IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "B", HYDERABAD

BEFORE SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER
AND SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA No. 1616/Hyd/2010
Assessment Year: 2006-07

Mylan Laboratories Ltd., Hyderabad (Formerly known as Matrix Laboratories Ltd.) PAN – AADCM3491M	vs.	Asst. Commissioner of Income-tax, Circle - 16(2), Hyderabad.
(Appellant)		(Respondent)

Assessee by	:	Shri Raghunathan Sampath
Revenue by	:	Shri D. Sudhakar Rao & Shri Rajeev Benjwal

Date of hearing	20-11-2014
Date of pronouncement	16-01-2015

O R D E R

PER SAKTIJIT DEY, J.M.:

Aforesaid appeal of assessee is directed against assessment order dated 18/10/2010 passed u/s 143(3) read with section 92CA and 144C of the IT Act in pursuance to the directions of the Dispute Resolution Panel (DRP) pertaining to the AY 2006-07.

2. Assessee in total has raised 11 grounds. Ground No. 11 being general in nature does not require any specific adjudication. At the outset ld. AR submitted that as per the instruction of assessee, he does not want to press ground No. 8. Accordingly, ground No. 8 is dismissed as not pressed.

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3. Ground No.1 reads as under:

> "*The Dispute Resolution Pane erred in directing the AO to make an adjustment of Rs. 8,180.307 to the interest charged by the assessee company in respect of short term facility granted to its subsidiary Matrix Laboratories NV, Belgium, (Associated Enterprise) by adopting interest rate of 7.2476% as against interest rate of 3.3336% per European money markets adopted.*"

4. Briefly the facts relating to the aforesaid ground are, assessee a company is engaged in the business of manufacturing and sale of pharmaceutical drugs. For the AY under consideration, assessee filed its return of income on 29/11/2006 declaring loss of Rs. 24,36,51,137 under normal provisions and book profit of Rs. 124,70,16,779 u/s 115JB of the Act. However, during the assessment proceeding, assessee filed a revised computation by declaring loss at Rs. 23,86,10,109 under normal provisions and book profit of Rs. 141,72,00,425 u/s 115JB. In course of the assessment proceeding, AO noticed that assessee has entered into certain international transactions with its AE by advancing a loan of Euro 1,46,10,390 for four months during the year to its 100% subsidiary Matrix Laboratories NV in Belgium against which assessee has charged interest at EURIBOR + 75 basis points which worked out to 3.3336% per annum. To find out whether the interest charged by assessee on the loan advanced is at arm's length, AO made a reference to the Transfer Pricing Officer (TPO) for determining the arm's length rate of interest. The TPO, however, did not agree to the rate of interest charged by assessee on the loans advanced to the subsidiary. The TPO was of the view that as per the prevailing market rate of loan advanced in India, the rate of interest should be benchmarked at 14%. Accordingly, TPO determined arm's length rate of interest at 14% per annum on the amount advanced, which worked out to Rs. 2,99,44,024 resulting in transfer pricing adjustment of Rs. 2,27,25,240. Accordingly, in the draft assessment order, AO proposed addition of Rs. 2,27,25,240 on account of TP adjustment. Being

aggrieved of the addition proposed, assessee made objections before the DRP.

5. While a single member of the DRP upheld charging of interest at 14%, two other members of the panel were of the view that rate of interest required to be adopted is LIBOR + 2%, which works out to Rs. 7.2476% per annum and, accordingly, they directed the AO to compute interest applying the said rate.

6. Ld. AR submitted before us that assessee had made EURO denominated short term advance to its subsidiary in Belgium, therefore, as per the normal practice the interest rate to be applied depends on the currency of the borrowing and relevant jurisdiction of borrowing. The rate of interest also further varies depending on the tenure of the loan. Thus, keeping in view all these factors, assessee has charged interest at EURIBOR + 75 basis points on such advance. Ld. AR submitted that in the given circumstances adoption of either LIBOR or PLR rate of interest is not relevant. Ld. AR submitted that during the same period, assessee's AE borrowed a one year tenured syndicated loan of EURO 165 MIO from ABN Amro Bank for which the bank charged interest at EURIBOR + 62.5 to 72.5 basis points. Hence, the rate of interest charged by third party i.e. ABN Amro Bank would constitute arm's length interest rate. As the interest charged by assessee to its AE being higher than the ALP no adjustment is required to be made. In support of such contention, ld. AR relied upon a decision of the ITAT, Mumbai Bench in case of Tata Autocomp Systems Ltd. Vs. ACIT, 2012(5) TMI 45.

7. The ld. DR on the other hand justified the order of DRP.

8. We have considered the submissions of the assessee and perused the orders of departmental authorities as well as other materials on record. We are of the view that as the assessee has advanced the loan in foreign currency PLR rate of interest will not be applicable. Moreover, since the AE is situated at Belgium EURIBOR

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rates would be more appropriate. Considering similar nature of loan transaction, the ITAT, Mumbai Bench in case of Tata Autocomp Systems Ltd. Vs. ACIT (supra), held as under:

> *"19. In the present case the AE is a German company. Eurobior rates are based on the average interest rates at which a panel of more than 50 European banks borrow funds from one another. There are different maturities, ranging from one week to one year. These rates are considered to be the most important rate in the European money market. The interest rates do provide the basis for the price and interest rates of all kinds of financial products like interest rate swaps, interest rate futures, saving account and mortgages. We find that the RBI in respect of export credit to exporters at internationally competitive rates under the scheme of preshipment credit in foreign currency (PCFC) and Rediscounting of Export Bills abroad (EBR), has permitted banks to fix the rates of interest with reference to ruling LIBOR, EURO LIBOR or EURIBOR, wherever applicable and thereto appropriate percentage ranging from 1% to 2%. The reference to the said circular is at page -80 of the Assessee's paper book. In our view the claim of the Assessee to adopt EURIBOR rate as stated before the TPO is reasonable and deserves to be accepted. Following the ruling of the tribunal in the aforesaid cases, we are of the view that the claim made by the Assessee in this regard has to be accepted. The AO is directed to work out the TP adjustment accordingly. Gr.No.1 to 4 are thus partly allowed."*

9. Respectfully following the aforesaid decision of the Mumbai Bench, we direct the AO to accept EURIBOR rate at which the interest has been charged by assessee. Accordingly, we delete the addition made on account of TP adjustment to the arm's length rate of interest.

10. Ground No.2 reads as under :

> "*2 a) The Dispute Resolution Panel erred in directing the AO to disallow the claim of the assessee that the amount of Rs. 978,967,500 received on the transfer of know-how to Astrix Laboratories Ltd. constituted capital receipts and or gains exempt in the hands of the assessee.*
>
> *2 b) It further erred in directing the AO to treat the amount of Rs. 978,967,500 received on transfer of know-how as amount received for imparting of special knowledge and experience in the field of manufacturing, marketing, selling and distribution of*

> *the ARV's and hence a business income received in the course of business activity of the assessee."*

11. Briefly the facts relating to this issue are the assessee is basically engaged in the business of manufacture of Active Pharmaceutical Ingredients (API), which are commonly known as bulk drugs and intermediates for bulk drugs. For this purpose, the assessee has set up two operating units in India (hereinafter referred to as "Unit-I and Unit-II"). Unit-1 was in existence over a period of 5 years and Unit-II was in existence over a period of 1 ½ year. As claimed by assessee it has developed in house technology and knowhow. The assessee for the purpose of expanding its business made investments in a joint venture with a south African company by name Aspen Pharma Care Holding Ltd., (ASPEN-SA) by purchasing 50% share in its operating Wholly Owned Subsidiary (WOS) situated in South Africa. In this regard, a share holders agreement has been entered into between the parties on 22nd September, 2005. ASPENSA also made 50% investment in shares of one of the WOS of the assessee viz., Astrix Laboratories Ltd., (Astrix India) by entering into another share holder agreement on 22nd September, 2005. In terms with the aforesaid shareholders agreement, the assessee transferred certain assets to and in favour of an Indian company as the joint venture company known as "Astrix Laboratories Ltd.,". The details of assets transferred under different agreements are as under :

Agreement	Assets Transferred
Agreement for transfer of facility dated 20 December 2005	Assets of manufacturing facility of unit II and other assets.
Agreement for Transfer of know-how dated 20 December, 2005	Transfer of know-how developed by Matrix India
Agreement for Development and transfer of know-how	Development and transfer of know-how to be developed by Matrix India
Agreement for transfer of product DMFs dated 20 December 2005	Transfer of Future DMFs to be developed and registered in respect of the products by Matrix India

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Agreement for transfer of patent application rights dated 20 December	Licensing of Patent application rights and patents granted, if any
Sale Deed dated 2 January, 2006	Transfer of land and building situated at Sy. No. 42, All Nagar, H/o
Sale deed dated 2 January 2006	Transfer of land and building situated at Sy. No. 10, Gaddapottverarn

12. In terms with the agreement, the assessee sold fixed assets of its Unit-II along with capital assets of its R & D unit to Astrix. Assessee also joined with Aspen Pharma Care South Africa as a JV partner in Astrix which was evidenced by a tripartite agreement entered into between the assessee Astrix and Aspin Pharma Care South Africa. In terms with the aforesaid agreements assessee claimed to have sold its technical knowhow relating to four Anti Retro Viral (ARV) products viz., Limipudine, Nevirapine, Stavudine and Zidobudine to Astrix for a consideration of Rs.97.89 crores. It also transferred Drug Master Files (DMF) relating to these four products for an additional consideration of Rs.3.15 crores. In terms with the agreement, assessee also agreed to develop knowhow as well as DMF for three more products viz., Didanosine, Ritonavir and Lopinavir. The assessee and Astrix entered into agreements inter alia for (a) transfer of technical knowhow (b) transfer of DMF (c) for sale of land and buildings at Kazipalli (d) agreement for licensing of patent application rights (e) agreement for development and transfer of knowhow (f) agreement for development and transfer of DMF. Assessee also appointed a third party expert to value the technical knowhow. Further, in terms with share holders agreement, the assessee was required to sign a binding agreement for sale of know how before 31st December, 2005 for seven products. Since Matrix was in possession of knowhow only in respect of four of the seven products, it entered into a separate agreement for development and transfer of future knowhow and subsequently also knowhow for those

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three products were developed and transferred to Astrix which were invoiced subsequently. While submitting the return of income for the impugned assessment year, the assessee treated the transaction relating to transfer of all the assets including knowhow to Astrix as transfer of capital asset, out of which, the consideration received towards knowhow was Rs.97.89 crores. However, the assessee did not offer any capital gain on the consideration received on know-how by claiming that since the assessee did not incur any cost in acquiring the knowhow there is no cost of acquisition for the capital asset and accordingly, in absence of cost of acquisition capital gain cannot be computed. In course of the assessment proceedings, the Assessing Officer noticing that the assessee has received a consideration of Rs.97.89 crores towards sale of technical knowhow relating to four ARVs to Astrix and has not offered any income, called upon the assessee to justify its claim. In response to the query made by the A.O. it was submitted by the assessee as under :

Matrix Laboratories Ltd is a company engaged in the business of manufacture and sale of Active Pharmaceutical Ingredients and Intermediaries since 1984. Astrix Laboratories Limited is subsidiary joint venture company of Matrix formed during the Financial Year 2005-06, During the said financial year, Matrix entered into an agreement dated lOm 2005 with Astrix for transfer of technical know-how relating to four of its ARV products i.e. Lamivudine, Zidovudine, Stavudine and Nevirapine- for a total consideration of Rs.97,89.67.500.

Know-how is defined in the agreement to mean evelything known by Matrix necessary for the manufacture, marketing selling and distribution of products excluding Matrix IPR"S and DMF's but including the body of the- technical information comprising the formula and the specific manufacturing and packaging processes(including but not limited to raw material procurement, packaging, production information, formulations, processes specifications, techniques and methods of quality control} used as at t" January 2006 to manufacture and/or package the products.

As per Section 45 of the Income Tax Act "Any profits or gains arising from the transfer ala capital asset effected in the previous year shall, save as otherwise provided in sections 53 and 54, be chargeable to income-tax under tile head" Capital gains ", and shall be deemed to be the income

of the previous year in which the transfer took place.

Section 2(14) of ttie Act defines "capital asset" to mean "property of any kind he'd by an assessee, whether or not connected with his business or profession, but does not include-

i) Any stock-in-trade, consumable stores or raw materials held for the purposes of his business or profession;

ii) Personal effects, that is to say, movable property (including wearing apparel, jewellery and furniture) held for personal use by the assessee or any member of his family dependent on him;

*It is **seen** that capital asset would mean property of any kind held by an assessee whether **or** not connected with his business or profession. However, the term 'property' has not been defined in the Act.*

The Bombay High Cocrt in the case o] Commissioner of Income- tax Vs. Taw Services Ltd. (122 fTR 594) held that the word "property" used in section 2(14) of the Act is a word of the widest ampiitude and the definition has re-emphasized this by the use of the words "of any kind", Any right which can be called property will be included in the definition of "capital asset"

Authority for Advance Ruling in the case of foster's Australia Ltd (302 ITR 289) held that "Property of any kind" undoubtedly includes intellectual property which is but species of intangible property. Trade mark. brand, goodwill, technical know-how relating to the manufacture of goods would all qualify to be treated as capital assets within the meaning of section 2(14) of the Act. Section 55(2)" which deals with the cost of acquisition of a capital asset, makes it clear that goodwill trade mark. or brand flame associated with a business and other incorporeal rights mentioned therein, are treated as capital assets under the Act for the purpose of capita! gains. "

Further, for the purposes of allowing depreciation, Section 32(1)(ii) of the Ad considers Know-how to be an Intangible asset. Explanation to the Sub-Section 1 of Section 32 defines Know-How to mean any industrial information or technique Uk.ely to assist in the manufacture or processing of goods or in the working of a mine, oil-well or other sources of mineral deposits (including searching for discovery or testing of deposits for the winning of access thereto.

Therefore, in view of the above decisions, it is submitted that Know-how transferred by Matrix is a capital asset and any income arising from transfer of the same would be charged under tile head 'Capital gains'

In terms of Section 48 of the Act, "The income chargeable under

the head "Capital gains" shall be computed. by deducting from the tuu value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely:-- '

i) expenditure incurred wholly and exclusively in connection with such transfer;

ii) the cost of acquisition of the asset and the cost of any improvement thereto."

Accordingly, capital gains have to be arrived at by deducting the cost of acquisition of the Know-how for the consideration Rs.97,89,67500/- received on transfer of such know-how. However, as mentioned above, the Know-how transferred by MaUix is developed by it is incidental to the manufacturing activity over a period of time and therefore does not have any cost of acquisition.

As per Section 55(2) (a) of the Act for the purposes of sections 48 and 49 'cost of acquisition', in relation to a capital asset, being goodwill of a business, 'or a trade mark or brand name associated with a business or a right to manufacture. produce or process any article or thing "'·or right to carry on any business, tenancy rights, stage carriage permits or loom hours. -

i) in the case of acquisition of such asset by the assessee by purchase from a previous owner, means the amount of the purchase price; and

ii) in any other case not being a case falling under sub-clauses (i) to (iv) of sub-section (1) of section 49, shall be taken to be nil

From the above, it is evident that cost of acquisition has to be taken as 'nil' only in respect of the assets specified therein. It is not specifically provided for in Section 55(2) (a) that tile cost of acquisition of Know-how is to be taken as 'nil', Further, Know-how does not fall in any of the categories of sett-generated assets specified therein.

It is to be noted that though Section 45 Of the Act provides for charging to Income to any profit and gains arising from transfer of capita asset gains thereof have to be computed in accordance with the mode of computation as provided in Section 48 of the Act. The charging section and the computation provisions together constitute an integrated code and the liability to tax would arise only when effect can be given to both. It is to be noted that in the present case, even though the know-how is a self generated asset, the cost of acquisition thereof for the purposes of computing capital gains chargeable to tax cannot be taken as nil', This is so since the Act specifically provides the class of assets where the cost of acquisition can be to en as 'nil', Accordingly, since there is no cost of acquisition of the know-how, capital gains on transfer of the same cannot be computed per the provisions of Section 48 of the Ace Once the quantum of capital gains is not ascertainable or cannot be computed under

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Section 48 of the Act, the provisions of Section 45 of the Act cannot be invoked.

Reliance is placed on the decision Of the Supreme Court in the case of CIT Vs. B.C. Srinivasa Shetty (128 ITR 294), Wherein the Hon'ble Court while deciding the question of whether transfer of self generated goodwill gives rise to capital gains has observed that:

• Section 45 is a charging section. For the purpose of imposing the charge, Parliament has enacted detailed provisions in order to compute the profits or gains under that head. Na existing principle or provision et variance with them can be applied for determining tile chargeable profits and gains. All transactions encompassed by s. 45 must fall under the governance of its computation provisions. . A transaction to which those provisions cannot be applied must be regarded as never intended by s. 45 to be the subject of the charge. This inference flows from the general arrangement of the provisions in the I. T. Act where under each head of income the charging provision is accompanied by a set of provisions for computing the income subject to that charge. The character of the computation provisions in each case bears a relationship to the nature of the charge. Thus, the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the, horsing section. Otherwise, one would be driven to conclude that while a certain income seems to fall within the charging section there is no scheme of computation for quantifying it. The legislative pattern discernible in the Act is against such a conclusion. It must be borne in mind that the legislative intent is presumed to run uniformly through the entire conspectus of provisions pertaining to each head 0/ income. No doubt there is qualitative difference between the charging provision and a computation provision. And ordinarily the operation of the charging provision cannot be affected by the construction of a particular computation provision. But the question here is whether it is possible to apply the computation provision at all if a certain interpretation is pressed an the charging provision. That pertains to the fundamental integrality of the statutory scheme provided for each head",

Having observed as above. the Hon'ble Apex Court proceeded to decide whether if the expression " asset" in s. 45 is construed as including the goodwill of a new business, it is possible to apply the computation sections for quantifying the profits and gains on its transfer. While referring to the provisions of Section 48. it was further observed that:

"What is contemplated is an asset in the acquisition of which it is possible to envisage a cost. The intent goes to the nature and character of the asset that it is an asset which possesses the inherent quality of being available on the expenditure of money to

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*a person seeking to acquire **it. It** is immaterial that although the asset belongs to such a class. it may, on the facts of a certain case, be acquired without tile payment of money. That kind of case is covered by s.49 and its cost, for the purpose of s. 48, is determined in accordance with those provisions. There are other provisions which indicate that s, 48 is concerned with an asset capable o{ acquisition at a cost. Section 50 is one such provision. So also is sub-so (2) of 5. 55. None of the provisions pertaining to the head "Capital gains" suggests that they include an asset in the ocquisitfcJI1 of which no cost at all can be conceived. Yet there are assets which are acquired by way of production in which no cost element can be identified or envisaged. From what has gone before. it is apparent that the goodwill generated in a new business has been so regarded. The elements which create **it** have already been detailed. In such a case, when the asset is sold and the consideration is brought to tax, what is charged is the capital value Of the asset and not ally profit or gain .*

The Gujarat High Court in the case of CIT V. Manoharsinhji P. Jadeja (281 ITR 19 applied the principles laid down by the Supreme Court in the case Of B. C. Srinivasa Shetty(Supra) and held ('hat "though section 45 of the Income-tax Act, 1961, is a charging section the Legislature has enacted detailed provisions in order to compute the profits or gains under that head and no provision at variance with such computation provisions can be applied for determining the chargeable profits and gains. The asset referred to in section 45 of the Act has to be one: (i) in the acquisition of which it is possible to envisage a cost (ii) in the acquisition whereof the assessee had incurred a cost, and the onus of showing that the assessee had incurred cost Is en the Revenue. if the Revenue fails to show that the assessee had incurred a cost, it would be impossible to compute the income chargeable to tax under the head "Capital gains". By the Finance Act, 1987, with effect from April 1, 1988, the amendment to section 55 of the Act only ropes in taxability of goodwill on transfer Of the same even if there is no cost of acquisition. Similarly, section 55 has been amended from time to time to enable the taxation of other assets wherein no cost of acquisition is envisaged. Therefore, even if the amendment is taken into consideration section 55 can be invoked in cases of nil cost of acquisition for the purpose of bringing to tax the entire sale consideration only in relation to the specified assets.

The Punjab & Haryana Court in the case of Commissioner of income tax Vs. .Amrik Singh (299 ITR 14) while deciding the issue of taxability under the head capital gains of income arising on transfer of tenancy rights relied upon of Court in the case of B. C. Stitlivasa Shetty and held that "the assessee became the owner oi the land in respect of which he had earlier acquired only tenancy right's. Thus, the assessee had acquired the ownership rights in the land by operation of law and (Iot by purchase or inheritance. There was no record of any payment made for the

acquisition of the land in question either by the assessee or his predecessor-in-interest. Therefore, the assessee was not liable to pay any capital gains tax."

In view of the above decisions, it can be concluded that since the cost of acquisition of self-generated know-how is not specified in the Act" the capital gains arising on the transfer of the same to sstn» cannot be computed. Therefore, the chargeability Section fails and the consideration received for transfer of know-how is exempt from tax."

The above note furnished by the assessee has been considered carefully with a view to appreciate the assessee's claim for exemption of the capital gain arising from the 'transfer of know-how' to Astrix."

13. The Assessing Officer after considering the explanation of the assessee and examining different agreements entered into between the parties, though, agreed that knowhow is a capital asset but he was of the view that to treat the consideration received to be chargeable under the head "Capital Gain" there should be a transfer in terms with section 2(47) of the Act. The A.O. after analyzing different clauses of section 2(47) noted that the definition of "Transfer" clearly contemplates the extinguishment of a right in a capital asset distinct and independent of such extinguishment consequent upon the transfer thereof. Keeping the aforesaid legal position in view, the A.O. after examining terms of the shareholders agreement as well as share issue agreement, opined that knowhow can be exploited by its owner by using it himself in the process of his own trade/manufacture or by using it himself in making further development/improvement including modifications i.e., research and development or by communicating it to others (supply of knowhow) by way of outright sale or imparting it to some other party while retaining the right to use it in his own business or to share it with other. The A.O. referring to the press release dated 8th April, 2005 as available in the website of the assessee noted that as per the said press release and subsequent agreements, assessee will transfer one of its API manufacturing facilities, technology and Intellectual Property (IP)

related to the manufacture of certain API Astrix Laboratories for a total consideration of $36 million. The A.O. on going through the share issue agreement and sale of know-how agreement found the following facts :

- Matrix has developed and is in possession of know-how In respect of certain active pharmaceutical ingredients (APIs), Antiretroviral Products (ARVs) – Lamivudine, Nevirapine, Zidovudine and Stavudine.
- Matrix also has DMFs (Drug Master Files) in respect of the above ARVs, filed with USFDA, by which Matrix could market its ARVs in the intended markets.
- Matrix has been manufacturing the above ARVs.
- Matrix and Aspen entered into agreement to form a Joint-venture company named Astrix Laboratories Ltd. to manufacture, market, sell and distribute the above ARVs.
- On being incorporated in pursuant to the Joint venture Agreement, Astrix came into existence w.e.f. 30th December, 2005 and commenced production of ARVs from the Plant located at Survey No.1O,Gaddapotharam, Kazipally Industrial Area, Jinnaram Mandal, Medak District, Andhra Pradesh, which was part of Matnx earlier, and transferred to Astrix.
- The above manufacturing facility/unit was transferred to Astrix by means of itemised sale of its assets viz., Land, building, Plant and Machinery, furniture and fixtures, etc., including the know-how and DMFs in respect of the ARVs.
- Matrix also undertook development of know-how in respect of the following ARV, APIs-·Didanosine, Ritonavir and Lopinavir for Astrix
- Matrix also agreed to transfer Future DMFs in respect of the following ARV APIs-Didanosine Ritonavir and Lopinavir for Astrix,
- A careful reading of the provisions of the above mentioned agreements leads to the conclusion that

i) Matrix reserves the right to use the know-how and the Intellectual properties associated with the ARVs, subsequent to the 'transfer/sale' (as claimed/termed by Matrix or by the parties in the agreements)

ii) Matrix has the right to make improvement on the know- how associated with the ARVs, subsequent to the 'transfer/sale (as claimed/termed by Matrix or by the parties in the agreements).

iii) Matrix retains Joint ownership of the DMFs, subsequent the transfer/sale (as claimed/termed by Matrix or to the agreements). As per the information available on www.fda.gov .the above mentioned DMFs (Lamivudine, Nevirapine, Zidovudine and Stavudine) are held only in the name of Matrix Laboratories ltd as on the date of his order.

iv) Even the DMFs relating to the new ARVs (Didanosine, Ritonavir and Lopinavir) for which the know-how has been developed by Matrix for Astrix, is held in the name of Matrix

v) Matrix also has the right to manufacture and sell the ARVs subsequent to the 'transfer/sale' (as claimed/termed by Matrix or in the agreements) using the know-how and DMF's.

14. From the aforesaid facts, the A.O. concluded that assessee has not divested itself completely of any further interest in the knowhow and DMF and as such the transfer/sale of knowhow cannot be a case of disposition of the capital asset. He observed the right over the property in the knowhow still remain with the assessee. Further the A.O. observed that the transfer/sale of knowhow is distinguishable from the transfer/sale of tangible asset like land, building, plant and machinery, furniture and fixtures etc., wherein the assessee completely divested itself of any further interest in those assets and as such, property in those assets were transferred from assessee to Astrix. The A.O. therefore, held that the claim of transfer/sale of knowhow cannot be considered as a transfer in terms with section

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2(47) of the Act as the transaction involving transfer of knowhow is not a transfer of sale or exchange as the property in the product/good remains with the seller. He observed, transaction also cannot be treated as relinquishment of the asset as the owner has not surrendered the property and abandoned its right thereto. He also observed that the transaction is not a transaction of extinguishment of any right therein because assessee has not extinguished any rights in respect of the know-how. The A.O. observed that assessee through the transfer of know-how in respect of the ARVs merely imparted its special knowledge and experience in the field of manufacturing, marketing, selling and distribution of ARVs to Astrix. The knowhow and related DMFs are supplied to Astrix with a view to enable Astrix to use the knowhow to manufacture and sell the ARVs. The property in the knowhow remain with the assessee who retained the right to use the knowhow to manufacture and sale the ARVs. Therefore, the consideration received on transfer of the knowhow cannot be treated as capital gain, on alienation of the property/rights in the knowhow but amounts to consideration received for imparting of special knowledge and experience in the field of manufacturing, marketing, selling and distribution of ARVs. Hence, the amount received by the assessee on transfer of knowhow is a business income received in course of assessee's business activity. Though, the assessee objected to such view of the A.O., the A.O. however, rejected all contentions of the assessee. The A.O. observed that as per clause 5.4 of the share issue agreement between the parties notwithstanding the sale/transfer of knowhow as contemplated in the agreement or as agreed between the parties assessee shall at all times will have the right to use the knowhow and to produce the products. He observed that the said clause does not provide for any condition/limitation on Matrix as to for what purposes it can use the knowhow subsequent to the transfer/sale of the knowhow to Astrix. Thus, assessee has unlimited rights in the knowhow and has not abandoned any of its

rights with respect to the knowhow including the right to manufacture the ARVs using the knowhow.

15. Rebutting the argument of the assessee to the effect that if it uses the technical knowhow except in terms of clause-12 of shareholders Agreement, it is required to make good to Astrix the profit actually made, the A.O. observed that such argument is not plausible in the absence of any explicit and unambiguous terms and conditions to that effect in the agreement. The A.O. observed that the entire argument of the assessee is based on the presumption that knowhow can be used only to manufacture the product and assessee cannot manufacture the product unless Astrix places an order for contract manufacturing in terms of clause-12 of the shareholders agreement. However, it was observed by the A.O. that knowhow is a body of information concerning industrial, commercial and scientific importance which remains unrevealed to the general public. He observed that assessee may not be able to use the knowhow to manufacture the products/ARV and to make profit given the conditions of the agreement. Even the Matrix may not be having the necessity to produce the products/ARV in question and make profit thereon as it has been compensated suitably for the profit that it might have made in future by using the knowhow in terms of the lumpsum consideration paid to it. But, the assessee has the right to use the knowhow in respect of those products in its R & D to make any modifications/improvements thereon. It has also the right to use the knowhow to develop new products/processes/derivatives from the existing products/processes. The A.O. undertaking a comparative analysis of different clauses of agreement for transfer of knowhow dated 20.12.2005 and agreement for development and transfer of knowhow dated 20.12.2005 between the parties noted that the provisions relating to transfer of knowhow vis-à-vis the development of transfer of knowhow clearly spell out the terms and conditions relating to the true nature of contracts. While the transfer of knowhow

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is a contract for supply of knowhow, the development and transfer of knowhow is a contract for technical service. He observed that under the contract for development and transfer of knowhow assessee has undertaken the development of knowhow relating to three ARVs namely Didanosine, Ritonavir and Lopinavir and agreed to transfer the ownership to Astrix. However, under the contract of supply of knowhow assessee agreed to supply the knowhow relating to four products i.e., Lamivudine, Nevirapine, Ziduvudine and Stavudine of which assessee is the legal and beneficial owner to enable Astrix to use the knowhow and manufacture the products. The A.O. observed that the terms of agreement make it clear that assessee did not transfer its ownership in respect of knowhow relating to the aforesaid four products. On the other hand, the ownership of the knowhow to be developed is vested with Astrix. On the basis of the aforesaid facts, the A.O. finally concluded that assessee through the transfer of knowhow and DMFs in respect of the ARVs merely imparted its special knowledge and experience in the field of manufacturing, marketing, selling and distribution of the ARVs to Astrix. The knowhow and related DMFs are supplied to Astrix with a view to enable Astrix to use the knowhow and DMFs to manufacture and sell the ARVs. The property in the know how remained with Matrix who retained the right to use the knowhow to manufacture and sell the ARVs. Hence, the consideration received on transfer of knowhow is not a capital gain from alienation of the property and rights in the knowhow but amounts to consideration for imparting of special knowledge and experience in the field of manufacturing, marketing, selling and distribution of ARVs. Accordingly, he treated the amount of Rs.97,89,67,500 as business income of the assessee for the year under consideration. The assessee challenged the decision of the A.O. by raising objections before the DRP.

16. In course of hearing before DRP, assessee apart from reiterating the submissions made before the A.O. furnished some more documents by way of additional evidence which are as under :

i. Supplementary agreement between Matrix Laboratories Ltd. and Astrix Laboratories Ltd. dated 01/01/2010.

ii. Auditor's certificate dated 02/02/2010

iii. R&D head's certificate dated 28/01/2010.

17. Referring to these documents, it was submitted by the assessee that it has not transferred through sale or outright licensing any technical knowhow in relation from products namely Lamivudine, Nevirapine, Ziduvudine and Stavudine to any other company, firm, person or parties during the period from April 1, 2005 to 30th September, 2009 except the transfer effected to Astrix. It was submitted by the assessee that the agreements read as a whole would clearly establish the intention of the parties that there is absolute transfer of rights over the knowhow to Astrix by the assessee. The DRP, however, did not agree with any of the contention of the assessee and accepted the view of the A.O. that the assessee retained the right over the knowhow. Hence, there is no transfer in terms with section 2(47) of the Act. The DRP observed that the additional evidences produced by the assessee cannot alter the factual position. Accordingly, the DRP confirmed the view of the A.O. that the consideration received of Rs.97,89,67,500 should be treated as business income. However, without prejudice to the aforesaid finding, the DRP also rejected assessee's contention that capital gain cannot be computed in absence of cost of acquisition. The DRP held that the ratio laid down in case of CIT vs. B.C. Srinivas Shetty 128 ITR 294 (S.C.) will not apply as there was subsequent amendment to the Act in section 55 as per which the cost of acquisition in such cases is to be considered as NIL. Thus, the DRP rejected assessee's claim. In pursuance to the order passed by the DRP, A.O. made the draft assessment order final by making addition of Rs.97,89,67,500.

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Being aggrieved of the addition made as above, the assessee is in appeal before us.

18. The Learned A.R. apart from making oral submissions at the time of hearing has filed elaborate written submissions. The contentions raised by the learned A.R. can be summarized as under.

- Along with movable and immovable assets assessee also sold technical knowhow relating to four ARV products for a consideration of Rs.97.89 crores. Further assessee also transferred DMFs relating to these four products for an additional consideration of Rs.3.15 crore.
- In addition, assessee also agreed to develop knowhow as well as DMF for three additional products and transfer the same to Astrix.
- As regards four ARV products for which technical knowhow is already owned and in possession of the assessee, it is required to make an unconditional sale of knowhow to Astrix, subject to conditions stipulated in such knowhow agreement.
- As per the terms of knowhow agreement, knowhow will mean everything known by the Matrix India necessary for the manufacture, marketing, selling and distribution of the products excluding Matrix India's IPR and DMFs but including the body of technical information comprising formula and the specific manufacturing and packaging processes (including but not limited to raw material procurement, packaging, production information, formulations, processes, specifications, techniques and methods of quality control) used at 1st January, 2006 to manufacture and/or package the products. As per the knowhow agreement, assessee had made an absolute sale of knowhow to Astrix and Astrix has purchased the same.
- The sale of knowhow by the assessee to Astrix is unconditional and except for the fulfillment of any conditions contained in the agreement.
- Clause 10.2 of shareholders agreement and 5.4 of share issue agreement have been provided to retain a minimal right to Matrix only with respect to one of the four ARVs viz., Stavudine Form-1 in view of the peculiar situation that the product at the time of knowhow sale has crossed a pure knowhow stage and an application for grant of the patent was pending before patent authorities. Once the application is presented, the defence with regard to the process lies with the applicant i.e., Matrix only. Therefore, to protect the application to go through the final approval stage, the knowhow in respect of process for the preparation of

Stavudine Form-1 was retained. However, this could not invalidate and term the sale relating to knowhow of all the four ARVs. Further, these clauses have been inserted with a view to facilitate the obligation caste on Matrix in terms of clause-12 of the shareholders agreement under which, Matrix is bound and required to contract manufacture for Astrix at cost price and without any profit element in case Astrix manufacturing capacities are fully utilized in a given period. Without right to use knowhow Matrix will not be able to complete its obligation of contract manufacture as per clause-12. The permission to use the knowhow therefore, should be seen in that perspective. If Matrix uses the technical knowhow sold to Astrix except in terms of Clause 12, it is required to make good to Astrix the profit actually made by Matrix on the said supplies. The wordings of clause 10.2 of shareholders agreement and 5.4 of share issue agreement merely permit the usage of knowhow by Matrix but Matrix has not been bestowed with any ownership rights on the knowhow. Thus, Matrix has made an outright sale of technical knowhow owned by it to Astrix for a valuable consideration and permission to merely use the said knowhow for the benefit of the Astrix could not make Matrix a beneficial owner of the technical knowhow. It is Astrix alone which is the owner of the technical knowhow and it alone can exploit it.

- In terms of clause 10.3 of shareholders agreement and clause 5.1.3 of share issue agreement Matrix was required to transfer ownership of the DMFs of the products to Astrix before 31.12.2005 as Matrix was in possession of DMFs for four products only it entered into agreement for transfer of DMF on 20.12.2005 under which, DMF for four products were transferred for a consideration of Rs.3.15 crores. Pursuant to such transfer and in terms of such agreement, Astrix acquired an unrestricted joint ownership over the said product DMFs. Neither Matrix nor Astrix shall be entitled to cede, assign, or otherwise part with its joint ownership rights in the product DMFs. The DMF would however, be maintained in the name of Matrix and it shall bear all the costs and expenses in this behalf. The DMF can be sold or disposed of only with the prior consent of Astrix and in case of such a sale, the entire sale proceeds from the sale or other disposal of the product DMFs shall be paid over to Astrix if collected by Matrix. Astrix has the right to obtain sole ownership of the product DMFs and in such an event, Matrix shall take necessary steps to effect the same without any further sale consideration. Thus, in terms with the agreement dated 20.12.2005 Astrix is the beneficial owner of the DMFs and Matrix is the joint owner for mere

convenience. Matrix being a joint owner, the rights of Astrix as the beneficial owner of DMF are not effected in any way.

- The Assessing Officer selectively relied on certain clauses of the agreement to come to his conclusion while ignoring the other clauses of the agreement as well as copies of sale invoices raised by Matrix.
- The Assessing Officer as well as DRP ignored the certificate obtained from the Chartered Accountant certifying that assessee has neither sold the technical knowhow nor granted outright licensing in respect of these four products to any third party in the last five years. Further the supplementary agreement entered into between Matrix and Astrix clarifying that Astrix was the exclusive owner of the knowhow was also ignored.
- DRP grossly misunderstood the shareholders agreement while concluding that assessee has granted to Astrix a royalty free licence to unrestricted use and enjoyment of assessee's intellectual property and therefore, the consideration received partakes the character of royalty license fee which are revenue receipts in the course of business for sharing knowhow experience.
- Referring to the definition of "Intellectual Property" as per clause 1.2.2.23 of shareholders agreement, it was submitted intellectual property is the body of technical information and knowhow in respect of and/or relating to the process for the preparation of Stavudine Form-1 as is more fully set out in patent application No.1352/CHU/2004 filed with the Government of India, Patent Office branch.
- Referring to commentaries in some books and the decision of the Hon'ble Delhi High Court in CIT vs. VRV Breweries and Bottling ITA.No.594/2005, 646/2005 and 559/2006 dated 19th August, 2011, it was submitted, where a person can use the technical knowledge obtained during the tenure of licence for the purposes of its business after the agreement has expired and in that sense resulting in an enduring advantage would by itself cannot be decisive to hold that it is not a sale but royalty licence fee because knowledge by itself may last for a long period even though due to rapid change of technology and huge strides made in the field of science, the knowledge may with passage of time become obsolete. In these circumstances, the transfer of technical know-how cannot be considered to be a licence. The ld. AR also referred to a third member decision of ITAT, Hyderabad Bench in case of Neeraj Petrochemicals Ltd. Vs. ITO, 73 ITD 11 wherein it is held that when there is no restriction regarding the duration of licence and the person who acquires it and possess it and owns even after the duration of the agreement period and where it is not bound to return it back to the seller or licencor after the duration of the

agreement period, then, it is a transfer of technical know-how. It was submitted that as in assessee's case also, transfer of know-how is without any restriction, it cannot be considered as a mere licence.

- AO having accepted assessee's stand that know-how is a capital asset, the consideration received from transfer of such asset has to be treated as capital gain.

- As assessee has not incurred any cost of acquisition for acquiring the know-how which was developed in-house, there is no cost of acquisition to assessee. In absence of cost of acquisition capital gain cannot be computed in terms with section 48. In this context, ld. AR relied on a decision of the Hon'ble Supreme Court in case of CIT Vs. B.C. Srinivas Shetty, 128 ITR 294.

- The cost of acquisition of the technical know-how cannot also be considered to be the value at which the previous owner acquired it as assessee's case does not fall within section 49(1)(4). Similarly technical know-how being a distinct and separate asset independent of the assets provided u/s 55, the cost of acquisition also cannot be taken as nil.

- Ld. AR in support of his contentions, relied on the following decisions:

    1. CIT Vs. Mrs. Grace Collis (248 ITR 323) (SC)

    2. CIT Vs. Ralliwolf Ltd., (143 ITR 720) (Bom.)

19. Ld. DR, on the other hand, strongly supporting the observations made by the DRP and AO, submitted that as assessee did not part its ownership rights in technical know-how in relation to the four ARVs, there cannot be a transfer as per section 2(47) of the IT Act. Ld. DR referring to the clauses relied upon by AO submitted that these clauses make it clear that assessee retains its right over the technical know-how and has merely given a licence to Astrix for a consideration to manufacture the four ARVs by using the technical know-how developed by assessee. Ld. DR submitted that when the clauses referred to by AO are explicit, there is no reason why assessee should rely on subsequent documents i.e. certificate from

CA and the supplementary agreement which are only self-serving documents. Thus, ld. DR submitted that AO as well as DRP were correct in treating the receipts from Astrix towards transfer of technical know-how as business income.

20. We have considered the submissions of the parties and perused the orders of revenue authorities as well as materials placed on record. We have also carefully applied our mind to the decisions relied upon by ld. AR. As can be seen from the discussions made hereinbefore, two issues arise for consideration before us, which are i) whether there is a 'transfer' of technical know-how in terms with section 2(47) of the Act and ii) if it is a transfer in terms of section 2(47) whether capital gain can be computed on the consideration received from such transfer. The second issue will only arise if it will be held that there is a 'transfer' of technical know-how u/s 2(47) of the Act. Therefore, at the first instance, we have to decide whether there is a 'transfer' of technical know-how in terms with section 2(47) of the Act. The term 'transfer' as defined u/s 2(47) of the Act, reads as under:

> *"(47) ["transfer", in relation to a capital asset, includes,—*
>
> *(i) the sale, exchange or relinquishment of the asset ; or*
>
> *(ii) the extinguishment of any rights therein ; or*
>
> *(iii) the compulsory acquisition thereof under any law ; or*
>
> *(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment ;] [or]*
>
> *[(iva) the maturity or redemption of a zero coupon bond; or]*
>
> *[(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A[54] of the Transfer of Property Act, 1882 (4 of 1882) ; or*
>
> *(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immov-able property."*

21. On a plain reading of the aforesaid provision it will be clear that the nature of transaction at hand can only fit in either under clause (i) or clause (ii). From reading of the different agreements entered into between the parties, it is to be seen that though assessee claims that there is outright sale of the technical know-how by assessee to Astrix but in reality it appears not to be so. Clause 5.4 of the share issue agreement reads as under:

> "*For the avoidance of doubt, it is recorded that Matrix shall at all times be entitled to use the know-how and the intellectual property and to manufacture the products.*"

22. On reading of the aforesaid clause, it is absolutely clear that assessee retains its right to use the know-how and the intellectual property over the four ARVs and manufacture the products. Further, clause 6.1 of agreement for transfer of know-how dt. 20/12/2005 makes it clear that any improvements made to the know-how subsequent to the effective date would be owned by the party that carries out such improvement. The AO has also very succinctly brought out the material difference between agreement for transfer of know-how and agreement for development and transfer of know-how. While agreement for development and transfer of know-how relating to three ARVs to be developed by assessee in future specifically provdes for Astrix having ownership of know-how, whereas there is no such vesting of ownership of know-how on Astrix relating to four ARVs already developed, as per agreement for transfer of know-how. Therefore, it cannot be said that by entering into the agreements and allowing Astrix to use the know-how for manufacturing the four ARVs, assessee has completely divested itself of its ownership rights over the technical know-how relating to the four ARVs. Therefore, neither there is relinquishment of assessee's right over the asset nor extinguishment of any rights therein. There is no doubt that technical know-how is an intangible asset, therefore, possession of the property cannot be transferred physically. Therefore, examining the terms of the agreements it can be ascertained as to whether assessee has

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transferred its right over the property or still retains its right. In the present case, on reading of different agreements the factual position which emerges is, though for a consideration assessee may have allowed Astrix to use technical know-how relating to the four ARVs, namely, Lamivudine, Nevirapine, Ziduvudine and Stavudine and produce them in the facility sold to them by assessee but fact remains assessee also simultaneously retains its right to use the know-how and the intellectual property relating to the four ARVs and also its right to manufacture the products.

23. Though clause 11.3 of the shareholders agreement provides that in case assessee sells these products to existing customers which could have been sold to them by Astrix, then, Matrix shall compensate Astrix to the extent of profits actually made by Matrix or its affiliates as a consequence of supplying the products which could have been supplied by Astrix. However, as can be seen, the restriction put under clause 11.3 is confined to existing customers only. There is no restriction on Matrix if it sells such products to parties other than existing customers. On a careful reading of various agreements placed before us, we do not find any condition that Matrix has given up its right completely/absolutely over the technical know-how of the ARVs in favour of Astrix and Astrix has become owner of the technical know-how in exclusion of all others including Matrix. Similarly, there is no restriction imposed in the agreements on assessee either with regard to sharing of technical know-how with third parties or for use by assessee itself in relation to the four ARVs. There is nothing in the agreement to suggest that there is absolute sale of technical know-how by assessee to Astrix by virtue of which Astrix became owner of technical know-how thereby divesting assessee from all rights over the technical know-how. Though as per clause 12 of the shareholders agreement assessee is required to contract manufacture the four ARVs on behalf of Astrix but that does not mean that the right to use the technical know-how and intellectual

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property by assessee is only restricted to such contract manufacture activity alone. Even clause 6.1 of the agreement for transfer of know-how which provides for ownership of any improvement made to the know-how subsequent to the effective date by the party who carries out such improvement would make it clear that Astrix does not possess exclusive ownership over the technical know-how relating to the four ARVs as claimed by assessee. Rather the agreements read as a whole would clearly suggest that what the parties have intended is the right to use of technical know-how by Astrix for manufacturing of four ARVs for a consideration but that by itself does not mean that assessee has absolutely transferred its ownership rights over the technical know-how. There is also no restriction that assessee cannot extend similar right to use the technical know-how to any other party except Astrix. Of course, it is another matter the assessee may not have done so. Therefore, considering the totality of facts and circumstances, it can be concluded that there is no 'transfer' of technical know-how relating to four ARVs in terms of section 2(47) of the Act, so as to treat the receipts therefrom as capital gain. Though, there cannot be any dispute or doubt that technical know-how is a capital asset but it does not necessarily follow that all receipts from exploitation of such asset are to be treated as capital receipts. Revenue receipts can also be generated by exploiting capital assets.

24. At this stage, it is necessary to examine the decisions relied upon by the ld. AR and to what extent they can be helpful to assessee. However, one has to bear in mind a decision is made on the basis of facts involved therein. Unless, there are similarity of facts, ratio laid down in a decision cannot be applied uniformly. Moreover, whether there is transfer in a particular case will depend upon facts involved in that case.

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25. In case of CIT Vs. Mrs. Grace Collis (supra), the Hon'ble Supreme Court while interpreting the expression 'extinguishment of any rights there in, held as under:

> "*We have given careful thought to the definition of 'transfer' in section 2(47) and to the decision of this Court in Vania Silk Mills Pvt. Ltd's case [1991] 191 ITR 647. In our view, the definition clearly contemplates the extinguishment of rights in a capital asset distinct and independent of such extinguishment consequent upon the transfer thereof. We do not approve, respectfully, of the limitation of the expression 'extinguishment of any rights therein" to such extinguishment on account of transfers or to the view that the expression "extinguishment of any rights therein" cannot be extended to mean the extinguishment of rights independent of or otherwise than on account of transfer. To so read the expression is to render it ineffective and its use meaningless. As we read it, therefore, the expression does include the extinguishment of rights in a capital asset independent of and otherwise than on account of transfer."*

26. The ratio laid down in the aforesaid decision cannot be applied to assessee's case as there is no extinguishment of rights over the technical know-how. As reiterated earlier, assessee in terms with clause 5.4 of share issue agreement retains its right to use the technical know-how and manufacture the products.

27. CIT Vs. Rallywolf Ltd(supra) – this decision will also in noway help the case of assessee as in the present case there is no absolute transfer of technical know-how to Astrix.

28. The other decisions also are factually distinguishable as there is nothing in those decisions to indicate that there is any clause akin to clause 5.4 of shareissue agreement allowing the owner to retain its rights to use technical know-how and manufacture the products.

29. It will be pertinent to mention here that ld. AR to strengthen his argument placed reliance upon a certificate issued by the Chartered Accountant and a supplementary agreement entered into between assessee and Astrix on 1st January, 2010. On a perusal of the auditor's certificate dated 2nd February, 2010, it is to be noticed that

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the auditor has merely certified that assessee has not transferred through sale or outright licencing any technical know-how in relation to four ARVs to any other third party during the period from 1st April, 2005 to 30th September, 2009. However, such non-transfer of technical know-how by assessee to any other party in no way proves the fact that technical know-how relating to the four products was absolutely transferred to Astrix by assessee without retaining any right thereof. In fact the certificate supports the fact that the assessee has rights on the know-how, but has not transferred to any other party. As far as supplementary agreement dated 01/01/2010 is concerned, a perusal of the same brings out some interesting facts. As can be seen from the agreement, the shareholders agreement between assessee and AspenSA was terminated on 09/10/08 as a result of which Astrix has ceased to be a joint venture between Matrix and AspenSA. Even though such event occurred in October, 2008, but on perusal of draft assessment order as well as other materials on record, it appears, this fact was not brought to the notice of AO. Furthermore, assessee and Astrix never thought it expedient or necessary to enter into a supplementary agreement immediately upon termination of joint venture, but, waited for more than a year to enter into such agreement. Therefore, the supplementary agreement entered into between the parties in 2010 after the draft assessment order was passed, appears to be an afterthought not only to get over the hurdle created by the original agreements executed in 2005 and to dilute the view taken by the AO but an attempt made for establishing the fact that Astrix shall be treated as the exclusive owner of know-how in respect of the four ARVs. Seen in the aforesaid perspective, the supplementary agreement being a self-serving document to help assessee get over the addition made by AO, cannot be given much importance. In the aforesaid view of the matter, we hold that there being no 'transfer' in terms of section 2(47) of the Act, the amount received towards allowing Astrix to use the technical know-how has to be treated as business income. In view of our

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aforesaid finding, the second issue as to whether capital gain can be computed in absence of cost of acquisition becomes redundant, hence, not required to be adjudicated. This ground is dismissed.

30. Ground No. 3 reads as under:

> "*The Dispute Resolution Panel erred in confirming the order of the AO in disallowing the superannuation contribution of Rs. 32,40,000 paid to LIC in respect of the working directors of the company.*"

31. Briefly the facts relating to this issue are, during the assessment proceeding, AO noticed that assessee has claimed deduction for an amount of Rs. 32,40,000 on account of contribution made to superannuation fund of specified directors. In the note submitted to the return of income, assessee stated that the contribution made was subjected to TDS by including the same as part of salary of the specified directors. It was submitted, the expenditure incurred being wholly and exclusively for the purpose of business, it is to be allowed u/s 37 of the Act. In support of such contention, assessee relied on the following decisions:

1. CIT Vs. Western India Paper and Board Mills Pvt. Ltd., 189 ITR 309 (Bom.)
2. CIT Vs. Punjab Financial Corporation Ltd., 295 ITR 510 (P&H)

32. AO however did not accept the contention of assessee. He was of the view that contribution to superannuation fund can only be claimed as deduction as per the provisions of section 36(1)(iv) and not u/s 37, which is a residuary provision. Accordingly, he disallowed the claim of deduction. Though the assessee objected to such disallowance before DRP, but, the DRP also confirmed the disallowance.

33. The ld. AR submitted before us that the company has incurred the expenditure of contribution made to superannuation fund of its directors, who hold more than 5% share in the company. While

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making the contribution, assessee has also deducted tax at source and has remitted the same to the government. Therefore, the contribution made being in the nature of expenditure incurred wholly and exclusively for the purpose of assessee's business is covered by the provisions of section 37. It was submitted that as the assessee has treated the contribution as part of the salary of the specified directors and has also deducted tax on the said amount, it ceases to be in the nature of contribution to a superannuation fund and accordingly it is allowable as expenditure u/s 37. In support of such claim, he relied upon a decision of the Hon'ble Gujarat High Court in case of CIT Vs. Karamchand Premchand Pvt. Ltd. 200 ITR 281. The ld. AR submitted that unless there is express or implied prohibition under other provisions of the Act, any expenditure incurred wholly and exclusively for the purpose of business can be claimed as deduction u/s 37. For this purpose, he relied upon a decision of the Hon'ble P&H High Court in case of CIT Vs. Punjab Financial Corporation Ltd., 295 ITR 510.

34. The ld. DR relied upon the decision of the AO and DRP.

35. We have considered the submissions of the parties and perused the orders of departmental authorities as well as other materials on record. From the facts and materials on record, it is evident that the incurring of expenditure has not been doubted or disputed by AO. The only reason for which the AO disallowed the expenditure is since contribution to superannuation fund is covered u/s 36(1)(iv) the same cannot be allowed u/s 37. The DRP has confirmed the disallowance solely for the reason that similar disallowance was upheld by CIT(A) for the AY 2005-06. However, on going through the facts and materials on record, we are of the view that the expenditure incurred is allowable as deduction if not u/s 36(1)(iv) but u/s 37 of the Act as it is exclusively incurred for the purpose of business. Moreover, it is not disputed that assessee has deducted tax at the time of making contribution to the superannuation

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fund and has treated it as part of salary of the concerned directors. That being the case, the expenditure incurred should be allowed as a deduction. In this regard, we rely on CIT Vs. Punjab Financial Corporation Ltd.(supra). Accordingly, we delete the addition made by the AO.

36. The common issue in ground Nos. 4 & 5 relates to reduction from taxable income the amounts of interest granted u/s 244A and subsequently withdrawn.

37. Briefly the facts relating to the aforesaid issue are, during the assessment proceeding, AO noticed that assessee has reduced from the taxable income an amount of Rs. 76,15,608 being the interest granted u/s 244A for AY 2005-06, which was subsequently withdrawn in pursuance to assessment order passed u/s 143(3). Similarly, assessee also had reduced an amount of Rs. 75,59,580 being interest granted u/s 244A and subsequently withdrawn by AO by order passed u/s 143(3) for the AY 2004-05. When the AO called upon assessee to justify its claim, it was submitted by assessee that it received an amount of Rs. 76,15,608 as interest u/s 244A of the Act on the amount of refund due as per intimation u/s 143(1) for AY 2005-06. The interest granted was shown as other income in the P&L account and offered to tax. However, assessment for the said AY was completed subsequently u/s 143(3) vide order dated 28/12/07 as per which no interest u/s 244A was allowed to assessee. Accordingly, interest granted u/s 244A was demanded by the department and was also paid by assessee. Therefore, no interest u/s 244A accrues to assessee. As the assessee has already shown that interest as income, the same is required to be reduced from the taxable profit for the AY 2006-07. Similarly, for the AY 2004-05 also, assessee received interest of Rs. 75,59,580 at the time of processing of return u/s 143(1), which was shown as income in the AY 2005-06. Subsequently, however, assessment for AY 2004-05 was completed u/s 143(3) by withdrawing the interest granted u/s 244A, which was also paid back to the department by assessee. Hence, the same is

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required to be reduced from the taxable profits of AY 2006-07. AO, however, did not accept the contention of assessee. AO observed that refund u/s 143(1) was issued on the basis of income admitted by the assessee. The subsequent event of additions in the scrutiny assessment and relief in further appeals are contingent in nature till the matter attains finality. Hence, assessee's claim that interest u/s 244A has not accrued cannot be accepted until the matter attains finality. On the aforesaid basis, AO rejected assessee's claim of reduction.

38. The DRP after considering the submissions of assessee held that in case the assessee has paid the demand it will be entitled to reduce the income admitted by way of receipt of interest. Ld. DRP directed the AO to verify and allow assessee's claim if it is found to be correct. AO however while completing the assessment finally again rejected assessee's claim on the pretext that assessee's appeals for AYs 2004-05 and 2005-06 are still pending.

39. We have considered the submissions of the parties and perused the orders of the departmental authorities as well as perused the materials on record. As can be seen from the facts and materials on record, interest on refund granted to assessee at the time of processing of return for AYs 2004-05 and 2005-06 were offered as income by assessee. It is also not disputed that when assessment orders under section 143(3) of the Act were passed for these assessment years resulting in demand, the interest granted under section 244A was withdrawn and the assessee was asked to pay back the interest amount to the department, which the assessee has also complied. Therefore, when the assessee has shown the income which was subsequently withdrawn by the department effectively no income on account of interest granted under section 244A accrues to the assessee. Therefore, the income already shown by the assessee by taking into account the interest granted earlier under section 244A requires to be reduced from the taxable profit for assessment year

2006-07. In fact, this is the precise direction of the DRP to the assessing officer. However, the A.O. has exceeded his brief by not complying to the directions of the DRP by observing that assessee's appeal for the relevant A.Y. are still pending. The action of the A.O. cannot be appreciated. We, therefore, direct the A.O. to allow assessee's claim after verifying the fact as to whether the assessee has shown the interest income which was subsequently withdrawn by the department.

40. Ground No.6 reads as under :

> "*The Dispute Resolution Panel erred in upholding the order of the AO as regards disallowance of Rs. 5,72,19,461 being amount debited to Profit & Loss account in respect of employee stock option scheme.*"

41. Briefly the facts relating to the aforesaid issue are, during the assessment proceedings, the Assessing Officer noticed that the assessee has debited an amount of Rs.5,72,19,461 to the P & L account on account of ESOP scheme which was claimed as part of the employee cost. The A.O. however, was of the opinion that the expenditure incurred is not revenue expenditure and is also contingent and notional in nature. Accordingly, he disallowed the deduction claimed of Rs.5,72,19,461 and added it to the income of the year. Assessee has objected to such addition before DRP. The DRP taking note of the fact that the CIT(A) in assessee's own case for the A.Y. 2005-06 has disallowed such claim upheld the addition made by the A.O.

42. We have heard the parties and perused the orders of the authorities and material placed on record. It is the contention of the learned A.R. that identical issue has been decided in favour of the assessee in assessee's own case for A.Y.2008-09. In this context, he relied upon the decision of the Coordinate Bench in ITA.No.66/Hyd/2013 dated 10.01.2014.

43. The learned D.R. has not disputed the contentions of the learned A.R.

44. On perusal of order dated 10.01.2014 passed by the Coordinate Bench in assessee's own case in ITA.No.66/Hyd/2013 for A.Y. 2008-09 it is seen that while dealing with identical issue of deduction claimed on account of expenditure incurred towards ESOP scheme, the Coordinate Bench taking note of the decision of the ITAT, Bangalore Special Bench in case of M/s. Biocon Ltd., vs. DCIT ITA.No.368 to 371/Bang/2010 dated 16.07.2013 remitted the issue back to the file of A.O. with a direction to examine the claim afresh in the light of the decision of the ITAT, Bangalore Special Bench. As the issue raised is materially same, respectfully following the aforesaid decision of the Coordinate Bench, we also remit the matter back to the file of Assessing Officer for considering afresh keeping in view the decision of the ITAT Bangalore Special Bench in the case of M/s. Biocon Ltd., (supra). Ground No.6 is allowed for statistical purposes.

45. Ground No.7 reads as under :

"*The Dispute Resolution Panel erred in confirming the Assessing Officer's action in rejecting the basis adopted by the assessee for apportionment of common corporate overhead expense to all the units of the company including 100% Export Oriented undertakings eligible for deduction u/s 10B of the Act and in the process reducing the benefit u/s 10B by Rs. 1,83,63,751.*"

46. Briefly the facts are during the assessment proceeding, the A.O. noticed that the assessee has claimed expenditure on corporate overheads at Rs.27,12,64,135/- which has been apportioned to the EOU units in the following manner :

	Unit 3.2 Jeedimetla	Unit – 7 Pashamylaram
Manufacturing expenses	9,72,252	27,00,494
Personal Costs	1,18,60,886	1,80,46,011
Administrativbe & Selling	1,02,10,493	2,32,97,781
Total	2,30,43,631	4,40,44,286

47. It was further explained by the assessee that manufacturing expenses were distributed over operating divisions on the basis of gross material cost. Personal cost is distributed over operating divisions on the basis of staff strength in operating division, whereas, administrative cost is distributed over operating division on the basis of sales effected. The A.O. however, was not convinced with the explanation of the assessee. According to the A.O. the correct procedure to be followed is to allocate the expenditure in proportion to the turnover of the unit vis-à-vis the total turnover of the company. Accordingly, the A.O. proceeded to apportion the expenditure and compute the profit under section 10B of the Act, as a result of which, the deduction claimed under section 10B was reduced by an amount of Rs.1,83,63,751/-. Though the assessee objected to the deduction computed under section 10B by the A.O. in the draft assessment order, but the same did not find favour with the DRP.

48. We have heard the parties and perused the arguments of the learned D.R. and Learned A.R. on the issue.

49. The learned A.R. submitted before us that the issue in dispute stands squarely covered by the decision of the ITAT, Hyderabad Bench in assessee's own case for assessment year 2008-09 in ITA.No.66/H/2013 dated 10.01.2014. Learned D.R. has not disputed this fact. On a perusal of the order dated 10.01.2014 passed in ITA.No.66/H/2013, it is seen that while considering similar issue in assessment year 2008-09, Tribunal has held as under:

> *"45. We have considered the issue and examined the facts. Even though the issue was pending in earlier year, we are of the opinion that issue can be decided independently in this year. After considering the facts as stated in the objections before the DRP and also before us, we are of the opinion that assessee has allocated the corporate overheads on a rational basis based on the material cost of purchase and number of people worked for the unit and also on the basis of head account which is reasonable. Adopting sales turnover as the basis may result in skewed allocation. For example, if a particular unit is producing only high cost/ high price product,*

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> *the effort and service cost for that unit will be less whereas, the profit margin will be more. If the unit is not producing much in the year and has lesser sales, allocation of amount on the basis of turnover may result in under allocation of service cost. Even in the case where the unit starts production only at the fag end of the year cost of working on that unit throughout the year for establishing/ starting production may not result in allocation of actual expenditure if turn over is considered. In view of this, since Assessing Officer has not given any rationale in adopting the turnover as the basis, ignoring the assessee's method, we are of the opinion that allocation of expenditure as was done by the Mylan Laboratories Ltd. (Formerly Matrix Laboratories Ltd.) assessee is more rationale and is in tune with the principles laid down by the Institute of Cost Accountants and also for the purpose of Company Law. Therefore, considering the detailed objections raised by the assessee as placed in the objections to the DRP, we are of the opinion that the allocation by the assessee is to be upheld. Assessing Officer is directed to accept the assessee's allocation of corporate overheads. Accordingly, ground No. 14 is allowed."*

Respectfully following the principles decided in the aforesaid decision of the Coordinate Bench we hold that the allocation of expenditure by the assessee between the EOU units is required to be upheld. Accordingly, we allow the ground raised by the assessee.

50. Ground No. 9 reads as under :

> "*The Dispute Resolution Panel erred in confirming the view of the AO that at the time of considering allowance of weighted deduction u/s 35(2AB), the R&D expenditure relating to the units claiming deduction u/s 10B will have to be revoked by giving credence to the weighted deduction allowed on R&D expenditure."*

51. Briefly the facts are during the assessment proceeding, the A.O. noticed that the assessee has claimed weighted deduction under section 35(2AB) on the R & D facilities. However, the deduction claimed is not supported by report in Form No.3CL and the assessee has only claimed the deduction on the basis of Auditor's Certification. When the A.O. called upon the assessee to furnish the certificates in Form No.3CL, the assessee stated that they will be in a position to furnish the same within a short period. However, in absence of

certificate in Form No.3CL, the A.O. did not allow the weighted deduction claimed by the assessee. AO also observed, at the time of considering allowance of weighted deductions, R&D expenditure relating to the units claiming deduction u/s 10B is also to be worked out by taking into account weighted deduction allowed on R&D. The DRP also confirmed the disallowance.

52. We have considered the submissions of the parties and perused the orders of the revenue authorities as well as other materials on record. The learned A.R. fairly submitted before us that the issue in dispute stands decided against the assessee by an order of the ITAT, Bangalore Bench in case of DCIT vs. M/s. Biocon Ltd., in ITA.No.248/Bang/2010 dated 30.04.2014. On a perusal of the aforesaid order of the Coordinate Bench, it is seen that while dealing with the specific issue has held as under :

> *"24. Thus, when the provisions of section 10A/10B of the Act are held to be exemption provisions, the provisions of section 35(2AB) of the Act which are contained in Chapter IV of the Act will not be applicable. Resultantly, the weighted deduction at 150% u/s. 35(2AB) of the Act will not be allowed while computing income of section 10A/10B unit. The 10A/10B unit will get only 100% deduction of revenue expenditure. The excess 50% allowed as deduction u/s. 35(2AB) of the Act has to be withdrawn as it will pull down the profits of the non-10A/10B unit which is taxable. Therefore, the withdrawal of 50% deduction allowed u/s. 35(2AB) of the Act while computing income of non-10A/10B unit has to be upheld both on general principles as well as by relying on the provisions of section 14A of the Act."*

As can be seen the ratio laid down in the aforesaid decision is to the effect that when a particular assessee is claiming deduction under section 10A/10B, it cannot claim weighted deduction under section 35(2AB). As in the present case, the assessee has claimed deduction under section 10B, no deduction under section 35(2AB) can be allowed to the assessee. Accordingly, ground No.9 is dismissed.

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53. Ground No.10 reads as under:

> "*The Dispute Resolution Panel erred in confirming the order of the AO by refusing to follow the analogy laid down by the Hon. Supreme Court as regards deduction for Export profits under clause (iv) of Explanation to section 115JB in the case of Ajanta Pharma Ltd. Vs. CIT (rendered on 09/09/2010) and restricting the deduction under clause (ii) of Explanation to section 115JB to the amount arrived at under normal computation instead of basing it on book profits and in the process increasing the book profits by Rs. 26,65,07,410.*"

54. While computing the book profit under section 115JB,the A.O. restricted the deduction under section 10B to the amount arrived at under normal computation on the reasoning that for the purpose of arriving at book profit the deduction as worked out under normal computation should only be considered and not the amount computed with reference to book profit, as a result of which, the book profit was increased to Rs.26,65,07,410/-. The DRP also confirmed the action of the Assessing Officer. Being aggrieved, the assessee is before us.

55. We have heard the parties and perused the orders of the revenue authorities as well as other materials on record.

56. Both the learned Counsels appearing for the assessee and the department have agreed that the issue is squarely covered by the decision of the Coordinate Bench in assessee's own case in ITA.No.835 to 837/Hyd/2005 dated 02.07.2012 for A.Ys. 2001-02 to 2002-03 and 2003-04. As can be seen the Coordinate Bench while considering identical nature of dispute, held as under :

> *"10. We have heard both the parties on this issue. This issue is common in all these appeals. While the assessee contests the CIT (A)'s order for not allowing deduction under clause (iv) of' Explanation on the entire amount of export profits computed from the base of book profits but instead restricting the deduction in terms of the phasing out per sub-section (1B), the Department is disputing the order of the CIT(A) for computing the deduction based on book profits instead of the amount as computed under section 80HHC based on profits of the business under clause (baa). The assessee relies on the recent decision of the Supreme Court in the case of Ajanta Pharma Ltd*

v CIT (2010) (327 ITR 305). The assessee submitted that the Apex Court has approved the Special Bench decision of ITAT in DCIT v Syncom Formulations (I) Ltd. (2007) (106 ITD 193).

11. The DR fairly conceded that the decision of the Supreme Court in the case of Ajanta Pharma (supra) is against the Department and in favour of the assessee. The Apex Court laid down the law that for purposes of computing book profit, the deduction to be allowed under clause (iv) of Explanation is the export profits as computed with reference to book profits. Sec. 115JB is a separate code for company assessees' for computing minimum tax payable in the absence / inadequacy of normal taxable income falling under the 5 heads of income. The minimum tax is to be computed with reference to book profits as per the audited accounts of the company. Consequently the export profits computed under the provisions of sec. 80HHC based on 'profits of business or profession' cannot be substituted into the computation scheme as prescribed in sec. 115JB which is an alternative computation to the normal computation of income. The Court also held that the deduction under clause (iv) of Explanation for the export profits should not be phased out as provided in sub-section (1B) of sec. 80HHC because, 115JB is an independent code and it covers full export profits as the eligible profits for the purposes of book profits tax and no phasing is required to be carried out. This view has been reiterated by the Apex Court in the recent case of CIT v Bhari Information Tech. Sys. P. Ltd in Civil Appeal No. 33750/2009 rendered on 20.10.2011. Thus, this ground in assessee's appeals ITA Nos. 835 to 837/Hyd/05 is allowed and related ground in Revenue appeals in ITA Nos. 930 to 932/Hyd/05 is dismissed."

Respectfully following the aforesaid decision of the Coordinate Bench, we direct the Assessing Officer to compute the book profit under section 115JB accordingly. Ground No.10 is considered as allowed.

57. In the result, assessee's appeal is partly allowed.

Pronounced in the open court on 16/01/2015.

Sd/-	Sd/-
(B. RAMAKOTAIAH)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad, Dated: 16th January, 2015

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2) ACI, circle 16(2), Aayakar Bhavan, Hyderabad.
3)DRP, Hyderabad
4) DIT (International Taxation), Hyderabad
5) The Departmental Representative, I.T.A.T., Hyderabad.

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