आयकर **अपीलीय** अधिकरण, पुणे न्यायपीठ **"ए"** पुणे **में**
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

श्री डी. करुणाकरा राव , लेखा सदस्य
एवं **श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष**

BEFORE SHRI D.KARUNAKARA RAO, AM
AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.1184/PUN/2015
निर्धारण वर्ष / Assessment Year : 2009-10

Serum Institute of India Ltd.
Sarosh Bhavan, 16-B/1,
Dr. Ambedkar Road,
Pune – 411 001
PAN : AABCS4225M .... अपीलार्थी/Appellant

Vs.

DCIT, Central Circle-1(1),
Pune .... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.1538/PUN/2015
निर्धारण वर्ष / Assessment Year : 2009-10

DCIT, Central Circle-1(1),
Pune .... अपीलार्थी/Appellant

Vs.

Serum Institute of India Ltd.
212/2, Hadapsar,
Pune-411 028.
PAN : AABCS4225M .... प्रत्यर्थी / Respondent

Assessee by : Shri Rajshekhar S. Abhyankar
Revenue by : Shri Rajeev Kumar

सुनवाई की तारीख / **Date of Hearing : 19.04.2018**		घोषणा की तारीख / **Date of Pronouncement: 08.06.2018**

आदेश / ORDER

PER D. KARUNAKARA RAO, AM :

These are the cross appeals filed by the Assessee and the Revenue against the order of CIT(Appeals)-11, Pune, dated 28.11.2014 for the Assessment year 2009-10.

2. Background facts of the assessee include that the assessee is a company engaged in the business of manufacture and sale of life saving drugs and vaccines. The cases of Poonawalla Group include two sub-groups (1) includes family members of Shri Cyprus Soli Poonawalla (in short CSP) and the group concerns under his control and management (with M/s. Serum Institute of India Ltd. as the flagship company and (2) other sub-group includes family members of Shri Zavareh Soli Poonawalla (in short ZSP) and the group concerns under his control and management, which is mainly engaged in stud farm activities. Assessee company filed the original return of income on 29-10-2009 declaring total income of Rs.3,07,98,940/- and further revised its income declaring total income of Rs.3,08,25,762/- There was search u/s.132 of the Act on the assessee's group of cases on 21-06-2011. In response to notice u/s.153A of the Act, assessee filed the return of income on 12-02-2012 declaring total income of Rs.5,30,21,440/-. During the said search action, various incriminating documents were found and seized/ by the Department in respect of entities connected with the group. Cash was also seized by the Department. During the assessment proceedings u/s.143(3) of the Act, AO made various disallowances u/s.14A of the Act, EDP expenses, Foreign Travel Expenses, depreciation on plant and machinery, freight and insurance expense pertains to EOU unit etc., apart from others and finally assessed the income at Rs.3,34,98,903/-. CIT(A) partly allowed the appeal of the assessee relying on the decisions of his predecessor/Tribunal.

3. Aggrieved with the part relief given by the CIT(A), the Revenue is in appeal before the Tribunal. Further, aggrieved with the confirmation of additions, the assessee is in appeal before us

We shall first take up the appeal of the Revenue.

ITA No.1538/PUN/2015 (By Revenue)
A.Y. 2009-10

4. Grounds raised by the Revenue are extracted here as under:

> "*1. Whether on the facts and circumstances of the case the Ld. CIT(A) has erred in interpreting the provisions of Sec. 10B and accordingly allowed exclusion of Freight & Insurance from Total Turnover for the purpose of quantifying deduction u/s.10B.*
>
> *2. Whether on the facts and circumstances of the case, the Ld. CIT(A) has made an extrapolation of definition of Export Turnover to define "Total Turnover, and thereby distorted the legislative intent in providing strict interpretation of "Export Turnover" as per Explanation 2 to Sec. 10B of the Income Tax Act 1961.*
>
> *3. Whether on the facts and circumstances of the case, the Ld. CIT(A) has erred in allowing Product Development Expenditure as Revenue expenditure when the same should have been capitalized.*
>
> *4. Whether on the facts and circumstances of the case, the Ld. CIT(A) has erred in holding that donation paid by the assessee was an allowable expenditure for the purpose of Sec. 37(1) and expanded wholly for business purposes.*
>
> *5. Whether on the facts and circumstances of the case, the Ld. CIT(A) has erred in accepting the assessee's contention when the Assessing Officer had adhered to the definition of Plant & Machinery and Furniture and Fixtures as per Appendix 1A to Rule 5 (1) (A) of the Income Tax Rules 1962, read with Sec. 32 of Income Tax Act 1961."*

5. Before us, at the outset, Ld. Counsel for the assessee submitted that most of the grounds raised by the Revenue and the Assessee are covered issues in favour of the assessee. In this regard, Ld. Counsel submitted charts on the grounds raised by the Revenue as well as the Assessee. Therefore, we proceed to decide the issues raised in these appeals based on the said information. However, Ld. DR for the Revenue relied on the order of the AO. Ground-wise adjudication is given in the following paragraphs.

6. Ground Nos.1 & 2 raised by the Revenue relate to exclusion of Freight & Insurance from Total Turnover for the purpose of quantifying deduction u/s.10B of the Act.

7. Relevant facts include that the assessee excluded the freight expenses amounting to Rs.12,66,53,746/- and insurance charges amounting to Rs.2,79,78,540/- from the total turnover for the purpose of working of deduction u/s.10B. AO disallowed the same. In the First Appellate proceedings, the CIT(A) allowed the said expenses in favour of the assessee relying on the decision of Special Bench in the case of Sak Soft Ltd. 121 TTJ 865 and the judgment of jurisdictional High Court in the case of Gem Plus Jewellery India Ltd. 330 ITR 275. Aggrieved with the order of CIT(A), the Revenue is in appeal before us.

8. After hearing both the sides, we find this issue was subject matter in the assessee's own case in ITA No.914/PUN/2013, dated 22-07-2016 for the A.Y. 2008-09. The Tribunal upheld the order of the CIT(A) and dismissed the ground raised by the assessee on this issue. For the sake of completeness, we proceed to extract the relevant paragraph from the order of the Tribunal (supra) and the same reads as under :

> *"50. The issue relating to exclusion of freight and insurance from both numerator and denominator i.e. export turnover and total turnover while claiming deduc ion u/s. 10B/10AA of the Act has been laid to raised by the Special Bench of the Tribunal in the case of ITO Vs. Sak Soft Ltd. reported as 121 TTJ 865. The Commissioner of Income Tax (Appeals) has decided this issue by following the decision of Special Bench of the Tribunal in the case of ITO Vs. Sak Soft Ltd. (supra) and the decision of Hon'ble Bombay High Court in the case of Gem Plus Jewellery India Ltd. reported as 330 ITR 175. We do not find any infirmity in the order of Commissioner of Income Tax (Appeals) in* ***directing the Assessing Officer to exclude freight and insurance charges both from export turnover and total turnover while allowing deduction u/s. 10B and 10AA of the Act.*** *Accordingly, ground No. 4 raised by the Department in its appeal is dismissed."*

Thus, it is a settled legal proposition that the said expenditures, i.e. freight and insurance are to be excluded both from the total turnover and the expected turnover of the assessee for the year under consideration. Therefore, following the decision of Co-ordinate Bench of

the Tribunal in assessee's own case, the Ground Nos. 1 and 2 raised by the Revenue are dismissed.

9. Ground No. 3 relates to allowing of Product Development Expenditure of Rs.20,07,02,581/- as Revenue expenditure by the CIT(A).

10. Relevant facts include that the assessee capitalised the development cost amounting to Rs.20,07,02,581/- in the books of account and claimed the same as revenue expenditure u/s.35(1)(i) of the Act. CIT(A) after elaborately discussing the same and relying on various judgmental laws deleted the same holding it as revenue expenditure. Contents of Para No.4.3 to 4.3.4 of the order of CIT(A) are relevant. For the sake of completeness of the order, we proceed to extract the operational Para No.4 3.4 and the same reads as under :

> *"4.3.4 For the foregoing reasons, I am of the considered opinion that the Assessing Officer is not legally justified in treating the impugned expenditure in question as capital in nature and disallowing the same. Accordingly, the addition of Rs.19,96,93,543/- made by the Assessing Officer on this ground is deleted."*

11. Aggrieved with the said order of CIT(A), the Revenue is in appeal before us.

12. After hearing both the sides on this issue, we find this issue already been decided by Co-ordinate Bench of Tribunal in the assessee's own case in ITA No. 914/PN/2013 for the A.Y. 2008-09 (supra.) in favour of the assessee. Relevant paragraphs of the Tribunal's order read as under:

> "*45. In so far as the argument of the ld. DR that the assessee has shown product development expenditure in its books of account as capital in nature and subsequently while filing revised return of income has claimed the same to be revenue due to change of mind is not tenable. It is a well settled law that entries made in the books of account does not determine the true nature of transaction.*

46. The Hon'ble Supreme Court of India in the case of Sutlej Cotton Mills Limited Vs. Commissioner of Income Tax (supra) has clearly enunciated that the books of account are not determinative of the question whether the assessee has earned any profit or suffered any loss. The assessee may, by making entries which are not in conformity with the proper accountancy principles, conceal profit or show loss and the entries made by him cannot, therefore, be regarded as conclusive. What is necessary to be considered is the true nature of the transaction and whether in fact it has resulted in profit or loss to the assessee. Thus, the Hon'ble Apex Court has in unambiguous terms held that entries in the books of account alone are not conclusive in determining the nature of income. This law laid down by the Hon'ble Apex Court have been reiterated by the Hon'ble Jurisdictional High Court in the case of Commissioner of Income Tax Vs. Gopal Purohit reported as 336 ITR 287 (Bom). Recently, in the case of Commissioner of Income Tax Vs. Smifs Securities Ltd. reported as 348 ITR 302 (SC) the Hon'ble Supreme Court of India has reaffirmed the view that the accounts maintained by the assessee are not conclusive for deciding the nature of expenditure.

Thus, in view of the facts of the case and various decisions discussed above, we do not find any infirmity in the findings of Commissioner of Income Tax (Appeals) ***in accepting the product development expenditure as revenue in nature.*** *Accordingly, ground Nos. 1 and 2 raised by the Revenue in its appeal are dismiss d."*

Thus, the Tribunal decided an identical issue in the own case of the assessee and in favour of the assessee. Following the said decision of the Co-ordinate Bench of the Tribunal, the Ground No. 3 raised by the Revenue is dismissed

13. Ground No 4 raised by the Revenue relates to the donation paid by the assessee amounting to Rs.16,10,000/- to Aslaji Agiary Trust - Rs.14,00,000/-, IndCare Charitable Trust – Rs.2,00,000/- and Ram Krishna Math – Rs.10,000/- and claimed the same as deduction u/s.37(1) of the Act. AO disallowed the same holding that the expenditure has nothing to do with the business of the assessee. In the First Appellate proceedings, the CIT(A) sustained the disallowance to the extent of Rs.14,00,000/- paid to Aslaji Agiyari Trust and allowed Rs.2,10,000/- paid to Indcare Charitable Trust & Ram Krishna Math.

14. Aggrieved with the part relief given by the CIT(A), the Revenue is in appeal before us.

15. After hearing both the sides, we find this issue also has been decided by the Co-ordinate Bench of Tribunal in the assessee's own case vide ITA No.931/PN/2013 for the A.Y. 2008-09 (supra.) in favour of the assessee. Relevant paragraph of the Tribunal's order reads as under:

> "*52. The ld. AR submitted that the assessee contributed Rs.2,00,000/- towards celebration of Indian Cost Guard's 31 years of service to the Nation. The intention of celebrating 'Cost Guard Day' is to spread awareness of the service which operates with Indian Navy during external aggression and independently guards Indian cost line from intruders during peace. The business motive behind contributing the fund was the assessee has taken godowns on lease from M/s. Sovereign Pharma Pvt. Ltd. at Daman for storage of vaccines and Indian Cost Guard has its huge base at Daman.* ***The expenditure has been incurred towards discharge of corporate social responsibility.***"

Following the decision of the Co-ordinate Bench of the Tribunal in the assessee's own case, Ground No. 4 raised By the Revenue is dismissed.

16. Ground No.5 relates to allowing of depreciation in respect of 'Plant & Machinery and Furniture and Fixtures. AO classified certain items under Furniture and fixtures as well as plant and machinery and eventually allowed depreciation @10% and @15% on some items in his order u/s.143(3) r.w.s. 153A of the Act. The CIT(A) relying the order his predecessor for the A.Y. 2008-09 in the assessee' own case and the order of Tribunal in A.Yrs. 2006-07 and 2007-08 allowed depreciation @15%. The relevant finding of CIT(A) is extracted as under :

> *"13.3.3. In view of the above and in line with the decision of my Ld. Predecessors in the appellant's own case for the earlier years, the Assessing Officer is directed to segregate the impugned assets in two categories, i.e. one falling under the head 'furniture' eligible for depreciation at the rate 10%, i.e. stools, tables, racks etc. and the other items which were being used for carrying products of the appellant from laboratory to store and falling under the head 'plant & machinery', eligible for depreciation at the rate of 15% like trolley etc. Accordingly, this ground is partly allowed subject to the direction mentioned above."*

17. After hearing both the sides, we find this issue also has been adjudicated by the Co-ordinate Bench of Tribunal in the assessee's own case vide ITA No.931/PN/2013 for the A.Y. 2008-09 (supra.) in favour of the assessee. We therefore, find it relevant to extract the finding given by the Tribunal and the same reads as under:

> *"35. Both sides heard. Findings of authorities below on the issue examined. We have also considered the decision of Co-ordinate Bench of the Tribunal on this issue. We find that the issue of reclassification of certain assets which were classified by the assessee as 'Plant and Machinery' and held to be 'Furniture and Fixtures' by the revenue was considered by the Tribunal in assessment year 2001-02 in ITA No. 948/PN/2005 (supra). The Co-ordinate Bench of the Tribunal after considering the submission of the assessee held as under:*
>
> > *6. We have heard the parties and pe used the orders of the revenue. The jurisdictional High Court's judgment in the case of Park Devis, supra, is clear on the issue that the 'functional test' has to be applied in deciding if a particular tool constitutes plant and machinery or the furnitu e. Karnataka High Court In case of Hindustan Aeronautics Ltd, supra also decided the issue adopting the same logic Therefore, we need to adopt the same 'functional test' to decide if the impugned items i.e. Stools, Tables, Stainless Steel racks 55 cupboards, 55 trolleys. SS trays etc. constitutes 'plant & machinery' for the purpose of deciding the applicable rate of depreciation. The perusal of the orders of the revenue revealed that they have not applied the functional test to each of the disputed items. In a weeping statement, the AO mentioned that the 'furniture items like stools, chairs, tables, racks, trolleys etc' used in the factory cannot be categorized as plant and machinery as they fail even on the 'functional test'. There is no discussion in the orders on the details of the said test. In our opinion, the functional test implies if the said items are necessary for the production of the product in the laboratory premises. In other words, if the Stools, Tables, Stainless Steel racks, SS cupboards, SS trolleys, SS trays etc. are required for the laboratory purpose i.e. for the purpose of production or processing of the chemical tests in the laboratory premises leading to the production of the stocks, they must be categorized as plant and machinery. The impugned items like the case of 'fan' held as plant and machinery by the Jurisdictional High Court in the case of Park Davis, supra have both factory and office functions depending on the place of use and the employees using them. If the scientist or lab technicians have used the impugned chairs or stools or racks or trays as part of the production of the vaccines in the factory premises, they must be construed as 'plant' as held in the case of Park Davis on the dispute relating .to 'fan' and the applicable rate of depreciation. As argued by the Ld DR, the special design is an irrelevant factor as the same item can be used for multiple functions. Therefore, the use of the item for the function of production related function: at the place of laboratory must be decides its block i.e. Plant & machinery or the furniture. It is the not the case of the revenue that they were not used for the function of the production of the vaccines. In our opinion, the revenue authorities have carried away more by the nomenclature rather than the functions of the impugned items. Therefore,*

considering the set principle of functional test advocated by the jurisdictional High Court cited above, we are of the opinion the assessee must win on this issue. Accordingly, ground 2 raised in the appeal of the assessee are allowed."

36. The ld. DR has not placed on record any material to controvert the findings of Co-ordinate Bench on this issue. Respectfully, following the decision of Co-ordinate Bench we allow this ground of appeal of the assessee."

Following the rule of consistency, the Ground No.5 raised by the Revenue is dismissed.

18. In the result, appeal of the Revenue is dismissed.

Now, we shall take up assessee's appeal for adjudication.

ITA No.1184/PUN/2015 (By Assessee)

A.Y.2009-10

19. Grounds raised by the assessee are extracted here as under :

"On the facts and in the circumstances of the case and in law learned CIT(A) erred:

1a. in confirming the disallowance u/s.14A amounting to Rs.3,34,98,903/- as per rule 8D.

b. without prejudice to ground (a) above, confirming the disallowance applying Rule 8D without considering the contentions of the appellant company regarding the 'Own funds', Investment pattern, contents of exempt income and expenditure to be incurred to realize the exempt income and reasonableness as envisaged in section 14A.

2. in confirming the disallowance, as capital expenditure of foreign travel expenses of employees amounting to Rs.14,09,453/- who travelled abroad.

3. a. in confirming the classification of items of fixed assets of Rs.22,94,455/- like stainless steel tables, stools, racks etc. located in manufacturing unit by considering them as 'Furniture and Fixtures' and not as ' Plant and Machinery'.

b. in not applying correctly the functional test to the facts of the case while deciding whether certain items like Stainless steel table, stools, trolleys etc constituted 'Plant' or not.

4. Confirming the disallowance of the 'Provision for Leave Encashment' amounting to Rs.96,47,634/- pertaining to 'DTA' unit ascertained on the basis of actuarial valuation for the eligible employees of the Appellant Company.

5. confirming the disallowance made by A.O in respect of contribution to 'Aslaji Agiary Trust'-Rs.14,00,000/- u/s.37(1) ignoring the aspect of discharge of social responsibility.

6. Confirming disallowance of 'demat charges' amounting to Rs.1,10,605/- made by the Assessing Officer.

7. not treating the expenditure on laying of water pipeline amounting to Rs.72,26,828/- as 'revenue expenditure' which has been laid down in the vicinity area of factory where employees are staying.

8. in confirming disallowance of rent paid of Rs.24,00,000/- for bungalow at 70, Koregaon Park, Pune taken on lease (belonging to M/s. Poonawalla Finvest & Agro Pvt. Ltd., ZSP Group Company) for office of Director of appellant company and depreciation of Rs.17,96,127/- on the assets placed thereat.

9. in confirming the action of A.O for not reducing Wealth Tax paid of Rs.20,37,979/- for computing book profit u/s. 115JB. He erred in ignoring the decision in the case of Usha Martin Industries Ltd. Vs. CIT [2003] 81 TTJ (Cal.) 518.

10. in upholding the disallowance of purchases of Rs.43,47,750/- by treating the same as 'Bogus Purchases'.

11. The Appellant craves leave to add alter/withdraw any of the 'Grounds of appeal' at the time of appeal proceedings. Your appellant further submits that the grounds of appeal, save as otherwise specified, notwithstanding and without prejudice to each other."

We shall take up the **issue-wise adjudication** in the following paragraphs.

20. **First issue :** If the disallowance made by the AO u/s.14A r.w. Rule 8D(2) of the I.T. Rules, 1962 is sustainable when there is **no satisfaction** invoking the provisions of the Act/Rules ?

21. Bringing our attention to the assessment order in this regard, Ld. Counsel for the assessee submitted that, on similar satisfaction mentioned by the AO, the Tribunal in the case of group company – Poonawalla Investments and Industries Ltd. Vs. DCIT in ITA Nos. 245 to 250/PUN/2016 for A.Yrs. 2006-07 to 2011-12, dated 28-02-2018 deleted the disallowance made u/s.14A of the Act. In this regard, he read out the following lines from the assessment order :

"5.1 . . . . . It is difficult to accept the proposition that all the tax free income has been earned without incurring these expenditures and these expenditures were incurred only for earning taxable income. Further, assessee has disallowed expenditure on Adhoc basis without applying rule 8D.

Therefore, I am satisfied that the assessee has not made adequate disallowance as mandated u/s.14A of the I.T. Act and therefore, the case of the assessee is a fit case for computation of the said disallowance u/s.14A of the I.T. Act."

22. After hearing both the sides on this issue and on perusing the orders of the Revenue, we find the AO did not give the satisfaction having regard to the book of account of the assessee. Further, with similar kind of satisfaction in the case of Poonawalla Investment and Industries Pvt. Ltd. (supra), we hold that the same falls short of the requirement. For the sake of completeness relevant paras are extracted as follows :

"27. In connection with Ground No.1, Ld. Counsel for the assessee submitted that AO failed to record satisfaction which is required while invoking the provisions of section 14A of the Act r.w. Rule 8D of the I.T. Rules, 1962. Bringing our attention to the contents of Para No.5.1 of the assessment order, Ld. Counsel submitted that the AO failed to record the satisfaction before invoking the provisions u/s.14A of the Act. Further, Ld. AR read out the relevant lines from the said para of the assessment order. For the sake of completeness, we proceed to extract the same as under :

"5.1 . . . . . .

It is difficult to accept the proposition that all the tax free income has been earned without incurring these expenditures and these expenditure were incurred only for earning taxable income. Therefore, I am satisfied that the assessee has not made adequate disallowance as mandated u/s.14A of the I.T. Act and therefore, the case of the assessee is a fit case for computation of the said disallowance u/s.14A of the I.T. Act."

28. Further, Ld. AR for the assessee submitted that the above recorded satisfaction , is extremely general and it falls short of the legal requirement as provided in the judgement of Hon'ble Apex Court in the case of Godrej and Boyce Manufacturing Company Ltd vs. DCIT 394 ITR 448 (SC). Contents of Para No.37 of the said judgment is relied heavily and prayed for deletion of the addition made by the AO invoking the provisions of section 14A of the Act.

29. Ld. DR for the Revenue relied on the orders of the AO/CIT(A).

30. We heard both the parties on the issue relating to the issue of recording of satisfaction and perused the above extracted satisfaction recorded by the AO on this issue. We find the legal position was

explained by the Hon'ble Apex Court and the Para No.37 of the judgment of Hon'ble Apex Court in the case of Godrej and Boyce Manufacturing Company Ltd. (supra) are relevant. Hon'ble Supreme Court explained the provisions of sub-section (2) and (3) of section 14A of the Act. For the sake of completeness, we proceed the extract the same here as under :

> *"37. We do not see how in the aforesaid fact situation a different view could have been taken for the assessment year 2002-03. Sub-sections (2) and (3) of section 14A of the Act read with rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the assessee. Whether such determination is to be made on application of the formula prescribed under rule 8D or in the best judgment of the Assessing Officer, what the law postulates is the requirement of a satisfaction in the Assessing Officer that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It is only thereafter that the provisions of section 14A(2) and (3) read with rule 8D of the Rules or a best judgment determination, as earlier prevailing would become applicable." (emphasis supplied).*

31. The above ratio was adopted by the Pune Bench of the Tribunal in the case of Capgemini Technology Services Ind a Limited, (in the matter of iGate Computer Systems Limited, (formerly Patni Computer systems Limited amalgamated with iGate Global Solutions Limited and name changed) Vs. DCIT vide ITA Nos. 216 and 360/PUN/2015, order dated 25-01-2018 and allowed the issue in favour of the assessee. For the sake of completeness, relevant operational paras are extracted here as under :

> *"34. We have heard the rival contentions and perused the record. The Assessing Officer while passing the assessment order in para 10 had observed that the assessee had earned significant amount of tax free dividends and in the computation of income, the assessee has disallowed sum of Rs.50 lakhs under section 14A of the A t Then, reference is made to the Note filed by the assessee on expenditure disallowable under section 14A of the Act. The Assessing Officer thereafter, takes note of the contents of said explanation and observed as under:-*
>
> *"I have gone through the submissions made by the assessee. It is observed that apart from investments in the overseas subsidiaries (where there is no tax-free income since the dividend is also taxable) the investments made by the assessee are in mutual funds. The entire investment in mutual fund is in non-equity scheme. In respect of investment in mutual funds, except for growth funds, the company receives tax free dividend. The amount of dividend received by the company is substantial. This is a clear case for application of Rule 8D. Hence, the contention of the assessee cannot be accepted. The disallowance u/s 14A is required to be made by applying Rule 8D. As per the working of disallowance u/s 14A as per Rule 8D, the amount of disallowance comes to Rs.5,68,32,323/-. The assessee has already disallowed Rs.50,00,000/- in the computation of income."*
>
> *35. The requirement of section 14(2) of the Act is that the Assessing Officer is to record as to why the disallowance made by the assessee i.e. Rs.50 lakhs under section 14A of the Act is not correct. The Assessing Officer takes note of the disallowance, considers the explanation of assessee and holds that the*

contention of assessee cannot be accepted. The preliminary satisfaction to be recorded by Assessing Officer, before making disallowance under section 14A of the Act read with Rule 8D of the Rules, is missing in the case; in the absence of the same, there is no merit in the disallowance made by the Assessing Officer. We find support from the ratio laid down by the Hon'ble Supreme Court in Godrej & Boyce Manufacturing Co. Ltd. Vs. DCIT & Anr. (2017) 394 ITR 449 (SC).

"37. We do not see how in the aforesaid fact situation a different view could have been taken for the assessment year 2002-03. Sub-sections (2) and (3) of section 14A of the Act read with rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the assessee. Whether such determination is to be made on application of the formula prescribed under rule 8D or in the best judgment of the Assessing Officer, what the law postulates is the requirement of a satisfaction in the Assessing Officer that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It is only thereafter that the provisions of section 14A(2) and (3) read with rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable."

(underline provided by us for emphasis)

36. The ratio laid down by the Hon'ble High Court of Delhi in Indiabulls Financial Services Ltd. Vs. DCIT (supra) is thus, not applicable. The ground of appeal No.3 raised by the Revenue is thus, dismissed."

32. From the above, we are of the view that the satisfaction recorded by the AO in Para No.5.1 is extremely based on the suspicion and surmises. The satisfaction arrived at by the AO with reference to the entri s in the books of account of the assessee and also having regard to the correctness of the claim of the assessee. In that sense of the matter, the satisfaction recorded by the AO is extremely generic and which falls short of the legal requirement for assuming jurisdiction u/s.14A of the Act.

Considering the above position, we are of the view that the AO failed to record the sustainable satisfaction before invoking the provisions of section 14A of the Act. Therefore, the disallowance made by the AO is unsustainable technically. Accordingly, this part of the argument of Ground No.1 is allowed. We find adjudication of the other issues of the said ground relating to merits becomes an academic exercise. Therefore, the same are dismissed as academic."

Therefore, on the technical grounds, the Ground No.1(a) raised by the assessee on the issue of satisfaction stands allowed in favour of the assessee.

23. Further, regarding Ground No.1(b) relating to the disallowance of section 14A r.w. Rule 8D(2) where there are non-interest bearing funds, Ld. Counsel submitted the written submissions :

> *"1. In the return of income the assessee co. has offered disallowance u/s.14A on reasonable basis, i.e.10% of the exempt income received. (10% of Div. 1,28,06,077/- + Share of profit from Firm 1,78,594 /- = 12,98,467/-.*
>
> *2. The AO disallowed the amount of expenditure u/s.14A r.w.Rule 8D as under :*
>
> | | | |
> |---|---|---|
> | *i.* | *Direct Expenses* | *0* |
> | *ii.* | *Un-allocable interest expenses* | *1,26,64,487* |
> | *iii.* | *5% of Avg. Investments* | *2,08,34,416* |
> | | | *3,34 98,903* |
>
> *3. The assessee contends that no disallowance should be made u/s.14A for the interest component as there are sufficient own funds lying with the assessee. The details in respect of own funds and investments is given before the CIT(A)*
>
> *4. In respect of disallowance made by AO u/s.14A, submission were also made before CI(A) based on following principles (refer Page No.72-88 of the paper book).*
>
> *i. Non recording of satisfaction of AO before resorting to Rule 8D.*
>
> *ii. AO has to show computation of the assessee to be incorrect.*
>
> *iii. There should be nexus of expenditure with exempt income for disallowance to be made.*
>
> *iv. Investment in group companies should be excluded while computing disallowance u/s.14A r.w. r 8D.*
>
> *v. Investments which **have not earned exempt income** should not be considered while working out disallowance under Rule 8D.*
>
> *vi. As liability of MAT is based on actual expenses and income, no disallowance should be made on notional basis.*
>
> *vii. Any other method to be adopted which will result into reasonable basis of disallowance."*

24. Ld. DR for the Revenue relied on the orders of the AO/CIT(A). He also relied on the following judgments on the issue :

> *1. Devarsons Industries Pvt. Ltd. Vs. ACIT 84 taxmann.com 244 (Gujarat)*
>
> *2. Indiabulls Financial Services Ltd. Vs. DCIT 76 taxmann.com 268 (Delhi)*

25. In response to ground No. 1(a), on the issue of satisfaction, we have already granted relief to the assessee. Therefore, the Ground No.1(b) which relates to merits of disallowance, its adjudication becomes an academic exercise. Thus, this ground No.1(b) is dismissed as academic.

26. **Second issue:** Ground No.2 raised by the assessee relates to disallowance of foreign travel expenses of employees amounting to Rs.14,09,453/-

27. Relevant facts of the issue include that the AO treated the said foreign Travel expenses as capital in nature as against the claim of assessee as revenue expenditure. Assessee contended that the expenditure is incurred by senior executives in the normal course of business and 75% of the assessee's turnover is on exports and therefore, the expenditure is allowable u/s.37(1) of the Act. The AO considered the decision of his predecessor in assessee's own case for the A.Y. 2006-07 where the matter was travelled upto the Tribunal and the Tribunal confirmed the same. Therefore, considering the above facts, AO concluded that the assessee travelled abroad for acquiring machinery and thus denied the benefit to the assessee. In the First Appellate proceedings, the CIT(A) upheld the views of the AO. Aggrieved with the order of CIT(A) the assessee is in appeal before us.

28. Before us, Ld. Counsel submitted the following written submissions and the same are extracted here as under :

> *"During the year, company has spent Rs. 18,01,08,856/- on 'Travelling & Conveyance. It mainly includes Foreign Travel amounting to Rs. 7,65,62,825/- . During the course of hearing, Your Goodself has asked explanation on/to justify the same. In this regard, we state that :*
>
> *We have submitted the details of Foreign Travel of Rs. 7,65,62,825/- vide our seventh submission. From the details of foreign travel enclosed, it will*

be clear that the expenditure on foreign travel has been incurred by our senior executive in the normal course of business and for business purpose only. Considering nature of business and keeping in mind, more than 75% of total sales represents exports to 140 countries all over world (Map enclosed as Annexure No - 6. Business cannot be carried out smoothly and conveniently but for such expenditure on foreign tours which is a must for personal interaction of the company with various customers which includes Govt. authorities / agencies of different countries. The same is also necessary to create awareness and goodwill and public opinion all over world of our company and our products. In our opinion the expenditure is incurred in normal course of business and the same is fully allowable.

It is our practice to submit the tour report to the superior when an employee comes back from foreign tour.

During the course of hearing, Your Honor has asked to justify the travelling expenses of some of the employees who have travelled for the purpose of acquiring the fixed assets which may need to be disallowed and to be capitalized in the year of purchase of fixed asset. In this regard, we submit as under:
Justification of foreign undertaken by employees travelled for capital purposes

Details of travelling for the purpose of purchase of machinery : Your Honor has asked for the details of the employees who have made foreign tours for purpose of purchase of ma hinery. In this regard, we state that following employees have undertaken foreign tours for purchase of machinery.

Mr Ravi Menon employee of the Company undertook a travel to Turky in the month of Jan ,2009 t meet national control authorities in connection with market complaint about the particular matter in the product. The expenditure of tour was Rs.2,42,190/-.

Mr. Sunil Athawale employee of the company undertook a travel to France, Zurich in the month of November,2008 to test conducted at the manufacturing facility in France. The expenditure of the tour was Rs.1 ,77,897/

Mr. J.D. Patil employee of the company undertook travel to France in the month of July-2008. The expenditure of the tour was Rs.1,87,074/-.

Mr. Ram Shinde employee of the company undertook travel to France in the jmonth of May 2008 for purchase parts and equipments of machinery. The expenditure of the tour was Rs.1,26,599/-.

Mr. S.G Bankar employee of the company undertook travel to USA in the month of May 2008. The visit at AKITV-ORY LLC Colorado. It is relates to advance functioning of formulation activity. The expenditure for tour was Rs.2,27,190/-.

Mr. Sangram Homrao & Mr. R.B. Naik *employee of the company undertook travel to Germany in the month of April 2008. The total cost of tour was* ***Rs.1,07,720/- & Rs.37,827/-.***

Mr. Vi/as Badhe *employee of the company undertook travel to France in the month of June,2008 for purchase of machinery from Usifroid France. The expenditure of the tour was* ***Rs.69,784/- .***

Mr. Satish Kakade *employee of the company undertook travel to Turkey during the month of June 2008 to attend course training course on cold*

chain management on wheels organized by PHAO-WHO. The expenditure incurred of the tour was ***Rs.92,636/-.***

Mr. Shafik Shaikh *employee of the company undertook travel to France for undertaking training in respect of calibration, validation and understanding of electrical circuit, refrigeration and vacuum system. The expenditure of the tour was* ***Rs.1,40,536/-."***

29. Per Contra, Ld. DR relied on the orders of the AO/CIT(A).

30. On hearing both the sides on this issue, we find the Tribunal in the assessee's own case vide ITA No.931/PUN/2013, dated 22-07-2016 for the A.Y.2008-09 has decided the issue against the assessee and the said finding is extracted here as under for the sake of completeness :

"*26. The seventh ground raised in the appeal by the assessee is against disallowance of foreign travel xpenses of employees Rs.25,77,069/-. The assessee had claimed the expenditure as revenue expenditure. The ld. AR of the assessee fairly admitted that in the earlier assessment year 2005-06 under identical circumstances the Tribunal has disallowed the capitalization of foreign travel expenditure of employees. The ld. AR placed on record a copy of the order of Tribunal in assessee's own case in ITA No. 1383/PN/2011 for assessment year 2006-07 decided on 22-02-2013. The Assessing Officer disallowed the foreign travel expenditure incurred on employees for finalizing the proposal of purchasing the plant and machinery. The assessee had claimed expenditure as revenue in nature. The Assessing Officer held expenditure to be capital expenditure and allowed depreciation on the same. Therefore, Assessing Officer rectified his order u/s 154 and disallowed Rs.25,77,069/-. In first appeal, the Commissioner of Income Tax (Appeals) upheld the findings of Assessing Officer.*

27. The ld. DR vehemently defended the order of Commissioner of Income Tax (Appeals) in upholding the expenditure incurred towards foreign travel of employees as capital in nature.

28. Both sides heard. The assessee has assailed the order of Commissioner of Income Tax (Appeals) in upholding the disallowance made by the Assessing Officer amounting to Rs.25,77,069/- in order dated 04-02-2011 passed u/s. 154 of the Act. We find that the assessee had claimed the expenditure as revenue in nature. However, in an alternate submission before the Assessing Officer, the assessee prayed for treating the foreign travel cost as part of cost of machinery and allow depreciation on the same. The Assessing Officer allowed the capitalization of expenditure and also allowed depreciation on the same as admissible to the plant and machinery. Subsequently in rectification order u/s. 154 the Assessing Officer disallowed Rs.25,77,069/-. In first appeal before the Commissioner of Income Tax (Appeals) upheld the findings of Assessing Officer. We find that the issues relating to capitalization of foreign travel expenditure of employees in connection with the finalizing the purchase of machinery had come before the Tribunal in assessee's own case in ITA No. 679/PN/2009. The Tribunal upheld the action of Assessing Officer in treating the expenditure as capital in nature and disallowed unrelated expenditure. The relevant extract of the findings of Tribunal are as under :

"24. We have carefully considered the rival submissions. We find that in response to a specific query from the Assessing Officer as to the details of employees who made foreign tours for the purpose of purchase of machinery, assessee furnished details vide letter dated 27-11-2008 which has been reproduced by the Assessing Officer in para 7 of the assessment order. In the said para, the Assessing Officer has also referred to a letter of the assessee dated 12-11-2008 wherein it was pointed out that the machinery was purchased in the subsequent year. In this background, the point to be decided as to whether the impugned expenditure of Rs. 7,91,197/- on the foreign travel was to be allowed as a revenue expenditure or not. Quite clearly, the plea of the assessee has been that such expenditure has been incurred on foreign tours of the employees for the purpose of purchase of machinery. Since the purpose of travel admittedly, is purchase of machinery, the CIT(A), in our view, made no mistake in holding that the cost of such foreign travel was liable to be treated as part of cost of machinery. Ostensibly, the purchase of the machinery was not finalized in the particular year but the same has been purchased in subsequent year, as adverted by the assessee before the Assessing Officer. Therefore, it would be in the fitness of things tha such expenditure would form part of cost of purchase of machinery as and when in the year in which the machinery is capitalized. On facts, therefore, the claim of the assessee for allowability of such expenditure as revenue expenditure is liable to be negated and on this aspect, we affirm the order of the Assessing Officer. In so far as the reliance placed by the assessee on the decision of the Tribunal for A.Y. 2002-03 is concerned, we find it appropriate to reproduce operative part of the order of the Tribunal contained in para 13, which is as under:-

> *We find that Revenue has not made out a case to demonstrate that the said foreign travel expenditure was incurred in connection with any capital asset. Therefore, Assessing Officer failed to discharge the onus successfully. When allegation is made by AO, it is expected that he should demonstrate with evidence against the assessee. In our opinion, the said judgments are relevant and applicable to the facts of the case. Accordingly, the grounds raised by the assessee should be allowed in his favour."*

25. A perusal of the aforesaid clearly shows that in the assessment year 2002-03, the Tribunal allowed the foreign travel expenses as revenue expenditure primarily for the reason that Revenue did not make out a case that the foreign travel expenditure was incurred in connection with any capital asset. However, the factual position in the instant year is quite different, inasmuch as we have noted earlier that the assessee itself submitted before the Assessing Officer vide letter dated 27-11-2008 that the expenditure on foreign travel in question was undertaken for purchase of machinery, though the purchase of such machinery was finalized in subsequent year. Therefore, the decision of the Tribunal in the case of the assessee for A.Y. 2002-03 does not help the assessee in the instant year and thus on this Ground, assessee has to fail."

29. The ld. AR of the assessee has admitted that the issue in the present appeal is identical to one adjudicated by the Tribunal in 19 ITA Nos. 914 & 931/PN/2013 assessment year 2005-06. Therefore, in

view of the decision of Coordinate Bench this ground of appeal is dismissed."

31. However, on the issue of capitalization of the expenditure, in view of the assessee's submission that the expenses incurred for the purpose other than the purchase of machinery, needs to be verified by the AO, we find this issue needs to be remitted back to the file of AO for verification of correctness of the facts relating to this claim. AO is directed to verify the expenses in this regard after granting reasonable opportunity of being heard to the assessee. Assessee is directed to produce relevant documents to substantiate his claim Accordingly, Ground No. 2 raised by the assessee is allowed for statistical purposes.

32. **Third issue:** Ground No.3 raised by the assessee relates to classification of items of fixed assets amounting to Rs.22,94,455/-.

33. Relevant facts of this issue include that the AO classified certain items as Furniture and allowed depreciation at the rate applicable to Furniture and certain items as Plant and Machinery and allowed depreciation at the rate applicable to them by applying functional test. Eventually, in the assessment made u/s.143(3) r.w.s. 153A of the Act, the AO made addition of Rs.1,44,126/- being difference in depreciation @10% and 15% on some items under block of Plant and Machinery treating the same as Furniture. Before the CIT(A), the assessee submitted that this issue has been decided in favour of the assessee for the A.Yrs. 2006-07, 2007-08 and 2008-09. The CIT(A) after considering the submissions of the assessee and the order of CIT(A) for the A.Y. 2008-09 partly allowed the appeal of the assessee. Contents of Para No.13.3.3 of the order of CIT(A) are relevant.

34. After hearing both the sides, we find this issue has already been adjudicated by us against the Revenue and in favour of the assessee while dealing with the appeal of the Revenue. Considering the same, this ground raised by the assessee is allowed.

35. **Fourth issue:** Ground No.4 raised by the assessee relates to disallowance made by the AO on account of 'provision for Leave Encashment' amounting to Rs.96,47,634/-.

36. Before us, Ld. Counsel for the assessee submitted that the issue stands decided against the assessee by the order of Tribunal in assessee's own case in ITA No.931/PN/2013, dated 22 07-2016 for the A.Y.2008-09.

37. After hearing both the sides on this issue, we find the Tribunal vide the discussion given at Para No 18 has decided the issue against the assessee relying on the order of Tribunal for the A.Y. 2002-03 wherein the Tribunal relied on the judgment of Hon'ble Calcutta High Court in the case of Exide Industries Ltd. and Another Vs. Union of India 292 ITR 470 and the judgment of Hon'ble Bombay High Court in the case of Universal medicate Private Limited 324 ITR 263. For the sake of completeness, we proceed to extract the relevant finding given by the Tribunal (supra) and the same reads as under :

> *"18. We have heard the submissions made by the ld. AR of the assessee and have perused the order of the Co-ordinate Bench in assessee's own case in ITA No.413/PN/2006 for assessment year 2002-03 decided on 24-02-2012. We find that the Co-ordinate Bench of the Tribunal has observed that this issue has been decided against the assessee by the Hon'ble Calcutta High Court in the case of Exide Industries Ltd. & ANR Vs. Union of India reported as 292 ITR470 and Hon'ble Bombay High Court in the case of Universal Medicare Private Limited reported as 324 ITR 263. The ld. AR of the assessee in the preceding assessment years has not pressed this ground. The ld. AR has fairly conceded that the issue may be decided in line with the earlier order of the Tribunal. Accordingly, ground No. 4 raised in the appeal by the assessee is dismissed."*

Considering the same, the Ground No.4 raised by the assessee is accordingly dismissed.

38. **Fifth issue :** Ground No.5 relates to confirmation of disallowance on account of contribution made to Aslaji Agiary Trust amounting to Rs.14,00,000/-.

39. Relevant facts on this issue include that assessee claimed deduction of Rs.16,10,000/- being donations made to three institutions namely, (1) donation of Rs.14 lakhs made to Aslaji Agiary Trust (2) donation of Rs.2 lakhs made to Indcare Charitable Trust and (3) donation of Rs.10,000/- made to Ramkrishna Math. Assessee contended that donations have been made to discharge the social responsibility and the contributions are wholly for the purpose of business and claimed the same u/s.37(1) of the Act. AO denied the same and made disallowance of Rs.16,10,000/-. In the First Appellate proceedings, the CIT(A) confirmed the disallowance of donation made to Aslaji Agiary Trust amounting to Rs.14 lakhs and granted relief of Rs.2,10,000/- in respect of the donations made to Indcare Charitable Trust and Ramakrishna Math.

40. Earlier, assessee made a written submission before the CIT(A) on this issue stating that company contributed Rs.14 lakhs on 28-01-2009 to Aslaji Agiary Trust towards General Maintenance Fund. It is the submission of the assessee that the said contribution is allowable u/s.37 of the Act since the said contribution enhances the status of Dr. Cyprus Poonawalla, MD of the company being well known in Parsi Community. The said contribution also helps the trust as business advertisement through the word of mouth.

41. Ld. DR for the Revenue relied on the order of the AO/CIT(A).

42. After hearing both the sides, and perusing the orders of the Revenue, we find it relevant to extract the relevant finding of the CIT(A) while sustaining the disallowance of Rs.14 lakhs and the same reads as under :

> "*15.3 The submissions made by the Ld. Counsel are carefully considered with reference to the nature of contributions made and the provisions of sec. 37(1) of the I T Act. The first item of contribution amounting to Rs. 14 lacs is stated to have been made to Aslaji Agiary Trust, which is running a worship Centre for Parsi community. It was explained that Dr. Cyrus Poonawalla, MD of Appellant is well known in Parsi community and this donation to Aslaji trust helps business advertisement and fosters goodwill in form of 'word of mouth' publicity in entire Parsi community about the activities of the appellant company. Firstly, except stating that the donation/contribution serves business purpose of the appellant by way of publicity in the entire Parsi community, the appellant has not furnished any details as to how such con ribution to a particular religious community serves the business purpose of the appellant. Therefore the assertion that donation is motivated with this object of 'return' is not supported by any reliable data or evidence. On the contrary, the appellant submitted before the Assessing Officer that the contribution was made to help the society and discharge the social obligations without any commercial intention. The expenditure at best enhanced the social status of Dr. C S Poonawalla, MD of the appellant in Parsi community but the same cannot be said to have been incurred for the purpose of the business of the appellant. It is also not the case of the appellant that the expenditure was incurred out of business expediency and to further the interest of the appellant. Secondly, even presuming for a while that the donation is motivated with this object of 'return' such 'return' provides benefit of enduring nature to the appellant over a period of time in the form of goodwill in the Parsi community. In such circumstances, the expenditure, in my considered opinion, is otherwise capital outlay and cannot be claimed as revenue expenditure. In view of the above, the A.O. is justified in not allowing the donation amounting to Rs. 14,00,000/-, stated to have been made to Aslaji Agiary Trust, as revenue expenditure under sec.37 of the I.T. Act."*

We find the claim of expenditure if any u/s.37(1) is allowable only if the expenditure is wholly and exclusively for the business purposes of the assessee and not for the status enhancement of MD of the company. The argument relating to the advertisement through the word of mouth is far stretched one and too general in nature. As such, Ld. Counsel for the assessee has left it to the wisdom of the Bench to decide the issue. Considering the above discussion, we are of the opinion that the

expenditure of Rs.14 lakhs falls short of the legal requirement of wholly and exclusiveness qua the business purpose of the assessee. It cannot be said that the said expenditure is for the company in its entirety. Therefore, we are of the opinion that the CIT(A) is justified in upholding the addition to the extent of Rs.14 lakhs in respect of donation made to Aslaji Agiary Trust. Thus, the fifth issue raised by the assessee is dismissed.

43. **Sixth issue :** Ground No.6 raised by the assessee relates to addition of Rs.1,10,605/- u/s.48 of the Act made on account of demat charges which was claimed as expenditure incurred for earning income from capital gains.

44. Relevant facts on this issue include that assessee debited the said sum to the profit and loss account and claimed that the same should be allowed while computing the capital gains. Assessee relied on the decision of Bangalore Bench of the Tribunal in the case of Infosys Technologies Vs. JCIT 109 TTJ 631 (Bang.). Assessee contended that the said expenses has been incurred in the normal course of business and the dematerialization helped the assessee significantly in reducing the administrative costs. AO opined that the expenditure incurred for maintenance of share transactions from demat account is not to be allowed u/s.48 of the Act since the expenditure was not incurred wholly and exclusively in connection with such transfer or as the cost of acquisition and cost of improvement thereto and thus made the disallowance of sum of Rs.1,10,605/-. The CIT(A) defined the expression 'wholly' and 'exclusively' in his order. The CIT(A) also distinguished the decision of Bangalore Bench of the Tribunal in the case of Infosys Technologies Limited (supra) and held that the said decision is not applicable to the facts of the present case and upheld the

disallowance made by the AO on account of demat charges. Aggrieved with the order of CIT(A), the assessee is in appeal before us.

45. Ld counsel for the assessee at the outset submitted that the issue stands decided in favour of the assessee by the decision of the Pune Bench of the Tribunal in the case of KRA Holding and Trading Pvt. Ltd. Vs. DCIT and vice-versa vide ITA No.703/PN/2012 & ITA No.665/PN/2012 order dated 19-09-2013 for A.Y. 2008-09 wherein it has been held that the claim of Portfolio Management Fees is an allowable expenditure from such capital gain.

46. Ld. DR for the Revenue relied heavily on the orders of the AO/CIT(A).

47. After hearing both the sides on this issue and on perusing the orders of the Revenue, we find this issue has to be decided in favour of the assessee by virtue of the decision of Pune Bench of the Tribunal in the case of KRA Holding and Trading Pvt. Ltd. (Supra) wherein the Tribunal observed as under:

> *"9. In the appeal of the assessee, the solitary issue is with regard to the action of the CIT(A) in confirming the stand of the Assessing Officer that fees paid to ENAM Asset Management Company Pvt. Ltd. was not an allowable expenditure in computing appellant's income whether under the head 'business' or under the head 'capital gains'.*
>
> *10. In this regard, the Assessing Officer noticed that assessee had incurred expenditure of Rs.2,79,31,009/- representing payments to ENAM Asset Management Company Pvt. Ltd. as portfolio management fees in terms of an Investment Management Agreement dated 01.01.2005. Following his decision for the earlier assessment years i.e. assessment year 2004-05 to 2007-08, the Assessing Officer disallowed the expense against which assessee went in appeal before the CIT(A). The CIT(A) noted that similar issue for assessment years 2004-05 to 2006-07 was adjudicated by the Tribunal in the assessee's own case in favour of the assessee and against the Revenue vide order dated 31st May, 2011 (supra). However, the CIT(A) noticed that subsequently Mumbai Bench of the Tribunal in the case of one Shri Homi K. Bhabha vs. ITO in ITA No. 3287/Mum/2009 decided a similar issue against the assessee and therefore he held the issue against the assessee. In view of the aforesaid, assessee is in further appeal before us.*

11. At the time of hearing, the learned counsel for the assessee submitted that similar stand of the CIT(A) in the assessee's own case for assessment year 2007-08 came up before the Tribunal in ITA No. 356 & 240/PN/2011 dated 25.07.2012 and after considering the divergent view of the Mumbai Bench of the Tribunal in the case of Shri Homi K. Bhabha (supra) which has been relied upon by the CIT(A), the issue has been decided in favour of the assessee. It was, therefore, contended that the issue is accordingly liable to be decided in favour of the assessee.

12. The learned CIT(DR) appearing for the Revenue has not controverted the factual matrix brought out by the learned counsel so however she has relied upon the order of the CIT(A) in support of the case of the Revenue.

13. We have carefully considered the rival submissions and also the precedent in the assessee's own case by way of the order of the Tribunal dated 25.07.2012 (supra). In the said case, the Tribunal considered the allowability of expenditure incurred by way of payment of fees of ENAM Asset Management Company Pvt. Ltd. in terms of the investment agreement dated 01.01.2005, which is precisely the issue before us also. The Tribunal referred to its earlier decision in the asses ee's own case for assessment year 2004-05 vide order dated 31st May, 2011 (supra) and noticed that the issue has been decided in favour of the assessee. Thereafter, the Tribunal noted that against the decision of the Tribunal dated 31st May, 2011 (supra), Revenue preferred an appeal before the Hon'ble Supreme Court only on the issue treatment of income from the sale of shares as 'capital gain' or 'business income' and that the Revenue had not preferred any appeal against the order of the Tribunal allowing the claim of deduction of expenditure by way of Portfolio Management Fee representing payments to ENAM Asset Management Company Pvt. Ltd. while computing the income under the head 'Capital Gains'. After noticing the aforesaid th Tribunal concluded as under in para 11 of its order dated 25.07.2012 :

> *"11. The decision of the Mumbai Bench of the Tribunal in the case of Homi K. Bhabha vs. ITO was brought to our notice by the learned DR wherein it was held that Portfolio Management Scheme fees is not deductible against capital gains. The decision of the Pune Bench of the Tribunal in the case of KRA Holding & Trading was not followed by the Mumbai Bench in the above cited decision. The Mumbai Bench following other decisions of the coordinate Benches of the Tribunal declined to follow the decision in the case of KRA Holding & Trading (supra). It is the settled proposition of law that when two view are possible on the same issue the view which is favourable to the assessee has to be followed. [CIT vs. Vegetable Products 88 ITR 192 (SC)]. Further, in the instant case the Tribunal in assessee's own case has already taken a view in favour of the assessee. Since the AO & CIT(A) have followed the order for earlier year in the case of the assessee and since the order of CIT(A) for earlier year has been reversed by the Tribunal, therefore, unless and until the decision of the Tribunal is reversed by a higher court, the same in our opinion should be followed. In this view of the matter, we respectfully following the order of the Tribunal in assessee's own case for A.Y. 2004-05 allow the claim of the Portfolio Management fees as an allowable expenditure. The ground raised by the assessee is accordingly allowed."*

14. Following the aforesaid precedent, which has considered the similar objections of the CIT(A), in our considered opinion, the order of the CIT(A) in the present case is untenable and we accordingly set-aside the same and direct the Assessing Officer to delete the impugned addition."

Respectfully following the above decision of the Tribunal, we reverse the order of CIT(A). The Demat expenditure of Rs.1,10,605/- is allowable u/s.48 of the Act. The ground No.6 raised by the assessee. Accordingly, Ground No.6 raised by the assessee is allowed.

48. **Seventh issue :** Ground No.7 raised by the assessee relates to addition of Rs.65,04,144/- made by the AO on account of expenditure incurred on laying of water pipeline. This is net amount after allowing eligible depreciation u/s.32 of the Act. Relevant facts on this issue are that the assessee claimed the said expenditure as revenue expenditure. Assessee explained that the expenditure has been booked under Schedule-6 addition to fixed assets in respect of Building totalling to Rs.21,21,67,826/-. Assessee also explained that assessee entered into leave and license agreement with the Executive Engineer, Khadakwasla Irrigation Division on 11-02-2008 for aying the pipeline at a stretch of 6 kilometres from the company location. Details of breakup of the said expenditure are also given by the assessee. Assessee relied on the decision in the case of CIT Vs. Chowgule Chemicals Pvt. Ltd. 216 ITR 234. Assessee contended that assessee is engaged in the business of vaccine production and purified water is the main ingredient for running the business and hence the expenditure is to maintain the business and not to create an asset. Rejecting the explanations given by the assessee the AO treated the expenditure as capital expenditure and allowed depreciation @10%, as applicable to the intangible assets. Thus, the AO made net addition of Rs.65,04,145/- (net of depreciation) to the assessee. In the First Appellate proceedings, the CIT(A) upheld the addition made by the AO. While doing so, the CIT(A) distinguished the decision relied on by the assessee and held that the expenditure was incurred for laying a new water pipeline to the factory premises

which belongs to the assessee, unlike in the case of CIT Vs. Chowgule Chemicals Pvt. Ltd. and such expenditure provides enduring benefit to the assessee over a period of time. Aggrieved with the order of CIT(A) the assessee is in appeal before us.

49. Before us, Ld. Counsel for the assessee filed the note (written submissions) on this issue and the same are extracted here as under :

> *"During the year, the company has spent Rs.72.26 lac on laying down the water pipeline from canal to the factory premises to ensure the continuous potable water supply.*
>
> *The same has been claimed as revenue expenditure as the pipeline laid down is under the permission from Irrigation Dept of Maharashtra Government and subject to control and discretion of the Government. We are producing note on business expediency of the drawing the water from pipeline directly from canal/ reservoir, without going into using the other sources of water*
>
> *1. Vaccine manufacturing and water: Control of the quality of water throughout the production, storage and distribution processes, including microbiological and chemical quality, is a major concern for Pharmaceutical company. Unlike other product and process ingredients, water is usually drawn from a system on demand, and is not subject to testing and batch or lot release before use. Assurance of quality to meet the on-demand expectation is, therefore, essential for Vaccines. Pharmacopoeias requirements or guidance for WPU are described in national, regional and international pharmacopoeias and limits for various impurit es or classes of impurities are either specified or recommended. Companies wishing to supply multiple markets should set specifications hat meet the strictest requirements from each of the relevant pharmacopoeias. Similarly, requirements or guidance are given in pharmacopoeias on the microbiological quality of water.*
>
> *2. Volume of Water Requirement: Serum Institute is one of the biggest manufacturer of vaccines in world. For any vaccine, water is the most widely used substance, raw material or starting material in the production, processing and formulation of pharmaceutical products.*
>
> *3. Location of factory and quality of land: Serum is located in Hadapsar are of Pune. It is adjoined by dry areas like Manajri, Kharadi and Magarpatta. It is on the bank of river Mula-Mutha which is mostly out of running water due to Khadakwasla dam; it carries only the sewerage water of city which also percolates to underground water. Majority of water in large units with high consumption is pumped from a borehole or is supplied by municipality. However, both of these sources have limitations for Vaccine production.*
>
> *4. Water from Bore well - is raw and for Serum to extract water from bore well would have required excavation / drilling at numerous places to access groundwater in underground aquifers. Digging numerous bore wells would have also created ground water shortage from Hadapsar and adjoining areas where its employees also abode. Further, borewell water is mostly hard, with pathogens and impurities from the surface easily reach shallow sources, which leads to a greater risk of contamination and as per standard Good Manufacturing practices, such water should not be used for any Pharma products.*

5. Water from Municipality - normal water distributed from local authorities is commonly used by the factory. However, water distribution from this source is limited, not timely and cannot be stored in huge quantities. Vaccine production is in running batches and requires uninterrupted supply. Local authority, even if assumed to be agreeable cannot increase the water flow and supply as its supply flow, piping is limited and already in place. Hence, Serum cannot rely on this source as well.

Other sources like rain water harvesting, unpurified water are also not reliable for reasons mentioned above.

We also request to refer the Good Manufacturing Practices Manual by WHO expert Committee which is essential to be followed by us. We are attaching extract of the same in Annexure -1. We also request your Honour to refer to extract from Vaccine manual by United Nation's Food and Agricultural organization attached in Annexure-2. It is pertinent to note that WHO / United Nations are also biggest customers of Serum.

6. Benefits of drawing directly through canal pipeline

a. Residential area: As the neigh boring area to the factory is residential area, we cannot reduce the water level by taking out the huge water daily either through bore well or approvals from municipality.

b. Availability of water: As the canal is passing near by factory location for irrigation of farming land, the continuous supply of water is ensured.

c. Expenditure required for purification: Even if the water is made available, the company cannot ensure the quality of water from bore well. It would have incurred heavy expenditure on erection of purification plants and due to this company cannot make available vaccines on affordable prices."

50. Ld. DR for the Revenue relied heavily on the orders of the AO/CIT(A)

51. We heard both the sides and perused the orders of the Revenue as well as the cited binding judgment in the case of CIT Vs. Chowgule Chemicals Pvt. Ltd. 216 ITR 234. There is no dispute on the facts that the assessee spent Rs.72.96 lakhs (rounded off) on the project of laying water pipeline to carry the water from the source-Pond/Reservoir to the factory premises for continuous supply of water to the company for its business purposes. The whole of the project involves a number of obligations or undertakings given to the Irrigation Department of Maharashtra Government It involves number of controls and discretion of Government of Maharashtra in matters pertaining to supply of water,

rights on land used for canal and also the entire continuation of the project. As such, the assessee is not the owner of the land through which the water is carried to the factory premises but only has the leased rights. Assessee is also under obligation to provide water to the surrounding villages as a condition for obtaining the permission of the Maharashtra Government. Water is an essential raw material for the Serum Institute and the quality of water is specified. There is no dispute on these facts. From this point of view, assessee is not the owner of the land/water under any law. On the above facts, we have to decide what law shown in the case of Chowgule Chemicals Pvt. Ltd. (supra). On perusal of the said judgment of jurisdictional High Court, we find the said assessee also incurred expenditure for laying a new pipeline for supplying water to the factory premises of the assessee during the year 1978-1979. On the issue of capital/revenue nature of the said expenditure, the Hon'ble High Court held in favour of the assessee relying on its own judgment in the case of CIT Vs. Tata Engineering and Locomotive Company Ltd. 201 ITR 1036. Contents of Para 4 of the said judgment are relevant and therefore, the same are extracted as under :

> *"4. On a careful consideration of the facts of the present case, we find it difficult to accept the above contention. The various tests evolved from time to time by courts to determine whether an expenditure is a revenue expenditure or capital expenditure are too well known to need reiteration. Equally well known is the legal position that no test can be laid down for the purpose of universal application. The Supreme Court has also given a note of caution against indiscriminate application of the oft repeated tests like "once for all payments" and "enduring benefit test", and made it clear that these tests are not to be treated as something akin to statutory conditions. Whether an expenditure is revenue or capital will depend on the facts and circumstances of each case and on the application of the proper principles of law. As observed by this court in CIT v. Tata Engineering and Locomotive Co. Ltd. [1993] 201 ITR 1036 :*
>
> > *".....One of the guiding factors should be the aim and object of the expenditure. The question, however, will have to be decided by looking at the overall facts and circumstances of the case from the point of view of a practical and prudent businessman rather than from the angle of a tax gatherer upon strict juristic classification of*

the legal rights, if any, secured in the process. In other words, in order to arrive at a just and proper conclusion, one must look at the type, nature and character of the advantage in a commercial sense (without giving undue emphasis to the form thereof or the terminology used) in the light of the surrounding circumstances and in the larger context of necessity and expediency. If the expenditure is so related to the carrying on or conduct of the business that it may be regarded as an integral part of the profit making process and not for acquisition of an asset or a right of permanent character, the expenditure may be regarded as revenue expenditure even though the advantage may endure for some indefinite future. What is relevant is the purpose of the outlay and its intended object and effect, considered in a commonsense way, having regard to the business realities. In a given case, the test of 'enduring benefit' might break down....."

5. It was held in the above case :

"The 'purpose of the outlay', 'its intended object and effect', considered in a commonsense way, having regard to the business realities, are more relevant factors for determining whether a particular outlay is capital or revenue. In a given case, if the situation so requires, the test of 'enduring benefit' might even break down under the weight of these considerations."

6. Applying the above principles to the facts of the present case, we are of the clear opinion that the expenditure incurred by the assessee was a revenue expenditure and not an expenditure of capital nature and the Tribunal was justified in holding so and allowing the deduction to the assessee in the computation f its income on account thereof."

From the above, it is evident that the Hon'ble High Court has categorically held under the weight of other business considerations, the test of enduring benefit might even break down. The said view has strength of the Supreme Court judgment in the case of Dalmia Jain and Company Ltd. Vs. CIT 81 ITR 754 as well which is relevant for the proposition that certain litigation expenditure relating to the leasehold rights constitute Revenue expenditure. Therefore, we are of the opinion that the expenditure incurred on laying of the water pipeline involving the land owned by Maharashtra Government constitutes Revenue expenditure. Accordingly, Ground No.7 raised by the assessee is allowed in favour of the assessee.

52. **Eighth issue :** Ground No.8 raised by the assessee relates to the addition made on account of rent paid for the property at Bungalow No.70, Koregaon Park amounting to Rs.24 lakhs.

53. Background facts of this issue include that there is house property at 70, Koregaon Park and the same is owned by Poonawalla Finvest and Agro Pvt. Ltd. The said property is occupied by Mr. Z.S. Poonawalla (Director of both Poonawalla Finvest and Agro Pvt. Ltd. and Serum Institute of India Ltd.). He is the brother of Dr. Cyprus Poonawalla. Considering the heritage value of the property as well as the occupation of the said property by Mr. Z.S. Poonawalla (Director of the company), the Serum Institute incurred huge expenditure on the repairs and renovation of the said house. Further, to compensate the housing facility provided to its own Director, Serum Ins itute paid rent of Rs.24 lakhs per annum over the years including the year under consideration. Allowability of the said expenditure incurred the rent and the repairs/renovation was the bone of contention between the assessee and the Revenue over the years. Eventually, the Tribunal decided the issue in favour of the assessee and held that the said expenditure incurred on repairs and renovation constitutes revenue expenditure and a lowable u/s.37(1) of the Act in the case of Serum Institute of India Ltd, The decision of the Tribunal in this regard are already cited by the assessee's counsel before us.

Additionally, the rent of Rs.24 lakhs paid by Serum Institute of India Ltd. to Poonawalla Finvest and Agro Pvt. Ltd. is also held as an allowable deduction in the case of Serum Institute of India Ltd. over the years including A.Y. 2006-07. Contents of Para Nos. 24 to 27 of the order of Tribunal in ITA Nos. 985 and 986/PN/2015 and ITA Nos.1535 & 1536/PUN/2015, dated 28-11-2007 for the A.Yrs. 2006-07 and 2007-08 are relevant.

54. We heard both the sides and perused the orders of the Revenue and the order of the Tribunal in the assessee's own case for the A.Yrs.

2006-07 and 2007-08. On perusal of the said order of the Tribunal (supra), it is evident that the ground raised in this appeal relates to rent as well as expenditure incurred on repairs and renovation. At the end of the proceedings, the Tribunal allowed the ground raised by the assessee. We find it relevant to extract the relevant paras of the Tribunal (supra) and the same reads as under :

> *"25. On this issue, Ld. Counsel for the assessee submitted that similar issue was adjudicated in assessee's own case for A.Y. 2005-06 in his favour. Bringing our attention to Para Nos. 35 to 37 of the order of the Tribunal in ITA No.1703/PN/2014 dated 30-11-2016, Ld. Counsel for the assessee submitted that the expenditure incurred on Repairs/Renovation of the Bungalow was allowed, as 'business expenditure' of the assessee.*
>
> *26. On hearing both the sides on this issue, we perused the said paragraphs of the order of the Tribunal in assessee's own case dated 30-11-2016 and for the sake of completeness we proceed to extract the relevant lines of the operational para. The same reads as under :*
>
> > *"35. In view of the above iscussion, we are of the considered opinion that the* ***expenditure of Rs.1,17,88,000/- incurred on repairs and renovation on bungalow located at 70, Koregaon Park, Pune has to be allowed as a business expenditure in the hands of the assessee company.*** *We therefore set asid the order of the CIT(A). The ground raised by the assessee is accordingly allowed."*
>
> *27. We find that the arguments raised by the Ld. DR for the Revenue are identically raised in the said appeal proceedings for A.Y. 2005-06. Following the decision of the Tribunal in assessee's own case for A.Y. 2005-06 (supra), we are of the opinion that this issue also should be allowed in favour of the assessee. Accordingly, Ground no.4 raised by the assessee is allowed."*

Although, the above finding did not specify the rent expenditure in fact, the ground is on the rent only. Therefore, the ground raised by the assessee stands allowed in favour of the assessee. Considering the above decision of the Tribunal in assessee's own case, we are of the opinion that the expenditure on account of rent paid on the house property is allowable in favour of the assessee.

55. Regarding the other limb of ground relating to allowability of depreciation of capital expenditure in connection with the said house property at 70, Koregaon Park, it is now settled legal issue that the

expenditure by Serum Institute of India Ltd. constitutes an allowable expenditure so long as there are revenue in nature. Regarding the expenditure of capital nature of same analogy, assessee only wanted allowability of depreciation on the said capitalised expenditure considered for business purposes.

56. On hearing both the parties on this issue, we find there is no clarity with reference to the capitalised items of assets credited to the Serum Institute of India Ltd. in the said house premises occupied by Mr. Z.S. Poonawalla, applicable rate of depreciation and the use of the asset etc. As discussed in the open court, we are of the opinion that this limb of the ground should be remanded to the file of AO for fresh adjudication after granting reasonable opportunity of being heard to the assessee in accordance with the set principles of natural justice. Accordingly, this part of the issue is allowed for statistical purposes. Thus, Ground No.8 is partly allowed for statistical purposes.

57. **Ninth issue :** Ground No.9 raised by the assessee relates to allowability of deduction to the Wealth Tax paid by the assessee for the purpose of computing book profits u/s.115JB of the Act. AO denied the said payment of tax as not an allowable deduction.

58. Before us, Ld. Counsel for the assessee submitted that this issue is also covered in favour of the assessee by virtue of decision of Tribunal in the assessee's own case in ITA Nos. 1183 and 1537/PUN/2015, dated 28-11-2017 for the A.Y. 2008-09.

59. On hearing both the sides, we find this issue has to be decided in favour of the assessee in view of the order of Tribunal (supra) in assessee's own case for the A.Y. 2008-09. For the sake of

completeness, we proceed to extract the finding given by the Tribunal and the same reads as under :

> *"26. On hearing both the parties on this issue, we find the decision in the case of Usha Martin Industries Ltd. (supra) helps the assessee. For the sake of completeness, we perused the said decision of the Tribunal and find the discussion given in Para Nos. 7 & 8 are relevant. The Tribunal considered the relevant provisions of section 115JA(2) of the Act and held the provisions of Wealth Tax constitutes an ascertained liability. The relevant portion of the Tribunal order is extracted as under :*
>
> > *"7. . . . . .We agree with the contention of the learned authorised representative of the assessee that a provision made for wealth-tax cannot be equated to any liability towards income-tax and accordingly, cannot be disallowed while computing the book profit by invoking Clause (a) of the Explanation to Section 115JA(2) of the Act.*
>
> *27. In any case, this is the case where no incriminating material was seized by the Revenue during the search action connecting to the disallowability of Wealth Tax payment qua the book profits computation. Therefore, on both counts, the assessee is entitled to relief. Accordingly, Ground No.9 raised by the assessee is allowed.*

Thus, the Wealth Tax paid constitutes an allowable deduction as held by the Tribunal in assessee's own case for the A.Y. 2008-09. Considering the settled nature of the issue in favour of the assessee, the Ground No.9 raised by the assessee is allowed.

60. In the result, the appeal of the assessee is partly allowed for statistical purposes.

61. To sum up, the appeal filed by the Revenue is dismissed and the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on this 08th day of June, 2018.

Sd/-	**Sd/-**
(VIKAS AWASTHY)	**(D. KARUNAKARA RAO)**
न्यायिक सदस्य **/JUDICIAL MEMBER**	लेखा सदस्य **/ ACCOUNTANT MEMBER**

पुणे Pune; दिनांक Dated : 08th June, 2018
सतीश

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. The CIT(Appeals-11, Pune.
4. The CIT (Central), Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "A Bench" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

//True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune