEENA A PILLAI)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dt. 28.11. 2018

**GMV/*Kavita Arora*

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

- TRUE COPY -

By Order,

ASSISTANT REGISTRAR
ITAT Delhi Benches