

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: Bench 'I-1', NEW DELHI**

**BEFORE SHRI R.K.PANDA, ACCOUNTANT MEMBER
AND SMT. BEENA A PILLAI, JUDICIAL MEMBER**

**ITA No. 1972/Del/2015
AY: 2010-11**

**ITA No. 1787/Del/2016
AY: 2011-12**

**ITA No. 7085/Del/2017
AY: 2012-13**

Whirlpool of India Ltd. Plot No.40, Sector – 44 Gurgaon 122 002 PAN: AAACW1336L	vs.	DCIT, LTU New Delhi
(Appellant)		(Respondent)

Appellant by : Sh. Ajay Vohra, Sr. Adv.
Sh. Neeraj Jain, Adv. &
Mr. Ramit Katyal, C.A.

Respondent by : Sh. Sanjay I Bara, CIT(DR)

Date of Hearing : 08/01/2019

Date of Pronouncement: 18/01/2019

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

Present appeal has been filed by assessee against order dated 26/02/2015 passed by DCIT LTU-1, New Delhi under section 143(3) read with 144C of the Income Tax Act, 1961(the Act). At the outset Ld. Counsel submitted that, grounds raised by assessee in all years under

consideration are same and identical. This fact has not been disputed by Ld.CIT DR and therefore, we have taken these appeals to be disposed off, by way of common order. For sake of convenience, grounds for assessment year 2010-11 are reproduced hereunder:

General Ground:

1. *That the impugned order of assessment framed by the officer in pursuance of the directions of the Dispute Resolution Panel (hereinafter referred to as 'DRP') under Section 143(3) read with Section 144C of the Income-tax Act, 1961 ('Act'), is bad in law, violative of principles of natural justice and void ab-initio.*
 - 1.1 *That the assessing officer erred on facts and in law in determining income of the appellant at Rs. 4,455,589,972 against returned total income of Rs. 1,941,316,860.*

Transfer Pricing Matters:

2. *That the assessing officer erred on facts and in law in making addition of Rs. 243,85,14,991 on account of alleged difference in the arm's length price of international transactions resulting from the advertisement, marketing and sales promotion expenses (hereinafter referred to as 'the AMP expenses') incurred by the appellant on the basis of the order passed by the TPO under section 92CA(3) of the Act.*
 - 2.1. *That the assessing officer erred on facts and in law in holding that the (i) associated enterprise is the beneficiary of the efforts of the appellant and (ii) the assessee is creating a marketing intangible in favour of the associated enterprise.*
 - 2.2. *That the DRP erred on facts and in law in holding that the appellant has been developing local marketing intangibles for its associated enterprise in India by (i) promoting brands owned by the associated enterprises and creating awareness among Indian customers and (ii) developing and maintaining network of sub distributors, dealers, retailers and other business partners.*

- 2.3. *That the DRP erred on facts and in law in not appreciating that by virtue of agreements entered into with Indian distributors, dealers, and retailers the distribution network in India is owned by the appellant.*
- 2.4. *That the DRP erred on facts and in law in holding that the expenditure incurred towards promotion of marketing intangibles enhancing the value of the intangible property is an international transaction*
- 2.5. *The DRP/TPO erred on facts and in law in not appreciating that the AMP expenses, etc., unilaterally incurred by the appellant in India could not be characterized as an international transaction as per section 92B, in the absence of any proved understanding / arrangement between the appellant and the associated enterprise, so as to invoke the provisions of section 92 of the Act.*
- 2.6. *The DRP erred on facts and in law in not holding that the Indian company had incurred expenditure on advertisement of the products in India and merely because the AMP expenses incurred by the taxpayer, were proportionately higher than those incurred by comparable cases taken by the TPO, did not lead to the inference of “transaction” between the taxpayer and the foreign AE for creating marketing intangibles on behalf of the later.*
- 2.7. *The Dispute Resolution Panel (DRP)/TPO erred on facts and in law in not appreciating that the only Transfer Pricing adjustment permitted by Chapter X of the Act was in respect of the difference between the arm’s length price (ALP) and the contract or declared price, but the said provision could not be invoked to determine the ‘quantum’/extent of business expenditure.*
- 2.8. *The DRP/TPO erred on facts and in law in holding that expenditure incurred by the appellant which incidentally resulted in brand building for the foreign AE, was a transaction of creating and improving marketing intangibles for and on behalf of its foreign AE*

and further that such a transaction was in the nature of provision of a service by the appellant to the AE.

- 2.9. That the DRP/TPO erred on facts and in law in not appreciating that adjustment on account of allegedly excess AMP expenses is unwarranted in the case of the appellant, a full risk bearing manufacturer/distributor.*
- 2.10. That the DRP/TPO erred on facts and in law in re-characterizing the appellant, a full risk bearing manufacturer/distributor, as a limited risk service provider entitled to cost plus remuneration for its marketing efforts.*
- 2.11. Without prejudice that the DRP/TPO erred on facts and in law in not appreciating that since the AMP expenses incurred by the appellant ought to have been benchmarked by aggregating the same with other closely linked transactions undertaken by the appellant*
- 2.12. Without prejudice that the DRP/TPO erred on facts and in law in not appreciating that since the operating profit margins of the appellant were higher than margins of the comparable companies, the appellant was adequately compensated for the allegedly excess AMP expenses incurred by the appellant.*
- 2.13. That the DRP/TPO erred on facts and in law in holding that the entity in control of the intangible asset is treated as the owner, not appreciating that the appellant, by performing the critical decision making functions is controlling the intangible, and accordingly shall be considered as owner of such intangible.*
- 2.14. That the DRP/TPO erred on facts and in law in holding that the appellant has developed marketing intangible for 'Whirlpool' brand by bearing significant cost and risks and was accordingly entitled to get reimbursement of the cost incurred by it in excess of routine distributor.*
- 2.15. That the DRP/TPO erred on facts and in law in holding that benefit accruing to the associated enterprise is not incidental and instead*

the increase in sale of the appellant is actually the incidental benefit arising as a result of incurring the AMP expenses.

- 2.16. *That the DRP/TPO erred on facts and in law in holding that the AEs are deriving huge benefit from the intangible developed by the appellant by way of enhanced sale of products in India not appreciating that the associated enterprise is not selling any goods directly in India.*
- 2.17. *That the DRP/TPO erred on facts and in law in arbitrarily holding that if the associated enterprise decides to distribute the products by itself or through some other entity in India after terminating the contract with the appellant, it would enjoy the fruits of efforts put in by the appellant for promoting the brand.*
- 2.18. *That the DRP erred on facts and in law in based upon assumptions and surmises, holding that the associated enterprise can terminate the license agreement at any given time because of the peculiar relationship between the assessee and the associated enterprise.*
- 2.19. *That the DRP/TPO erred on facts and in law in relying on the US transfer pricing guidelines not appreciating that even under such guidelines the appellant, being the licensed user of 'Whirlpool' brand in India would be treated as owner of such brand for transfer pricing purposes.*
- 2.20. *That TPO/DRP erred on facts and in law in not appreciating that such a Transfer Pricing adjustment could not at all be made in respect of AMP expenses which were found to constitute legitimate, bonafide and deductible business expenditure and the appellant was the economic owner of the benefit of such expenses.*
- 2.21. *Without prejudice, the DRP /TPO erred on facts and in law in not appreciating that even if marketing intangible has been created then the appellant is the economic owner of such intangible.*
- 2.22. *The DRP/TPO erred on facts and in law in applying Bright Line Test (BLT) for computing adjustment on account of expenditure on*

advertisement and brand promotion expenses, without appreciating that BLT is beyond the provisions of Chapter X and has no mandate under the Act.

- 2.23. *Without prejudice that the DRP/TPO erred on facts and in law, in not appreciating that the AMP expenses incurred by the appellant was appropriately established to be at arm's length applying TNMM and aggregating the AMP expenses with other closely linked transactions undertaken by the appellant.*
- 2.24. *That the DRP/TPO erred on facts and in law in not excluding the Rebate Discount/Pricing adjustment of Rs.204,55,83,442 from the quantum of AMP expenditure, allegedly holding that " the question being investigated is 'marketing intangible' and not just 'brand promotion' alone in the instant case.*
- 2.25. *That the DRP/TPO erred on facts and in law in holding that commission on sales or sales discount etc. help the company to create loyalty among distributors not appreciating that such expenses are incurred only for effecting the sales and not for promoting the brand.*
- 2.26. *That the DRP erred on facts and in law in holding that selling expenses are incurred by the appellant for promotion of the brand through creation of a net work of dealers and shops and are leading to the creation of marketing intangibles.*
- 2.27. *That TPO erred on facts and in law in excluding salary paid to product demonstrators amounting to Rs.9,97,38,593/- from the AMP expenses, despite the direction of the DRP to not to include such expenses if they have no direct nexus with the creation of intangibles.*
- 2.28. *That the TPO/DRP erred on facts and in law in holding that the appellant has rendered service to the AEs by incurring the AMP expenses and by holding that mark up has to be earned by the appellant in respect of the AMP expenses, alleged to have incurred*

for and on behalf of the AE.

- 2.29. *Without prejudice, the TPO/DRP erred on facts and in law in not appreciating that mark up, if at all, had to be restricted to the value added expenses incurred by the appellant for providing the alleged service in the nature of brand promotion.*

Corporate Tax Additions:

3. *That the assessing officer/DRP erred on facts and in law in making an addition of Rs.15,77,011 alleging that the assessee has made cash deposit to that extent, holding the same to be unexplained money in terms of section 69A of the Act.*
4. *That the assessing officer erred on facts and in law in making an addition of Rs.10,546 allegedly on account of difference in the sales tax deposited by the assessee in Bangalore on the basis of unsubstantiated information received from individual transaction statement/Air information.*
5. *That the Assessing Officer/DRP erred on facts and in law in making an addition of Rs. 25,30,000/- allegedly on account of lease payment made by the appellant to Bird Automotive Pvt. Ltd. on the basis of information obtained from individual transaction statement/AIR information.*
6. *That the Assessing Officer/DRP erred on facts and in law in making an addition of Rs. 21,26,953/- allegedly on account of payment made towards club membership fee or hotel bills, outside the books of accounts and unaccounted in the return of income on the basis of individual transaction statement/AIR information.*
7. *That the Assessing Officer/DRP erred on facts and in law in making disallowance of Rs. 2,43,85,14,991/- being expenses incurred on advertisement and publicity on an alternative basis holding that such expenses were not wholly and exclusively incurred for the purpose of the business of the assessee.*

8. *That the Assessing Officer/DRP erred on facts and in law in making an addition of Rs. 8,87,611/- allegedly being undisclosed income, on the basis of difference in the TDS claimed by the appellant and amount of TDS reported in the individual transaction statement/AIR information.*
9. *That the Assessing Officer/DRP erred on facts and in law in making an addition of Rs. 3,60,76,000 invoking the provisions of section 40(a)(ia) of the Act, allegedly on account of shortfall in tax deducted at source on the basis of the individual transaction statement /AIR information.*
10. *That the Assessing Officer/DRP erred on facts and in law in making disallowance of Rs. 3,25,50,000/- being provision for expenses of package tour holding the same to be contingent in nature.*
11. *That the Assessing Officer erred on facts and in law in levying interest under section 234B, Section 234C and Section 234D of the Act.*
12. *That the Assessing Officer erred on facts and in law in initiating penalty proceedings under section 271(1)(c) of the Act.*

The appellant craves leave to add, amend, alter or vary, any of the aforesaid grounds of appeal before or at the time of hearing of the appeal.”

Asst: Yr:2010-11

2. Brief facts of the case are as under:

Assessee filed its return of income declaring 'Nil' under normal provisions of the Act and income of Rs.2,11,96,44,616/- under section 115JB of the Act, on 14/10/2010. The same was processed under section 143(1) of the Act, and subsequently was selected for scrutiny. Accordingly, notice under section 143(2) of the Act was issued followed by notices under section 142(1) and questionnaire.

2.1. Ld.AO, during assessment proceedings, observed that assessee had entered into international transaction with its AE and since value of such transactions exceeded more than Rs. 15 crores, case was referred to Transfer Pricing Officer (TPO). Ld.TPO on receipt of reference, issued notice to assessee and called upon to file documentations prescribed under Rule 10 D of Rules, 1962 and other details as called for.

2.2. Ld.TPO observed that assessee is a subsidiary of Whirlpool USA, and is engaged in production, sale and distribution of Whirlpool appliances. It was observed that assessee entered into following international transaction:

Nature of international transactions	Method	Amount (In Rs.)
Purchase of raw materials, components & spares	TNMM	473,706,494
Purchase return	TNMM	115,906
Sale of Spares	TNMM	17,679,550
Purchase of finished goods & spares	TNMM	144,546,214
Sale of finished goods	TNMM	1,272,334,718
Technical and brand assistance fee	TNMM	303,030,776
Service Income	TNMM	645,925,115
Interest received	TNMM	25,287,505
Cost Recharges paid	TNMM	45,273,697
Cost Recharges received	CUP	102,180,049

2.3. Ld.TPO after calling for all requisite details and submissions from assessee computed adjustment as under:

Computation of TP adjustment	(In Rs.)
Value of Gross Sales	26,02,91,03,000
AMP/Sales of the Comparables	2.39%
Amount that represents bright line	62,20,95,561
Expenditure on AMP by assessee	2,78,96,64,442
Expenditure in excess of bright line	2,16,75,68,881
Mark-up at 12.50%	27,09,46,110

Reimbursement that assessee should have received	2,43,85,14,991
Reimbursement actually received	N i l
Adjustment to assessee's income	2,43,85,14,991

3. Aggrieved by adjustment made, assessee raised objections before the DRP. DRP in their direction dated 18/12/14 directed Ld.TPO/AO to examine nature of salary and remuneration amounting to Rs.9,97,38,593/-, spent by assessee. Ld.TPO upon verification did not make any changes in addition proposed in draft order. Thereafter, upon receipt of such intimation from Ld.TPO, Ld.AO passed final assessment order by determining the total income of assessee at Rs.4,45,55,89,972/-, as against returned income of Rs.1,94,13,16,860/-.

4. Aggrieved by order of Ld. AO, assessee is in appeal before us now.

5. At the outset, Ld. Counsel submitted that **Ground No. 1** raised by assessee is general in nature, and therefore do not require any adjudication. **Accordingly the same is dismissed.**

6. **Ground No. 2 to 2.29** has been raised against adjustment made by Ld.AO on account of alleged excessive AMP expenses amounting to Rs.243.85 crores. It has been submitted by Ld. Counsel that said issue now stands squarely covered in assessee's own case by *order of this Tribunal in ITA No.426/Del/2013 for Assessment Year 2008-09 vide order dated 13/01/14 reported in (2014) 42 taxmann.com 553*, which is upheld by *Hon'ble Delhi High Court reported in (2015) 64 taxmann.com 324*.

At this juncture, Ld.Sr.DR submitted that against order of *Hon'ble Delhi High Court*, revenue preferred appeal before *Hon'ble Supreme Court* which

is pending for final hearing. He submitted that till disposal of matter by *Hon'ble Supreme Court*, the issue may be kept in abeyance.

7. We have considered rival contentions of both sides in light of records and orders passed on this issue by Coordinate Benches of this Tribunal as well as *Hon'ble Delhi High Court*.

7.1. From records placed before us, it is observed that, undisputedly Ld.TPO proposed adjustment on account of AMP expenses by applying bright line test. It is observed that Ld.TPO as well as DRP treated AMP expenses as international transaction by applying ratio laid down by *Special Bench* decision of this *Tribunal* in case of *LG Electronics India Pvt. Ltd., vs. ACIT* reported in (2013) 29 *Taxmann.com* 300, which stands overruled by decision of *Hon'ble Delhi High Court* in case of *Sony Ericson India Pvt.Ltd vs. CIT* reported in (2015) 55 *Taxmann.com* 240. *Hon'ble Court* while deciding *Sony Ericson India Pvt.Ltd (supra)* categorically held that bright line test is not an appropriate yardstick for determining existence of an international transaction for calculating arm's length price.

7.2. *Hon'ble Delhi High Court* while deciding question of law raised for Assessment Year 2008-09 held as under:

“Conclusion

47. For the aforementioned reasons, the Court is of the view that as far as the present appeals are concerned, the Revenue has been unable to demonstrate by some tangible material that there is an international transaction involving AMP expenses between WOIL and Whirlpool USA. In the absence of that first step, the question of determining the ALP of such a transaction does not arise. In any event, in the absence of a machinery provision it would be hazardous for any TPO to proceed to determine the ALP of such a transaction since BLT has been negatived by this Court as a valid

method of determining the existence of an international transaction and thereafter its ALP.

48. Question (i) in the Assessee's appeal viz., "Was there an international transaction between WOIL and its AE involving the AMP expenses within the meaning of Section 92B of the Act read with Section 92F(v) of the Act?" is answered in the negative, i.e., in favour of the Assessee and against the Revenue. Consequently Question (ii) in the Assessee's appeal is not required to be answered. Further, the only question framed in the Revenue's Appeal viz., "Whether the ITAT erred in deleting the addition of Rs. 180,73,10,769 made by the AO/TPO on account of AMP expenses under Section 37 of the Act?" is answered in the negative, i.e. in favour of the Assessee and against the Revenue.

49. The impugned order of the ITAT and the corresponding orders of the DRP and the TPO, on the above issues are hereby set aside. The appeal of the Assessee, ITA No. 228 of 2015 is allowed and the appeal of the Revenue, ITA No. 610 of 2014 is dismissed in the above terms, but in the circumstances with no orders as to costs."

7.3. On perusal of orders passed by Ld.TPO/AO/DRP for year under consideration, it is observed that AMP expenditure has been considered to be international transaction by applying bright line test, whereby Ld.TPO proposed an adjustment of 243.8 crores.

7.4. Ld.Sr.DR preferred adjournment application on the ground that issue involved in present appeal is in respect of AMP adjustment. He submitted that consistent stand has been taken by revenue before this Tribunal to request for adjournment in all appeals, where AMP adjustment has been disputed by either parties on ground that *Hon'ble Supreme Court* is ceased with the matter.

7.5. During the course of argument Ld.Sr.DR sought permission from the Bench to file written submission regarding issues raised by assessee which was granted. Accordingly, on 10/01/2019 a detailed written

submission has been filed by revenue in respect of issues raised by assessee for all years under consideration which is taken on record.

7.6. Plea taken by revenue in written submission to justify AMP adjustment proposed by Ld.TPO that assessee has been working for benefit of foreign AE and deserves suitable remuneration. Heavy reliance has been placed by Ld.Sr.DR on BEPS Guidelines, provided for Transfer Pricing of intangibles, under Action Plan 8-10 of GE 20/OECD BEPS project in support of adjustment.

7.7. It has further been alleged by Ld.Sr.DR that, there is mutual agreement/arrangement between assessee and its AE, for discharge of function of marketing and market development in addition to agreement/arrangement for sale and distribution of goods purchased from its AE, for which cost has been borne by AE. Ld.TPO has also rejected claim that assessee is a full risk bearing manufacturer/distributor, as there is no supporting ground for the same.

8. In our considered opinion, since basis on which adjustment has been made being bright line test itself has been rejected by *Hon'ble Delhi High Court* in assessee's own case for Assessment Year 2008-09, no further interference can be called for at this stage. Further reliance placed by Ld.Sr.DR on BEPS guidelines and action plan 8-10 cannot be applied as the same is yet to be implemented.

8.1. Further it has been submitted by both sides that facts and circumstances in present appeal are no manner different with that of Assessment Year 2008-09 that was for consideration before this Tribunal and thereafter before *Hon'ble High Court*. In our considered opinion under such circumstances, no purpose will be served by keeping present

appeal pending, as issues raised by revenue in assessee's own case along with other cases, has not been listed before *Hon'ble Supreme Court*. We are therefore inclined to follow view taken by this *Tribunal* in assessee's own case which has been upheld by *Hon'ble High Court* for Assessment Year 2008-09. We therefore, reject prayer advanced by Ld.Sr.DR for adjournment. It is observed that similar view has been taken by this *Tribunal in assessee's own case for assessment year 2009-10* in *ITA No.1254/del/2014 vide order dated 26/11/18*.

8.2. However, we appreciate the concern raised by Ld.Sr.DR that decision of *Hon'ble Supreme Court* will be binding upon assessee as well as revenue. We are therefore, inclined to set aside this issue to Ld.AO/TPO to pass fresh order considering decision of *Hon'ble Supreme Court*. Needless to say that proper opportunity shall be granted to assessee of being heard.

Accordingly Grounds 2 to 2.29 stand allowed for statistical purposes.

9. Amongst corporate grounds raised by assessee, Ld.Counsel submitted that **Ground Nos. 3, 4, 5, 6, 8, 9** has been raised due to mismatch in 26 A-S. He submitted that at the time of assessment, all details regarding claim raised in these grounds were not available with assessee due to which reconciliation could not be drawn. However Ld.Counsel submitted that now assessee has all relevant information to file reconciliation statement in respect of same. He submitted that these grounds may be set-aside to Ld.AO for due verification on basis of submissions advanced by assessee.

9.1. Ld.Sr.DR does not object to plea advanced by Ld. Counsel.

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

9.3. Perusal of record it appears that differential amount reflected in form 26 A-S were not properly reconciled. As now assessee has all relevant information for the same, in the interest of natural Justice, we direct Ld. AO to tally database of revenue in light of details filed by assessee.

9.4. We are therefore inclined to set aside these grounds to Ld.AO for reconciliation.

Accordingly Ground Nos. 3, 4, 5, 6, 8, 9 are allowed for statistical purposes.

10. Ground No. 7 has been raised by assessee regarding disallowance of expenses under section 37 of the Act, incurred by assessee on account of alleged AMP expenses.

10.1. Ld.Counsel submitted that this issue has been considered by *Hon'ble High Court* assessee's own case which has been referred to herein above. He submitted that issue relates to AMP expenses which have been disallowed by Ld.AO under section 37 of the Act. Ld.Counsel submitted that *Hon'ble High Court* has answered the question in negative that is in favour of assessee and against revenue.

10.2. Ld.Sr.DR placed reliance upon order of authorities below and submitted that this issue is also interconnected with main issue of treatment of AMP expenses as international transaction.

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

10.4. As the issue relating to nature of AMP expenses being international transaction or not has been set aside to Ld.AO in preceding paragraphs, the allowability of such expenses claimed by assessee under section 37 of the Act also deserves to be set-aside. The outcome of this ground raised depends upon decision of *Hon'ble Supreme Court* in assessee's own case.

Accordingly this ground raised by assessee stands allowed for statistical purposes.

11. Ground No. 10 is in respect of disallowance of Rs.3,25,50,000/- giving provision for expenses of tour packages given to dealers.

11.1. Ld.Counsel submitted that dealers are given tour packages. It has been submitted that vision for tool packages were made on accrual basis to account for achievement of sales targets and necessary to and resultant expenses these were accounted for in subsequent financial years.

11.2. Ld.AO disallowed it by holding that expenses are of contingent in nature which depends upon happening of certain event and therefore not allowable for year under consideration. Is it is also submitted by Ld.Sr.DR that provision made towards expenses were not actual expenses incurred which has been crystallised during year under consideration and therefore same is not allowable.

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

No doubt, unless expenditure is actually incurred, or it is accrued during relevant year, it would not be allowed as deduction. Liability has to be *in praesenti*. However at the same time, in present scenario where assessee's employees or dealers achieved sales target, assessee offered

foreign tours, expenses of which were accounted for in subsequent year, which is consistent with Accounting Standards and these accounting standards also lay down the norms indicating the particular point of time when the provisions for all known liabilities and losses has to be made, the making of such a provision by assessee appears to be justified, more so when assessee has actually made payment to such employees/dealers and provision has been made. The only difference is that, expenses were accounted for in subsequent financial year. It is undisputed that expenditure incurred by assessee is admissible deduction. The only dispute that Revenue seeks to raise is regarding year of allowability of expenditure. Considering that assessee is a company assessed at uniform rate of tax, entire exercise of seeking to disturb year of allowability of expenditure is, in any case, revenue neutral.

11.4. However, DRP notes that assessee has not discharged onus to substantiate its claim with actual figures for such package tools undertaken by employees/dealers as a part of incentives. Even from the records we understand that no documents/evidences have been placed to establish the claim. We are therefore inclined to set aside this issue back to learn the AO/TPO for readjudication. Assessee shall file all requisite details in order to establish the claim. It shall give itemised details regarding the incentives that have been awarded to its employees or dealers as the case may be. Ld. AO/TPO shall then verify the same and if found in order shall allow the claim of assessee even though the expenses has been accounted for in subsequent financial year.

Before we part with, We are reminded of a classic observations by *Hon'ble Bombay High Court* in case of the *CIT v. Nagri Mills Co. Ltd.*, reported in (1958) 33 ITR 681, which reads as under:

“We have often wondered why the Income-tax authorities, in a matter such as this where the deduction is obviously a permissible deduction under the Income-tax Act, raise disputes as to the year in which the deduction should be allowed. The question as to the year in which a deduction is allowable may be material when the rate of tax chargeable on the assessee in two different years is different; but in the case of income of a company, tax is attracted at a uniform rate, and whether the deduction in respect of bonus was granted in the assessment year 1952-53 or in the assessment year corresponding to the accounting year 1952, that is in the assessment year 1953-54, should be a matter of no consequence to the Department; and one should have thought that the Department would not fritter away its energies in fighting matters of this kind. But, obviously, judging from the references that come up to us every now and then, the Department appears to delight in raising points of this character which do not affect the taxability of the assessee or the tax that the Department is likely to collect from him whether in one year or the other.”

11.5. The aforesaid observations of *Hon'ble Bombay High Court* has been reiterated by *Hon'ble Delhi High Court* in the case of *CIT v. Shri Ram Pistons & Rings Ltd.* Reported in [2008] 174 Taxman 147, as under :

“Finally, we may only mention what has been articulated by the Bombay High Court in Commissioner of Income Tax, Delhi, Ajmer,

*Rajasthan and Madhya Pradesh v. Nagri Mills Co. Ltd. [1958] 33
ITR 681 as follows :*

In the reference that is before us there is no doubt that the Assessee had incurred an expenditure. The only dispute is regarding the date on which the liability had crystallized. It appears that there was no change in the rate of tax for the assessment year 1983-84 with which we are concerned. The question, therefore, is only with regard to the year of deduction and it is a pity that all of us have to expand so much time and energy only to determine the year of taxability of the amount.”

Ld. AO/TPO shall keep in mind the underlying ratio rendered in the above referred decisions while deciding the allowability of claim of assessee.

Accordingly this ground raised by assessee stands allowed for statistical purposes.

12. Ground No. 11 is in respect of levy of interest under section 234B, 234C and 234D of the Act which is consequential in nature and **Ground No. 12** is in respect of penalty proceedings under section 271 (1) (c) of the Act which is premature at this stage and does not require any adjudication.

In the result appeal filed by assessee for Assessment Year 2010-11 stands allowed as discussed above.

13. In respect of **Assessment Year 2011-12 to 2012-13**, Ld.Counsel submitted that all grounds are identical and similar to that of 2010-11. Ld.Sr.DR did not object to submissions advanced by Ld.Counsel in respect of the same.

Accordingly, we decide grounds raised for Assessment Years 2011-12 to 2012-13 in similar manner as Assessment Year 2010-11 hereinabove.

14. For **Assessment year 2011-12** assessee raised before us additional ground in terms of rule 11 of Income Tax (Appellate Tribunal) Rules, 1963, which reads as under:

“ 1. That on the facts and circumstances of the case and in law, the DRP /assessing officer erred in not holding that the appellant was eligible for claiming weighted deduction under section 35(2AB) of the Act in respect of expenses incurred by in-house research & development facility, which was approved by Department of Scientific & Industrial Research. Ministry of Science & Technology (DSIR) vide their approval dated November 5, 2012.

2. That on the facts and circumstances of the case and in law, the DRP/assessing officer erred in not allowing weighted deduction of research & development expenses amounting to Rs. 21,96,33,264 incurred during the relevant previous year as per section 35(2AB) of the Act.”

14.1. Ld.Counsel submitted that assessee raised additional ground in view of legal position recently clarified by *Hon’ble Delhi High Court* in case of *Maruti Suzuki India Ltd vs Union of India* reported in (2017) 84 *Taxmann.com* 45 wherein, *Hon’ble Delhi High Court* while clarifying the position of law in this regard held that, section 35 (2 AB) clearly provides that, any expenditure incurred by a party on its R & D facility except, insofar as it relates to land and building liable to be allowed to be claimed as deduction.

14.2. Ld.Counsel submitted that *Hon’ble Delhi High Court* further held that for availing benefit under section 35 (2AB), what is relevant is not

date of recognition or cut-off date mentioned in Certificate of DISR or even date of approval, but existence of recognition. He further submitted that *Hon'ble Delhi High Court* thus opined through this decision that, if an R&D centre is not recognised, it is not entitled to deduction under section 35 (2 AB) of the Act. He placed reliance upon decision of *Hon'ble Gujarat High Court* in case of *CIT vs Claris Lifesciences Ltd.*, reported in 326 ITR 251, which has been referred to and relied upon by *Hon'ble Delhi High Court* while deciding the case of *Maruti Suzuki India Ltd (supra)*.

14.3. Considering legality of issue involved that has been clarified by *Hon'ble Delhi High Court*, we deem it fit and proper to admit additional ground so raised by assessee.

14.4. While arguing upon issue in additional ground, Ld.Counsel placed reliance upon various documents which was not before Ld.AO for his consideration and verification.

14.5. Ld.Sr.DR therefore submitted that the issue may be set-aside to Ld.AO for verification and consideration on basis of documents filed by assessee.

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

14.7. This issue has been raised by Ld.Counsel for first time, before us, and considering legality of claim, raised in additional ground it has already been admitted hereinabove in preceding paragraphs. However, we are of opinion that Ld.Assessing Officer has not got an opportunity to verify claim in light of documents relied upon by assessee before us. In the interest of natural Justice, we set aside this issue to Ld.AO for due verification of documents and to consider claim of assessee in light of

decision delivered by *Hon'ble Delhi High Court* in case of *Maruti Suzuki India Ltd (supra)*. Needless to say that Ld.AO shall grant proper opportunity to assessee as per law to represent its claim.

Accordingly the additional grounds raised by assessee stands allowed for statistical purposes.

In the result appeal filed by assessee for Assessment Year 2011-12 to 2012-13 stand allowed as discussed above.

Order pronounced in Open Court on 18th January, 2019.

Sd/-

(R.K.PANDA)

ACCOUNTANT MEMBER

Dt. 18th January, 2019

- Gmv
- Kavita Arora

Sd/-

(BEENA A PILLAI)

JUDICIAL MEMBER

Copy forwarded to: -

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

- TRUE COPY -

By Order,

ASSISTANT REGISTRAR

ITAT Delhi Benches

S.No.	Details	Date
1	Draft dictated on Dragon	11/01/2019 17/01/19
2	Draft placed before author	11/01/2019 17/01/2019
3	Draft proposed & placed before the Second Member	18/01/2019
4	Draft discussed/approved by Second Member	18/01/2019
5	Approved Draft comes to the Sr. PS/PS	18/01/2019
6	Kept for pronouncement	18/01/2019
	Order uploaded on :	
7	File sent to Bench Clerk	18/01/2019
8	Date on which the file goes to Head Clerk	
9	Date on which file goes to A.R.	
10	Date of Dispatch of order	