आयकर अपीलीय अधिकरण
मुंबई पीठ "जे", मुंबई
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J", MUMBAI
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री नबीन कुमार प्रधान, लेखा सदस्य के समक्ष
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI N.K.PRADHAN, ACCOUNTANT MEMBER
आअसं. 6630/मुं/2018 (नि.व. 2014-15)
ITA NO. 6630/MUM/2018 (A.Y.2014-15)

Sony Pictures Networks India Private Limited
(Successor of MSM Discovery Private Limited)
Interface Building No.7, 5th Floor,
Malad Link Road, Malad (West),
Mumbai 400 064
PAN:AABCS1728D ..... अपीलार्थी /Appellant

बनाम Vs.

The Assistant Commissioner of Income
Tax-12(3)(2),
19th Floor, Air India Building,
Nariman Point,
Mumbai 400 021 ..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Jahangir Mistry, Sr. Advocate
प्रतिवादी द्वारा/Respondent by : Shri A. Mohan, CIT -DR

सुनवाई की तिथि/ Date of hearing : 24/08/2020
घोषणा की तिथि/ Date of pronouncement : 21/09/2020

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the assessment order dated 23/10/2018 passed under section 143(3) r.w.s. 144C (13) of the Income Tax Act, 1961 (in short 'the Act').

2. The assessee in appeal has raised as many as 22 grounds assailing the directions of the Dispute Resolution Panel (DRP) and the Assessment Order passed in consequent thereto. The assessee has also raised additional ground of appeal. The grounds of appeal and the additional ground of appeal read as under:-

Grounds of appeal:

"Based on the facts and in the circumstances of the case and in law, the Appellant respectfully craves leave to prefer an appeal against the order passed by the Assistant Commissioner of Income-tax12(3)(2) Mumbai ['Learned A.O'], under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 ('Act') ('Assessment order'), in pursuance of the directions issued by Dispute Resolution Panel-3 (Hon'ble DRP'), Mumbai, on the following grounds:

On the facts and circumstances of the case and in law, the Learned A.O, based on the directions of the Hon'ble DRP has:
General Ground

1. *erred in assessing the total income of the Appellant at Rs.4,00,08,51,830 against Rs.49,58,34,942 as computed by the Appellant in its return of income;*
2. *erred in making a transfer pricing adjustment of Rs.3,50,50,16,888 to the total income of the Appellant on the premise that the international transactions entered into by the Appellant with its associated enterprises ('AEs') were not at arm's length;*

Order passed is without jurisdiction and bad in law:

3. *order passed under Section 92CA(3) of the Act is passed by Additional Commissioner of Income-Tax, Transfer Pricing-3(2), Mumbai (Addl. CIT) is without jurisdiction and bad in law in as much as the 'Transfer Pricing Officer' means a Joint Commissioner or a Deputy Commissioner or Assistant Commissioner authorized by Board to perform all or any of the functions of an Assessing Officer specified in Section 92C and 92D in respect of any person or class of persons, as per Explanation to Section 92CA of the Act;*

Reference made to the Transfer Pricing Officer ('TPO')

4. *erred in referring the Appellant's case to the Learned TPO under Section 92 CA(1) of the Act, without satisfying the conditions specified therein;*

TPO erred in characterizing the distribution fee paid by MSMD to its AE as royalty

5. *erred in characterizing the distribution fee paid /payable by the Appellant to its AEs to be in the nature of royalty;*

Rejections of economic analysis by the Appellant in its transfer pricing study report.

6. erred in not following the Appellant's own order for AY 2010-11 which was passed by the Hon'ble DRP accepting software distributors as appropriate comparable to benchmark the Appellant's international transactions;

7. erred in rejecting the transfer pricing analysis undertaken by the Appellant under section 92C of the Act and disregarding the fact that software distributors are appropriate comparables to benchmark MSMD's international transaction in the absence of any direct comparables;

8. erred in law and in facts, in rejecting the following companies from the Transfer Pricing Study for FY 2013-14 which are comparable to the Appellant;
- *(i) Advance Technology Ltd.*
- *(ii) Integra Telecommunication and Software Limited.*
- *(iii) Sonata Information Technology Limited*
- *(iv) Trijal Industries Limited.*

<u>Benchmarking analysis undertaken by the learned TPO/Hon'ble DRP by considering royalty agreements as Comparable Uncontrolled Price (CUP) to benchmark Appellant's international transactions</u>

9. erred in not selecting CUP to benchmark the international transactions of the Appellant without appreciating that Transaction Net Margin ('TNMM') is the most appropriate method to benchmark the Appellant's international transactions;

10. erred in not appreciating that a 'distribution' agreement like that entered into by the Appellant with its AE is different from a 'license/ royalty' agreement selected by the Hon'ble DRP/learned TPO to benchmark the Appellant's international transactions;

11. erred in considering royalty agreements as comparable to benchmark the Appellant's distribution activity with its AEs disregarding the fact that all agreements are functionally different and are entered into in different geographies (i.e. other than India) hence the economic and commercial circumstances under which they are entered would be different from the distribution agreement entered into by the Appellant;

<u>Internal comparability</u>

12. Without prejudice to the other grounds, should software distributors not be appropriate comparables, internal comparables are suitable over the royalty agreements selected by the Hon'ble DRP/ learned TPO to benchmark the Appellant's international transactions;

<u>Selection of Local Cable Operators ('LCOs')/ Multi System Operators ('MSOs')/ Direct to Home ('DTH') as comparables</u>

13. Without prejudice to the other grounds, should software distributors be rejected as comparables then Local Cable Operators ('LCOs')/ Multi System

Operators ('MSOs')/ Direct to Home ('DTH') companies can be considered as appropriate comparables;

Impugned order passed in the name of non-existent entity (i.e. MSM Discovery Private Limited)

14. *on the facts and circumstances of the case and in law, the impugned order dated 23.10.2018 passed under section 143(3) r.w.s. 144C(1) of the Act is without jurisdiction, illegal and bad in law;*

15. *erred in law and facts in passing the impugned order in the name of "MSM Discovery Private Limited", though the said entity was not in existence as on the date of passing the said order dated 23.10.2018 and that such an assessment order on a non-existent entity is void and an incurable defect in law;*

Short grant of tax deducted at source (TDS)

16. *erred in short granting credit of taxes deducted at source of Rs 82,64,263 while computing the tax liability for the year;*

Interest under Section 234A of the Act

17. *erred in levying interest of Rs 1,94,74,594 under Section 234A of the Act since the Appellant had filed its return of income on 28th November 2014 which is before the due date of filing the return of income (i.e. 30th November 2014)*

Interest under Section 234B of the Act

18. *erred in levying interest of Rs 53,55,51,335 under Section 234B of the Act;*

19. *without prejudice to the above, erred in computing the interest under Section 234B of the Act at Rs 53,55,51,335 instead of Rs 53,10,05,989;*

Interest under Section 234D of the Act

20. *erred in levying interest of Rs 2,07,16,512 under Section 234D of the Act;*

21. *without prejudice to the above, erred in computing the interest under Section 234D of the Act at Rs 2,07,16,512 instead of Rs 2,00,65,302;*

Penalty Proceedings

22. *erred in initiating penalty proceedings under Section 271(1)(c) of the Act."*

Additional Ground of appeal:

Ground No.16- Deduction of education and secondary and higher education cess paid on the income-tax liability.

1. *"The assessee submits that deduction shall be granted under the head "Profits and Gains from Business or Profession" with respect to education cess and secondary higher education cess levied on income tax."*

3. Shri Jahangir Mistry, appearing on behalf of the assessee explaining the facts of the case submitted that the assessee is a joint venture between Multiscreen Media Pvt. Ltd. and Discovery Communication India. The assessee is engaged in distribution of TV Channels to Local Cable Operators/Multi System Operators/DTH operators. For this activity the assessee is remunerated at cost + mark-up of 5%. The costs include marketing, personnel, general and administrative and depreciation. Apart from above, the assessee is entitled to reimbursement of expenditure viz. distribution commission without any mark-up.

3.1. The ld. Counsel for the assessee further submitted that the assessee has raised additional ground of appeal in respect of deduction of education and secondary and higher education cess paid on the income-tax liability under the head "profits and gains from business or profession". The ld. Counsel of the assessee pointed that the additional ground raised by the assessee is a legal issue for which all the facts are already on record of the lower authorities. No new facts or additional evidences are required to be adduced in support of the same. The Tribunal in assessee's appeal in ITA No.6676/Mum/2017 for assessment year 2013-14 has admitted identical additional grounds and has adjudicated the same vide order dated 29/06/2020. The ld. Counsel of the assessee submitted that if the additional ground raised is admitted then grounds of appeal No. 3, 4 and 12 to 15 would become academic. The ld. Counsel for the assessee submitted that the facts in the assessment year under appeal are identical to the facts in the immediately preceding assessment year i.e. assessment year 2013-14. The ld. Counsel for the assessee

placed reliance on the following decisions to contend that additional ground claiming deduction of Education Cess is purely a legal issue:

1. Sesa Goa Ltd. vs JCIT, 117 taxmann.com 96 (Bombay);
2. Voltas India Ltd. vs. ACIT, 117 taxmann.com 547 (Mum-Trib.);
3. Atlas Copco India Ltd. vs. ACIT, 112 taxamann.com 120 (Pune-Trib.); and
4. Symantec Software India P. Ltd. vs. DCIT,114 taxmann.com 455 (Pune-Trib.).

3.2. In respect of ground No.5 of the appeal, the ld. Counsel for the assessee submitted that the Transfer Pricing Officer (TPO) has erred in holding that distribution fee paid by the assessee to its Associated Enterprise (AE) is in the nature of royalty. The Tribunal in assessee's appeal for assessment year 2013-14 has already dealt with this issue and after placing reliance on the order of Tribunal in assessee's own case for assessment year 2011-12, held that distribution fee paid by the assessee is not in the nature of royalty.

3.3. In respect of ground No.6 to 8 of the appeal, the ld. Counsel for the assessee again referred to the order of Co-ordinate Bench of the Tribunal in assessee's own case for assessment year 2013-14. The ld. Counsel for the assessee pointed that the ground raised are identical to the ground raised in immediately preceding assessment year. The facts being identical, the ground can be decided in similar manner.

3.4. In respect of ground No. 9 to 11 of the appeal, the ld. Counsel for the assessee submitted that the assessee adopted TNMM as the most appropriate method to benchmark its international transaction. The TPO after holding that the distribution fee paid by the assessee is in the nature of royalty, applied CUP. Since the Tribunal in the immediately preceding assessment year has held that distribution fee paid by the assessee is not in the nature of royalty, the method adopted by TPO to benchmark the transaction would not hold good.

3.5. In respect of ground No.16 & 17 relating to short grant of TDS and interest under section 234A of the Act, respectively. The ld. Counsel for the assessee submitted that the assessee has filed rectification petition before the Assessing Officer. The same has not been disposed off till date. The ld. Counsel for the assessee prayed that a direction may be given to the Assessing Officer for an early disposal of application.

4. Per contra, Shri A. Mohan, representing the Department vehemently defended the impugned order. The ld. Departmental Representative opposed the admission of additional ground of appeal filed by the assessee. The ld. Departmental Representative contended that as per section 143(2) of the Act as mended by Finance Act, 1987, only upward revision of income is permissible. The additional ground raised by the assessee, if admitted and allowed would result in an assessment of income less than the returned income. This is impermissible. To support his contention, the ld. Departmental Representative placed reliance on the decision rendered in the case of Goetze (India) Ltd. vs. CIT, 284 ITR 323(SC). The ld.Departmental Representative further placed reliance on CBDT Circular explaining the Finance Act, 1987. As regards the fact that the ground raised by the assessee in the present appeal have been considered by the Tribunal in assessee's own case in assessment year 2013-14, the ld.Departmental Representative fairly admitted that all the issues raised by the assessee in present appeal have been considered by the Tribunal in assessee's own case in the immediately preceding assessment year. The ld. Departmental Representative asserted that the impact of amendment to Section 143(2) vide Direct Tax Laws (Amendment) Act, 1987 were not subjected to the judicial scrutiny. The ld. DR to further buttress his contentions placed reliance on the decision of Hon'ble Bombay High Court in the case of M/s. Ultratech Cement Ltd vs. The Additional Commissioner of Income Tax in Income Tax Appeal No. 1060 of 2014, decided on 18.04.2017 and distinguished the judgments rendered in the case of CIT

vs. Pruthvi Brokers & Shareholders Pvt. Ltd. (349 ITR 336) and National Thermal Power Corporation vs Commissioner of Income Tax 229 ITR 383 (SC) .

5. We have heard the submissions made by rival sides and have examined the orders of authorities below. The ground No.1 and 2 of the appeal are general in nature and hence, require no adjudication.

6. The ground No.5 of the appeal is against re-characterization of 'distribution fee' paid/payable by the assessee to its AE as 'Royalty'. We find that identical ground was raised by the assessee in ITA No.6676/Mum/2007 for assessment year 2013-14(supra) assailing the action of DRP/AO in holding 'distribution fee' as 'royalty'. The Co-ordinate Bench while adjudicating the ground held as under:-

> *"13. We have heard the submissions of learned Senior Counsel Sh. J.D. Mistry (ld. AR), of the assessee and the learned CIT-DR for the revenue. At the outset the learned Sr. Counsel Mr. Mistry submits that the grounds of appeal related with the transfer pricing (TP) adjustment are covered in favour of assessee by the decision of this Tribunal in assessee's own case for assessment year 2011-12 (ITA No. 971/Mum/2016) dated 16th March 2020, wherein the assessee raised identical grounds of appeal. The learned AR of the assessee further submits the lower authorities while passing the orders have relied on the orders for AY 2012-13, which in turn has relied on the orders for AY 2011-12. In AY 2011-12, the Tribunal categorically held distribution fees paid by the assessee to its associated enterprises (AE) is not "Royalty". The ld. AR of the assessee further submits that "distribution fees" is not in the nature of Royalty has been upheld by Tribunal and affirmed by Hon'ble Bombay High Court in the hands of payer as well as the recipient of distribution fees in case of SET India Private Limited (ITA No. 1347/2013 and in case of recipient of distribution fees in CIT vs. MSM Satellite (Singapore) Pte Limited (ITA No. 103 & 207/2017. The learned AR furnished the copy of decision of Tribunal and copy of decision of Hon'ble Bombay High Court.*
>
> *14. On the other hand the ld. DR for the revenue supported the order of the lower authorities.*
>
> *15. We have considered the submissions of both the parties and gone through the order of the lower authorities. We have seen that on similar set of facts the coordinate bench of the Tribunal in assessee's own case for AY 201-12 on the issue held that the distribution fee paid by the assessee to its AE is not 'Royalty'. The coordinate bench (authored by JM) passed the following order;*

> *"30. We have considered the rival submissions of the parties and have gone through the orders of the lower authorities. The first issue for our consideration is whether the 'distribution fee' is in the nature of 'Royalty' or not. Before us the ld. AR for the assessee vehemently submitted that the TPO wrongly characterized the channel distribution fee as Royalty. It was further explained that the assessee acts as a intermediary between the broadcaster and the ultimate customers who uses the channels. Thus, distribution fee paid by the assessee cannot be termed as Royalty. This fact in not controverted by ld. DR for the revenue nor any contrary facts were brought on record by the lower authorities. The ld. DRP in assessee's MSM Satellite (Singapore) Pte Ltd in its order dated 19.12.2014 for AY 2010-11 by following the order of Tribunal for AY 2005-06 & 2006-07 dated 28.08.2015 held that distribution revenue is not Royalty income. The Hon'ble Bombay High Court in CIT Vs SET India Pvt Ltd (ITA No. 1347 of 2013) held that the distribution fee paid is not in the nature of royalty. Similar view was affirmed by Hon'ble Bombay High Court in CIT Vs MSM Satellite (Singapore) Pte Ltd (ITA No. 103 of 2017). Considering the decision of the Hon'ble Jurisdictional High Court and respectfully following the same, we are of the view that the payment of distribution fee cannot be termed as 'Royalty'. Since, we have held that distribution fee cannot be termed as 'Royalty' thus; discussion on the royalty agreement selected for comparability has become academic."*

The ld. Departmental Representative could not bring any material on record to show that the facts in the assessment year under appeal are distinguishable or any judgment to controvert the findings of the Tribunal. We see no reason to take a divergent view. Thus, following the order of Co-ordinate Bench we hold that the 'distribution fee' paid by the assessee is not in the nature of 'Royalty'. **The ground No.5 of the appeal is allowed.**

7. In ground No.6 to 8 of the appeal, the assessee has assailed rejection of comparables by the TPO. The assessee in its transfer pricing study for the Financial Year 2013-14 (relevant to assessment year 2014-15) included following companies as comparables:

(i) Advance Technology Ltd.
(ii) Integra Telecommunication and Software Limited.
(iii) Sonata Information Technology Limited
(iv) Trijal Industries Limited.

We find that the aforesaid companies were also included by the assessee as comparables in Transfer Pricing Study for assessment year 2012-13 and the same were rejected by the TPO for the similar reasons. The Co-ordinate Bench placing reliance on the decision of Tribunal in assessee's own case for AY 2011-12 (ITA No.

971/Mum/2016) restored the issue back to the file of Assessing Officer. For the sake of completeness the relevant extract of the findings of Co-ordinate Bench are reproduced as under:-

> *"19. We have considered the rival submission of the parties and have gone through the orders of lower authorities. We have also considered the written submissions filed by ld. Briefing Counsel Sh. Hiten Chande, Advocate on 26.06.2020. We have also deliberated on the case laws relied by learned Sr Counsel of the assessee. We have seen that in assessee's own case for AY 2011-12, (ITA No. 971/Mum/2016) the coordinate bench while examining and accepting the validity of comparability of Avance and Sonata passed the following order;*
>
> > *"25. We have considered the submission of both the parties and perused the record. The TPO during the TP Adjustment proceeding rejected Avance on the ground that this companies is engaged in software trading, sales of hardware and other services and no segmental information is available. DRP upheld the action of on the basis of order for A.Y. 2010-11.Before Tribunal, the assessee has placed on record the financial statement of Avance. Perusal of financial statement reveals that this company has earned Rs. 140 Crore from sale of software out of total sales of Rs. 176 Crore. This company has approximately 80% of its income from software product. Thus, segmental information as placed before us is available at (Page No. 204 to 205 of Paper Book). Further, while rejecting Empower, the TPO held that this company is engaged in selling of hardware and no segmental are available. From the financial statement placed before Tribunal at (Page No. 207 to 219 of the Paper Book) As per discussion available on Page No. 22 of Annual Report of this comparable (Page No. 209) the company has earned more than 80% of its revenue from software sales. Similarly, Sonata was rejected by TPO by taking view that this company is engaged in software trading, consultancy services. We have noted that this comparable was accepted in A.Y. 2020-11 by TPO himself in its order dated 29.01.2014. Further, financials of this comparable shown that this company has earned Rs. 584 Crore from distribution of software product out of total sales of Rs. 597 Crore, thus, earned 97.49% of its total revenue from software product (Page No. 224 of the Paper Book). SVAM Software was rejected by TPO on the ground that this comparable is engaged in software development, sale purchase of software and computer related hardware. The revenue of software is only Rs. 2 Crore against the total revenue of Rs. 20 Crore. From the financial of this company it is noted that entire income of Rs. 2.09 Crore is shown from sales (sale of product). Considering the nature and activities carried out by all these 4 comparable company which are primarily engaged in distribution of software product as noted above. The software distribution company are held to be good comparable to distributor satellite channels in Turner International India (P.) Ltd. vs. ACIT (supra). Therefore, we accept the submission of ld. AR of the assessee to accept these comparable as comparable with assessee and direct the AO/TPO to work out the T.P. Adjustment afresh. Needless to order that before passing the order, the TPO/Assessing Officer shall grant opportunity to the assessee. In the result, the grounds related to comparability of comparable are allowed in accordance with the aforesaid directions. Considering the fact that we have allowed the functional comparability, therefore, discussions on alternative adjustment held by DRP have become academic."*

20. We have further seen that Delhi Tribunal in Turner International India Private Limited (supra) for AY 2012-13 has accepted Integra and Trijal as valid comparable again in Turner International India Private Limited (supra) for AY 2010-11 (2019 101 taxmann.com 446 Del Tri) and in AY 2006-07 (ITA No.1204/Del/2014, with Channel Distributor.

21. Considering the facts that the Avance and Sonata were accepted as valid comparable in assessee's own case in AY 2011-12 in ITA No. 971/Mum/2016 and Trijel and Integra was held as valid comparable with channel distribution, therefore, we in principal agree and accept the submission of ld. AR of the assessee to accept these four comparable as comparable with assessee. However, we have seen that the TPO rejected the comparability of these comparable summarily, without examining their segmental data, hence we direct the AO/TPO to verify the segmental data of these four comparable for the relevant financial years as per Rule 10B(4) and recompute the TP adjustment afresh and allow appropriate relief to the assessee. The assessee is also directed to provide all necessary information and evidence to the TPO/AO. Needless to order that before passing the order, the TPO/Assessing Officer shall grant opportunity to the assessee. In the result, the grounds related to comparability of comparable are allowed in accordance with the aforesaid directions."

Since, the fact in the impugned assessment year are pari-materia to assessment year 2013-14, and the reasons given by the TPO to exclude the aforesaid companies are similar, these grounds are restored to AO/TPO with similar directions. **The ground No. 6 to 8 of the appeal are allowed for statistical purposes**.

8. In ground of appeal no. 9 to 11, the assessee has assailed benchmarking of international transaction of alleged 'Royalty' payment by applying CUP as the most appropriate method. Since, we have held that 'distribution fee' paid/payable by the assessee is not in the nature of 'Royalty', the grievance of assessee in ground no. 9 to 11 does not survive. These grounds have become academic and hence, are not deliberated upon.

9. The ground No.16 of the appeal is against short grant of TDS credit while computing tax liability in the impugned assessment year. In ground No.17, the assessee has assailed charging of interest under section 234A of the Act. The ld. Counsel of the assessee pointed that on both the issues, the assessee has filed rectification petition under section 154 of the Act on 22/11/2018 (at page 1120 to

1122 of the Paper Book) before the Assessing Officer. The said application is still pending for disposal.

The Assessing Officer is directed to decide the aforesaid application filed by the assessee, in accordance with law by passing a speaking order within a period of three months from the date of receipt of this order. **The ground No.16 and 17 of the appeal are allowed for statistical purposes with above direction**.

10. In grounds No.18 to 21 of the appeal, the assessee has assailed charging of interest under section 234B and 234D of the Act. The levy of interest under section 234B and 234D is mandatory and consequential, hence, **aforesaid grounds raised by the assessee are dismissed, sans-merit.**

11. In ground No.22 of the appeal, the assessee has assailed initiation of penalty proceedings under section 271(1)(c) of the Act. Challenge to penalty proceedings at this stage is premature. **This ground of the appeal is dismissed, as such**.

12. The assessee has raised additional ground, claiming deduction of education and secondary and higher education cess paid on the income-tax liability under the head “profits and gains from business or profession”. The ld. Counsel for the assessee has pointed that identical ground was raised by the assessee in assessment year 2013-14. The Co-ordinate Bench of Tribunal after considering the decision of Hon'ble Bombay High Court in the case of Sesa Goa Ltd. (supra.) admitted additional ground and has restored the same to the file of Assessing Officer. The ld. DR has strongly opposed admission of additional ground and has even expressed reservations that if additional ground is allowed, the assessed income of the assessee would go below the returned income, and the same is impermissible in the light of CBDT Circular. We find that the in the case of Sesa Goa Ltd. (supra.) similar was the situation where the assessee had claimed deduction of “Education Cess” by raising additional ground before the CIT(A) and the Tribunal. The ld. Counsel for the assessee in the said case raised similar objections before the Hon’ble High Court

against the admissibility of assessee's claim. The Hon'ble High Court after considering various decisions rejected the contentions raised on behalf of the Department and held:

> *"37. Ms. Linhares, learned Standing Counsel for the Revenue however submitted that the Appellant - Assessee, in its original return, had never claimed deduction towards the amounts paid by it as "cess". She submits that neither was any such claim made by filing any revised return before the Assessing Officer. She therefore relied upon the decision of the Supreme Court in Goetze (India) Ltd. v. Commissioner of Income-tax (2006) 284 ITR 323 (SC) to submit that the Assessing Officer, was not only quite right in denying such a deduction, but further the Assessing Officer had no power or jurisdiction to grant such a deduction to the Appellant - Assessee. She submits that this is what precisely held by the ITAT in its impugned judgments and orders and therefore, the same, warrants no interference.*
>
> *38. Although, it is true that the Appellant - Assessee did not claim any deduction in respect of amounts paid by it towards "cess" in their original return of income nor did the Appellant - Assessee file any revised return of income, according to us, this was no bar to the Commissioner (Appeals) or the ITAT to consider and allow such deductions to the Appellant - Assessee in the facts and circumstances of the present case. The record bears out that such deduction was clearly claimed by the Appellant - Assessee, both before the Commissioner (Appeals) as well as the ITAT.*
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> *39. In CIT v. Pruthvi Brokers & Shareholders Pvt. Ltd. 349 ITR 336, one of the questions of law which came to be framed was whether on the facts and circumstances of the case, the ITAT, in law, was right in holding that the claim of deduction not made in the original returns and not supported by revised return, was admissible. The Revenue had relied upon Goetze (supra) and urged that the ITAT had no power to allow the claim for deduction. However, the Division Bench, whilst proceeding on the assumption that the Assessing Officer in terms of law laid down in Goetze (supra) had no power, proceeded to hold that the Appellate Authority under the IT Act had sufficient powers to permit such a deduction. In taking this view, the Division Bench relied upon the Full Bench decision of this Court in Ahmedabad Electricity Co. Ltd. v. CIT (199 ITR 351 to hold that the Appellate Authorities under the IT Act have very wide powers while considering an appeal which may be filed by the Assessee. The Appellate Authorities may confirm, reduce, enhance or annul the assessment or remand the case to the Assessing Officer. This is because, unlike an ordinary appeal, the basic purpose of a tax appeal is to ascertain the correct tax liability of the Assessee in accordance with law.*
>
> *40. The decision in Goetze (supra) upon which reliance is placed by the ITAT also makes it clear that the issue involved in the said case was limited to the power of the assessing authority and does not impinge on the powers of the ITAT under section 254 of the said Act. This means that in Goetze (supra), the Hon'ble Apex Court was not dealing with the extent of the powers of the appellate authorities but the observations were in relation to the powers of the assessing authority. This is the*

distinction drawn by the division Bench in Pruthvi Brokers (supra) as well and this is the distinction which the ITAT failed to note in the impugned order.

41. Besides, we note that in the present case, though the claim for deduction was not raised in the original return or by filing revised return, the Appellant - Assessee had indeed addressed a letter claiming such deduction before the assessment could be completed. However, even if we proceed on the basis that there was no obligation on the Assessing Officer to consider the claim for deduction in such letter, the Commissioner (Appeals) or the ITAT, before whom such deduction was specifically claimed was duty bound to consider such claim. Accordingly, we are unable to agree with Ms. Linhare's contention based upon the decision in Goetze (supra).”

We find no merit in the objections raised by the ld. Departmental Representative against admission of additional ground. The ld. Departmental Representative has failed to show that the facts in the assessment year under appeal are distinguishable. Further, the ld.Departmental Representative has also not been able to controvert, that necessary facts for deciding additional ground of appeal are already on record and hence, no new additional evidence is required to be adduced for the adjudication of this legal issue. The additional ground raised by the assessee is purely of legal nature. Taking into consideration the facts and the decision rendered in the case of Sesa Goa Ltd. (supra.), we admit the additional ground and restore the issue to the file of Assessing Officer for consideration. The Assessing Officer shall afford reasonable opportunity of hearing to the assessee and shall pass speaking order, in accordance with law. **The additional ground raised by the assessee is thus, allowed for statistical purpose.**

13. The ld. Counsel for the assessee stated at the Bar that in case additional ground is admitted, then grounds of appeal No.3, 4 and 12 to 15 would become academic. Thus, in view of the statement made by ld. Counsel of the assessee, we are not deliberating on the aforesaid grounds of appeal.

14. In the result, appeal of the assessee is partly allowed in the terms aforesaid.

Order pronounced on Monday the 21st day of September, 2020.

Sd/-	Sd/-
(N.K.PRADHAN)	(VIKAS AWASTHY)
लेखा सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated: 21/09/2020
Vm, Sr. PS (O/S)

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai