IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND

SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA no.1956/Mum./2014
(Assessment Year: 2009-10)

M/s. Mahindra & Mahindra Limited
Corporation Taxation,
P.K. Kurne Chowk,
Worli, Mumbai – 400 018
PAN No.AAACM3025E ……. Appellant

v/s

Additional CIT RG 2(2)
Aayakar Bhavan
M.K.Road, Mumbai – 400 020 ……. Respondent

Assessee by : Shri. H.P. Mahajan and
Shri Prasad Bapti

Revenue by : Shri Jayant Kumar

Date of Hearing – 15/01/2019	Date of Order - 10/04 /2019

O R D E R

PER: SHAMIM YAHYA

This appeal by the assessee is directed against order of the Assessing Officer passed u/s.143(3) r.w.s. 144C of the Act pursuant to direction of ld. Dispute Resolution Panel (DRP) dated 31/12/2013 and pertains to assessment year 2009-10.

2. The grounds of appeal raised by assessee are as under:-

"Being aggrieved by the Order passed under section 143(3) read with section 144C of the Income-tax Act 1961. by the Additional Commissioner of Income-tax, Range - 2(2), Mumbai, (hereinafter referred to as Addl. C.I.T.) Mahindra & Mahindra Limited, Mumbai (hereinafter referred to as Appellant) hereby submits the following grounds of appeal for your kind and sympathetic consideration; these grounds are being raised without, prejudice to one another :

1. The order passed by the Dispute Resolution Panel (DRP) u/s 144C of the Act is ab initio bad in law and therefore the order passed by the Addl. CIT u/s 143(3) pursuant to the said order of the DRP is also bad in law and should be annulled.

Without prejudice to the generality of the above ground, the DRP erred in passing the impugned order u/s 1 44C in violation of the provisions of that section and further erred in not giving the Appellant a reasonable opportunityof being heard in the matter and in passing the impugned order without fully appreciating the submissions made and the material placed before it during the course of the hearing.
2. Expenditure debited to Profit and loss account Rs. 15,33,86,228/-

On the facts and in the circumstances of the case and in law the Appellant contends that the learned Addl. C.I.T. erred in proposing and the DRP erred in confirming disallowance of the following sums treating the same as capital expenditure and also further erred in coining to conclusion that these expenses were not incurred for the purposes of the business of the Appellant:

No	Particulars	Amount	Amount
A	Professional Fess - FES Division -		
1	China Project Expenses	4,81,24,372	4,81,24,372
B	Expenses incurred on various other acquisitions - AD marketing		
1	Professional fees-Paid to PWC-Proposed acquisition Jaguar & Land Rover.	1,22,78,790	
2	Legal Charges for Joint Ventures	9,86,615	132,65,405
C	Expenses incurred on various other acquisitions -AD Kandivli		
	Foreign Travel Expenditure on various projects		24,51,563
D	Expenses incurred on various other acquisitions — Head Office		
1	Professional fees-Paid to PWC-Proposed acquisition Jaguar & Land Rover	1,22,78,190	
2	Foreign travel-Acquisitions related	40,87,493	
3	Professional fees-Acquisitions related	5,99,57,981	
4	Legal charges - relating to acquisition	93,04,454	
5	Professional fees. Foreign consultancy fees for acquisition	37,33,491	8,93,61,009
E	SSBU		

	Meeting for JLR acquisition (Travelling Expenses)	1,83,279/-	1,83,279/-
	TOTAL		15,33,86,228

The learned Addl C.I.T ./ DRP ought to have upheld the Appellant's contention that the expenses were incurred wholly and exclusively for the purpose of business of the Appellant and therefore were allowable as deduction as claimed.

Without prejudice to the above, the Appellant contends that the learned Add! C.I.T should have allowed depreciation thereon at the appropriate rate.

Further, without prejudice to the above the Appellant contends that the said expenditure, to the extent resulting in acquisition of shares/investments be added to the cost of such shares/investments.

The claims of the Appellant be allowed.

3. Premium payable on Foreign Currency Convertible Bonds (FCCBs) — Rs. 74,11,35,248/-

On the facts and in the circumstances of the case and in law the Appellant contends that the learned Addl C.I.T. erred in proposing and the DRP erred in confirming disallowance of pro-rata premium payable on FCCBs stating that the same cannot be treated as revenue expenditure allowable l,7s. 37(l) of the Income Tax Act, 1961 since the same was for increasing the capital base of the Appellant. The learned Addl C.I.T/DRP also erred in holding that the liability on account of premium could not be ascertained till the date of redemption of the bonds.

The claim of the Appellant be allowed.

4. Provision for Warranties - Rs. 31,03,16,452/-

On the facts and in the circumstances of the case and in law the Appellant contends that the learned Addl C.I.T. erred in proposing and the DRP erred in confirming treatment of the provision for warranties made as at 31-03-2009 as inadmissible expenditure on the ground that this provision is in the nature of contingent liability and hence not an ascertained liability. The learned Addl C.I.T/DRP erred in coming to the conclusion that the Appellant had been unable to pass the tests prescribed by the Supreme Court in the case of Rotork India Ltd. The findings of the learned Addl C.I.T/DRP that in view of certain alleged infirmities and deficiencies the liability for warranty was not an ascertained liability, are perverse and, being contrary to facts are bad in law.
The Claim of the Appellant be allowed

5. Disallowance U/s.40A(9) Rs. 2,59.650 representing the actual expenses incurred and Rs. 12,00,000/- being contribution to Mahindra Academy

a) On the facts and in the circumstances of the case and in law the Appellant contends that the learned Addl C.I.T. erred in proposing and the DRP erred in

confirming disallowance of deduction of Rs. 2,59,650/-, being the actual expenditure incurred during the year on employee welfare.

b) On the facts and in the circumstances of the case and in law the learned Addl C.I.T. erred in proposing and the DRP erred in confirming disallowance u/s 40A(9) of Rs. 12,00,000 representing amount paid to Mahindra Academy. The Appellant contends that the school run by MahindraAeademy was for the benefit appellant's employees and also of other local residents and therefore, provisions of section 40A(9) are not applicable to such payment.

c) The claim of the Appellant be allowed.

d) 6. Expenses on Employees' stock Option - Rs. 5,86,81,405/-

e) On the facts and in the circumstances of the case and in law the learned Add) C.I.T. erred in proposing and the DRP erred in confirming disallowance of deduction of Rs. 5,86,81,405 claimed by the Appellant being the difference between the fair market value of the shares offered to employees on the date of the grant of option and the price at which they are offered to employees under the ESOP Scheme of the Appellant. The Addl C.I.T./DRP erred in treating the said expenditure as being for increasing the share capital of the Appellant rejecting the contention of the Appellant that it was actually in the nature of employee cost and hence allowable while computing the income of the Appellant.

f) The claim of the Appellant be allowed.

7. Disallowance U/s. 14A-Rs. 47,54,00,000

On the facts and in the circumstances of the case and in law the learned Addl C.I.T. erred in proposing and the DRP erred in confirming disallowance u/s. 14A as per Rule 8D rejecting the contention of the Appellant that both on facts and in law no such disallowance was called for. The learned Addl C.I.T./DRP ought to have appreciated that fact that the Appellant had sufficient own funds for making investments which were basically trade investments; the learned Addl C.I.T./DRP has also failed to establish nexus between borrowings and investments. The disallowance be deleted or at least be suitably reduced. Without prejudice, the learned Addl. C.I.T./DRP ought to have accepted the alternate contention of the Appellant in the matter of computation of disallowance u/s 14A accepted in earlier years.

The Addl. C.I.T. further erred in proposing and DRP erred in confirming the Investment in Trust as Taxfree Investment while making calculation of disallowance under section 14A read with Rule 8D. The learned Addl C.I.T. ought to have treated the investment in trust as Taxable investment since it is a private trust and income earned therefrom is taxable in the hand of the Trust.

8. Adjustment u/s 92CA(3) to Arm's Length Price of international transaction - adjustment of Rs. 4,62,38,658/-

On the facts and in the circumstances of the case and in law. the learned Addl C.I.T./TPO erred in proposing and the DRP erred in confirming addition to the income of the Appellant a sum of Rs. 1,25,40,000 being adjustment in respect of corporate Guarantee and Rs. 3,36,98,658 by way of notional interest on the basis of Transfer Pricing Officer's order u/s 92CA on account of the determination of Arm's Length Price (ALP) on international transactions with an Associated Enterprise rejecting the contention of the Appellant that the same was not warranted on facts and in law. The order passed by the learned TPO u/s 92CA

is contrary to the provisions of the Act dealing with determination of ALP. Addition be deleted.

Without prejudice to the aforesaid ground, the learned Addl C.I.T. / DRP erred in confirming addition to total income on account of guarantee fees at 3%. If at all any adjustment was required the Addl. C.I.T should have restricted the addition of guarantee fees to the extent of 1% p.a.

9. Disallowance of capital loss on sale of R&D assets of Rs. 2,29,79,716

On the facts and in the circumstances of the case and in law the learned Addl C.I.T. erred in proposing and the DRP erred in confirming disallowance of claim for deduction of capital loss on sale of R&D assets of Rs. 2,29.79.716and thereby not accepting the Appellant's contention that such loss was correctly claimed under the provisions of Act.
The claim of the Appellant be allowed
10. Disallowance under section 40a(ia) in respect of year end provisions Rs. 18,37,00,791/-

On the facts and in the .circumstances of the case and in law the learned Addl C.I.T. erred in proposing and the DRP erred in confirming disallowance of of Rs. 18,37.00,791 u/s 40a(ia) rejecting the contention of the Appellant that the provisions of the said section were not applicable to the facts of the case.

Further the learned Addl. C.I.T/DRP erred in concluding that "Once the Appellant debits its P/L A/c, it is simultaneously crediting party based on matching principle" instead of accepting the contention of the Appellant that since 'income' had not accrued to the payee at the relevant point of time, there was no obligation on the Appellant to deduct tax at source under the Act.

In any event, the learned Addl C.I.T/DRP. ought to have appreciated that unless the Appellant is held to be an assessee in default u/s 201 of the Act it cannot be held that the Appellant had failed to deduct tax at source in accordance with the provisions of the Act so as to merit disallowance u/s 40a(ia) of the Act.

In any event the learned Addl C1T/DRP ought not to have made disallowance u/s 40a(ia) in those cases where the payees had filed their returns of income and paid tax due there under for the relevant assessment year, there being thus no subsisting tax liability of the payee which would entitle the Appellant to claim deduction under the proviso to the section at any subsequent point of time.
The addition be deleted.

11. Disallowance of weighted deduction under section35(2AB) Rs. 165,13.63.447/-
On the facts and in the circumstances of the case and in law the learned Addl C.I.T. erred in proposing and the DRP erred in confirming disallowance of claim for weighted deduction u/s 3o(2AB) with reference to expenditure of Rs. 165,13,63,447incurred on in-house Scientific Expenditure rejecting the contention of the Appellant that it was entitled to the said deduction and also that non-receipt of form 3CL from DSIR was not determinative of the issue. The learned Addl C.I.T/DRP ought to have appreciated that submission of report in form 3CL was neither the obligation of the Appellant nor within its control and therefore cannot be a ground for sustaining disallowance.

The learned Addl. C1T be directed to allow the claim of the Appellant.

12. Disallowance u/s. 40a(ia) of Dealer Incentive Rs. 128,09.72,000/- and Service Coupon Rs. 38,92,51,000/-

On the facts and in the circumstances of the case and in law the learned Addl C.I.T. erred in proposing and the DRP erred in confirming disallowance u/s 40a(ia) of Dealer Incentive Rs. 128,09,72,000 & Service Coupon 38,92,51.000 aggregating to Rs. 167,02,23,000 rejecting Appellant's contention that tax was not deductible on dealer incentive & service coupon under Section 19411 & 194C respectively.

In any event the learned Addl. C.I.T./DRP ought not to have, made disallowance u/s 40a(ia) in those cases where the payees had filed their returns of income and paid tax due there under for the relevant, assessment year, there being thus no subsisting tax liability of the payee which would entitle the Appellant to claim deduction under the proviso to the section at any subsequent point of time.

In any event, the DRP also erred in not following the binding decision of the Honorable Tribunal in the Appellant's own case in the matter of disallowance u/s 4(a)(ia) in respect of Dealer Incentive and in issuing directions contrary thereto.

The addition made by the learned Addl C.I.T./DRP being contrary to the provisions of law be deleted.

13. Disallowance of Depreciation on Intangible Assets of Rs. 18,34,496/-
On the facts and in the circumstances of the case and in law the Appellant contends that the learned Addl C.I.T./DRP erred in disallowing depreciation of Rs. 18,34,496 on Intangible asset claimed by the Appellant .

The claim of the Appellant be allowed .

14. Disallowance of deduction of Octroi Incentive of Rs. 44,89,56,000

On the facts and in the circumstances of the case and in law the learned Addl C.I.T. erred in proposing and the DRP erred in not accepting the contention of Appellant that Octroi Incentive of Rs. 4489 lakhs was not taxable on the ground that it was a capital receipt.

The learned Addl C.I.T. be directed to exclude the said sum from the income of the Appellant.

15. Rental Income on Property let out to Ridge Business Centre P.Ltd Rs. 18.69 Crore

On the facts and in the circumstances of the case and in law the learned Addl C.I.T. erred in proposing and the DRP erred in confirming addition to the income of the Appellant a sum of Rs. 18.69 crores on the ground that the Appellant ought to have additionally received the said income by way of rent in respect of property let out to Ridge Business Centre P. Ltd of Rs.18.69 crore (being the difference between rent received by Ridge Business Centre P.Ltd from a third party and the amount of Rent received by the Appellant from Ridge(Rs. 20.37 Cr - Rs. 1.68 Cr) .

Both on facts and in law the addition made by the learned Addl. CIT/DRP is bad in law and be deleted.

The learned Addl C.I.T. be directed to delete the addition made by him.

16. Disallowance of deduction for Difference in Exchange of Rs 251.63 crores

On the facts and in the circumstances of the case and in law the learned Addl C.I.T. erred in proposing and the DRP erred in not allowing deduction for difference in exchange of Rs.251.63 crores as claimed by the Appellant in the computation of income.
The Learned Addl CIT/DRP ought to have accepted the contention that there is no requirement in the Law to capitalize the difference in exchange to the capital assets acquired by the Appellant as also the loss arising due to difference in exchange was not contingent in nature and therefore was allowable as revenue deduction while computing the taxable income of the Appellant.

Without prejudice to the aforesaid contention that the difference in exchange was allowable as revenue deduction, the Learned Addl CIT/DRP ought to have allowed depreciation on such difference in exchange as capitalized in the books of accounts.

17. Disallowance of deduction under section 80 1C — Rudrapur Unit

On the facts and in the circumstances of the case and in law the Appellant objects to the arbitrary methodology of calculation of profits derived from the Appellant's Rudrapur Unit directed by the DRP and applied by Learned Addl CIT which has resulted in restricting deduction u/s. 801C to Rs. 99,76,03,710 as against Rs. 359,67,62,865 claimed by the Appellant relating to the said unit.

The said directions of the DRP are contrary to facts and the position in law and are in any event perverse and have been given without giving the Appellant an opportunity of being heard and are in disregard to the material available on record.

The Addl. CIT/DRP has erred in coming to conclusion that the profits of Rudrapur Unit were inflated and the allocation of various expenses was defective, the valuation of inter-unit transfer was not appropriate.

The said conclusion is based on mere conjectures and surmises and is contrary to the material on record and the submissions made before the said lower authorities.

Without prejudice to the above the Addl. CIT/DRP erred in computing deduction under section 80'IC by applying the proportion of turnover of the eligible unit to the company turnover to total computed taxable business income of the Appellant, which is contrary to the scheme of the Act and the law on the subject.

The learned Addl GIT ought to have accepted the computation of profits and the audited accounts submitted by the Appellant and should have allowed deduction under section 80'IC accordingly.
The claim of the Appellant be accepted in toto

18. Disallowance of deduction under section 80IC Haridwar Unit

On the facts and in the circumstances of the case and in law thelearned Addl. CIT erred in not assessing and quantifying the profits for the year and net loss suffered by the Appellant at its unit at Haridwar, profits from which are otherwise eligible for deduction under Sec.80IC.

The learned Addl C.I.T be directed to assess and to compute profit for the year and the determine the net losses suffered by the said eligible unit at Haridwar.

19. Adjustment under section 145A for unutilised CENVAT credit -Rs. 22,95,00,000/-

On the facts and in the circumstances of the case and in law the learned Addl C.I.T. erred in adding to the income of the Appellant Rs. 22,95,00,000 (out of Rs. 5069 lacs erroneously computed by the DRP) u/s 145A and/or s 28 of the Act rejecting the contention of the Appellant that no such addition was called for under those sections.

The principles applied by the learned Addl. CIT/DRP in making this addition are contrary to facts and the position in law and hence the addition merits being deleted in its entirety.

The DRP further erred in holding that 'adjustment to closing stock does not warrant any corresponding adjustment to opening stock of the same year' and further that 'adjustment in purchases is to be allowed only to the extent of unutilized CEXVAT credit available at the end of the year for raw material still in the closing stock of the assessee', both rulings being contrary to among others, the scheme of the Act itself.
Without prejudice to the aforesaid contention the learned Addl. CIT erred in not allowing deduction for Rs. 53.60 crore being the amount of unutilized CKXVAT credit as on 31/3/2008 brought to tax in AY 2008-09

Addition of Rs. 22.95 crore made by the learned Addl. CIT be deleted and deduction of Rs. 17.10 crore claimed by the Appellant be allowed.

20. Adjustment to business income and income from other sources Rs. 84.10 crores

The DRP erred in directing learned Adl. CIT to assess business income of Rs. 84.10 crores as income from other sources which direction is contrary to facts and the position in law.

The learned Addl. CIT be directed to accept the head of income as shown in the Return of income in respect of the said income of Rs. 84.10 crores.

Your appellant reserves the right to add to alter or amend any of the above grounds of appeal, if felt necessary.

3. At the outset, learned Counsel of the assessee submitted that he shall not be pressing for ground No.1 raised in the grounds of appeal. Hence, ground No.1 is dismissed as not pressed.

Ground No. 2:- Disallowance of Capital Expenditure of Rs.15,33,86,228

4. The Assessing Officer has held that impugned expenditure to be capital being expenditure incurred in acquiring entities which are engaged in similar business in India and overseas to be capital in nature. The Dispute Resolution Panel has confirmed the same. The ITAT in A.Y.2006-07 has held that the expenditure is capital in nature, however, it was held that it should form part of cost of investment. The same decision was followed for A.Y.2007-08 and A.Y.2008-09.

5. We find that in the present assessment year the Dispute Resolution Panel has given details of expenditure involved in this case as under:

No.	Particulars	Amount	Amount
A.	Professional Fees - FEES Division		
1.	China Project Expenses	4,81,24,372	4,81,24,372
B.	Expenses incurred on various other acquisitions-AD marketing		
1.	Professional fees - Paid to PWC-Proposed acquisition Jaguar & Land Rover.	1,22,78,790	
2.	Legal Charges for Joint Ventures	9,86,615	132,65,405
C.	Expenses incurred on various other acquisitions -AD Kandivali		
D.	Expenses incurred on various other acquisitions -Head Office		24,51,563
1.	Professional fees - Paid to PWC - Proposed acquisition Jaguar & Land Rover.	1,22,78,190	
2.	Foreign Travel -Acquisitions related	40,87,493	
3.	Professional fees - Acquisitions related	5,99,57,981	
4.	Legal charges - relating to acquisition	93,04,454	

5.	Professional fees - Foreign consultancy fees for acquisition	37,33,491	8,93,61,609
E.	SSBU		
	Meeting for JLR acquisition (Travelling Expenses)	1,83,279	1,83,279
	TOTAL		15,33,86,228

6. The Dispute Resolution Panel following the ITAT order for earlier years i.e., 2006-07 and 2007-08 has held that this expenditure is capital in nature and no intervention is required. On the issue of depreciation on those assets, the DRP had followed the order of DRP in A.Y.2008-09 and has directed the assessee to suo-moto submit the details of capital assets that have come into existence on incurring the expenditure and the definite cost of acquisition of such capital asset, to the Assessing Officer within 7 days of the receipt of the directions so as to enable him to quantify the depreciation allowable correctly. Further, ITAT on similar issue in the assessment year 2006-07 and 2007-08 has decided the matter in the favour of revenue. Accordingly, we hold the expenditure to be capital and leave the allowability of depreciation to results of the verification by the Assessing Officer . Since, issue is covered in favour of the revenue, we do not find any infirmity in the action of the DRP, accordingly, we uphold the same.

Ground No.3:- Disallowance of Pro-rata Premium of Rs.74,11,35,248/- payable on redemption of Foreign Currency Convertible bonds.

7. At the outset on this issue, learned Counsel of the assessee submitted that ITAT has decided the similar issue in favour of the assessee in A.Y.2006-07 and 2007-08. He submitted that the DRP has also recognised this fact, however, they have noted that matter has not attained finality and they have accordingly upheld the disallowance. Hence, learned Counsel of the assessee pleaded that in accordance with the ITAT's decision for A.Y.2006-07 and 2007-08, this issue should be decided in favour of the assessee.

8. After hearing both the Counsel and following the precedents from ITAT in assessee's own case which has not been reversed by the Hon'ble Jurisdictional High Court, we set aside the order of the authorities below and decide the issue in favour of the assessee.

Ground No.4: Provision of Warranty of Rs.31,03,16,452/-

9. On this issue, the assessee has claimed the provision in respect of warranty made in certain products, the estimated cost of which accrued at the time of sale. The Assessing Officer has treated this as contingent liability and held to be disallowable. The assessee made elaborate submissions before the Dispute Resolution Panel. The Dispute Resolution Panel after elaborately dealing with the issue has held as under:-

> *"4.10. The assessee has not given the details of number of warranty expired during the year and the amount remaining unutilized on account of such expired warranties. Similar details have not been furnished for earlier years also. In fact, assessee has no records regarding expiry of warranties in any year and amount remaining unutilized on expiry of warranties is received in the accounts, it cannot be said that assessee has maintained the warranty accounts and created the provision correctly and scientifically.*

The assessee has not shown to have made any reversal in the accounts on account of expired warranties either in this year or in preceding years on the basis of any records of warranties expired. Therefore it cannot be said that warranty provision account has been maintained faithfully and reliably to represent the liability on account of warranty in a true and fair manner and unutilized warranties have been offered to tax as and when the warranties expire.

4.11. Therefore, we agree with the AO's observation in para 5.3 of the draft order that there was a balance of RS. 106.42 crores in the provision account as on 1.4.2008 and the utilization during the year was only 54.27 crore which clearly indicated that the provision made in the preceding years did not have any scientific basis. The AO has allowed the deduction on actuals basis and disallowed the excess of provisions. On facts of the case, the order of AO is reasonable and correct. Accordingly we uphold the aforesaid disallowance.

4.12. The assessee has also not been able to establish the stability and certainty of facts and the principles applied in its method of calculation of the provision over various years. We find that in Rotork India Ltd. case of SC, the warranty provision was held as an ascertained liability since the provision was on a scientific basis. However, on facts as already explained in this case, it cannot be said that the provision has any scientific basis. The estimate is not reasonable rather it is arbitrary and skewed with actuals. Hence, the SC case in Rotork Controls does not apply. DRP in FY 2008-09 has also held similarly. We also agree to the same. Hence objection of the assessee on this ground is rejected.

4.13. Furthermore as evident from the table at para 4.13 ante, the actual utilization over the years is much less than the provision made. Therefore, it is evident that the assessee is making excessive provision of warranty. Though, the AO has allowed the deduction on actual utilization basis in this AY, it is not known whether in earlier AY's also the deduction has been allowed on actual utilization basis only. The closing balance in the warranty provision account is the actual provision made in excess of utilization. Though the deduction for the entire provision has not been allowed, still a disallowance of excess provision already made is warranted to the extent deduction has been allowed but the provision has remained unutilized applying section 41(1).

4.14. Accordingly, the AO is directed to examine from his own records, the opening provision in FY 2003-04 Rs. 27.17 crores, whether deduction for the same has been allowed in AY 2003-04 or earlier AY's, and subsequent provisions for which deduction has been allowed irrespective of actual

> *utilization and disallow the excessive unutilized provision available in the closing balance in FY 2008-09 for which deduction has already been allowed over the years. No disallowance shall be made on account of closing balance for which deduction has not been allowed.*

10. Against this order, assessee is in appeal before us.

11. We have heard both the Counsel and perused the records. Ld. Counsel of the assessee submitted that in A.Y.1989-90 to A.Y.1998-99 the ITAT has consistently allowed the issue in favour of the assessee. However, ITAT in 2006-07 and also in 2007-08 and 2008-09 has remitted the issue back to the file of the Assessing Officer to be decided in the light of Hon'ble Supreme Court decision in the case of Rotork Controls Ltd., 314 ITR 62. Learned Counsel submits that in all the years, the Assessing Officer has once again passed the orders repeating the disallowance for the reasons that details of reversal of provision made in earlier years has not been provided. Further submissions of the ld. Counsel of the assessee in this regard are as under:-

> *"The difference is negligible*
> *Average utilization of provision is in the range or 70%.*
>
> *As per AS 1 notified under section 145 a provision essentially involves making an estimate of a liability whose amount cannot be determined with substantial degree of accuracy.*
>
> *In the light of this DRP's mandate to provide vehicle-wise data of warranties expired and provision reversed is unrealistic since vehicles are sold on a daily basis and total number of vehicles/tractors sold during the year itself is 376701.*
> *The Supreme Court held that provision for warranty was an allowable expenditure when it arises from manufacture and sale of an army of sophisticated goods. So the entire army or mass of goods has to be collectively viewed as one and not on a vehicle by vehicle basis as intended by the DRP*

In view of facts noted by the DRP the issue should not be referred back to the AO unlike in the earlier years."

12. Upon careful consideration, we find that ITAT in assessee's own case in earlier years remitted the issue to the file of the Assessing Officer and directed that the issue be decided in accordance with Hon'ble Supreme Court decision in the case of Rotork Controls Ltd.,(supra). In our considered opinion, we should follow the principles of precedents and the earlier direction of ITAT in assessee's own case. It is not at all the case that the decision of ITAT consistently in assessee's own case has been reversed by the Hon'ble Supreme Court. That in earlier years, pursuant to the ITAT direction AO has passed perfunctory cannot be a ground for us to deviate from following precedents as above. Accordingly, following precedents as above, we remit the issue to the file of the Assessing Officer to examine the issue by following the decision of Apex Court in the case of Rotork Controls Ltd., (supra.)

Ground No.5 : Disallowance u/s.40A(9) of Rs.2,59,650/- and Rs.12,00,000/- Main contribution to Mahendra Academy

13. Upon hearing both the Counsel and perusing the records, we find that as regards the issue of contribution of Rs.2,59,600/- is concerned, the DRP has disallowed the same following its order for A.Yrs.2007-08 and 2008-09. Similarly contribution of Rs.12,00,000/- to Mahendra Academy has been disallowed u/s.40A(9) following DRP order for A.Yrs.2007-08, 2008-09. We note that in ITA No.586/Mum/2013 for A.Y.2008-09, ITAT has dealt with identical issue as under:-

"4. In ground no.6, the assessee has challenged the disallowance under section 40A(9) of Rs.27,47,447 representing the actual expenditure of Rs.18 lakhs incurred on employees welfare being contribution to Mahindra Academic.

25. Before us, it has been admitted by both the parties that the Tribunal, for the assessment years 2006-07 and 2007-08, in assessee's own case, has set aside this issue to the file of the Assessing Officer.

26. After hearing both the parties and in view of the order of the Tribunal in assessee's own case for earlier years, we set aside the impugned order passed by the Assessing Officer and restore this issue back to his file for denovo adjudication and in accordance with the law. Thus, ground no.6, is allowed for statistical purposes."

14. Accordingly following precedent as above, we remit the issue to the file of the Assessing Officer for fresh consideration.

Ground No.6: Disallowance of Rs.5,86,81,405/-

15. This ground relates to disallowance of Rs.5,86,81,405 claimed by assessee as (ESOP) employee cost being the difference between the fair market value / the shares offered to employee on the date of the grant of option and the price at which they are offered to employee.

16. Upon careful consideration and after hearing both the Counsel and perusing the records we find that issue has been considered and decided by ITAT Special Bench in the case of Biocon Ltd., vs. Dy. CIT (ITA No.248/BANG/2010). Accordingly, we remit the issue to the file of the Assessing Officer to consider the issue in light of the ITAT Special Bench in the case of Biocon Limited.

16. Following precedent as above, we remit the issue to the file of the Assessing Officer with directions as above.

Ground No.7: Disallowance u/s.14A of Rs.47,54,99,000/-

17. In this issue, assessee has claimed that no expenses have been incurred for earning exempt income has been rejected by the Assessing Officer. The Assessing Officer has applied rule 8D and accordingly computed the disallowance and DRP has confirmed the same. Now, the ld. Counsel of the assessee has made following submissions before us.

> *There is no disallowance u/r 8D(i);*
>
> *As regards disallowance under Rule 8D(ii) & (iii) the AO may be directed to re-compute the disallowance towards other expenditure after reducing investment on which no exempt income has been received {Reliance Industries Limited [TS-259-ITAT-2017(Mum)*
>
> *Reliance is also placed on following case laws:*
>
> • *Bombay High Court in the case of CIT V/s HDFC BANK LTD. [2014] 366 ITR 505 (Bom) and Mumbai ITAT in the case of Yes Bank Ltd. v. ACIT (2016) 46 ITR 317 (Mum.)(Trib.) has held that no disallowance under Rule 8D(2)(i) and (ii) is required to be made, as the non- interest bearing funds available with the assessee are more than the amount of investment which generate tax free income. In Appellant's case tax- free investments as on 31.03.2009 is Rs. 5221.61 crores, as against shareholders' funds of Rs. 5249.53 crores. Therefore, in view Bombay High Court decision, no disallowance should be made under Rule 8D(2)(ii).(also followed in Alok Industries Ltd (ITA 1017/Mum/2017(Mum)*
>
> *Investment on which dividend is not received to be excluded while calculating disallowance-*
> • *CIT v. Delite Enterprises [IT Appeal No. 110 of 2009]*
> • *ACIT .v. M. Baskaran (Chennnai)(Trib.)*

18. Upon hearing both the Counsel, we find that the request of the ld. Counsel of the assessee is cogent. The Assessing Officer is directed to make necessary factual verification and to consider the issue in this aspect afresh after considering the

Hon'ble Jurisdictional High Court decision quoted as above and also the decision of Special Bench of ITAT in the case of Vireet Investments and assessee should be granted adequate opportunity of hearing.

Ground No.8:- Relating to Rs.1,25,40,000 adjustment for fee of Corporate Guarantee and Rs.3,36,98,658/- being notional interest as per adjustment made in TPO's order u/s.92CA.

Re:Adjustment for fee of Corporate Guarantee:

19. Upon hearing both the Counsel and perusing the records, we note that ITAT had confirmed the adjustment @3% in A.Y.2008-09 following earlier years.

20. At the request of the ld. Counsel of the assessee that following some other decisions, the amount should be reduced. However, since in assessee's own case, ITAT had confirmed the rate of 3% and it is not the case that the said decision has been reversed by the Hon'ble Jurisdictional High Court, we hold that adjustment @3% should be made.

21. Re: The addition towards notional interest is of Rs.3,36,98,658/-. In this regard, we find that the ITAT in assessee's own case in ITA No.586/Mum/2013 for A.Y.2008-09 has restored back the issue following the Tribunal order in earlier years for the AO to decide on the basis of LIBOR rate prevailing at the relevant point of time. It was directed that in case LIBOR rate is less than 6% then charging of interest rate @ 6% by the assessee should be taken as arm's length price (ALP). Following the

above said order in assessee's own case, we direct accordingly and restore the issue to the file of the Assessing Officer with similar direction.

Ground No.9:Determination of Loss of Rs.2,29,79,716/- on transfer of capital assed used for R & D Activity

22. On this issue, ld. Counsel for the assessee fairly accepted that ITAT has decided the issue against assessee in A.Y.2006-07 and A.Y.2007-08. Accordingly, we uphold the order of the Assessing Officer on this issue following aforesaid precedent.

Ground No.10: Addition u/s.40(a)(ia) in respect of year end provision of Rs.18,37,00,791/-

23. On this issue we note that ITAT has allowed the assessee's claim in A.Yrs.2006-07, 2007-08 and 2008-09. The DRP has also noted the same but has confirmed the AO's order by observing that matter has not reached its finality. Respectfully following the order of ITAT in assessee's own case, we set aside the order of the authorities below and decide in favour of the assessee.

Ground No.11: Weighted deduction u/s 35(2AB) with reference to expenditure of Rs.165,13,63,447/- incurred on scientific expenditure:

24. On this issue the disallowance was made on the ground that form 3CL has not been furnished. We note that in earlier year i.e., for A.Y.2008-09, Tribunal has noted the submission from assessee that once the R & D facilities are approved and DSIR has not rejected the application submitted by the assessee, it could be presumed that

the application has been accepted. Further that failure on the part of DSIR to confirm the authorities in time cannot be reason for taking back deduction to the assessee. Noting the above and following judicial precedents from earlier year, the Tribunal had directed that assessee is entitled to grant of better deduction u/s.35(2AB). Referring to these case laws from ITAT and also from Cummins India Ltd., (ITAT Pune) and Sri Biotech Laboratories India Ltd., (ITAT Hyderabad), assessee has requested that AO be directed to allow the claim for deduction u/s.35(2AB) as non-receipt of form 3CL from DSIR is not determinative of the issue.

25. Respectfully following the decision as above, we accede to the assessee's request in the light of the above and directed accordingly.

Ground No.12: Disallowance of Dealer incentive of Rs.128,09,72,000/- and service coupon of Rs.38,92,51,000/- u/s.40a(ia).

26. On this issue, ld. Counsel of the assessee has made following submissions:-

> ***Dealer Incentives:***
> *Hon ITAT in AY 2007-08 has upheld the Appellant's contention that the relationship of the company with those of dealers is in the nature of principal to principal (not an agent) and that accordingly provisions of s 194H would not apply.(M.A.No.397/ Mum/2012 for A.Y. 2007-08. Page No. 2-4, para 6.1.1)*
>
> *This order has been followed in AY 2008-09 (Page No 18-19, Para 61). Department's Appeal was dismissed by Hon'ble Bombay High Court vide its order dated 6th February, 2017 in ITA No 1148 of 2014. Hon'ble Supreme Court has dismissed the SLP filed by Department against the order of the Bombay High Court vide SLP No 37462/2017 dated 12.01.2018.*
>
> ***Service Coupon:***
> *The issue is whether TDS u/s 194C was required to be deducted failing which disallowance u/s 40a(ia) was made.*

Regarding Service Coupons the issue has been restored back to the AO for fresh adjudication. (M.A.No.397/ Mum/2012 for A.Y. 2007-08. Page No. 2-4, para 6.1.1) Similar directions have been given in AY 2008-09 and the issue is yet to reach finality

27. Upon careful consideration, we note that ITAT in assessee's own case for A.Y.2008-09 has held as under:-

"61. After considering the relevant findings of the Assessing Officer and the decision relied upon by the learned Counsel, we find that the issue of dealer incentive has been decided by the Tribunal wherein, the Tribunal has decided the issue in favour of the assessee by holding that the dealer incentive is not covered by the provisions of section 194H as the sale was made on principal-to-principal basis. Regarding the issue of service coupon, the same has been restored back to the file of the Assessing Officer. Thus, consistent with the view taken therein, we also restore this issue back to the file of the Assessing Officer for fresh adjudication and also to consider the case law as relied upon by the learned Counsel for the assessee. Thus, ground no.14, is partly allowed for statistical purposes."

28. Accordingly following the precedents from ITAT in assessee's own case, we decide the issue of dealer incentives in favour of the assessee and the issue of disallowance on service coupons is remitted to the file of the Assessing Officer in accordance with the direction of ITAT in earlier years.

Ground No.13:Disallowance of Depreciation of Rs.18,34,496/- on intangible asset:-

29. On this issue, the ld. Counsel of the assessee fairly agreed that ITAT has disallowed assessee's claim in A.Y.2007-08 and 2008-09. Respectfully following the decision referred as above, we uphold the order of the Assessing Officer on this issue.

Ground No.14: Octroi Incentive of Rs.4489 lakhs treated as revenue receipt and not capital receipt:-

30. On this issue, ld. Counsel of the assessee submits that ITAT has rejected the assessee's claim for A.Y.2006-07 and also for A.Y.2007-08, however, for A.Y.2008-09, the matter was restored to the file of AO with certain directions.

31. Ld. Counsel of the assessee referred several case laws in support of the claim to be allowed. We note that ITAT has remitted the matter to the file of the Assessing Officer with directions to follow the Hon'ble Supreme Court decision in the case of Ponni Sugar and Chemicals Ltd., 306 ITR 392 and Hon'ble Bombay High Court in the case of Chaphalkar Brothers. Now pursuant to said direction as claimed by the ld. Counsel of the assessee, if the AO decides perfunctorily the precedence from ITAT's decision does not cease to be a precedent for us. Accordingly, following the aforesaid precedent from ITAT, we remit the issue to the file of the AO for deciding the issue afresh in accordance with the same directions as by the ITAT in A.Y.2008-09.

Ground No.15: Addition to income of Rs.18,69,00,000 representing difference of rent received by Ridge Business Centre Ltd., from sub-letting of property

32. On this issue, ld. Counsel of the assessee submitted that in the order for A.Y.2008-09, Tribunal has deleted the disallowance for the reason that property in question in stock in trade provisions of Section 28 will apply and not those of Section 23.

33. Upon careful consideration, we note that ITAT in ITA No.586/Mum/2013 for A.Y.2008-09 has decided the issue as under:-

> *"94. We have carefully considered the submissions of the parties and also perused the relevant findings of the Assessing Officer. It is not in dispute that the income from letting out the property to Ridge Business Centre has been assessed as business income right from the earlier years and the same position has been accepted by the Department. Once the income which has been derived from stock-in-trade and has been accepted as business income, then the computation has to be made under section 28and not under section 23. The assessee has duly shown the income received / accrued from Ridge Business Centre as business income, then any further rent realized by Ridge Business Centre form the third party cannot be said to have been earned / received or accrued to the assessee company. Thus, we are inclined to agree with the contention of the learned Counsel for the assessee that no further income can be attributed to the assessee once the rental income has been assessed as business income and not from the income from house property."*

34. Respectfully following the precedent, we decide the issue in favour of assessee.

Ground No.16: Disallowance of difference in exchange loss claimed as revenue expenditure Rs.251,63,00,000/-

35. Brief facts of the case are that during the year, the assessee claimed a deduction of *Rs.* 251.63 crores out of computation of income on account of difference in exchange arising out of repayment of foreign currency loans / revaluation of foreign currency. The loans have not been repaid during the year. The loans are said to have been utilized towards purchase of fixed assets as well as for certain current assets. The assessee has given details of foreign exchange fluctuation expenses and application of the foreign exchange loans as under:-

Particulars	Profit & Loss F.2009 Rs. In lakhs	Capital Expenditure tfsT In lakhs	f orex Reserve Rs. In lakhs t	Utilisation of forex reserve
Zero Coupon Foreign Currency Convertible bonds loan	19507	16496"	3011	Investment in Mahindra Gears International Limited, Mauritius and Mahindra Overseas Investment Company (Mauritius) Limited.
HSBC Loan	5181	4904	277	Investment in Mahindra Gears International Limited, Mauritius and Mahinrfra Oversea Investment Company (Mauritius) Limited.
Union Bank of India	145T		1455	General Working Capital Purpose
CITI Bank & DBS	3		3	General Working Capital Purpose
ICS S Given	-982		-982	
Total	25164	21400	3764	

36. It was submitted that the assessee has not debited this amount in the profit and loss account and has accounted the same in compliance with Accounting Standard 11. The assessee has charged the same to the fixed assets/capital work-in-progress or carried forward the same in the 'Foreign Currency Monetary item Translation Difference Account' to be written-off to the profit & loss account in later years. The assessee submitted that the foreign exchange expense fluctuation liability has been capitalized in the books but for income tax purposes it is considered as revenue expense. Accordingly the cost of assets for computation of depreciation allowable under section 32, such foreign expense has not been considered as cost of capital asset. The deduction has been claimed in the computation of total income filed.

37. The AO has disallowed this expenditure stating that the same is a contingent liability. Also, for the loans taken for fixed assets, the same was required to be capitalized and hence the AO has disallowed this expenditure.

38. The DRP upon assessee's appeal has dealt with the issue as under:-

"21.4. We have considered the assessment order, the facts of the case as well as the submissions of the assessee. Admittedly foreign exchange loss of Rs. 214 crores is on capital account and the assessee vide submission dated 18th December 2013 has submitted that depreciation on this amount may be allowed considering that the assets have been put to use for period less than 182 days during the year. However, the assessee has not been able to furnish the details of specific foreign exchange loans taken for capital purposes and identified and correlated the respective capital assets and when such assets have been put to use. It has submitted that foreign exhange loss on zero coupon FCCB Rs. 195.07 crore, and on HSBC loan 51.81 crores are of both capital and revenue purposes. The capital purpose loss on FCCB loan is 164.96 crores loan is 49.04 crores and on HSBC loan is 49.04 Crores.

21.5. From the balance sheet of the assessee it is seen that the assessee has secured foreign currency loan from banks Rs. ***378 crores (302 crores in preceding year) and unsecured foreign*** *currency* ***loans on FCCB*** *and bank is* ***Rs 1587 crores*** *(1293* ***crores in preceding*** *year). The secured loan includes Rs. 253 crore short term loans. From the schedule of fixed assets in the balance sheet it is seen that the assessee has added fixed assets Rs. 1291 crore during the year. The capital WIP on 31st March is 646.73 crores whereas in the preceding year it was 546.45 crores.*

21.6. The addition to the assets have been made under various heads including land, building, plant and machinery, furniture fittings and vehicles, development and software expenditure. The assessee pas not furnished details of foreign exchange loss attributable to various items of capital assets and WIP. In absence of details of application of foreign exchange loans to different items of capital assets it is not possible to attribute such loss to any item of capital asset as cost of acquisition of such asset and allow depreciation. From application of loan as given in the table, it is evident that loan has been applied also for investment in equity of Foreign subsidiaries. Therefore the order of the AO regarding disallowance of foreign exchange loss to the tune of Rs. 214 crores is upheld.

21.7. Regarding the balance foreign exchange loss of Rs 37.64 crores claimed as revenue expenditure, as per information submitted, the loss of Rs. 32.88 crores has been incurred in relation to investment in the equity of Mahindra Gears International Limited Mauritius and Mahindra OVERSEAS Investment Company Mauritius limited. Therefore the forex loss of Rs 32.88

crores is on capital account and the disallowance in this regard does not need any intervention.

21.8. Another foreign exchange loss of Rs. 14.55 crores is stated to be incurred in relation to working capital loan from Union Bank of India; the copy of loan document regarding such loan has been produced. This is an undated document signed by the assessee purporting to be a Packing Credit Agreement with Union bank of India, Industrial finance Branch, Nariman Point for packing credit loan of Rs. 100 crore. This loan is in Indian currency. Therefore this is not foreign currency loan and hence any foreign currency loss cannot be incurred in relation to this loan.

21.9. The Assessee has also credited Foreign exchange gain of Rs.9.82 crore under the Revenue account being Foreign Exchange Loss accrued on Inter Corporate deposits given in Foreign currency. This gain has been treated by the Assessee on the Revenue account and accordingly gross foreign exchange loss on revenue account Rs. 47.46 Crores has been reduced by this amount and deduction of only the balance Rs.37.64 crores has been claimed. The foreign exchange losses on various accounts have already been discussed and directions as appropriate have been issued. The AO is directed to treat this foreign exchange gain on ICDs on revenue account as shown by the assessee in the return and bring it to tax.

21.10. In the result the disallowance of foreign exchange loss Rs. 251.64 crores made by the AO is upheld and the AO is further directed to tax the foreign exchange gain of Rs.9.82 crore on ICD."

39. Against this order, assessee has filed an appeal before us.

40. The submission of the ld. Counsel of the assessee on this issue are summarised as under:-

"There is no provision in the Income Tax Act, other than s. 43A, which deals with tax treatment of foreign exchange fluctuations.

In this situation, the accounting principles laid down in Accounting Standards notified by the ICAI would govern.

In Woodward Governor India P Ltd the SC has held (para 17) that Accounting Standard 11 is mandatory. The AS dealt with by the Court was the one ' revised in 1994 para 10 of which provided for adjustment of carrying amount of fixed assets for exchange differences;

On the other hand, Para 13 of if AS 11 revised in 2003 provides that exchange differences arising on settlement or revaluation of monetary items should be treated as income or expense of the relevant period.

Similarly, Income Computation and Disclosure Standards notified under s 145(2) w-e-f AY 2017-18 provide in Para 5 (1) that expenses differences should be recognized as income or expense in the relevant year

In his submissions before the Delhi High Court in the case of Chamber of Tax Consultants wherein the constitutional validity of ICDS was challenged the Additional Solicitor General. Appearing on hehalf of the Union of India submitted that the changes brought about (by ICDS) are only aimed at bringing uniformity and clarity in the computation of income.

Therefore in terms of AS 11 (revised 2003) and ICDS VI, all exchange differences relating to monetary items (revision of liability designated in foreign currency) would have to be recognized as income or expense."

41. Upon hearing both the Counsel and perusing the records, we find that Hon'ble Apex Court in the case of Satlej Cotton Mills Ltd., vs. VIR 116 ITR 1 had expounded that where profit or loss arises to an assessee on account of appreciation or depreciation in the value of foreign currency held by it, on conversion into another currency, such profit or loss would ordinarily be trading profit or loss if the foreign currency is held by the assessee on revenue account or as a trading asset or as part of circulating capital embarked in the business. But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or loss would be of capital nature. In this view of the matter, in our considered opinion the action of the authorities below in holding that foreign exchange gain or loss incurred on acquisition of capital asset has to be adjusted with the cost of capital asset is correct.

42. As regards the gain or loss of revenue account, the same has to be dealt with in the revenue field. The AO in this regard has erred in holding that these are contingent as the same is contrary to the Hon'ble Apex Court decision in the case of CIT vs. Woodward Governor India P Ltd. However, we note that the ld. DRP has analyzed the nature of foreign exchange loss claimed by the assessee and decided the issue properly. The claim of the assessee that foreign exchange fluctuation loss irrespective of it being in the field of capital or revenue be allowed as revenue expenditure is not sustainable in the light of the above case law from Satlej Cotton Mills (supra) from the Hon'ble Supreme Court. The reference of the assessee regarding the income computation and disclosure standards (ICDS) notified u/s.145(2) w.e.f. AY 2017-18 does not help the case of the assessee. From the perusal of CBDT Circular 10/2017 dated 23/03/2017, it is observed that ICDS shall be applicable with the transaction years held therein in relation to A.Y.2017-18 and subsequent assessment year. Admittedly, in the present assessment year the said ICDS is not applicable, hence, the exposition of Hon'ble Apex Court decision in the case of Sutlej Cotton Mills (supra) as above duly holds the field. In these circumstances, we find that the observations of the DRP in this regards are in accordance with the above said expeditions. In this view of the matter, we do not find any infirmity in the order of DRP, hence, we are upholding the same.

Ground No.17: Deduction u/s.80IC of Rs.359,67,62,865/- in respect of Rudrapur Unit which was restricted to gross total income

43. Brief facts of this issue are that the assessee claimed a deduction of Rs. 102.42 crores under Section 80IC of the Act in the original return but subsequently reduced the claim to Rs. 86.44 crores in the revised return. Thereafter the assessee submitted the computation of total income during the assessment proceeding and has claimed a deduction of Rs. 359.67 crores u/s 80IC. It submitted that the amount eligible for claimed enhanced deduction of Rs. 359.67 crores but the actual claim was restricted to available business income after excluding the long term capital gains. The assessee before the AO furnished auditor's report in Form 10CCB n 10.01.2013 together with unit wise computation of profit eligible for deduction u/s 80IC, profit and loss account of Rudrapur unit, balance sheet of Rudrapur unit, alongwith relevant schedules and Annexure.

44. The assessee explained that it has undertaken expansion of the Rudrapur unit in FY 2003-04 and completed the expansion in FY 2004-05. Accordingly, it is eligible for deduction u/s 80IC as it fulfills the eligibility conditions provided therein.

45. The AO has examined the claim in the light of provisions of Section 80IC and has held that the Rudrapur unit commenced its production / operation on 28.03.2000 and the expansion comes under the provision of Section 80IC(4) and therefore it is not eligible for deduction u/s 80IC. Alternately, the AO has held that the provision of section 80IA(8) and 801A(10) r.w. provision of Section 80IC(7) are applicable in this case and the assessee has shown excessive than normal profits in Rudrapur unit.

46. The AO has examined the unit wise accounts and found that Rudrapur unit has net profit margin of 20.80% whereas the company has overall profit margin of 7.75%, if income from other sources is considered as part of net profits. On excluding the

income from other sources shown as business income, the net margin of the company remains 2.40% only. Thus the AO has shown that net profit rate of the eligible unit is about 9 times higher than the overall profit rate of the company. The AO has also held that turnover of Rudrapur unit is only 12.96% of total turnover of the company and if the profit of the Rudrapur unit as claimed by the assessee is excluded, the business of the company is into loss. The AO has also found that annual return on investments in Rudrapur unit is 231.27% as against 11.12% ROI in case of the company. Further, assessee has claimed a deduction of 495.40 crores u/s 35(2AB) of the Act, but no part of this deduction has been allocated to Rudrapur unit. The assessee has also not allocated any interest expense to Rudrapur unit. The total investment in Rudrapur unit is Rs. 155 crores whereas the annual income from the unit is 359.67 crores.

47. For the above reasons, the AO has invoked the provision of Sections 80IA(8) and 80IA(10) of the Act and computed the profit of eligible unit @ 2.40% of turnover of such unit Rs. 1732.19 crores and computed the profit eligible for deduction Rs. 41.57 crores. However, the AO has held that the assessee is not eligible for any deduction u/s 80IC since it does not fulfill the eligibility criteria.

48. Against the above order, assessee made elaborate submissions before the DRP and submitted various documents. After examining the same, ld. DRP has held as under:-

> *22.10. From the above documents furnished by the assessee it is seen that the assessee undertook a project for expansion of its industrial undertaking at Rudrapur in Financial year 2003-04 which is evident from various documents filed as above. The expansion project is said to be completed on 20th December 2004 as per 10CCB report. The gross value of plant and machinery as on 31/03/2005 is Rs 1456 lakhs. Thus there is an addition of exceeding 1228 lakhs in plant and machinery during FY 2004-05.*

22.11. On the basis of above documents it is evident that the assessee has undertaken expansion of its tractor manufacturing unit at Udhamsingh Nagar and such expansion has been completed in FY 2004-05. Since the addition in plant and machinery for such expansion is exceeding 50% of the gross value of plant and machinery before such expansion was undertaken, the expansion amounts to" substantial expansion" as defined in Clause (ix) of Section 80-IC(8) of the Act.

22.12. Further it is declared in Form 10CCB that plant and machinery valued Rs 135.31 lakhs have been transferred to Rudrapur Unit from other units. The reasons mentioned by the AO for disallowing deduction under section 80-IC is that the expansion is hit by provisions of section 80-IC(4) and therefore it is not eligible for deduction under section 80-IC.

22.13. We have the examined facts of the case, the various documents filed including Form 10CCB. It is evident from the information given in Form 10CCB that the company has completed an expansion project in financial year 2004-05. Plant and Machinery used for such expansion from transfer of machinery previously used is about 10% of total value of plant and machinery installed during such expansion.

22.14. As per explanation below section 80IC(4) read with explanation 1 and 2 below section 80-IA(3), for the purpose of eligibility to claim deduction under section 80-IC, plant and machinery upto 20% of total value of plant and machinery installed in expansion, is allowed to be transferred from other business.

22.15. Since the assessee has used only about 10% of the plant and machinery previously used in its other business, the conditions in section 80IC(4) is not violated. Therefore it is hereby held that the assessee is eligible for deduction under Section 80-IC of the Act. Also, the AO has allowed deduction in AY 2005-06 for this expansion.

22.16. Regarding computation of profit of Rudrapur Unit, the assessee was requested to furnish various details regarding tractors produced at Rudrapur, Nagpur and Kandivali. The details submitted are as under –

Model wise PBIT for F04, F05 & F09 - for RDPR 80IC

F2004	RDPR				NGPR				KNDV			
	QTY	SP	TOT COST	PROFIT	QTY	SP	TOT COST	PROFIT	QTY	SP	TOT COST	PROFIT
265 DI	2,284	212,785	181,667	31,118	6,259	204,559	176,206	28,352	824	200,349	186,518	13,830
275 DI	226	228,693	185,051	43,643	7,267	218,371	179,605	38,766	81	219,840	191,749	28,091

295 Dl												
475 Dl												
575 Dl												

F2004	RDPR				NGPR				KNDV			
	QTY	SP	TOT COST	PROFIT	QTY	SP	TOT COST	PROFIT	QTY	SP	TOT COST	PROFIT
265 Dl				18,091	7,106	244,427	212,871	31,556				
275 Dl				35,224	11,038	267,119	218,247	48,772	81	249,802	207,425	42,377
295 Dl												
475 Dl	1,092	226,850		50,990	6,988	279,539	223,805	55,734	5984	280,516	237,458	43,058
575 Dl												

F2009	RDPR				NGPR				KNDV			
	QTY	SP	TOT COST	PROFIT	QTY	SP	TOT COST	PROFIT	QTY	SP	TOT COST	PROFIT
265 Dl	8,277	312,678	258,556	54,123	5,429	300,951	268,702	32,248				
275 Dl	15,525	334,659	265,721	68,938	765	347,012	279,325	67,687	28	300,304	256,055	44,248
295 Dl	623	355,348	305,371	49,977	7,222	345,543	314,390	31,152				
475 Dl	13,090	358,311	276,026	82,285	4,433	361,081	290,896	70,186	1,324	377,730	316,371	61,359
575 Dl	9,714	394,008	284,809	109,199	4,879	399,771	307,396	92,375	869	423,537	331,258	92,279

22.17. From the above chart it is seen that cost of production of various models of tractors at Rudrapur is lowest and it is highest at Kandivali. (model 275 Dl for Kandivali is shown to be having lowest production cost but number of units produced are only 28. Hence it is ignored). Sale price of various models produced at Rudrapur are also much higher than sale price of same models at other units. In this regard the assessee has submitted explanation vide letter dated 18th December 2013 as under:-

- *On the issue of computation of profits of the Rudrapur unit we have already made detailed submissions challenging the stand of the AO while questioning profitability of the Rudrapur Unit. We would like to rely on them.*

- *In response to specific questions raised by you we annex herewith evidence to support cost advantage regard power consumption and details of manpower cost working.*

- *We are attaching specimen bills for power consumed which shows lower tariff at Rudrapur as compared to Nagpur.*

- *As regards man power cost per tractor we are annexing a working to substantiate the cost advantage.*

- *As regards freight it may be clarified that the saving in freight has happened at Rudrapur after undertaking substantial expansion in as much as this substantial expansion included backward integration as explained in the earlier note. Because of this backward integration' some components which were earlier procured from outside Rudrapur came to be manufactured at Rudrapur this saving on inward freight cost.*

- *Head office expenses allocated to the Farm Equipment Sector have been shared by all the tractor manufacturing locations in the proportion of total cost of production at each location. Total cost of production for entire tractor sector was Rs.3119.16 crore. The Cost of production of Rudrapur was Rs. 1067.48 crore thus the proportionate allocated cost of the expenses being 78.97 crore to Rudrapur was 27.03 Crore. (78.97/3119.16*1067.48)*

- *Similarly, total Marketing expenses (as per statement annexed) have been allocated on the basis of number of tractors sold. Per tractor rate so arrived at has been applied to number of number of tractors sold from Rudrapur unit production.*

- *We would like to rely on the elaborate submissions made before the DRP under cover of letter dated 20/11/2013 wherein all these aspects have been exhaustively dealt with.*

- *As regards in per tractor sales price at different plants noticed by you it may be clarified that under each model there are various variants as well whose prices differ from other variants in that model category. Thus 265DI model has different variants such TR265B, TR265NBP, TR265NST, TR265NSTCM. All India prices of the same variant are almost the same for all plant locations.*

22.18. The above submission of the assessee has been considered carefully. There are inherent contradictions and the assessee's submission that all India

prices of same variant of 3 given model are the same for all plant locations is found to be inconsistent with the above data of sale prices submitted.

22.19. Regarding the variation in cost of production of traitors at Nagpur and Rudrapur, the assessee has explained that labour cost at Nagpur unit is Rs 11879 per tractor whereas for Rudrapur Unit -unit labour cost is Rs 3774. In this manner the assessee has tried to explain cost differential of about Rs 8000 per tractor. However the labour cost at Rudrapur is only about 40% of labour cost at Nagpur. The assessee has not given the number of man hours required in production of 1 tractor at Nagpur and at Rudrapur separately and also the wages paid to each worker at Nagpur and Rudrapur to demonstrate the difference in labour cost.

22.20. Other explanation of the assessee is power tariff at Rudrapur is Rs 3.90 per unit whereas for Nagpur unit it is Rs 4.59 per unit. However power cost per tractor produced has not been given. The assessee has also not given the details of power consumed per unit of tractor produced at Nagpur and Rudrapur to explain the low power cost per tractor at Rudrapur.

22.21. The assessee has also explained that certain components are manufactured at one unit and then transferred to other units for use in final product. However the assessee has not furnished any data regarding such components produced at other units and transferred to Rudrapur unit, cost of production of such components at other units, price at which it has been transferred to Rudrapur unit and whether a reasonable net profit on such components produced at other units have been accounted at other units and whether such transfers are at market price. The excessive profits at Rudrapur and loss in other business show that the transfer of components to Rudrapur unit from other units is not at market price rather this is the cause of loss in other business since the transfer to Rudrapur unit is not at arm's length price. The primary onus is on assessee to demonstrate that the transfer of components to Rudrapur unit is at arm's length. This onus has not been discharged. Therefore the provision of Section 80IA(8) and 80IA(10) are therefore attracted.

22.22. The assessee has given details of allocation of head office expenses wherein the head office personnel cost is allocated based on the number of employees in each unit, depreciation is allocated based on assets used by respective unit and other miscellaneous expenses based on the miscellaneous expenses of each unit / division. However, the assessee has not given any reason why a high expense u/s 35(2AB) has not been allocated to Rudrapur unit at all. It has also not given details the purpose and the project for which the expenses have been incurred and the locations where; the results of R&D

exercise are utilized. In absence of these details, it cannot be said that no part of R&D expenses is allocable to Rudrapur unit. It has been submitted that no interest expenses is allocable to Rudrapur unit. No allocation of other expenses claimed in t not debited in P&L account has been made to Rudrapur Unit.

22.23. On the above facts, it is evident that the profits of Rudrapur unit are inflated due to variation in cost, variation in sale price and defective allocation of head office expenses, defective allocation of R & D expenses, non-allocation of other expenses and deduction claimed in computation, inter-unit transfers to Rudrapur unit not being at market price etc. Therefore the unit wise accounts prepared by the assessee as produced before the AO (though not produced before us) are rejected as they do not represent true and fair results of the different units of the assessee company.

22.24. However the profit of Rudrapur unit is allowable as deduction under section 80-IC. The AO has computed the profit of Rudrapur unit in proportion to turnover. In absence of reliable unit wise accounts of; the assessee company, this basis is reasonable. Accordingly, the AO is directed to determine the business profit of Rudrapur unit by allocating the business income assessed as per order after giving effect to this order in proportion to turnover of Rudrapur unit to the total turnover of the company.

49. Against the above order, assessee is in appeal before us.

50. Learned Counsel of the assessee objected to the findings of the DRP submitting that the approach of the DRP is very simplistic approach and it does not help to arrive at profits derived from Rudrapur Unit at the higher profit attributable to the unit. That it does not give weightage to a special locational and statutory advantage enjoyed by Rudrapur unit. That company has vide and varied business activity, profitability of each would be separate. That assessee's claim is duly supported by audited accounts and detailed working in the past.

51. As regards in per tractor sales price of various models from Rudrapur and Nagpur units, ld. Counsel submits that each model has various variants and price of

each variant differs from that of others, that all India prices of the same variant are almost same for all plant locations.

52. He submitted that labour cost is direct cost at Rudrapur and not an allocated cost, that comparative rates for manpower cost at Rudrpur and Nagpur have been provided. The details of wages paid for workers for all the worker at Rudrapur and Nagpur is an unreasonable demand and the same information has otherwise been provided which is more than sufficient to support submission made by the assessee.

53. It has further been submitted that power cost is direct cost which is based on actuals. Hence, there is no question of comparing. Per unit power cost at Rudrapur is lower than Nagpur as demonstrated by submission of power bills. That detail of inter-unit transfers are available in the audited accounts and audit report u/s.80IC. That the reasons for higher profitability have been properly explained that assessee has discharged onus but the DRP has failed to act reasonably. Further, it has been submitted that method of calculation has not been objected by the DRP with regard to head office personnel cost depreciation, miscellaneous head office expenses. For not allocating R & D cost, it has been claimed that R & D is mainly incurred for export models which has not been manufactured at Rudrapur. For not allocating any interest claimed for Rudrapur Unit, it has been claimed that it is cash surplus unit all along. Further, it has been submitted that the following expenses have rightly been not allocated to Rudrapur Unit as they are not directly or indirectly related to the Rudrapur Unit :-

1. Difference in exchange relatable to loan debited to fixed assets.

2. Donation

3. Employee cost liability on account of ESOP

4. Expenditure incurred for employee welfare

5. Provision for premium on redemption of FCCB

6. Deduction u/s.35 DDA

54. It has further been submitted the claim is duly supported by an audit report in form 10CCB. All expenses have been captured from trial balance at Rudrapur. Farm equipment sector is also subject to cost audit report which is on record by AO. All figures are duly reconciled with the cost audit report.

55. We have carefully considered the submissions and perused the records. We find that the dispute resolution panel has given several reasons for holding that profit of the Rudrapur unit is inflated to claim higher deductions. Per contra learned Counsel of the assessee has given elaborate reasons submitting that these are not sustainable. We find that as regards the objection of the Dispute Admisison Panel regarding absence of detail of employee cost of Nagpur Unit and Rudrapur unit, we find that assessee submission is cogent that it is a direct expense and there is no need of drawing adverse inference in this regard. Similarly, the adverse inference drawn by the Dispute Resolution Panel on account of power cost attributable is also not sustainable as it is a direct cost. The power cost at Rudrapur unit is claimed to be lower than at Nagpur Unit.

56. Similarly, the Dispute Resolution Panel adverse inference on the prices of various models is also not sustainable in light of the assessee's explanation as above.

57. As regards the cost of inter unit transfers, the Dispute Resolution Panel is holding that proper detail has not been given to show that inter unit transfer has been properly done. The assessee's contention in this regard is that the details are given in audited accounts and audit report under section 80IC. In our considered opinion, this issue needs to be examined at the level of the Assessing Officer from detail as claimed by the ld. Counsel of the assessee to be available on record.

58. We further note that the DRP has found that assessee has incurred huge expenditure and claimed deduction also for Research and development expenditure. However, assessee has not allocated the same to this exempt unit. Assessee has not submitted the necessary details and has only submitted that these are mainly related to export models. We find that this general submission does not exonerate the assessee from submitting to the authorities below proper and cogent details of expenses to show that research and development expense not related with this unit. Further, the assessee submitted that employee cost of employee welfare expenditure need not be allocated to this unit is also not cogent. Whey these expenditure cannot relate to this unit need proper explanation. Further, other items of revenue expenditure in the profit and loss account which have not been allocated to the exempt unit also need to be examined by the Assessing Officer in light of the explanation being offered by the assessee's Counsel.

59. Accordingly, we remit this issue to the Assessing Officer to examine the issue afresh in light of our discussion and direction as above.

Ground No.18:- Deduction u/s.80-IC in respect of manufacturing unit at Haridwar:-

60. On this issue, it is claimed that AO has erred in not assessing and quantifying the profits for the year and net loss suffered by the assessee in Haridwar Unit, profit for which are otherwise eligible for deduction u/s.80IC. The ld. Counsel of the assessee has submitted as under:-

> *"Hon ITAT has directed AO to quantify losses of the unit under section 80-IC in AY 2006-07 (page 64 para 21) being the first year of the claim and followed in AY 2008-09 (page no.31-32 para 101)*
>
> *While giving effect to ITAT orders for AY 2006-07 & 2007-08 & 2008-09 AO has passed orders quantifying such losses."*

In accordance with the above, we direct the AO accordingly.

Ground No.19: Adjustment to closing stock -145A-adjustment – Rs.22,95,00,000/-

62. On this issue, it is the contention of the ld. Counsel of the assessee that in earlier years ITAT had remitted the matter to the AO for giving proper effect to stocks, purchases and sales and arrive at definite conclusion. It is claimed by the ld. Counsel of the assessee that A.Yrs.2006-07, 2007-08 and 2008-09, the AO has given effect to the order of the ITAT and has concluded that no addition is warranted u/s.145A. Furthermore, assessee's Counsel placed reliance upon Hon'ble Bombay High Court in the case of Diamond Dye Chem Ltd., We find that ITAT for A.Y.2008-09 has given following directions on this issue.

"19. It has been admitted by both the parties that this issue has been set aside to the file of the Assessing Officer. In view of the fact that similar issue has been set aside to the file of the Assessing Officer to deal and decide the issue afresh as the decision of the Assessing Officer while giving effect to the earlier order in pursuance of the Tribunal order, will have the effect in this year also. Therefore, this ground is treated as allowed for statistical purposes."

63. We follow the aforesaid precedent and remit the issue to the file of the Assessing Officer with similar directions. Needless to add that the Assessing officer shall take into account the earlier orders passed in this regard and also the decision of Hon'ble Bombay High Court referred above.

Ground No.20: Interest income of Rs.84.10 Crores whether business income or income from other sources:

64. On this issue there is no discussion in the Assessing Officer's order. The DRP has directed the AO to assess the income under the income from other sources. The relevant discussion of the DRP on this issue is as under:-

"27. It is further seen that as per assessment order, the AO has assessed income from other sources only Rs. 4,75,72,689/-. No discussion has been made in the assessment order in this regard. Neither any submission has been made during hearing. However, from the accounts, it is seen that other income of assessee comprising of interest, dividend, capital gains etc. is Rs. 270.34 crores. The assessee has investment in subsidiaries including foreign subsidiaries-yielding dividend. TDS on interest income is about Rs. 20!crores. Thus, the assessee has not offered the interest income, dividend income from foreign subsidiaries etc. under head 'Income from Other Sources'. The AO also has not assessed these incomes under head 'Income from Other Sources'. However, these incomes are chargeable to tax under head other sources only since these are not business income and have no immediate and proximate dif.ect nexus with the business income of Assessee Company.

27.1 Admittedly the income received by the assessee was on deposit of surplus funds made by it in the Banks and other investment. Debentures, ICDs etc. Dividend from investments in foreign subsidiaries is income from other sources as per law. Thus there in no direct nexus between the interest income and

business of the assessee. Surplus fund not immediately required in business is invested to earn interest. Admittedly, money lending is not the business of assessee. On the facts in this case, interest income is from FDs and ICDs etc. wherein surplus funds have been deployed temporarily. Mumbai High Court in case of Swani Spices P. Ltd. 332 ITR 288 (Bom) has held that interest earned from surplus funds kept as deposits is assessable as income from other sources. Hence applying the SC decision in Liberty India (supra) and also Pandian Chemicals 262 ITR 278 and Bombay HC in Swani Spices (supra) it is held that interest income in this case is assessable under head 'Income from Other Sources'. Accordingly, AO is directed to assess interest income of the assessee and dividend—from foreign subsidiaries (if any) under the head 'Income from Other Sources'."

65. The submission of ld. Counsel of the assessee on this issue is as under:-

"Interest earned on temporary deployment of surplus business funds hence assessable under the head Business income as in the past ***Case law relied upon by the DRP*** *(Swani Spices* ***332 ITR 268)(Bom)*** *was rendered* ***in the context of s*** *80HHC;*

Lok Holdings (308 ITR 356)(Bom) - surplus money received by way of booking advances kept with banks and other concerns – held interest was in the nature of business income reason being that monies accrued from business and monies accured from business and monies were also used for the purpose of business.

Indo Swiss Jewels ***Ltd (284 ITR*** *389)(Bom) – interest on surplus funds kept aside* ***awaiting utilization*** *for specific purpose –* ***taxable as*** *business income*."

66. Upon carefully consideration, we find that the impugned income has been shown as business income. The Assessing Officer has not tinkered the classification, however, the DRP has directed to treat the same as income from other sources by referring to the case laws in the context of deduction under chapter VI where issue related to income attributable to or derived from business income. The reliance by the ld. Counsel of the assessee on Hon'ble Bombay High Court decision in Lok Holding (supra) and Swiss Jewel (supra) duly support the case of assessee. Hence, in our

considered opinion, the direction of the DRP is liable to be set aside and the same is accordingly set aside.

67. In the result, appeal by the assessee is partly allowed.

Order pronounced in the Open Court on 10/04/2019

Sd/-	**Sd/-**
RAM LAL NEGI	**SHAMIM YAHYA**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

MUMBAI, DATED: 10/04/2019
Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

By Order

Karuna
Sr. Private Secretary

(Dy./Asstt.Registrar)

ITAT, Mumbai