

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-1', NEW DELHI**

**Before Sh. N. K. Saini, Hon'ble Vice President
and**

Smt. Beena A. Pillai, Judicial Member

ITA No. 3013/Del/2015 : Asstt. Year : 2008-09

ITA No. 6264/Del/2015 : Asstt. Year : 2009-10

Asstt. Commissioner of Income Tax, Circle-9(2), New Delhi	Vs	M/s Fresenius Kabi Oncology Ltd. (earlier known as M/s Dabur Pharma Ltd.), B-310, Som Datt Chambers-1, Bhikaji Cama Place, New Delhi-110066
(APPELLANT)		(RESPONDENT)
PAN No. AABCD7720L		

**Assessee by : Sh. K. M. Gupta, Adv. &
Ms. Shrwati Khimta, Adv.
Revenue by : Sh. Sanjay I. Bara, CIT DR**

Date of Hearing : 19.12.2018	Date of Pronouncement : 31.12.2018
-------------------------------------	---

ORDER

Per N. K. Saini, Vice President:

These two appeals by the department are directed against the order dated 19.02.2015 and 18.08.2015 for the assessment years 2008-09 and 2009-10 respectively passed by the Id. CIT(A)-44, New Delhi.

2. Since, the appeals belonging to the same assessee, having common issues involved, were heard together, so, these are being disposed off by this consolidated order for the sake of convenience and brevity.

3. At the first instance, we will deal with the appeal in ITA No. 3013/Del/2015 for the assessment year 2008-09. Following grounds have been raised in this appeal:

“1. On the facts and circumstances of the case and in law, the ld. CIT(A) has erred in deleting the addition of Rs.17,76,54,391/- made by the AO on account of Arm’s Length Price adjustment.

2. On the facts and circumstances of the case and in law, the ld. CIT(A) has erred in deleting the addition of Rs.17,94,174/- made by the AO on account of excess claim of depreciation u/s 32 of the IT Act.

3. The appellant craves leave to add, alter or amend any ground of appeal raised above at the time of hearing.”

4. Vide ground no. 1, the grievance of the department relates to the deletion of addition of Rs.17,76,54,391/- made by the AO on account of Arm’s Length Price.

5. Facts related to this issue in brief are that the assessee filed the return of income on 23.09.2008 declaring an income of Rs.185,85,27,524/- which was processed u/s 143(1) of the Income Tax Act, 1961 (hereinafter referred to as the Act). Later on, the case was selected for scrutiny. During the course of assessment proceedings, the AO made a reference to the transfer pricing officer (TPO) in respect of international transaction entered into by the assessee with its AEs. The TPO passed the order u/s 92CA(3) of the Act on 31.10.2011 and proposed to make an addition of Rs.17,76,54,391/- on two international transactions, namely Corporate Guarantee and Interest on loan. Thereafter, the AO passed the final assessment order u/s 143(3) r.w.s. 144C(3) of the Act on 31.01.2012 by assessing the normal income at Rs.206,74,23,681/-.

6. Being aggrieved the assessee carried the matter to the Id. CIT(A) who allowed part relief on account of corporate guarantee and held that corporate guarantee rate of 0.5% was appropriate and that the rate of 0.6% should be taken as CUP for benchmarking the counter guarantee given by the assessee to ABN Amro Bank for the loan availed by Dabur, U.K. The relevant findings have been given in paras 5.5 to 5.7 of the impugned order which read as under:

“5.5 I have carefully considered the submissions made by the appellant. The AO has observed that the Appellant has failed to charge service fees for the corporate guarantee given to its UK Subsidiary. The ALP of services fee for providing corporate guarantee has been computed by the TPO/ AO at 4.75% against NIL charged by the Appellant. The TPO obtained information u/s 133(6) of the Act from SBI regarding rate of bank guarantee charged by it wherein SBI replied that it is charging guarantee fee of 2.75% per annum. The AO further added a mark-up of 200bp to it considering higher risk taken by the appellant in providing corporate guarantee and therefore applied a rate of 4.75%. The main contentions of the appellant are that provision of corporate guarantee is in nature of share holder’s activity and also since no cost has been incurred by the appellant for providing such guarantee, there is no need to charge any fee for providing corporate guarantee. The appellant has also contended that instrument of bank guarantee is fundamentally different from that of corporate guarantee. The appellant also contended that in view of Four Soft Ruling of Hyderabad Tribunal corporate guarantee is not an international transaction. However, this point of Appellant is not valid in view of the amendment brought by the Finance Act, 2012 with retrospective effect from 01.04.2002, by way of Explanation to Section 92B, guarantee commission is now considered to be an international transaction under clause (c) of said explanation. It now clearly emerges that providing guarantee is an international transaction and it needs to be benchmarked as per provisions of section 92(1). The Appellant had charged NIL rate for providing the corporate guarantee and in its TP study report, has justified arm’s length compliance by following TNMM. The appellant has taken a position that provision of corporate guarantee is integral part of sale transactions and hence it need

not be separately benchmarked. However, the appellant has not explained how this transaction of providing corporate guarantee is part and parcel of sales transactions. I therefore, do not agree with such contention of the appellant because provision of corporate guarantee is not at all linked with sales transactions and it being an independent transaction, cannot be clubbed with sale transactions and need to be benchmarked separately. The TPO has rejected the approach of the appellant and has applied CUP as most appropriate method. The TPO has gathered information from different banks in India regarding bank guarantee commission charged by the bank. Even the approach followed by TPO does not appear to be quite reasonable. Comparability norms as required for applying CUP have not been satisfied. In present case, the appellant has given corporate guarantee to a foreign bank for providing loan to its foreign AE in foreign currency. The situation adopted by the TPO in CUP method is of Indian bank giving guarantee in India for amount in INR. Bank guarantee and corporate guarantee are also not identical instruments. In corporate guarantee, primary liability is of borrower and liability of guarantor arises only in case of default on part of borrower. In case of bank guarantee, liability is only of the person who has obtained bank guarantee. Moreover, in present case, the concerned bank is ABN AMRO whereas TPO has used data obtained from different banks in India and it is very likely that rates charged by banks are quite different. In the case of Glenmark Pharmaceuticals Ltd. Vs. Addl. CIT (supra) the Hon'ble ITAT, Mumbai has observed as under:

“16. List of Decisions of Tribunal - Approved Corporate Guarantee rates:

Further, to substantiate assessee's Guarantee commission rate at 0.53% is competent and is at arm's length, Ld Counsel tabulated the list of the decisions of the Tribunal and the GC rates as approved in the said decisions and the same is reproduced as under:

<i>Sr. No.</i>	<i>Order of Hon'ble Mumbai Bench of Tribunal</i>	<i>A.Y.</i>	<i>Guarantee fee commission</i>	<i>Remarks</i>
<i>1.</i>	<i>Asst. CIT v. Reliance Industries Ltd.</i>	<i>2006-07</i>	<i>0.38%</i>	<i>Based on 10 instances given on page No. 66</i>

				<i>of order</i>
2.	<i>ACIT v. Asian Paints Ltd.</i>	2005-06	0.25% 0% 0.35%	<i>Citibank - Page No. 17 of order HSBC - Page No. 19 of order</i>
3.	<i>Everest Kanto Cylinder Ltd. v. Dy. CIT</i>	2007-08	0.60%	<i>ICICI bank - Page No. 21 of order.</i>
4.	<i>Asst. CIT v. M/s. Nimbus Communication Ltd.</i>	2005-06	0.5%	<i>M/s Everest Kanto has been taken as an external comparable - Page No 10 of order.</i>
5.	<i>Asst. CIT v. M/s. Nimbus Communication Ltd.</i>	2006-07 and 2007- 08	0.5%	<i>Based on rate approved in assessee's own case for A. Y. 2005-06</i>

In the case of Infotech Enterprises Limited Vs Addl CIT(supra) the Hon'ble ITAT Hyderabad has held that " We draw support from the order of Mumbai Tribunal in Glenmark Pharmaceuticals v. Asstt.. CIT [ITA No.5031/Mum/2012 dated 13-11-2013) which has analyzed this issue in detail and held that 0.53% corporate guarantee rate in that case was appropriate. We therefore set aside the issue to the TPO to decide the quantum of corporate guarantee rates in the instant case following the method adopted in Glenmark Pharmaceuticals (supra)." In the case of Glenmark Pharmaceuticals Ltd. Vs. Addl. CIT (supra) the Hon'ble ITAT, Mumbai has held that "Therefore, we are of the opinion, the GC rates of 0.53% and 1.47% benchmarked by the assessee are fair and reasonable and they should be accepted without any modification." In the case of ACIT Vs Nimbus Communications Ltd(supra), the Hon'ble ITAT Mumbai has held "We, accordingly modify the impugned order of the Id. CIT(A) on this issue and direct the A.O. to recompute the commission for guarantee given by the assessee to its Associated Enterprises @ 0.5% being the arm's length price."

5.6 As regards the loan of GBP 2.5 Million availed by Dabur Oncology Ltd UK (Dabur UK), the appellant has contended that Dabur UK has not been benefitted from the corporate guarantee given by the appellant. In my view, the contention of the appellant is not correct. The letter dated 27/05/2014 written by RBS reveals that since Dabur UK has been benefitted by the corporate guarantee provided by the appellant, the appellant needs to be

remunerated for it, because in non-AE situation, no third party would have given corporate guarantee without charging any fee. The appellant contended that rate of 4.75% charged by the AO/TPO is improper and un-realistic. Further, in various rulings cited by the appellant, the rate of corporate guarantee has been upheld at 0.5%. The appellant has submitted a letter from Royal Bank of Scotland (RBS) (formerly ABN AMRO bank) wherein it has been mentioned that the same loan that was taken by the overseas AEs on the basis of appellant's corporate guarantee at interest rate of LIBOR plus 0.5% was available without corporate guarantee at a rate of LIBOR Plus 1.5%, other terms and conditions remaining the same. On the basis of this letter, the appellant argued that Dabur UK got a benefit of 1.0% interest rate. This benefit is attributable to both corporate guarantee provided by it and bargaining power and other financial strengths of the borrower. According to the appellant, the rate of guarantee fee, if it is at all to be charged, therefore should not exceed 0.5% and that shall also be in line with what has been upheld in judicial decisions referred supra. I have carefully examined the submission of the appellant. For AY 2007-08, the Ld. CIT(A) XXIX has held that the letter from RBS Bank stating that the loan facility was available to the overseas AE at a rate of LIBOR Plus 1.5% without corporate guarantee versus LIBOR plus 0.5% with corporate guarantee is an authentic and reliable measure of benefit by the parties to the transaction. As per the terms and conditions of the loan agreement dated 17th march, 2006 between ABN AMRO Bank N.V. and Dabur Oncorlogy Pic, Dabur UK has provided adequate security and collaterals to satisfaction of the bank. The bank had first charge on assets of the borrower as security for the loan. From the said letter, it is clear that Dabur UK got interest saving of 1% because of corporate guarantee provided by the appellant. This difference of 1%, cannot be solely attributed as service fee due to appellant as some amount of bargaining between parties always remain in the trade. For AY 2007-08, the Ld. CIT(A)-XXI has held that a split of 50:50 in respect of interest saving is more appropriate for the purpose of benchmarking corporate guarantee. I have also gone through case laws relied upon by the appellant and noted that in majority of the cases, the Hon'ble ITAT has held the corporate guarantee rate of 0.5% as appropriate. Accordingly, the AO/TPO is directed to recompute

the ALP for corporate guarantee fee at 0.5% in respect of the loan of GBP 2.5 Million availed by Dabur Oncology Ltd UK from ABN AMRO Bank, UK.

5.7 As regards the loan of USD 5.20 Millions from Hospira INC, US, the appellant has submitted that ABN AMRO Bank, UK has given a bank guarantee to Hospira Inc, US which has given the loan of USD 5.20 Millions to Dabur Oncology PLC, UK @ Libor Plus 2%. For this loan, ABN AMRO Bank UK has given bank guarantee to Hospira INC, US and charged fees @0.6% from Dabur Oncology PLC, UK. In this regard, the appellant company had given the counter guarantee to ABN AMRO Bank UK for the equal amount. For giving the said counter guarantee in the form of the corporate guarantee, the appellant company had not charged any guarantee charges/fees from Dabur Oncology PLC, UK. However, ABN AMRO Bank, UK, had charged a fee @0.6% from Dabur Oncology PLC. The appellant has submitted that Dabur Oncology Pic, UK has already paid a service fee to ABN AMRO Bank for the bank guarantee and the former cannot be asked to pay twice the guarantee for the same purpose. The appellant has further submitted that the guarantee agreement was entered between ABN Amro Bank UK and Dabur Pharma Ltd India and no guarantee charges were levied on the appellant by ABN Amro Bank. The guarantee fee was directly paid by the UK subsidiary of the Appellant. The appellant has submitted that no guarantee fee can be recoverable again by it from its UK subsidiary. I have carefully considered the submission of the appellant. In the present case, ABN Amro Bank has given the guarantee to Hospira Inc, US for the loan of USD 5.20 Millions availed by Dabur Oncology Ltd UK (Dabur UK) on the basis of the counter guarantee of USD 5.20 Millions provided by the appellant company. For this purpose, ABN Amro Bank has charged fee @ 0.6% of the guarantee from Dabur Oncology PLC. However, ABN Amro Bank has given the guarantee to Hospira Inc, US for the said loan to Dabur UK only on the basis of the counter guarantee given by the appellant company. Without the counter guarantee given by the appellant company, ABN Amro Bank would not have given the guarantee to Hospira Inc, US for the loan of USD 5.20 Millions availed by Dabur UK. The counter guarantee given by the appellant to ABN Amro Bank for the loan

availed by Dabur, UK from Hospira Inc needs to be benchmarked because in non-AE situation, no third party would have given such counter guarantee for USD 5.20 Millions without charging any fee. Accordingly, I hold that the counter guarantee of USD 5.20 Millions given by the appellant company to ABN Amro Bank should be benchmarked. ABN Amro Bank has charged fee @ 0.6% of the guarantee from Dabur Oncology PLC for the said loan from Hospira Inc, US. In my view, the rate of 0.6% should be taken as CUP for benchmarking the counter guarantee given by the appellant to ABN Amro Bank for the said loan availed by Dabur, UK. Accordingly, the AO/TPO is directed to recompute the ALP for guarantee fee at 0.6% in respect of the guarantee of USD 5.20 Millions given by the appellant company to ABN AMRO Bank UK for the loan availed by Dabur, UK from Hospira Inc, US. The ground of appeal is accordingly partly allowed.”

7. As regards to the issue relating to interest on the loan given to the associated enterprise, the Id. CIT(A) directed that the rate of interest charged for international transaction by the assessee at 7% was higher than the LIBOR PLUS 1.5% prevalent during the financial year 2007-08. He, therefore, directed the AO/TPO to delete the addition made in this regard. The relevant findings are given in para 6.6 of the impugned order which read as under:

Name of the AE to whom loan is given	Currency of Loan	Rate of Interest	Amount in INR Crores	Benchmarking in TP Study
<i>Dabur Oncology Plc, UK (in short 'Dabur UK')</i>	<i>GBP</i>	<i>7% PA</i>	<i>143.35</i>	<i>Internal CUP @ 6.5%. Loan from HSBC and ABN Amro (PCFC)</i>
<i>Dabur Pharma (Thailand) Company Ltd., Thailand (in short 'Dabur Thailand')</i>	<i>THAI BHAT</i>	<i>7% PA</i>	<i>13.54</i>	
			<i>156.89</i>	

The interest earned on the above loans is Rs 8,99,76,604/- The appellant has stated that the foreign loan given by the appellant was justified to be arm's length on the basis of internal CUP (availing loan from HSBC @6.50%PA) and complete details were provided to the TPO in the course of the assessment. However, the

TPO disagreed with the approach of the appellant on the ground that while benchmarking the interest the appellant has not only taken the interest it is paying in India. The TPO has observed that in a situation when the Indian company has been chosen as the tested party, the comparables rates for benchmarking the interest have to be selected from the Indian domain and the rates charged by a third party to Dabur Oncology cannot be treated as CUP. The appellant has relied on different case laws and submitted that if internal CUP @ 6.5% based on loan from HSBC and ABN AMRO is not accepted, LIBOR Rates should be applied as a basis to benchmark the international transaction of loan in its case.

The appellant has relied on the Hon"ble Delhi ITAT in the case of Cotton Naturals (I) Pvt. Ltd. (supra) and argued that the rate charged for the international transaction of loan is 7% for the FY 2007-08 (AY 2008-09) which is higher than the external LIBOR Rates prevalent during the FY 2007-08 as per table below:

	<i>1-Month</i>	<i>3-Month</i>	<i>6-Month</i>	<i>12-Month</i>
<i>LIBOR RATES-March 2008</i>	<i>2.8066%</i>	<i>2.7825%</i>	<i>2.6798%</i>	<i>2.5133%</i>

For AY 2007-08, the Ld CIT(A) XXIX has held as under:

".....I have also gone through various case laws relied upon by the appellant. It is noted that Hon'ble ITAT has laid down a principle that in case of foreign currency loan to a foreign subsidiary, domestic prime lending rate has no application and LIBOR comes into play.

10.5 Thus, I hold that, interest rate of 14% charged by the Ld. TPO is in contravention of the Rule 10(B)(2) and that interest for Dabur UK and Dabur Thailand shall be charged at LIBOR PLUS 1.5%. Accordingly, this ground is partly allowed in favour of the Appellant."

The appellant has relied on the decision of the Hon'ble Delhi ITAT in the case Cotton Naturals (supra) and other case laws wherein it has been held that LIBOR is the best measure for benchmarking loan to AE in respect of international transaction For AY 2007 08, the Ld CIT(A) XXIX has held that the interest

rate of 14% charged by the TPO is in contravention of the Rule 10(B)(2) and that interest for Dabur UK and Dabur Thailand should be charged at LIBOR PLUS 1.5%. The facts of the present case are exactly similar to the facts as in AY 2007-08 The LIBOR RATE for F.Y 2007-08 was 2.5133%. In the instant case, the rate charged for the international transaction of loan is 7% for the FY 2007-08 (AY 2008-09) which is higher than LIBOR PLUS 1.5% prevalent during FY 2007-08 Respectfully following the decision of the Hon'ble Delhi ITAT in the case of Cotton Naturals (supra) and also the decision of the Ld CIT(A) XXIX for AY 2007-08, I hold that the interest charged by the appellant at 7% from its AEs, viz., (i) Dabur Oncology Pic, UK (in short 'Dabur UK") (ii) Dabur Pharma (Thailand) Company Ltd, Thailand (in short 'Dabur Thailand j satisfies the arm length principles. Accordingly, the AO/TPO is directed to delete the addition made in this regard. These grounds of appeal are allowed."

8. Now the department is in appeal. The ld. Counsel for the assessee at the very outset sated that this issue is covered by the earlier common order dated 03.10.2018 of this Bench of the ITAT in assessee's own case in ITA Nos. 575 & 3495/Del/2014 for the assessment years 2005-06 and 2007-08 respectively (copy of the said order is placed at page nos. 87 to 124 of the assessee's compilation).

9. In his rival submissions, the ld. CIT DR strongly supported the order passed by the AO but could not controvert the aforesaid contention of the ld. Counsel for the assessee.

10. After considering the submissions of both the parties and the material available on the record, it is noticed that an identical issue having similar facts has already been adjudicated by this bench of the Tribunal in ITA Nos. 575 & 3495/Del/2014 for the assessment years 2005-06 and 2007-08 respectively. The

relevant findings have been given in paras 10 & 10.1 of the said order which read as under:

“10.0 Coming to the department’s appeal for assessment year 2007-08, it is seen that the transfer pricing adjustment comprise of two limbs viz. corporate guarantee fee and interest on loan. As far as the issue of corporate bank guarantee is concerned, the issue arose because the assessee had failed to 32 charge service fee for the corporate guarantee given to its UK subsidiary and the TPO, after obtaining information u/s 133(6) of the Act from State Bank of India regarding rate of bank guarantee, proposed the ALP adjustment at 4.75% as against nil being claimed by the assessee. It is well settled that providing bank guarantee is an international transaction and the same needs to be benchmarked as per provisions of Section 92(1) of the Act. The Ld. Commissioner of Income Tax (A) has also held so and thereafter he proceeded to compute the corporate guarantee fee @ 0.5%. While doing so, the Ld. Commissioner of Income Tax (A) observed that the assessee had given corporate guarantee to a foreign bank for providing loan to its foreign AE in foreign currency whereas the TPO had considered the quote for giving guarantee in India. The Ld. Commissioner of Income Tax (A) also took into account the fact that the assessee’s bank was ABN AMRO whereas the TPO had used the quote from the SBI. The Ld. Commissioner of Income Tax (A) thereafter placed reliance on the quote from Royal Bank of Scotland (RBS) (formerly ABN AMRO Bank) and held that there was a saving of 1% in this regard, the benefit of which was attributable both to the assessee as well as the foreign AE. Thereafter by splitting the benefit between the two, the Ld.CIT (A) arrived at corporate bank fee of 0.5%. We agree with the observation of the Ld. Commissioner of Income Tax (A) that this letter from RBS Bank has more evidentiary value as it is from the very same bank which gave loan to Dabur UK. The Ld. Commissioner of Income Tax (A) has also recorded a finding that he has also examined the terms and conditions of the loan agreement dated 17.3.2006 between ABN AMRO Bank, Dabur UK and that Dabur UK has provided adequate security collaterals to the satisfaction of the Bank. The Ld. Commissioner of Income Tax (A) has also mentioned that the bank had the first charge on the assets of the borrower as security for the loan. The Department was not able to point out any factual infirmity in this categorical observation of the Ld. Commissioner of Income Tax (A). However, we do not fully agree with the findings of the Ld. Commissioner of Income Tax (A) in this regard that the benefit of interest saving of 1% should be shared

between the AE and the assessee equally as no cogent reasoning has been given for the same and, accordingly, we deem it fit to modify the order of the Ld. Commissioner of Income Tax (A) in this regard to the extent that corporate guarantee fee @1% should be applied in the case of the assessee in place of 0.5% as has been applied by the Ld. Commissioner of Income Tax (A). We accordingly direct the Assessing Officer to re-compute the ALP for corporate guarantee fee @1%. Thus, this ground stands partly allowed.

10.1 Coming to the second limb of the transfer pricing adjustment which pertains to interest on loan, it is seen that the assessee had given loan to two foreign subsidiaries in UK and Thailand and had charged interest rate of LIBOR plus 1.1% and 7% respectively whereas the TPO had applied the interest rate at 14%. The reason for the TPO in applying interest rate of 14% was that since the assessee has chosen itself as the tested party, the rate to be applied was to be seen from the perspective of the tested party in the Indian bank and further for the reason that the loan advance of Dabur Thailand was from borrowed capital. While allowing relief to the assessee, the Ld. Commissioner of Income Tax (A) took into consideration the submission of the assessee that the loan advanced to the UK subsidiary was at LIBOR plus 1.1% and the loan taken by the UK subsidiary from ABM AMRO Bank was at LIBOR +1.5% with the corporate guarantee of the assessee and further the corporate guarantee loan was available to the UK subsidiary at LIBOR plus 1.5%. With respect to the loan to Dabur Thailand @7%, the Ld. Commissioner of Income Tax (A) was of the view that LIBOR plus 1.5% could be used as the basis for arriving at the ALP for the loan transaction. Accordingly, the Ld. Commissioner of Income Tax (A) held that interest of both the loans was to be charged at LIBOR plus 1.5%. We also note that the Ld. DRP for immediately preceding assessment year 2006-07 has held that the foreign loan given to UK subsidiary was to be benchmarked at LIBOR plus 100 bps plus certain risk adjustment and accordingly, rate of LIBOR plus 300 bps was proposed by the Ld. DRP. Although the Ld. Commissioner of Income Tax (A) has duly made a mention of this direction of the Ld. DRP for assessment year 2006-07, it is apparent that he has not considered the directions of the Ld. DRP while deciding this issue. We also note that the assessee has not filed any appeal against this direction of the Ld. DRP for assessment year 2006-07. Accordingly, in view of the factual matrix, this issue needs to be restored to the file of the Ld. Commissioner of Income Tax (A) to be decided afresh after

considering the directions of the Ld. DRP in this regard in assessment year 2006-07 and after giving the assessee a proper opportunity present its case. Accordingly, this ground stands allowed for statistical purposes.”

11. So, respectfully following the said order dated 03.10.2018, this ground is partly allowed for statistical purposes as has been directed in the said order dated 03.10.2018.

12. The next issue vide ground no. 2 relates to the deletion of addition of Rs.17,94,174/- made by the AO on account of excess claim of depreciation u/s 32 of the Act.

13. The fact related to this issue in brief are that the assessee received a capital subsidy of Rs.1.50 crore under West Bengal Incentive Scheme, 2000 as part of interest fixed asset. The AO reduced the cost of the fixed assets by the capital subsidy and consequently reduced depreciation by Rs.17,94,174/-.

14. Being aggrieved the assessee carried the matter to the Id. CIT(A) who deleted the addition by following the order of his predecessor for the assessment year 2007-08 and the relevant findings have been given in para 8.4 of the impugned order which read as under:

“8.4 I have carefully considered the facts of the case. The issue whether subsidy of Rs.1.50 crores received by the appellant in FY 2006-07 is revenue or capital has already been decided by the Ld. CIT(A)-XXIX in AY 2007-08 in favour of the appellant. In AY 2007-08 the Ld. CIT(A) has held that subsidy received by the appellant is in nature of capital receipt and it would not go to reduce cost of acquisition of fixed assets. In view of it, the AO is directed to delete the disallowance of depreciation of Rs.17,94,174/- in this regard. These grounds of appeal are allowed.”

15. Now the department is in appeal. The Id. Counsel for the assessee at the very outset stated that this issue is squarely covered by the earlier order dated 03.10.2018 in ITA No. 575 & 3495/Del/2014 (supra).

16. In his rival submissions, the Id. CIT DR supported the order of the AO.

17. After considering the submissions of both the parties and the material available on the record, it is noticed that a similar issue had already been adjudicated by this bench of the Tribunal in assessee's own case wherein the relevant findings have been given in para 10.2 of the aforesaid referred to order dated 03.10.2018 which read as under:

“10.2 Coming to the remaining issue which is the deletion of disallowance of Rs 20,92,221/- pertaining to capital subsidy, it is seen that the assessee had, in terms of West Bengal Incentive Scheme 2000, expanded its existing industrial unit at Kalyani, West Bengal and was accordingly eligible for a state investment subsidy of Rs. 1.50 crore in terms of the West Bengal industrial policy. This payment was received on 23.09.2006 and the assessee credited the same to its capital reserve account treating the same as capital receipt. However, the Assessing Officer treated the same as revenue receipt and reduced the same from the fixed cost of assets and, thereafter allowed depreciation post the offset of subsidy. The Ld. Commissioner of Income Tax (A) has noted that he has examined the documents relating to West Bengal Incentive Scheme, 2000 and that further this subsidy is a one-time receipt. It has also been mentioned that nowhere on the perusal of the documents it was found that the subsidy was to be related to the reduction of the cost of fixed assets and, further the recipient of the subsidy was free to use the subsidy in any manner. We find that an identical issue had arisen before the Kolkata Bench of the ITAT in Bhagwati Sponge (P) Ltd. vs. DCIT reported in (2016) 72 taxmann.com 40 (Kolkata – Trib.) and the co-ordinate Bench held that the capital investment subsidy received from state government could not be reduced from the cost of capital asset for allowing depreciation. Accordingly, respectfully following the order of the

co-ordinate Bench as afore said, we find no reason to interfere with the findings of the Ld. Commissioner of Income Tax (A) on this issue and we dismiss the grounds raised by the department in this regard.”

18. So, respectfully following the aforesaid referred to order dated 03.10.2018 in ITA Nos. 575 & 3495/Del/2014 for the assessment years 2005-06 and 2007-08 respectively, we do not see any valid ground to interfere with the findings given by the ld. CIT(A).

19. In ITA Nos. 6264/Del/2015 for the assessment year 2009-10, similar issues are raised by the department. The only difference is that the issue relating to corporate guarantee is not involved in the year under consideration which was there in the preceding year i.e. assessment year 2008-09 in ITA No. 3013/Del/2015. Therefore, our findings given in the former part of this order shall apply *mutatis mutandis* for this year also.

20. In the result, the appeals of the department are dismissed.
(Order Pronounced in the Open Court on 31/12/2018)

Sd/-
(Beena A. Pillai)
JUDICIAL MEMBER

Sd/-
(N. K. Saini)
ACCOUNTANT MEMBER

Dated: 31/12/2018

Subodh

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR