

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1" NEW DELHI"**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No.2064/DEL/2014
Assessment Year: 2007-08

SRF Limited, Block-C, Unitech Crest, Greenwood City, Sector-45, Gurgaon – 122 003 PAN AAACS0206P (Appellant)	Vs.	DCIT, Circle 9(1), New Delhi. (Respondent)
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Assessee by:	S/Shri Pradeep Dinodia & R.K. Kapoor, CA
Department by :	Shri Surender Pal, CIT DR
Date of Hearing	20/01/2021
Date of pronouncement	06/04/2021

ORDER

PER AMIT SHUKLA, J.M.

The aforesaid appeal has been filed by the assessee against order dated 23.01.2014 passed by Ld. Commissioner of Income-tax (Appeals) for the quantum of assessment u/s 143(3) r.w.s 144C of the Income-tax Act, 1961, for assessment year 2007-08. In the grounds of appeal, the assessee has raised the following grounds:

1 (a) That the learned Commissioner of Income Tax (Appeals) has erred in law, on facts and in the circumstances of the case in upholding the disallowance u/s 14A of the Income Tax Act, 1961, amounting to Rs.39,55,351/- on wholly illegal, erroneous and untenable grounds.

(b) That the learned CIT (Appeals) has failed to appreciate that the A.O. has given no findings that the assessee has incurred any expenditure in relation to income which does not form part of total income under the Act as mandated by Section 14A(1) of the Act.

(c) That the learned CIT (Appeals) has erred in law and in the circumstances of case in not taking into account the various submissions made by the appellant during the course of hearing before him and erroneously upheld an addition amounting to Rs. 39,55,351/-.

(d) That the addition of Rs. 39,55,351/- upheld u/s 14A read with rule 8D is bad in law and is prayed to be deleted as rule 8D is not applicable in the current year.

2 (a) That the learned CIT (Appeals) has erred in law, on facts and in the circumstances of the case in upholding an addition of Rs. 44,77,914/- on account of transfer pricing u/s 9C of the Income Tax act based on the order of the TPO dated 15.10.2010 on wholly illegal, erroneous and untenable grounds.

(b) That the learned CIT (Appeals) has failed to appreciate that the transaction of the appellant with its AE SRFO Dubai was at arm's length as per Chapter X of the Income Tax Act.

The learned TPO and CIT (Appeals) have failed to appreciate that as per provisions of Chapter X no addition was called for on the transactions between the appellant and its AE SRFO Dubai.

(c) That on the facts and circumstances of the case and in law, the Ld. CIT (A) erred in upholding the action of the Assessing Officer and not considering the debit notes for Rs.36.95 lakhs raised by the appellant in addition to the invoices raised for supplies.

(d) That the addition of Rs.44,77,914/- is bad in law and is prayed to be deleted.

3 (a) That the learned CIT (Appeals) has erred in law, on facts and in the circumstances of the case is not admitting additional grounds raised before him on account of Rs.491.53 crores being capital receipt and exempt from tax representing sale proceeds from transfer of Carbon Credit (CER / Carbon Emission Reduction) on wholly erroneous and untenable grounds.

(b) That the hon'ble Tribunal be pleased to admit the grounds:

(i) That on the facts and circumstances of the case and in law, the amount received on account of CERs transferred was a capital receipt not liable to tax under the provisions of the Income Tax Act, hence the appellant is entitled to relief of Rs.4,91,53,00,344/-.

(ii) That AO erred while determining the total income of the appellant by treating sale proceeds from transfer of Carbon Credit (CER/Carbon Emission Reduction) of Rs.491.53 crores as the taxable income.

(c) That the amount of Rs.491.53 crores be reduced from the taxable income of the assessee.

4. That each ground is independent of and without prejudice to the other grounds raised herein.

2. Before us, the assessee further raised the following additional grounds of appeal:

Interest subsidy of Rs. 3,25,00,000/- under Technology Up gradation Fund (TUF)

“That an amount of Rs. 3,25,00,000/- received by assessee on account of interest subsidy under Technology Up-gradation Fund (TUF) scheme be excluded from the total income since it is a capital receipt in nature not liable to tax.”

Deduction of education cess u/s 37

“9. The Hon’ble ITAT may be pleased to grant the claim of ‘Education Cess’ (@ 3%) amounting to Rs. 2,54,68,332/- u/s 37 of the Act paid/payable by the assessee under normal provisions of the Act.”

3. The assessee company is mainly engaged in the business of manufacturing Nylon tyre cord fabric, Refrigerant Gasses and Packaging Films. It is a flagship company of SRF Group. SRF Group is one of the largest manufacturers of industrial yarn and fabrics in the world and is the seventh largest manufacturer of Nylon Tyre Cord Fabric and the fifth largest manufacturer of belting fabrics in the world.

4. The assessee has raised both transfer pricing issue (in ground no.2) and non-transfer pricing issues before us. We proceed to deal with each ground in seriatim.

Ground no.1 [(a)-(d)]-Disallowance u/s 14A read with Rule 8D-Rs.39,55,351/-

5. Regarding disallowance u/s 14A r.w.r. 8D, the facts in brief are that, assessing officer took note of the fact that assessee has received dividend income to the tune of Rs.1,49,06,665/- which has been claimed as exempt by the assessee and no disallowance has been made by the assessee u/s 14A in respect of such dividend income received. The assessing officer relying upon the judgment of ITAT Mumbai (Special Bench) in case of **ITO v. Daga Capital** [117 ITD 169] held that Rule 8D notified vide notification no.45/2008 dated 24th March, 2008 are procedural and clarificatory in nature and thus has retrospective operation including the relevant year under consideration i.e. AY 2007-08. The AO proposed the disallowance u/s 14A read with Rule 8D of Rs.45,69,828/-.

6. Before the Assessing Officer, the assessee contended that Hon'ble Bombay High Court in case of **Godrej and Boyce Manufacturing Co. Ltd. v. DCIT** [2010] 328 ITR 81 (Bombay) while reversing aforesaid judgment of ITAT Mumbai (Special Bench) in case of **ITO v. Daga Capital** [117 ITD 169] held that provisions of Rule 8D is prospective and thus applicable from A.Y. 2008-09. Thus, rule 8D will not be applicable fir A.Y. 2007-08. The assessee further contended that major investments are in foreign subsidiaries and thus the dividend income from which when received is taxable under the Act. Further, out of remaining

investments, only Rs.399.17 Lakhs has been made during the current year and over and above there is a repayment of loans to the tune of Rs.11905.39 Lakhs during the year. Further, Id. Counsel for the assessee pointed out that the charges in the nature of bank charges, bill discounting charges, LC charges etc. which actually are not in the nature of interest expense have been also taken for the purpose of disallowance u/s 14A r.w.r. 8D.

7. The assessing officer proceeded to make disallowance u/s 14A r.w.r 8D to the tune of Rs.45,69, 828/-. The disallowance consisted of Rs.38,17,938/- computed under Rule 8D(2)(ii), while an amount of Rs. 7,51,890/- under Rule 8D(2)(iii) was computed.

8. In the first appeal, the Ld. CIT(A) noted that in **Godrej and Boyce Manufacturing Co. Ltd. v. DCIT**[2010] 328 ITR 81 (Bombay), the Hon'ble Bombay High Court has held that Rule 8D would apply with effect from assessment year 2008-09. However, he ruled that assessee has failed to establish the acquisition of shares and sources thereof by producing books of accounts and other documentary evidence as the appellant has invested in shares out of the common pool of fund and in turn relied on the judgment of Calcutta High Court in case of **Dhanuka & Sons v. CIT** [2011] 339 ITR 319 (Cal). The Ld. CIT(A) upheld the disallowance u/s 14A r.w.r. 8D made by the assessing officer, however granted partial relief by excluding other finance charges of Rs.673.02 Lakhs and imputing correct figure of investments and assets. The CIT (A) reduced disallowance from Rs.45,69,828/- to Rs.39,55,351/-.

9. Before us, the ld. Counsel for the assessee, Shri Pradeep Dinodia submitted that, this issue is fully covered by judgments of this ITAT in assessee's own cases for AY 2006-07, AY 2008-09, AY 2010-11 and AY 2012-13. In his written synopsis he has also submitted the year wise summary of findings of ITAT starting from AY 2006-07.

10. On merits of case, the assessee reiterated that out of total of investments of Rs.10410.22 lakhs, amount pertaining to investment made in foreign subsidiaries dividend from whom is taxable is Rs.8756.86 lakhs. Of the remaining investments of Rs.1653.36 Lakhs, Rs.1254.19 Lakhs pertained to investment made in earlier years and thus, only Rs. 399.17 Lakhs pertains to the investment made in the financial year under consideration. As regards the loans, the assessee has given a comparative chart of loans taken/repaid during the previous four years including current year, which is reproduced hereunder:-

Rs. In Lakhs

Financial Year	Increase / (Decrease) in Borrowing	Increase / (Decrease) in investment from which income exempt
2003-04	(3,002)	0
2004-05	18,903	(500)
2005-06	17,707	(243)
2006-07	(12,020)	299

He pointed out that during the said period of four years, the assessee had borrowed approx. Rs 36,608 lakhs for various reasons which included expansion of its business, replacement of

assets, establishment of new factories and other business needs and there was no addition in investment made by the company during such three previous years prior to the relevant year. Further, during the relevant year under consideration the assessee repaid borrowings of Rs.12,020 Lakhs, while net investment made is only Rs.299 Lakhs.

11. In addition to above, the Id Counsel also highlighted the fact that assessee has *reserves & surplus* as on 01.04.2006 of Rs. 53,121.45 Lakhs and as on 31.03.2007 of Rs. 80,488.05 Lakhs, average being Rs.66,804.73 Lakhs which is almost 40 times of the other investment' (Other than foreign investments) of Rs.1653.36 lakhs. Moreover, even during the relevant year, the assessee has earned cash profit of Rs. 52,170.27 lakhs, while on the other hand increase in investment during the year is just Rs. 299.16 lakhs without any increase in borrowing during the year. The Id. Counsel thus heavily stressed upon this fact that assessee had sufficient surplus funds and none of the borrowed funds could have been said to be utilized for making investments yielding dividend income. He relied upon various judgments to the effect that if the assessee has sufficient own funds for investment then Section 14A r.w.r. 8D cannot be applied to make disallowance of expenditure. For instance:-

- **Pr. CIT v. Sintex Industries Ltd.** [2017] 82 taxmann.com 428 (Gujarat)-revenue's SLP dismissed by Hon'ble Apex Court [2018] 93 taxmann.con 24 (SC).
- Gujarat State Fertilizers & Chemicals Ltd. [TS-304-HC-2013(GUJ)].
- **Max India Ltd. [TS-498-HC-2016(P & H)].**

- HDFC Bank Ltd [TS-106-HC-2016(BOM)].
- Torrent Powers Ltd. [272 CTR 270 (Guj)].
- Bermaco Energy Systems Ltd. [TS-313-ITAT-2013(Mum)].
- CIT v. UTI Bank Ltd. [2013] 32 taxmann.com 370/215 Taxman 8 (Mag.)(Guj. HC).
- DIT (IT) v. BNP Paribas SA [2013] 32 taxmann.com 276/214 Taxman 548 (Bom. HC).
- Pr. CIT v. India Gelatine& Chemicals Ltd. [2015] 376 ITR 553/[2016] 66 taxmann.com 356.

12. The ld. Counsel in his synopsis also contended that no disallowance u/s 14A invoking the Rule 8D can be made for A.Y. 2007-08 under consideration. Additionally, he contended that disallowance cannot be sustained in absence of any satisfaction recoded by the assessing officer in its order.

13. The learned DR on the other hand relied on the order of assessing officer and CIT (A) and submitted that looking to the exempt income some disallowance has to be made and Ld. CIT (A) on facts has sustained part of disallowance which is justified.

14. We have heard the rival contentions, perused the relevant findings and as well as material referred to before us at the time of hearing. It is worthwhile to note that this Tribunal in assessee's own case for past and future years has dealt with the identical issue covering several aspects.

The findings of this tribunal for AY 2006-07 are reproduced hereunder:-

ITA No. 2181/Del/2009 A.Y. 2006-07

Para 9– “We have carefully considered the rival contentions and fully agree that for the impugned assessment year, the provisions of Rule 8D of Income Tax Rules, 1962 which has been made applicable with effect from assessment year 2008-90 only and does not apply to the impugned assessment year under appeal before us. Therefore, no disallowances under section 14A of the Income Tax Act, 1961 can be made in hands of the assessee for this assessment year based on computation formula of Rule 8D.”– “The second contention of the assessee is that the Ld. AO has not recorded any satisfaction where the assessee has contended that the assessee has not incurred any expenditure for earning exempt income. The detailed exploration of the assessee is available at Para No. 7.2 of assessment order where assessee has submitted that out of total investment, Rs. 8756.86 Lacs are invested in foreign subsidiary company where dividend earned by the company is taxable and not exempt. Furthermore, it was also contended that investment made during the year is out of operating cash flow of the current year and the remaining investment of Rs. 1096.7 Lacs had been made earlier in different financial year, to substantiate assessee also submitted the cash flow statement. Therefore, it was the contention of the assessee that it has not incurred any interest expenditure on the investment made. However, without rejecting the explanation of the assessee and recording an objective satisfaction on examination of the books of accounts of the assessee and without stating that assessee has incurred certain expenditure for the purpose of earning exempt income, Ld. AO straightway applied the provisions of Rule 8D of the Rules and made

disallowance of Rs. 54,76,618/-. Such an approach of the AO cannot be upheld. According to the provision of Section 14A of the Act, the Ld. AO, having regard to the accounts of the assessee should record satisfaction that correctness of the claim of the assessee that it has not incurred any expenditure for earning exempt income then only can determine the amount of expenditure incurred in relation to such income for disallowance. The Hon'ble Delhi High Court in CIT versus Taikisah Engineering Ltd. 370 ITR 338 has held that under sub-section (2) of section 14A of the Act, the AO is required to examine the accounts of the assessee and only when he is not satisfied with the correctness of the claim of the assessee in respect of incurring no expenditure in relation to exempt income, can be determine the amount of expenditure which should be disallowed in accordance with such method as prescribed, i.e. Rule 8D of the Rules. Therefore the AO at the first instance must examine the disallowance made by the assessee or the claim of the assessee that no expenditure was incurred to earn exempt income. If and only if the AO is not satisfied on this count after referring to the accounts, determine the disallowance. The Ld. AO has failed in his duty to do so. In view of this, we direct the AO to delete the disallowance of Rs. 54,76,618/- made u/s 14A of the Act. In view of this, we reverse the order of the Ld. CIT (A) on this ground.”

15. Whence, in assessee's own case for AY 2006-07, Tribunal has given a clear finding that provisions of Rule 8D cannot be invoked for any assessment year prior to assessment year 2008-09, then in A.Y.2007-08 also same cannot be held to be applicable. Nevertheless, the issue is settled in view of judgment of **Apex Court** in case of **Essar Teleholdings Ltd.** (TS-35-SC-2018) that Rule 8D cannot be

enforced prior to AY 2008-09 for making disallowance u/s 14A of the Act. Further, in A.Y. 2011-12 (ITA no.356/Del/2015) and AY 2012-13 (ITA no.5784/Del/2016), this Tribunal has upheld deletion of disallowance u/s 14A r.w.r. 8D in view of sufficiency of assessee's own surplus funds in form of reserves and surplus over the value of investments.

16. As has been brought to our attention that in the year under consideration, the reserve and surplus are much higher than the investments and further, investment made during the year is only Rs. 399.17 Lakhs (net Rs.299.00 Lakhs), while there is actual repayment of borrowings during the year to the extent of Rs.12,020 lakhs. Therefore, assessee's own funds are much more than investment and on the facts of the case it can be reasonably inferred that amount of investment made cannot be said to be made from borrowings but out of assessee's own funds. Thus, the contentions of CIT(A) that assessee has failed to establish the acquisition of shares and sources thereof by producing books of accounts and other documentary evidence by relying on the judgment of Calcutta High Court in case of **Dhanuka & Sons v. CIT** [2011] 339 ITR 319 (Cal) is erroneous. It is apparent from the facts submitted by the assessee before assessing officer as well as before CIT (A) from which one may reasonably infer that investments are not out of borrowings but from the assessee's own surplus funds.

17. In view of the above and following the judgments of this Tribunal in assessee's own case we direct the AO to delete the

disallowance of Rs. 39,55,351/- made u/s 14A r.w.r 8D. The order of the CIT (A) to the extent of disallowance upheld is thus reversed on this issue.

Ground no.2-Adjustment on account of transfer pricing issue-Rs.44,77,914/-

18. The international transaction under dispute is the 'Export of Nylon Tyre Yarn' amounting to Rs.41,53,89,904/- and 'Export of Chafer' amounting to Rs.29,14,709/- by the assessee to its associated enterprise namely 'SRF Overseas Ltd, Dubai'. The assessee benchmarked the aforesaid international transaction by applying CUP as most appropriate method (MAM) to determine ALP. The CUP method was applied on the basis of comparison of price of purchase of identical items by AE from a third party namely, PT Filamento Shakti. Further, during the period when no such purchases were made by the AE from third party, the similar purchase by assessee from said third party was taken as comparable uncontrolled transactions for benchmarking purposes. Further, the assessee also took the alternative CUP in form of prices published by an industrial magazine, "**Technon Orbichem Price Monitor**" for benchmarking the international transactions. The assessee also took the benefit of +5% while benchmarking the international transactions.

19. During the course of proceedings before TPO, the TPO rejected the benefit of +5% holding that benefit cannot be availed in case of single price. Further, the TPO also proposed to reject the assessee's alternative CUP from Technon Orbichem Price Monitor. The TPO proposed an adjustment of Rs.44,77,914/- in

respect of captioned transaction. What TPO has done is that he has taken note of the transaction on daily basis and if on any day the price is less than the price charged from the third party is more, he has made the adjustments. However, he has ignored the other days when price charged from AE is more than the third party. The Comparable price has been reproduced in his order at pages 14 to 20.

20. On appeal, the Ld. CIT (A) rejected the benefit of $\pm 5\%$ and upheld the adjustment made by the TPO.

21. During the course of hearing, the ld. Counsel's main objection against the above adjustment was that, while computing the arm's length price of above international transactions, the TPO cannot pick and choose the transactions with the same AE with an objective of making an adjustment. He took us through the chart of transactions reproduced in the TPO's order at page no. 14 to page no.20 to bring out the fact that there are number of transactions in the nature of export of goods with its AE on different dates spread across the entire year. Going through the chart given by the TPO himself in the order, he pointed out that there are certain transactions the price of which are more than the comparable price and hence no adjustment has been proposed by the TPO. While there are other transactions, where the prices are lower than the comparable prices and in respect of such transactions only, the adjustment has been made by the TPO. The difference even in such transactions, fall within the range of ± 5 . For instance from page no.14 of the TPO order from where the table starts, he pointed the first four transactions having serial no.1 to 4, the assessee's

transaction price is USD 2.82 per Kg, while the comparable transaction price is 2.87 in all such cases, thus an adjustment of 0.05 per Kg, which is a miniscule difference, has been made by the TPO in all these four transactions. However, on the same page, from serial no. 5 to 16, the assessee's transaction price is USD 2.90 per Kg, while the comparable transactions price taken by the TPO himself is USD 2.87 per Kg. in all such cases, however since the assessee's transaction price was higher than the TPO's comparable price in all such transactions at serial no.5 to 16, the TPO chose to ignore all such transactions and no benefit or set-off has been given by him for the same. Similar is the case, in remaining transactions from page no.15 to 20 of TPO's order.

22. The Id. Counsel stressed that all the above transactions are closely interlinked transactions as these are transactions of the identical nature being the export of nylon yarn and chafer and to the same AE. These are continuous transactions and functional analysis is the same for all transactions. He referred to Rule 10A (d) of Income-tax rules, which defines 'transaction' to include a number of closely linked transactions. Thus, the above transactions being closely linked transactions, aggregate approach should be followed by the TPO instead of cherry picking certain transactions out of whole just to make adjustment.

23. In support of his contention that aggregate approach is to be adopted in such circumstances, the Id. Counsel placed reliance on the various judgments against cherry picking of the transactions and in support of aggregation approach.

- Godrej Sara Lee Ltd. [TS-125-ITAT-2015(Mum)-TP]

- Goldstar Jewellery Ltd.[TS-14-ITAT-2015(Mum)-TP]
- Boskalis International-Dredging International CV [TS-215-ITAT-2014 (Mum)-TP]
- Taj Sats Air Catering Ltd [TS-256-ITAT-2013 (Mum)-TP]
- Bank of Tokyo Mitsubishi UFJ Ltd v DDIT [2020-TII-91-ITAT-Del-Intl]
- Gulbrandsen Chemicals Pvt Ltd [TS-1026-ITAT-2016(Ahd)-TP]
- Luwa India Pvt. Ltd. [TS-687-ITAT-2016(Bang)-TP]
- MTU Industries Ltd [TS-132-ITAT-Pune];

Heavy reliance was also placed on Mumbai ITAT ruling in the case of **Rohm and Haas India Pvt. Ltd.** [TS-926-ITAT-2019(Mum)-TP] wherein it was held that :

Je us.

25. The ld. AR also drew our attention to the fact, that during the year the assessee has raised a debit note amounting to Rs.36,95,456/- which has not been considered by the TPO and CIT(A). This would go to further reduce adjustment if any.

26. Lastly, on use of **Technon Orbichem Price Monitor** as comparable, the ld. AR submitted that though the TPO has refused to consider it as comparable data under CUP, he himself has used such data while computing the arm's length price as evident from the chart given in its TPO's order. The ld. AR also submitted that adjustment proposed is only 1% of the total value of the transaction which is meager and is within the threshold of +/-5%.

20. The ld. DR relied on the order passed by the adjudicating authorities and further submitted that transaction

has to be seen in segregation and if price charged from AE is lower than the comparable price on any transaction, then adjustment has to be made.

21. We have heard the rival contentions, perused the relevant findings and as well as material referred to before us at the time of hearing. The TPO and CIT (A) have rejected the relief of $\pm 5\%$ as the basis of making and upholding the adjustment proposed. However, the main ground raised before us is, whether aggregation of closely linked transactions can be made; and whether cherry picking of the interlinked transaction carried out throughout the year for export of same product can be made as done by TPO. Thus, we refrain to deal with the allowability of $\pm 5\%$ in the case in hand and restrict ourselves to the main ground raised before us.

22. On perusal of the chart given by the TPO in its order at page no.14 to page no.20, it is clear and also as pointed out by the ld. Counsel that TPO has only picked and chose only those transactions, when on that particular day of transaction price charged from AE is marginally low as compared to uncontrolled comparable transaction leaving those transaction of same goods where price charged from AE is more than third party, which could have resulted in the some transfer pricing adjustment. As stated above TPO has conveniently ignored the transactions where the price charged by the assessee is higher than the comparable price. Here the international transaction under dispute is the 'Export of Nylon Tyre Yarn' amounting to Rs.41,53,89,904/- and

'Export of Chafer' amounting to Rs.29,14,709/- by the assessee to its associated enterprise. Undisputedly, CUP is MAM, because data of uncontrolled comparable transaction is available of similar product. The export of the goods with the AE is continuous process and not one transaction and so is with the third party. What TPO has done has cherry picked certain transaction where the price charged is marginally low. As demonstrated above before us by Ld. Counsel in foregoing para 21, the TPO has chosen only those few transaction where there is minor difference in price charged which is on lower side; and where, the assessee's transaction price was higher than the TPO's comparable price in all such transactions, TPO chose to ignore all such transactions and no benefit or set-off has been given by him for the same. This action of TPO is not warranted as he cannot pick and choose certain transactions and leave other transactions while determining arm's length price of transactions or group of transactions. This precise issue has already been dealt by the Mumbai Tribunal in the case of **Boskalis International Dredging C.V vs. DDIT reported in 67 SOT 118, which decision has been subsequently approved by the Hon'ble Bombay High Court reported in TS-1310-HC-2018.**

23. We reiterate that the transactions under consideration are in the nature of export of nylon yarn and chafer by the assessee to its AE and the nature of transaction is same and homogeneous and is with the same AE. These transactions are continuous transactions and are closely

linked transactions. Though each international transaction is required to be benchmarked separately, however, the word **“transaction”** as defined under **Rule 10A (d)** of Income-tax Rules, 1962, includes within its ambit **a number of closely linked transactions**. If transactions with the AE are continuous and there number of closely linked transactions, like here in this case, then there cannot be separate benchmarking of closely linked transaction. The rules mandates that closely linked transactions can be treated as a class of transaction and benchmarked together. The price of the goods which are the subject matter of export transaction are negotiated based on international pricing quote for each day which are given ‘Technon Orbichem Price Monitor’. It depends upon when the order is booked and exported. If one carefully peruses the transactions as incorporated in the Table given by the TPO, it is seen that on most of the times the price charged with AE is higher than the comparable third party. This itself goes to show that the pricing depends upon the timing and date of booking of the order and even the price margin is quite meager. In fact, if all transactions given in the table are aggregated, there would be a positive figure of Rs.14,58,033/- instead of negative of Rs.44,77,914//, that is, with the AE price charged is more as compared to the third party. Then how can it be said that the transaction with the AE is not at ALP. Under these facts and circumstances we hold that aggregation approach has to be adopted as envisaged in Rule 10A (d) on the transaction of export of goods with the AE.

24. Having said that, one need to be conscious of the business realities while carrying out the benchmarking analysis, as transfer pricing is not an exact science. In the business dealings, the prices are negotiated based on the market forces and various other quantitative and qualitative considerations. It may always not possible to fetch the desired price and fluctuations in prices are expected over a period of time. A pragmatic approach is required to be followed while analyzing the transactions. It is not a case of one-off transaction but of routine business transaction carried out over a period of time. Thus, one needs to take a holistic view while dealing with such transactions.

25. We have carefully examined the working given by the assessee in Annexure-I of the synopsis, according to which the net effect under aggregate approach which we have affirmed before giving effect of debit note is a positive of Rs.14,58,033/- against the negative of Rs.44,77,914/- computed by the TPO. While the aforesaid net positive after giving the effect of debit note the same gets enhanced to Rs. 51,53,489/-. Hence there is no scope left for any ALP adjustment in these facts. We therefore, allow the claim of the assessee of benchmarking the entire transaction of export of nylon yarn and chafer using the aggregation approach which has been duly confirmed in various decisions cited supra and accordingly, the assessee's international transactions of export of Nylon Yarn and Chafer are held at arm's length. Thus, transfer pricing adjustment made by the TPO/AO and upheld by CIT (A) amounting to Rs.44,77,914 is hereby deleted.

Ground no.3-Receipt on account of transfer of Carbon emission reduction (CER) certificates:

26. The assessee has received carbon emission reduction ('CER' or 'carbon credits') certificates on account of its efforts to reduce the emission of greenhouse gases in terms of Kyoto Protocol. During the relevant year the assessee transferred 45,49,000 of such certificates for a consideration of Rs. 4,91,53,00,344/-.

27. The assessee initially included the above CER receipts in its total income while filing the return of income. Subsequently before the CIT (A), the assessee raised this issue for the first time by way of additional ground for exclusion of CER receipts from the total income based on the decision reported in **My Home Power Ltd. vs. DCIT** [2012] 27 taxmann.com 27 151 TTJ 616. Before CIT (A), the assessee explained the issue in detail vide its submissions dated 25.11.2013. Further, complete details of CER receipts were also submitted to the assessing officer while justifying the increase in legal and professional expenses (Page no.144 of Paper Book). The CIT (A) refused to consider the additional claim on CER on the ground that assessee has not made such claim before the assessing officer by filing a revised return. The CIT(A) relied on the Hon'ble Supreme Court's judgment in case of **Goetze India Ltd** [284 ITR 323].

28. The assessee on merits relied upon following judgments of Hon'ble High Courts which have upheld the capital nature of CER receipts:-

- CIT vs My Home Power Ltd. [2014] 365 ITR 82 (AP High Court)
- SubhashKabini Power Corporation Limited [TS-236-HC-2016(KAR)]
- Pr. CIT v. L.H. Sugar Factory Ltd [2016-TIOL-1942-HC-ALL High Court-IT] and
- Pr. CIT vs. Arun Textiles Pvt Ltd (Madras High court) (Appeal no 606 of 2016);
- Dodson Lindblom Hydro Power Pvt Ltd [2019-TIOL-531-HC-MUM-IT];
- Gujarat Flourochemicals Limited [ITA no. 11 & 28 of 2019]-Gujarat High Court.

29. The ld. Counsel stated before us that aforesaid issue is also fully covered by decisions of coordinate bench in assessee's own case for AY 2006-07, AY 2008-09, AY 2010-11 and AY 2012-13. In all such years, the issue of CERs was raised before the tribunal by way of additional ground. The tribunal in all years remitted the issue back to the assessing officer to decide the issue in accordance with the law.

30. We have heard the rival contentions, perused the relevant findings and as well as material referred to before us at the time of hearing. We have noted that various

Hon'ble high courts including **My Home Power Limited** (*Supra*) have held that carbon credits are not offshoot of business but offshoot of environmental concerns and hence not chargeable to tax. In case of judgment of Hon'ble Gujarat High Court in case of **Gujarat Flourochemicals Limited** [ITA no. 11 & 28 of 2019], cited above, the facts noted by the ITAT Ahmedabad in its order (ITA no.805 and 2744/Ahd/2017) are worth discussing. The appellant in said case was operating a HCFC-22 plant at village Ranjitnagar, District Panchmahals, Gujarat. During the production of HCFC-22, waste gas called HFC-23 was also generated. Appellant's CDM project consisted of incinerating HFC-23 instead of allowing it to be vented into the atmosphere, and thereby reducing GHG emissions. Due to reduction in emission of HFC-23, CERs were awarded to the appellant. The appellant raised the issue of exclusion of CER from total income before the DRP for the first time, which refused to entertain the claim of the assessee primarily relying on the judgment of Hon'ble Supreme court in **Goetze (India) Limited vs CIT** 284 ITR 323. The tribunal taking note of the facts and judgments on the issue allowed the appeal of the assessee with following findings:-

“41. Thus, taking into consideration resolution of litigation on this issue by the Legislature itself, which had made provision for taxation of such receipts at the rate of 10% from the assessment year 2018-19 as well as authoritative pronouncements of Hon'ble

jurisdictional High Court, we are of the view that receipts received by the assessee on sale of carbon credit are to be treated as capital receipts and not liable to tax. The ld.DRP has assigned one more reasons for not entertaining claim of the assessee particularly in the assessment year 2012-13 is that such claim was not in the return of income, rather it was made during the course of assessment proceedings. On the strength of Hon'ble Supreme Court judgment in the case of Goetez India Ltd.(supra), we are of the view that the AO cannot entertain any claim for allowing deduction resulting in a reduction of total income returned, which is not claimed in the original return or a revised return. To this reasoning of the DRP, we are of the view that we have considered this aspect while dealing with the issue regarded enhancement claim made under section 80IA of the Act. We have made reference to the decision of the ITAT, Mumbai and Bangalore Benches as well as Hon'ble High Gujarat High Court in the case of MiteshImpex (supra) and held that if a particular item is going to affect taxability of assessee, then a fresh claim can be entertained by the first appellate authority or by the DRP. Thus, we overrule this reasoning of the DRP and direct the AO to treat these receipts in both assessment years as capital receipt.”

Aggrieved, the revenue took the matter before Hon'ble High Court of Gujarat, which dismissed the appeal as under:

“26. The fifth question proposed by the revenue whether the income from the Carbon Credits is capital in nature. The issue is squarely covered by the following decisions:-

(1) M/s Alembic Ltd.

Tax Appeal No.553 & 554 of 2017

(2) CIT Vs. My Home Power Ltd.

[2014] 46 Taxmann.com 314

(3) SubhashKabini Power Corporation Ltd. (KHC)

[2016] 69 Taxmann.com 394

27. We quote the relevant observations made by this Court in the Alembic Limited (Supra) as under:-

“6. The last surviving question pertains to the treatment that the assessee’s income from trading of carbon credits should be given. The Tribunal held that receipts should be in the nature of capital receipts and therefore, would not invite tax. This issue has been examined by two High Courts. The Karnataka High Court in case of CIT v. SubhashKabini Power Corporation Ltd. reported in (2016) 385 ITR 592 (Karn) and Andhara Pradesh High Court in case of Commissioner of Income-tax v. My Home Power Limited reported in (2014) 365 ITR 82 (AP) have held that receipts of carbon credit are in nature of revenue receipts. Following the decision of said two High Courts, this question is also not considered.”

31. We have observed that facts of the assessee are similar to the case of **Gujarat Flourochemicals Ltd (Supra)**. Further, in other cases too, the Hon'ble High Courts have held CER as the capital receipts not liable to tax. This tribunal in earlier years also has dealt with this issue in the case of assessee and remitted the matter to the file of AO. The observation of the tribunal in assessee's own case for AY 2010-11 (ITA no.356/Del/2015) is reproduced herein below for reference:

“60. On the aspect of claim of the assessee that receipt of CER is capital nature, we find force in the argument of the Ld. AR that cause of action had arisen in the case by virtue of the decision in My Home Power Ltd. (supra). The claim of assessee is bonafide and has been raised before AO as well as DRP. The assessee is not in the business of trading in CERs but in business of technical textile, chemicals, refrigerant gaseous etc. The assessee has been granted CERs on account of its efforts for reduction in harmful greenhouse gases in terms of Kyoto Protocol. Thus it cannot be said that CERs are benefits arising from the business of the assessee. Various Hon'ble High Court including My Home Power Ltd. (supra) have held that carbon credits are not offshoot of business but offshoot of environmental concerns and hence not taxable.

Further coordinate bench in assessee's own case for AY 2006-07 and AY 2008-09 has allowed to raise this claim of the assessee and remitted the issue back to AO to decide the issue in accordance with law.

“61. We therefore, allow the assessee's plea for entertainment of above additional claim and this issue is remitted back to the file of AO to decide it in accordance with law, after granting reasonable opportunity of heard to the assessee. The assessee shall be free to file such documents, explanations, submissions as it deems fit in respect of this claim.”

32. We therefore, following the judgments of coordinate benches in assessee's own case on merits, remit this issue back to the file of AO to decide it in accordance with the law having regard to above observations and the case laws relied upon by the assessee, after granting a reasonable opportunity of hearing to the assessee.

Additional Grounds:

33. The assessee has raised the two additional grounds, one in respect of interest subsidy under TUF scheme and other pertaining to allowance of deduction of education cess u/s 37 of the Act.

34. The issue of admissibility of additional grounds/claim has been dealt by the Apex court in the case of **NTPC Ltd** [229 ITR 383 (1998)] and **Goetze (India) Limited vs CIT** 284 ITR 323. The apex court in the case of **Goetze (India) Limited vs CIT** (supra) held as under:

*“The decision in question is that the power of the Tribunal under section 254 of the Income-tax Act, 1961, is to entertain for the first time a point of law provided the fact on the basis of which the issue of law can be raised before the Tribunal. The decision does not in any way relate to the power of the Assessing Officer to entertain a claim for deduction otherwise than by filing a revised return. In the circumstances of the case, we dismiss the civil appeal. **However, we make it clear that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income-tax Appellate Tribunal under section 254 of the Income-tax Act, 1961.** There shall be no order as to costs.”*

The Hon'ble Apex Court in case of **NTPC Ltd.** (*Supra*) held:

“Under section 254 of the Income-tax Act, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the

Tribunal under section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/ cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier.”

The Hon'ble Jurisdictional High Court in case of **Jai Parabolic Springs** Ltd. [2008] 172 taxmann 258 (Delhi) has also categorically held that there is no fetters on the powers of the tribunal to entertain an additional ground. Hon'ble Court has described that power of tribunal in dealing with appeals have been expressed in widest possible term.

35. We, therefore allow the application of the assessee for admission of additional grounds, which are dealt with hereunder:

Interest Subsidy under Technological upgradation fund (TUF).

36. The brief facts are that during the year, assessee had obtained loan of Rs. 3,000 Lacs from SBI and Rs. 3,500 Lacs from State Bank of Mysore under TUF Scheme issued by the ministry of textile, Government of India. Under the TUF scheme, the assessee was eligible for 5% Interest subsidy calculated on the loan outstanding which amounted to Rs. 3,25,00,000/-. The Objective of the subsidy/incentive under TUF scheme was expansion of capacities, modernisation and up-gradation of facilities.

The assessee included the above interest subsidy as taxable receipts in its return of income. Before, us the assessee has raised this issue for exclusion of interest subsidy received under the TUF scheme for the first time. The contention of the assessee is that interest subsidy received under TUF scheme is in the nature of capital receipt and hence should be excluded from total income.

37. At the outset the Id. Counsel submitted that issue is covered by the order of coordinate bench in assessee's own case vide ITA no.5784/Del/2016 for A.Y. 2012-13. The relevant para of above order is reproduced hereunder:-

“Para no.27-We have heard the rival contentions, perused the relevant findings and as well as material referred to before us at the time of hearing. It is a settled position that purpose of subsidy or incentive and not the nomenclature of such incentive have to be seen for the purpose of deciding its nature as capital or revenue. In the judgment of Ponni Sugars & Chemicals Ltd. (Supra), the Hon'ble Apex Court have held that character of the receipt of a subsidy in the hands of recipient assessee has to be decided with respect to the purpose for which subsidy is granted. If the subsidy is received to enable the assessee to run its business more profitably then such subsidy is revenue in nature. While, if the subsidy has been received by the assessee to set up a new unit or for expansion of existing unit then such subsidy would be capital in nature. We find from the objective of TUF scheme that interest subsidy

under such scheme was granted for expansion of capacities, modernisation and up gradation of facilities. In case of CIT v. Sham Lal Bansal (Supra), the Hon'ble Punjab & Haryana High Court on similar facts held subsidy received under TUF Scheme as capital receipt. Since the issue under hand is related to additional claim which was not entertained by the lower authorities, we therefore allow the assessee's ground for entertainment of above additional claim and remit the issue back to the file of AO to decide the same in accordance with law after granting a reasonable opportunity of being heard to the assessee. The assessee shall be free to file such documents, explanations, submissions as it deems fit in respect of this claim."

38. We have heard the rival contentions, perused the relevant findings. It is a settled position that purpose of subsidy or incentive and not the nomenclature of such incentive have to be seen for the purpose of deciding its nature as capital or revenue. Following the order of coordinate bench in assessee's own case for AY 2012-13, we remit the issue to the file of assessing officer to verify the claim of the assessee and allow the relief if the same is in the nature of interest subsidy under TUF scheme after granting a reasonable opportunity of being heard to the assessee.

Deduction of education cess u/s 37 of the Act

39. Under this additional ground the assessee has raised the issue of allowability of deduction of 'education cess' amounting to Rs.2,54,68,332/- u/s 37 of the Act on relying the various judgments viz. Hon'ble Rajasthan High Court (Jaipur Bench) in the case of **Chambal Fertilisers & Chemicals Ltd.** vs. CIT being Appeal No. 52/2018 decided on 31st July, 2018 and the Hon'ble Bombay High Court (Goa Bench) in the case of **Sesa Goa Limited vs. JCIT** in Tax Appeal No. 17/2013 vide its judgment dated 28th February, 2020. Further reliance has been placed on the ITAT's judgments in case of **Philips India Limited** [TS-326-ITAT-2020(Kol)] and **Sicpa India Private Ltd.** [TS-154-ITAT-2020(DEL)] for allowance of deduction of education cess u/s 37 of the Act.

40. It is noted that provisions of section 40(a)(ii) of the Act prohibits the allowance of any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at proportion of, or otherwise on the basis of, any such profits or gains. There is no dispute that tax payable under the Act is not an allowable expense due to express provisions of section 40(a)(ii). The core issue however is that whether the education cess is part of tax or not. In judgment referred by the ld. Counsel, it has been held that 'cess' is not part of tax. Reference is also made to the CBDT Circular No. F. NO. 91/58/66-ITJ(19) dated May 18th, 1967 which clarifies that since the word 'cess' had

been omitted from Sec. 40(a)(ii), only taxes paid are to be disallowed for AY 1962-63 and onwards.

41. The coordinate bench in case of **Sicpa India Private Ltd.** [TS-154-ITAT-2020(DEL)] has already dealt with the issue holding as under:

*“33. This issue has been decided by Hon’ble High Court of Rajasthan in case of **Chambal Fertilizers and Chemicals Ltd.** (supra) in the light of the interpretation of Circular dated 19.05.1967 (supra) in favour of the assessee by returning following findings :-*

“13. On the third issue in appeal no.52/2018, in view of the circular of CBDT where word “Cess” is deleted, in our considered opinion, the Tribunal has committed an error in not accepting the contention of the assessee. Apart from the Supreme Court decision referred that assessment year is independent and word Cess has been rightly interpreted by the Supreme Court that the Cess is not tax in that view of the matter, we are of the considered opinion that the view taken by the tribunal on issue no.3 is required to be reversed and the said issue is answered in favour of the assessee.

*34. So, in these circumstances, education cess is not a disallowable expenditure u/s 40(a)(ii) of the Act having been expressly excluded from section 40(a)(ii) of the Act. Moreover, cess is not in the nature of tax as has been held by Hon’ble Supreme Court in case of *Smith Kline Amp; French (India) Ltd. and Ors. vs. CIT (1996) 219 ITR 581 (SC)*. So, we are of the considered view that AO/CIT(A)*

have erred in disallowing the deduction for education cess on income-tax, dividend distribution tax and fringe benefit tax for AYs 2009-10, 2010-11 & 2011-12 in computing the total income under normal provisions of the Act, consequently ordered to be deleted. Hence, Ground No.4 of AY 2009-10, Ground No.3 of AY 2010-11 & Ground No.4 of AY 2010-11 in assessee's appeals are allowed."

42. Accordingly, we remit the issue back to the file of the AO to verify the claim of the assessee and allow the same in accordance with the law after granting a sufficient opportunity to the assessee.

43. Other grounds are either consequential or have become academic, hence same are treated as infructuous.

44. In the result appeal of the appellant assessee is partly allowed for statistical purposes.

Order pronounced in the Open Court on 6th April, 2021.

sd/-
(O.P. KANT)
ACCOUNTANT MEMBER

sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Dated: 06/04/2021

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

