

**IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "I-1": NEW DELHI]**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
(Through Video Conferencing)**

ITA. No. 7362/Del/2018
(Assessment Year: 2014-15)

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| DCM Shriram Ltd., 1 st Floor, Kanchanjunga Bldg., 18 – Barakhamba Road, New Delhi – 110 001. PAN: AAACD0097R | Vs. | Addl. CIT, Special Range – 3, New Delhi. |
| (Appellant) | | (Respondent) |

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| Assessee by : | Shri Pradeep Dinodia, C. A.; & Shri R. K. Kapoor, C. A.; |
| Department by : | Shri Surendra Pal [CIT] – DR; |
| Date of Hearing : | 02/09/2021 |
| Date of pronouncement : | 28/10/2021 |

ORDER

PER PRASHANT MAHARISHI, A. M.

01. This appeal is filed by the assessee i.e. DCM Sriram Ltd (the appellant/assessee) against the order passed by the learned Additional Commissioner Of Income Tax, special range – 3, New Delhi (the learned AO) u/s 143 (3) read with Section 144 (C) of The Income Tax Act, 1961 (The Act) dated 31/10/2018 for assessment year 2014 – 15.
02. Assessee has raised following grounds of appeal:-

“1. General Grounds

1.1 The Ld. DRP/AO have erred in law and on facts, and in the circumstances of the appellant's case in making an addition/adjustment of Rs. 1,30,10,43,765/- on account of the order of the Transfer Pricing Officer (TPO) u/s 92CA(3) and making an addition/disallowance of Rs.4,12,79,790/- on account of non-transfer pricing additions / disallowances.

1.2 That the final assessment order u/s 143(3) r.w.s. 144C of the Act dated 31 October 2018 is bad in law.

1.3 That the additions/disallowances made by Ld. AO are wholly illegal, untenable and on erroneous grounds.

GROUND OF APPEALS IN RESPECT OF TRANSFER PRICING ADJUSTMENTS Transfer of power-Rs. 26,52,98,490/-

2. That the Ld. DRP/TPO/AO have erred in law and facts and in circumstances of the case in making an adjustment of Rs 26,52,98,590/- to the arm's length price of transfer of power from eligible unit to non-eligible unit on wholly illegal and erroneous grounds.

2.1 That Ld. DRP and consequently Ld. AO have grossly erred in law and on facts and in circumstances of the appellant's case in erroneously interpreting the transaction of purchase of power by appellant from State Electricity Board (SEB) at Kota, Rajasthan as an external CUP data and thus proposing a different treatment by averaging the same with IEX rates, while determining the Arm's length price.

2.2 The Ld DRP has erred in not appreciating that purchase of power from SEB at Kota is an internal CUP data similar to the sale of power by appellant's power plants in Uttar Pradesh, which has been accepted by Ld DRP as internal CUP.

2.3 That Ld. DRP/TPO and consequently Ld. AO have grossly erred in law and on facts and in circumstances of the appellant's case in treating the rates of power obtained from Indian Energy Exchange Ltd (IEX) u/s 133(6) of the Act, as comparable uncontrolled rates/prices under the CUP method. IEX rates are not comparable on account of following reasons:-

a) The modus operandi of IEX which is an spot exchange is not comparable to the assessee's case.

b) The rates obtained from IEX u/s 133(6) do not qualify as an appropriate comparable data for the application of CUP method.

c) There is material differences between the terms and conditions of transaction entered into by the assessee and those published on IEX.

2.4 The Ld. DRP/TPO and consequently Ld. AO have grossly erred in law and on facts and circumstances of the case in applying an additional external data in the form of IEX rates when reliable internal CUP data in form of actual transactions of purchase of power from SEB, Kota was available with the assessee for the transaction of transfer of power.

2.5 The Ld. DRP/TPO and consequently Ld. AO have grossly erred on the facts and in law in applying the external CUP on the basis of data obtained from IEX under section 133(6) of the Act, without appreciating the fact that such information was not available in public domain and therefore could not be relied upon for purpose of comparison under CUP method.

2.6 The Ld. DRP/TPO/AO have grossly erred in law and on facts and circumstances of the case in not following rule of consistency by disregarding the methodology followed by appellant since assessment year 1997-98.

2.7 It is prayed before Hon'ble ITAT that adjustment made by the Ld. AO in respect of transfer of power may kindly be deleted by upholding the assessee's approach of using internal CUP over IEX rates.

Transfer of steam Rs. 1,03,57,45,275/-

3. That the Ld. DRP/TPO/AO have erred in law and facts and in circumstances of the case in making an adjustment of ₹103,57,45,275/- to the arm's length price of transfer of steam from eligible units to non-eligible units on wholly illegal and erroneous grounds.

3.1 That Ld. DRP and consequently Ld. AO have grossly erred in law and on facts and in circumstances of the appellant's case in merely confirming the Ld, TPO's action of determining the ALP of transfer of steam at NIL, without providing any reasoning or passing a speaking order on the issue.

3.2 The Ld. TPO/AO have grossly erred in law by proposing transfer pricing adjustment in respect of transaction of transfer of steam without giving any opportunity/issuing a proper show cause notice u/s 92CA(2), thus not following the principle of natural justice. The adjustment made therefore, is prayed to be quashed.

3.3 The Ld. DRP/TPO and consequently Ld. AO have failed to appreciate that a commercially valuable product should only be transferred at an arm's length price to a related party. The Ld. DRP/TPO have failed to appreciate that the product, in the instant case 'steam', whether bye-product or joint product or whether it has cost or 'Nil' cost is irrelevant for purpose of determining the ALP for the purpose of transfer thereof to a related party in a transfer pricing analysis.

3.4 The Ld. TPO has erred in proposing and Ld. DRP in upholding the adjustment on account of transfer of steam:

3.4.1 by determining the arm's length price for transfer of steam at NIL and, in effect, disregarding the entire transaction- on the following grounds by incorrectly holding that:-

- The cost of electricity absorbs the entire cost of production of steam.
- Steam is only a by-product of the process of manufacturing power, ignoring the fact that steam is joint product of power plants.
- The entire cost has been utilized for generation of power and unutilized part of steam may have been used for other purposes but it does not have any cost.
- The assessee has not provided the CUP details of steam.

3.4.2 By observing that the power plants of the assessee were not installed for steam production but only for power generation, thus distinguishing steam from power.

3.4.3 By disregarding the cost certificates certified by Cost accountant and Chartered Accountant certifying the cost of steam transferred.

3.5 It is prayed before Hon'ble ITAT that adjustment made by the Ld. AO in respect of transfer of steam may kindly be deleted by upholding the assessee's approach of transferring the steam at its cost of production.

GROUND OF APPEALS IN RESPECT OF CORPORATE TAX ISSUES

Disallowance u/s.14A r.w.r 8D-Rs.1,55,48,790

4. The Ld. DRP/AO have grossly erred in law and in facts and in the circumstances of the appellant by enhancing the disallowance u/s 14A of the Act, by an amount of Rs 1,55,48,790/- which is wholly

untenable in law and based on conjectures and surmises.

4.1 The Ld. DRP has grossly erred in holding that term loans were also taken for the purpose of strategic investments in subsidiaries and other investments and further erred in directing the Ld. AO to compute disallowance under rule 8D(2)(ii) in respect of dividend bearing investments, in spite of the fact that no such term loans were applied by appellant for making such investments.

4.2 The Ld. DRP and consequently Ld. AO have, while enhancing disallowance u/s 14A of the Act, grossly erred in holding that the entire amount of finance cost of ₹ 75.02 Crores is indirectly attributable for earning a dividend income, disregarding the fact that no interest expenditure is disallowable as owned funds of the company are much more than the amount of investments and thus clause (ii) of rule 8D(2) is not attracted.

4.3 The Ld. DRP and consequently Ld. AO have erred in making disallowance u/s 14A of the Act disregarding the order of Hon'ble Jurisdictional High Court in assessee's own case for AY 2008-09, Hon'ble ITAT's order for AY 2009-10 and for AY 2010-11,

4.4 It is prayed before Hon'ble ITAT that disallowance u/s 14A r.w.r. 8D(2)(ii) made by the Ld. AO may kindly be deleted.

Addition u/s 50C of the Act – Rs.2,57,31,000/-

5. That the Ld. DRP/AO have erred in law and facts and in circumstances of the appellant's case by making an addition of ₹2,57,31,000/- u/s 50C of the Act which is against the mandate of law and thus bad in law.

5.1 The Ld. DRP and consequently Ld. AO have erred in law and in facts and in the circumstances of the appellant's case by making an addition of ₹2,57,31,000/- u/s 50C of the Act, by substituting the sales consideration of lands (at 4 locations) with their stamp valuation.

5.2 The Ld. DRP/AO have grossly erred in disregarding the fair market valuation of such lands carried out by the independent valuers. The Ld DRP/AO have thus erred in law in not entertaining the claim of the assessee that stamp valuation exceeds the fair market value of such lands arrived on the basis of said independent valuation and hence no addition should be made u/s 50C of the Act.

5.3 The Id AO has erred in law in making and Ld. DRP in upholding the aforesaid addition without referring the valuation to valuation officer in accordance with the provisions of law u/s 50C(2) of the Act.

5.4 The Ld. DRP has erred in observing that reference to valuation officer at the fag end of the limitation was not possible.

5.5 It is prayed before Hon'ble ITAT that addition u/s 50C of the Act made by the Ld AO may kindly be deleted.

Addition to Books profits u/s 115JB-Rs.1,55,48,790

6. That the Ld. DRP/AO have erred in law and in facts and circumstances of the case by making an addition of ₹1,55,48,790/- in the book profits of the appellant, being the disallowance u/s 14A r.w.r. 8D made by Ld. AO under normal provisions of the Act.

Penalty

7. The Ld. AO has erred in law & circumstances of the case by initiating penalty proceedings u/s 271(1)(c) of the Act.

8. The above grounds are without prejudice to each other.

9. The appellate craves the leave to add, amend or alter all or any of the grounds of appeal. “

03. Brief facts of the case shows that assessee company is engaged in the business of manufacturing and trading of chemicals, PVC resins, PVC compounds, UPVC windows and door systems, cement, sugar, fertilizer, seeds, textile yarn, power generation and retail outlets with the name Hariyali Kisan Bazar.
04. The assessee filed its return of income on 28/11/2014 declaring income as per normal provisions of income tax offering income of Rs. 1,379,154,615/- and book profit as per provisions of Section 115JB of the act of Rs 3,168,496,338/- . This return was further revised on 23/3/2016 the income as per normal provisions of income tax and book profit remained the same but the revision took place because of the claim of tax deduction at source as per updated form number 26AS. The case of the assessee was picked up for scrutiny and notice u/s 143 (2) of the act was issued on 1/9/2015.

05. During the course of assessment proceedings, Id AO noticed that the assessee company has entered in to International Transactions [IA] in the form of specified domestic transactions (SDT) with Associated Enterprises [AE]. The transactions were either covered u/s 40 A (2) (b) or are covered u/s 80 IA of the act. Mainly specific domestic transactions were with respect to transfer of low-pressure steam from eligible business to other non-eligible businesses and transfer of power from its captive power plants (eligible business for deduction u/s 80 IA of the act) to other non-eligible businesses. Therefore, learned AO referred to the Additional Commissioner of Income Tax, Transfer Pricing Officer 1 (2), New Delhi, [learned Transfer Pricing Officer/TPO] to determine the arm's-length price of the international transactions entered into by the assessee as per the provisions of Section 92CA of the act.
06. As stated, that assessee mostly had Specified Domestic Transactions [SDT]. Assessee has shown transfer of power and steam from eligible unit to non-eligible unit during the year.
07. Assessee has shown the transfer of the power as per its transfer pricing study report from eligible unit to non-eligible unit as Under :-

| Transferor unit | Transferee unit | Quantity [KWH] | Rate | Amount in Rupees |
|---------------------|-------------------------------|-----------------|------|------------------|
| UP Region | | | | |
| TG – 1 Loni | Sugar plant | 1,86,41,986 | 4.29 | 7,99,74,118 |
| TG-II Loni | Sugar plant | 9,23,797 | 4.20 | 38,79,947 |
| TG -1 Hariawan | Sugar unit | 1,93,06,294 | 4.29 | 8,28,24,001 |
| TG-II Hariawan | Sugar unit | 8,51,577 | 4.29 | 36,53,265 |
| TG-II Ajbapur | Sugar unit | 34,83,722 | 4.24 | 1,47,70,983 |
| TG-III Ajbapur | Sugar unit | 1,02,52,023 | 4.24 | 4,34,68,579 |
| Rajasthan Region | | | | |
| Kota power plant | Fertilizer and chemical plant | 31,21,15,871 | 6.30 | 196,63,29,987 |
| Gujarat Region | | | | |
| Bharuch power plant | Alkali and chemical plant | 40,31,84,860 | 6.67 | 268,96,24,567 |
| Total | | | | 488,45,25,447 |

08. Assessee has benchmarked the above transactions at the rate on which the electricity has been transferred to UPPCL at the rate of Rs. 4.39 per unit in UP, at the rate of ₹ 38.56 power unit in Gujarat at the rate which was purchased from DGVCL and rate on which power was purchased from JVVNL in Rajasthan region at ₹ 8.35 per unit.
09. The learned transfer-pricing officer examined the above benchmarking and he was of the view that Indian Energy Exchange (IEX), the main exchange where nearly 95 – 96 percentage of the power is traded, such quoted rates should be adopted. Therefore, he issued notice u/s 133 (6) of the act to IEX on 6/10/2017 which was replied on 11/10/2017 wherein it was found that the average sale price for the year 2013 – 14 was per unit of KWH is Rs 2.55 in UP , Rs 2.55 in Rajasthan region and Rs. 2.52 in Gujarat region. Therefore, based on this information the assessee was asked that why external cup should not be applied in this case and sale rate of power could not be taken at the average price of IEX and at the price at which power was purchased and sold by the assessee instead of rate shown by the assessee.
10. Assessee submitted its reply on 30/10/2017 objecting to the adoption of price from Indian energy exchange stating that it is not an appropriate CUP data in comparison with assessee's actual transaction of transfer of power, which is an internal cup rates. It was further stated that rates collected from IEX is non-comparable and unreliable. Assessee further stated that when the internal CUP data is available with the assessee, reliance on external CUP of outside data is unwarranted. Assessee further stated the modus operandi adopted by the IEX and how the rates are derived, stating that there is a lack of surety in relation to the availability of power and rates offered by IEX are not comparable. It was further stated that it is an exchange where the buyer has to pay for the electricity quantity traded rather than the quantity actually used, therefore the traded quantity cannot be compared with the actual

quantity produced and consumed. Assessee relied on the OECD guidelines and then submitted that there is no sufficient level of comparability between IEX and eligible units of the assessee and CUP method cannot be applied in a manner by adopting those rates. Assessee also relied upon several judicial precedents. Assessee further submitted that in respect of the transfer of the power since assessment year 1997 – 1998, the internal CUP has been used at the state Electricity Board rates, which have been accepted by the revenue, and therefore the rule of consistency should be followed and there is no reason to deviate from the same.

11. The learned transfer-pricing officer considered the explanation of the assessee and referred to the change in the legislature with respect to the transfer pricing provisions of the specific domestic transaction and therefore these transactions are required to be benchmarked according to the new provisions. The AO held that though assessee has applied internal CUP method for benchmarking the transaction but whether the correct CUP Rates is applied or not is a matter required to be examined. He held that for determining arm's-length price [ALP] of the sale of electricity by the eligible unit, there would be a need for making multiple adjustment for the charges incorporated in the electricity price paid for functions like distribution and transmission. He further held that the state Electricity Board is responsible for generation, transmission, and distribution of power where assessee is only generating the power for its captive consumption. Therefore, according to the learned TPO assessee cannot use state Electricity Board rates. With respect to the rates of the Indian energy exchange, the learned TPO was of the view that those are required to be adopted and therefore, he adopted the external CUP data for determination of arms length price of those transactions. After considering the submission of the assessee, the learned transfer-pricing officer devised a method to adjust the arm's-length price of the power supplied by the eligible unit to non-eligible unit. For each of the

transaction he took the rates at which power was purchased and sold from the respective DISCOMS, he also considered the average of IEX rates i.e. Rs 2.55 per unit. He took average price of both the above prices. He took this price as the arm's-length price of the power supplied. He found the difference between the rates charged by the assessee from eligible units to non-eligible units and worked out the difference between the two. He found that in Uttar Pradesh region and Rajasthan region, the prices charged by eligible units to non-eligible units are higher and therefore he proposed an adjustment. Precisely the learned TPO held that the power rate in Uttar Pradesh region has the arm's-length price of ₹ 3.47 per unit and in case of Rajasthan unit; such arm's-length price is RS 5.45 per unit. In both these regions, the assessee's eligible unit has charged higher rate to its non-eligible unit and therefore there is an adjustment to that extent. In Gujarat region the learned that TPO found that such average rate of price charged by Discoms and rates of IEX is ₹ 20.54 per unit whereas the assessee has charged only ₹ 6.67 per unit and thus there is no adjustment required. Therefore, based on the above facts, he made an adjustment of ₹ 308,365,268/ – on account of transfer of power from eligible business to other businesses with respect to Uttar Pradesh and Rajasthan region.

12. Another specified domestic transaction was that Assessee also transfers low-pressure steam from the eligible business to another business. For benchmarking of these transactions, assessee adopted the 'other method' as the most appropriate method. The other method adopted by the assessee is "At cost". Thus, the assessee transferred steam from eligible unit to non-eligible units at the cost i.e. Without charging any markup. The learned assessing officer issued a show cause notice on 26/10/2017 directing assessee to furnish costing of steam produced. The assessee submitted such details in accordance with the cost accounting standard – 4 issued by the Institute of cost and works accountants of India. The learned transfer-pricing officer initially stated

that assessee should have applied cost plus method as the most appropriate method. Assessee also submitted that the cost plus method, if applied, it will lead to the margin over the cost and will automatically increase the deduction u/s 80IA of the act. The learned assessing officer was also supplied with the cost certificates issued by the cost accountant as well as from the chartered accountant and chartered engineers. The learned assessing officer examined the same. He held that steam production is not the objective of the assessee and entire steam was utilized to run turbine for power generation based on capacity of power plant. Therefore, he held that the cost of generation of the steam is already included in the costing of the power generation. Therefore, the cost certificates submitted by the assessee do not serve any purpose. He further held that the steam produced is utilized for power generation and the unutilized part of steam may have been used by the assessee for other purposes but obviously does not have any cost. Entire cost has been utilized for generation of power. He further held that the power plant was not installed for steam production but for power generation. The unutilized steam is only used for other purposes. According to him, As such, entire cost is for power generation and steam being byproduct, does not have any cost. As the assessee has transferred the steam on cost price, he rejected the most appropriate method adopted by the assessee. In the end , He held that the steam is used for generation of electricity thus the cost of electricity absorbs entire cost of production of steam and therefore the resultant cost of excess steam is Rs NIL . He further held that the steam is only a byproduct of the process of manufacturing power and it bears no cost. He therefore held that the cost of producing steam is Nil. He held that since cost of steam is already considered while generating power, therefore, the resultant cost is nil and therefore no markup has to be added for transferring the same to the non-exempt unit. In such an eventuality, he considered the arm's-length price of transfer of steam at

Rs Nil resulting an adjustment of ₹ 1,035,745,275. Accordingly he proposed total adjustment because of transfer of power and steam from eligible unit and non-eligible unit of ₹ 1,344,110,543/-. Accordingly the order u/s 92CA (3) of the Act was passed on 31/10/2017.

13. The learned assessing officer further noted that the assessee has earned exempt income of ₹ 91,388,245/- which has been claimed as exempt income u/s 10 (35) of the act. The assessee has made a disallowance of ₹ 6,399,219/- u/s 14 A of the act. The AO asked the assessee to justify the above disallowance made in the return of income. The assessee submitted that it has disallowed Rs 6,399,219/- based on 0.5% of the average investment of ₹ 127.98 crores considering those investments on which dividend/exempt income is received. It was further stated that no interest expenditure could be disallowed u/s 14A as the amount of investment made by the assessee is less than the amount of interest free funds in the form of share capital and free reserves available to the assessee. It was further stated that for the administrative expenditure the only the disallowance could be made with respect to the average investment taking only those investments where from the exempt income is received during the year. The learned assessing officer rejected the contention of the assessee and applied the provisions of rule 8D (2) of the Income Tax Rules and worked out disallowance of Rs 1.55 crores of indirect interest expenditure and Rs 64 lakhs on account of administrative expenditure and worked out the total disallowance of Rs 29,048,009/-. He reduced the above adjustment by the disallowance already offered by the assessee and made the net disallowance of Rs 1, 55,48,790.
14. The another issue that was noted in during the course of assessment proceedings was the assessee has sold the land at 13 different locations and calculated capital gain in respect thereof vide return of income filed by it. The assessee was required to provide information in respect of fair market valuation in respect of each of the land for the purpose of

determination of the stamp valuation. Assessee submitted such detail by 18/12/2017. Learned AO found that the stamp duty valuation with respect to the sale consideration for the land in respect of four different locations is higher than the actual sale consideration shown by the assessee. Assessee objected to the same as the learned AO asked the assessee that why the stamp duty rate should not be applied as the deemed sale consideration. Assessee submitted that the land are sold which are located in an agricultural area and further assessee has purchased those land for the purpose of setting up retail stores in the rural areas and later on as such business was not found to be suitable , it decided to close down the business and therefore these properties are sold. Assessee submitted that these properties are agricultural land only. Pursuant to this decision of closing of the business, lands located at various places were disposed of. The stamp duty rates adopted were for the commercial properties whereas the land is situated in agricultural areas. Assessee further submitted, if stamp duty value of agricultural land is adopted the sale consideration is shown by the assessee is much higher and therefore no addition is warranted Under the provisions of Section 50C of the act. The learned assessing officer rejected the contention of the assessee and adopted the stamp valuation rates for the purpose of determination of deemed consideration and therefore, addition of ₹ 25,731,000/- was made.

15. The draft assessment order was made by the learned AO , which was objected to by the assessee before Learned Dispute Resolution Panel – 1, New Delhi [Ld DRP] , who passed its direction on 20/9/2018 as under :-

- i. On the issue of claim of deduction u/s 80 IA of the act in respect of power generated by the assessee, the learned DRP gave its direction as per paragraph number 2.2.5 onwards holding that the assessee has sold surplus power generated from the power plant as per agreements with the distribution companies for sale of

surplus power, whereas the power unit at Rajasthan the assessee has purchased power from discom and the assessee has taken rates of the power sold to 3 discoms and power purchased from SEB in Kota as internal CUP. The DRP held that this is a fallacious and incorrect method, since while the former are internal CUP, the latter could only be an external CUP. With respect to the rates taken for benchmarking, the learned DRP directed the assessing officer/TPO to adopt internal CUP for benchmarking the transfer/sale of power by the three units in Uttar Pradesh and recompute the adjustment. With respect to the Rajasthan unit, it was noted that assessee has not applied correct internal CUP as the assessee has applied the rates at which it is purchasing power from power Distribution Company and therefore it is an external CUP. The learned DRP noted that since the assessee has not sold power to any third party, the comparable sale rate for internal CUP is not available. Therefore, ld TPO has applied the average price of power traded by IEX and Discom rates applicable for Kota Rajasthan and the prices at which the assessee has purchased power from Jaipur vidhyut vitran Ltd is proper. Accordingly, the adjustment proposed by the learned transfer-pricing officer in respect of power transferred/sold from its power unit at Kota Rajasthan was upheld.

- ii. With respect to the determination of arm's-length price of the transfer of steam, the learned DRP asked assessee to submit the process of generation of steam and costing of the steam. Assessee explained the same by the way of flow diagram for production and distribution of steam. Assessee also submitted certificate by cost accountant to determine cost of production of steam. The learned Dispute Resolution Panel at page number 22 of its direction held that since the transfer pricing officer has held that since cost of

steam is already considered while generating power and therefore the resultant cost of production of steam is Rs Nil and therefore no markup is to be added for transferring the same to the non-exempt unit. Accordingly, the learned Dispute Resolution Panel held that they are in agreement with the reasons given by the transfer-pricing officer.

iii. With respect to the disallowance u/s 14 A of the act, the learned DRP directed the learned assessing officer to compute the indirect interest expenditure Under rule 8D (2) (ii) of the act only with respect to the dividend bearing investment and further for the purpose of rule 8D (2) (iii) the disallowance made by the assessee itself of ₹ 6,399,219 was upheld.

iv. With respect to addition u/s 50 C of the act of Rs 2, 57,31,000 where the sale consideration of the land is lower than the stamp duty valuation rates the learned dispute resolution panel noted that that the reply of the assessee was submitted to the learned assessing officer on 18th/12/2017 and the draft order was passed by the learned assessing officer on 29/12/2017 just before the limitation. The assessee has contended before panel that the AO was liable to refer the valuation to the valuation Officer in view of the objection raised by the assessee before the assessing officer for adoption of the stamp duty valuation rate for working of the computation of capital gain. In Response Id DRP held that as there was no time left it was not possible and therefore they rejected the objection of the assessee and confirmed the addition of Rs. 2 57,31,000.

16. Consequently the learned AO passed assessment order u/s 143 (3) read with Section 144C of The Income Tax Act dated 31/10/2018 determining the total income of the assessee at ₹ 2,623,437,423/-.

17. Assessee is aggrieved with that assessment order and has preferred an appeal before us.

18. The assessee has also raised the following additional grounds of appeal:-

“1. The income tax appeal in the case of M/s. DCM Shriram Limited (ITA NO. 7362/DEL/2018) for the A.Y. 2014-15 has been scheduled for hearing before the I-i Bench of the Hon’ble ITAT on 02.09.2021.

2. That the appellant had inadvertently omitted to raise a ground of appeal on education cess due to oversight.

3. That the appellant wishes to raise additional ground of appeal on education cess which may be treated as Ground No. 10 as under:-

“26. The Hon’ble ITAT may be pleased to grant the claim of ‘Education Cess’ (@ 3%) amounting to Rs.1.33.41.210/- u/s 37 of the Act paid / payable by the assessee under normal provisions of the Act.”

1. That an amount of Rs.1,33,41,210/- may be pleased to allow u/s 37 of the Act as paid / payable on the basis of the judgments of the 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 may be placed on the Hon’ble ITAT judgment in case of Philips India Limited [TS-326-ITAT-2020 (Kol)], Sicpa India Private Ltd. [TS-154-ITAT-2020 (DEL)] and Reckitt Benckiser (India) Private Limited [TS-614-ITAT-2020 (Kol)] for allowance of claim of education cess u/s 37 of the Act.

4. That as the ground of appeal on education cess raised a pure question of law, it is prayed that the same may please to be admitted in view of aforesaid judgments.

5. It is prayed that in the interest of justice, the additional ground of appeal on education cess may be admitted by the Hon’ble ITAT and the same may please be adjudicated along with the other grounds of appeal. “

19. Mainly there are only three issues involved in this appeal:-

- i. the determination of the deduction u/s 80 IA of the income tax act with respect to the transfer price of the power transferred by the assessee from eligible unit to non eligible unit and the transfer price of the steam transferred by the assessee from eligible unit to non eligible unit. (Covered by ground number 2 – 3)
 - ii. Disallowance confirmed by the learned dispute resolution panel in its direction to the extent of Rs 1, 55,48,790/- u/s 14 A of the income tax act and consequent adjustment to the book profit u/s 115JB of the act. (Covered by ground number 4 – 6)
 - iii. addition on account of difference between the market value of the property sold and the actual sale consideration by application of the provisions of Section 50 C of the act whereby the addition of Rs 2,57,31,000 is made. (Covered by ground number 5)
20. Ground number 1 of the appeal is general in nature, no specific arguments were raised thereon, but various additions are contested by the separate grounds. Ground number 7 is with respect to the initiation of the penalty proceedings u/s 271 (1) © of the act. Assessee cannot be aggrieved with the above ground that it is merely an initiation of the penalty proceedings and the assessee would be given a proper opportunity for raising all its contention before the penalty is levied. In view of this ground number 1 and 7 of the appeal of the assessee are dismissed.
21. With respect to ground number 2, the learned authorised representative submitted that
 - i. this issue is fully covered by the order of the learned CIT – A India assessee’s own case for assessment year 2015 – 16 wherein the learned CIT – A has upheld the assessee’s internal cup in respect of Kota unit over IEX rates and also completely rejected the

transfer pricing officer's action on taking average of assessee's internal cup as the rate at which power was purchased from JVVNL and rates obtained from IEX by invoking the provisions of Section 133 (6) of the act. He referred to the order of the learned CIT – A listed page number 335 of the case law compiler and submitted. He further submitted that the power purchased by the assessee from JVVNL is an internal cup and as per OECD guidelines internal, comparable means a comparable transaction between one party to the controlled transaction and an independent party. However, the learned dispute resolution panel has considered the internal cup as external cup. At the same time, the learned dispute resolution panel has accepted the internal cup in case of power sold by the assessee in Uttar Pradesh. He submitted that the approach of learned dispute resolution panel of affording treatment to assessee's internal cup is erroneous. He further referred once again to the order of the learned and CIT – A NASA's own case for assessment year 2015 – 16.

- ii. He further submitted that the learned transfer-pricing officer has averaged out the actual internal cup and IEX rates. He submitted that this methodology is flawed.
- iii. With respect to the rates taken of the exchange he submitted that these are not even comparable rates with the assessee's transaction on account of the reason that in that particular exchange only the power is traded and not produced. It further shows only 3% of the total electricity generated data. He further stated that it is a spot exchange and is not comparable to the assessee's case. He further stated that there is no surety in relation to the availability of power. He also objected to the fact that the rates obtained u/s 133 (6) do not qualify as an appropriate comparable that for the application of cup method as these are material. He referred to the provisions of rule 10 B (2) of

the income tax rules. He further submitted that Under the exchange by has to pay for the electricity quantity bid rather than the quantity actual used. His main argument was that there is material differences between the terms and conditions of the transactions entered into by the assessee and those published on the exchange.

- iv. With respect to the exchange base rate and exchange landed cost, he submitted that these rates are further required to be adjusted even otherwise for the electricity duty, other taxes, and variable charges. He submitted that the assessee's transaction is even otherwise are at arm's-length even if actual power purchase price from JVVNL (₹ 8.35) are averaged with IEX landed rates which is ₹ 6.36 per unit which will come to ₹ 7.35 per unit which is more than the rates at which power is transferred from eligible unit to non eligible unit.
- v. He further referred to several judicial precedents where Electricity Board rates are used for benchmarking the electricity transfer and are approved as an arm's-length price.
 - i. Godawari Power & Ispat Ltd. [[2014] 42 taxmann.com 551 (Chhattisgarh)]
 - ii. Gujarat Alkalies & Chemicals Ltd. [[2017] 88 taxmann.com 722 (Gujarat)]
 - iii. DCIT, Circle- 10(2), Kolkata Vs. M/s Balarampur Chini Mills Ltd. (ITANo. 1672/Kol/2019)
 - iv. Reliance Industries Ltd. [[2019] 102 taxmann.com 372 (Bombay)]
 - v. Gujarat Fluor chemicals Ltd. (R/Tax Appeal No. 11/2019 with R/Tax Appeal No. 28/2019)(HC of Gujarat at Ahmedabad)
 - vi. PCIT Vadodara1 vs Alembic Limited (Tax Appeal no. 553 of 2017 with Tax Appeal no. 554 of 2017)(HC of Gujarat at Ahmedabad)

- vii. Commissioner of Income-tax, Kolkata-IV, Kolkata v. Kanoria Chemicals & Industries Ltd. [2013] 35 taxmann.com 566 (Calcutta)
- viii. Graphite India Ltd [ITA Nos.304-305/Kol/2008]
- ix. Gujarat Fluor chemicals Ltd. [[2018] 97 taxmann.com 10 (Ahmadabad - Trib.)]
- x. Hero MotoCorp Limited [TS-844-ITAT-2012(Mum)]
- xi. Saf Yeast Company Pvt. Ltd. [TS-614-ITAT-2017(Mum)]

vi. He further submitted that the rule 10 THC provides that the use of tariff notified by the electricity commission should be considered as an arm's-length price of the transfer of power. He referred to the OECD guidelines in para number 3.27 and stated that the application of internal cup over external cup should be preferred. He referred to the decision of the honourable Supreme Court in case of Engineering Analysis Centre Of Excellence Private Limited (2021) 125 taxmann.com 42 (SC) Stating that the OECD commentary continues to have persuasive value for determining the arm's-length price for transfer pricing regulation.

vii. He further submitted that in assessee's own case for assessment year 1997 - 98 the assessee has been using the methodology of benchmarking the transaction of transfer of power by using the internal cup method which has not been disturbed by the revenue for all these years and therefore on the principles of consistency also the same methodology of adopting the rate should be accepted.

- 22. Therefore, according to him, the order passed by the learned transfer-pricing officer and confirmed by the learned dispute resolution panel to that extent is not sustainable in law.
- 23. The learned CIT DR vehemently supported the orders of the lower authorities. It was stated that the reliance placed by the learned authorised representative on the rule of consistency need not be

followed because of the reason that in those years i.e. assessment year 97, 98 there were no transfer pricing provisions applicable to deduction u/s 80 IA (8) of the act. He further submitted that direction of the learned dispute resolution panel should prevail over the order of the learned CIT – A relied upon by the assessee for assessment year 2015 – 16. In view of this, the learned CIT DR submitted that the order passed by the learned that transfer pricing officer and confirmed by the learned dispute resolution panel deserves to be upheld.

24. We have carefully considered the rival contention and perused the orders of the lower authorities. Brief facts of the case is that assessee has sold power from its eligible units to its non eligible units in Uttar Pradesh, Rajasthan and Gujarat region. The assessee has benchmarked the transaction of sale of power by adopting cup method. The comparable uncontrolled Price taken by the assessee for benchmarking the about transaction adopting the rates at which assessee has transacted with the various Discoms. Assessee has sold power to Uttar Pradesh the power Corporation Ltd [UPPCL] at the rate of ₹ 4.39 per kilowatt in UP region. Further, in Gujarat region assessee has purchased power from DGVCL at the rate of ₹ 38.56 per kilowatt. However, assessee has purchased power in Rajasthan region from JVVNL at the rate of ₹ 8.35 per kilowatt. Therefore the claim of the assessee is that it's price adopted for transfer of power in all these three regions is at arm's-length.

25. The learned transfer pricing officer for determination of A-L P of the power transferred the average rate of power from Indian energy exchange by obtaining the data u/s 133 (6) of the act and found that average sale price for the year 2013 – 14 relevant to assessment year 2014 – 15 at that exchange with respect to these region is as Under:-

| serial number | region | average sale price for kilowatt |
|---------------|--------|---------------------------------|
| 1 | U p | 2.55 |

| | | |
|---|-----------|------|
| 2 | Rajasthan | 2.55 |
| 3 | Gujarat | 2.52 |

26. Based on the above information, the learned TPO held that external cup should be applied in this case and the sale rate of power should be taken at the average price of Indian energy exchange and price at which power was purchased/sold by the assessee from the various agencies instead of rate shown by the assessee. The learned TPO computed the ALP of the power supplied by the eligible unit to non eligible unit as Under:-

| transferor unit | quantity of power supplied | rate at which power is supplied by the assessee | total power transaction | rate at which power was purchased/sold by various Discoms to the assessee in respective region | Average Indian energy exchange rates | Average of rates of Indian energy exchange as well as the rates at which the power is sold and purchased by the assessee from this comes | The difference in rates | Amount of adjustment |
|------------------------|----------------------------|---|-------------------------|--|--------------------------------------|--|-------------------------|----------------------|
| U P Region | | | | | | | | |
| Tg 1 Loni | 1,86,41,986 | 4.29 | 7,99,74,118 | 4.39 | 2.55 | 3.47 | 0.82 | 1,52,80,429 |
| TG II Loni | 9,23,797 | 4.20 | 38,79,947 | 4.39 | 2.55 | 3.47 | 0.73 | 6,74,372 |
| TG –I Hariawan | 1,93,06,294 | 4.29 | 8,28,24,001 | 4.39 | 2.55 | 3.47 | 0.82 | 1,58,31,161 |
| TG-II Hariawan | 8,51,577 | 4.29 | 36,53,265 | 4.39 | 2.55 | 3.47 | 0.82 | 6,98,293 |
| TG-II Ajabpur | 34,83,722 | 4.24 | 1,47,70,983 | 4.39 | 2.55 | 3.47 | 0.77 | 26,82,466 |
| TG –III Ajabpur | 1,02,52,023 | 4.24 | 4,34,68,579 | 4.39 | 2.55 | 3.47 | 0.77 | 78,94,058 |
| Rajsthan Region | | | | | | | | |
| Kota power plant | 31,21,15,871 | 6.30 | 196,63,29,987 | 8.35 | 2.55 | 5.45 | 0.85 | 26,52,98,490 |
| Gujarat region | | | | | | | | |
| Baruch power plant | 40,31,84,860 | 6.67 | 268,96,24,567 | 38.56 | 2.52 | 20.54 | Nil | Nil |
| Total | | | 488,45,25,447 | | | | | 30,83,65,268 |

27. When this transfer pricing adjustment was challenged before the learned dispute resolution panel it gave the following directions:-

“2.2.5 We have considered the submissions of the assessee and the TP order. We also considered the judgment relied upon by the assessee. The various judgments referred to by the assessee have held that in terms of provisions of subsection (8) of Section 80 IA of the act, the “market value” referred to in the explanation below the subsection (8) should be taken as the rate, in this case the rate of power, to a customer in the open market and not the rate at which power is sold to supplier. Thus, unambiguously it is held in these judgments that the rate at which the supplier sales in the open market should be considered for benchmarking the transaction is. Therefore, the rate at which IEX all the electricity boards since power to the consumer are Pari materia from which power is produced, and since power to the consumer as per the demand. If the IEX since power to consumers at lower price, any consumer would prefer to purchase power from IEX or any other supplier of power, and certainly not from supplier who sends power at high cost.

2.2.6 on consideration of the facts of the case it is apparent that the assessee has sold surplus power generated from the power units at Ajbapur , Hariawan and Loni in UP to SEBs as per agreements with them for sale of surplus power, and in respect of the power unit at Kota in Rajasthan, the assessee has purchased power from the SEB. The assessee has taken both the power sold to the three SEBS in UP as well as power purchased from SEB in Kota as internal cup. This is a fallacious and incorrect method since while the former are internal cup, the latter could only be an external cup.

2.2.7 the assessee has submitted copies of agreement with SEBs in respect of the three power units in UP for sale of surplus power to them. The assessee has entered into separate agreements with Madhaynchal Vidhyut Vitran Nigam Limited in respect of three units at hariwan [wef 1/3/2006]] Loni [with effect from 6/12/22006] and Ajbapur from [with effect from 26/12/2006]. The assessee has also submitted the invoices of power bills duly verified by the executive engineer and not all officers of the respective SEB according to which the rate of sale of power by the assessee two SEB at Hariawan is ₹ 4.39 per kilowatt (March 2014), ₹ 4.39 per kilowatt at Loni (March 2014) and ₹ 4.24 per kilowatt at Ajbapur. In view of the fact that internal cup is available for these three units, the AO/TPO is directed to apply internal cup for benchmarking the transfer/sale of power (electricity) by these three units and recompute the adjustment in respect of these three units.

2.2.8 As discussed earlier hereinabove, in respect of the total unit (no adjustment was made in respect of Baruch unit) the assessee has not applied correct internal cup in as much as the assessee has applied the rate at which it is purchasing power from SEB , which is an external cup. Since the assessee has not sold power to any third party, the comparable sale rate for internal cup is not available. In fact, had the assessee sold power to any independent third party, that could have been considered as correct internal cup. Under cup strict comparability is desired and adjustment for variations are not allowed, data of which in any case in respect of SEBS are not available. The TPO has applied the average price of power traded by

IEX applicable for Kota, Rajasthan and in the price at which the assessee has purchased power from Jaipur Vidhyut Vitran Nigam Limited. Under these facts and circumstances, the adjustment made by the TPO in respect of power transferred/sold from its power unit at Kota, Rajasthan is upheld.”

28. Based on above the adjustment of ₹ 265,298,490/- with respect to power transferred by the assessee from eligible unit to non eligible unit was made. The claim of the assessee is that price at which assessee has purchased power from SEB is internal cup and therefore these prices are to be preferred over any external cup price i.e. average price of IEX and the price at which it has purchased power in Rajasthan. Therefore , it needs to be examined first whether assessee has adopted internal cup or not. In internal cup would be available where the same party that engages in a controlled sale/purchase transaction also engages in an uncontrolled sale/purchase transaction of the same products/services. The external cup would be available when an external party engages in an uncontrolled sale/purchase of a product/services that is like the products/services sold/purchased in a controlled transaction. There is no dispute about the applicability of internal cup prices with respect to transaction of sale of power from eligible unit to non eligible unit with respect to UP. This is so for the reason that in UP region assessee sales power to SEBs and therefore it is an internal cup accepted by the learned DRP also. However in Kota, Rajasthan, assessee purchases power but it does not sell the power and in that circumstances it cannot be said to be an internal cup applied by the assessee. Therefore we are in agreement with the learned dispute resolution panel that for the purpose of benchmarking of power transferred from eligible unit to non eligible unit assessee can only claim internal cup when it also sales power to SEB. Here it purchases power from SEB therefore it cannot be

used as an internal cup but is rightly held by the learned dispute resolution panel to be an external cup.

29. Now the issue arises is that whether the learned that TPO has correctly adopted IEX rates for the purpose of benchmarking the transaction of sale of power by Kota eligible unit to non eligible unit. We look at the provisions of Section 92C (2) of the act which provides as per the first proviso to that Section that where more than one price is determined by the most appropriate method, the arm's-length price shall be taken to be the arithmetical mean of such prices. The claim of the revenue is that according to the cup method, two external comparable is our available (1) rates at which the assessee purchases power at Rajasthan and (2) IEX rates applicable to Rajasthan. Therefore both of them can be averaged to determine the arm's-length price. As we have already held that the rates at which the assessee purchases power at Rajasthan is a proper external cup upheld by the learned dispute resolution panel, which can be adopted by the learned TPO for benchmarking the arm's-length price of the transfer of power. However, the issue now arising is whether the Indian energy exchange rates are proper external cup or not.
30. Firstly if we look at the rate Indian energy exchange which is stated to be pertaining to Rajasthan region is Rs 2.55 per kilowatt whereas the rates at which the power was purchased by the assessee in Rajasthan from SEBs ₹ 8.35 per kilowatt. This shows that the rates at which the power is sold by SEBs is 3.30 times higher than the rates which are quoted by Indian energy exchange. It is also undisputed fact that most of the power is supplied in Rajasthan region by Jaipur Vidhyout Vitran Nigam Limited and used by the consumers. Whereas there is no data available that how much power is being sold at the platform of Indian energy exchange in Rajasthan region.
31. It is also an undisputed fact that product comparability is a critical element while applying cup method and needs to be closely examined. In

case if there are any differences identified between the controlled and uncontrolled transaction that would affect price, adjustment should be made to the price of the uncontrolled transaction in order to make the same comparable to the controlled transaction. No doubt the product similarity exist in the above transactions. However comparability Under the cup method depends on the similarity with respect to the following factors also which could materially affect the price in uncontrolled transaction

- i. quality of the product
- ii. contractual terms (i.e. scope and terms of warranties provided, sales are purchased volume, credit terms, transport terms)
- iii. level of market (i.e. whole sale or retail etc)
- iv. geographic market in which the transaction takes place
- v. date of the transaction
- vi. intangible property associated with the sale, foreign currency risks and alternatives realistically available to the buyer and seller

the learned transfer pricing officer has used the average sale price for the financial year 2013 – 14 available at the Indian energy exchange. Therefore there cannot be much of the grievance when the assessee also charges the same rate for the whole year. However the claim made by the assessee before us which remains uncontroverted is that Indian energy exchange is not the main exchange where the power is traded. As per the Indian power market journey so far and way forward June 2014 report published by Indian energy exchange which is available in public domain has categorically stated that the size of power exchange-based market has grown to 3% approximately of the total electricity generated. Therefore the argument of the learned transfer pricing officer that Indian energy exchange is the main exchange where nearly 95 – 96% of power is traded is a negative by the report of Indian energy exchange itself. Therefore it is apparent that it is the very minuscule part of the total

power traded. Further the Indian energy exchange is a spot exchange and cannot be compared with the continuous power supplied by SEBs to the assessee. Of course, in Indian energy exchange there would always be a doubt about the availability of continuous power. This shows that there are material differences existing between the transaction entered into by the assessee for transfer of power and the rates stated by Indian energy exchange. Undoubtedly the rates quoted at Indian energy exchange are based on the bid price rather than the actual quantity consumed by the assessee. Even otherwise the data is not available in the public domain and learned transfer pricing officer has used the powers u/s 133 (6) of the act to obtain such rates i.e. data. Furthermore the Indian energy exchange rates are also required to be adjusted for the various levies and other variable charges of transmission et cetera as well as the transmission loss. Even otherwise the assessee has submitted the land rate at Indian energy exchange which shows the average price at ₹ 6.36 per kilowatt by taking base rate at Rs 2.55. Even if the average of the SEBI rates at ₹ 8.35 per kilowatt and the landed rate at Indian energy exchange at ₹ 6.36 per kilowatt is averaged out it comes to ₹ 7.355 per kilowatt which is more than the rates at which the power is transferred from eligible unit to non-eligible unit at Kota Rajasthan by the assessee i.e. at ₹ 6.30 kilowatt.

32. There is no doubt that the rates at which the SEBs supplies power to the assessee is an perfect external cup. Such rates are ₹ 8.35 per kilowatt. Rates of Indian energy exchange shown at Rs 2 .55 per kilowatt. If the rates of SEB compared with the rates of Indian energy exchange clearly shows that there is a wide disparity between the two rates. It is not in dispute that SEB in Rajasthan is supplying power to majority of the consumer using electricity. Therefore, much sanctity is attached to the rates adopted by SEBs. However, the learned transfer pricing officer has failed to show the reason of such a wide disparity

between the rates of Indian energy exchange which is a spot exchange compared with the rates at which the energy is actually consumed in that geographical region. This does not mean that the quoted price cannot be used for the comparability analysis in cup method. But if the prices are so divergent and the difference between the two external cup becomes irreconcilable, the external cup price which is more reliable should be used. Therefore, in our view, IEX rates for these reasons cannot be said to be an external cup available for invoking the provisions of first proviso to Section 92C (2) of the act.

33. Further in case of the assessee for assessment year 2015 – 16 , external corporate of purchase price of power from SEB is used as a comparable discarding the Indian energy exchange rate by the learned CIT – A, and the same order has not been challenged before the higher forum, it becomes final. This shows that in the subsequent year the learned transfer pricing officer/assessing officer has accepted the methodology of benchmarking the transaction of transfer of power in Rajasthan from eligible unit to non eligible unit at the purchase price of power from SEB.
34. In view of the above facts we do not find any infirmity in the benchmarking analysis of the assessee wherein the assessee has considered rate of ₹ 6.30 per kilowatt against the rate of power purchase paid by the assessee to Jaipur Vidyut Vitran Nigam Limited at the rate of ₹ 8.35 per kilowatt, using the external cup for comparability. Accordingly, the ground number 2 of the appeal of the assessee is allowed and the transfer pricing adjustment of ₹ 265,298,490/- is deleted.
35. With respect to ground number 3, the learned authorised representative submitted that:-
 - i. this issue is a fully covered by the order of the learned CIT – A in assessee's own case for assessment year 2015 – 16 wherein the learned CIT – A has rejected the learned transfer pricing officer's

action of determining the arm's-length price of steam at rupees nil and upheld the assessee's approach of benchmarking steam. He further submitted that there is no appeal filed by the Department against the above order and therefore it has been accepted and then the issue is now is squarely concluded in favour of the assessee.

- ii. He further submitted that the learned dispute resolution panel and the learned transfer pricing officer has failed to appreciate that the steam is a commercially viable products for sugar plant having a definitive income economic value. Therefore, it cannot be valued at rupees nil in fact the assessee would have charged mark up over the cost, however the assessee has transferred the 16 only at the cost price.
- iii. He further submitted that for the purpose of providing transfer pricing analysis, the learned transfer pricing officer as well as the learned dispute resolution panel has not given any method that why the value of the steam should be considered as rupees nil.
- iv. He further submitted that the argument of the learned transfer pricing officer on the commercial expediency of the transaction by stating that the power plant were not installed for production of steam but for power generation is flawed because the steam is also a commercial product.
- v. With respect to the price of the steam, which is transferred at cost by the assessee to non-eligible units, he referred to the certificate issued by the chartered accountant, cost accountant that has been disregarded by both the learned dispute resolution panel and the transfer-pricing officer without giving any reason. He further submitted that steam is one of the powers and can be considered as a joint product but it cannot be considered as a byproduct having nil value. He once again pressed the rule of consistency and stated that in several judicial precedents, the steam is held to

be a commercially viable product and its value cannot be taken as a nil. It is further held that the steam is a form of power and hence eligible for deduction u/s 80 IA of the act.

- vi. It was further stated that the total cost of production is located between electricity and steam based on the scientific basis since inception and which is also substantiated by the Cost sheets is certified by the cost accountant following the cost accounting rules.
- vii. It was further stated that the entire cost has not been utilized for generation of the power but it is a residual steam as a usable low-pressure steam, which is desired with requisite characteristics used by sugar units for crystallization process. He further submitted that assessee uses both high pressure and low pressure steam for its processes and nothing is left unutilized
- viii. it was further stated that on careful analysis of the accounts he referred to page number 94 of the submission that the power sale for instance in case of Hariawan TPG is only around 22% of the total cost incurred by the power units. Therefore, the production of steam is not an unintentional but an essential ingredient for both production of power and sugar.
- ix. He submitted that assessee has adopted “ other method” as the most appropriate method however the learned transfer pricing officer has contended that no cup details has been provided by the assessee.
- x. The learned authorised representative also placed heavy reliance on the direction of the learned dispute resolution panel in case of a sister concern SRF Ltd which is also placed in the paper book stating that in the identical facts and circumstances of the case the learned dispute resolution panel has held that steam has a cost and therefore arm’s-length price of steam cannot be determined at rupees nil. It was further stated that value of steam

can be expressed in terms of equivalent units of electricity that would have been generated and such value is usually higher than the cost of steam. He therefore submitted that the view taken by the learned dispute resolution panel in case of the sister concern is the most plausible and correct. Therefore, the view of the learned dispute resolution panel in case of the assessee is diametrically opposite.

xi. He further referred to the various ledgers and invoices for actual sale of steam to 3rd party and stated that it is at much higher price than the cost of production of steam and with regard to the value of steam is concerned the assessee also submitted the certificate of the chartered engineer which also shows that the steam sale price is much higher than the cost of production of steam

36. the learned CIT DR, vehemently opposed the submission of the assessee and stated that steam is merely a product, which is generated out of the power generation, which does not have the cost and even if it is accosted has been taken care of in the cost of production of the power. It was further stated that the direction of the learned dispute resolution panel in case of assessed concern cannot be used in the case of the assessee.

37. We have carefully considered the rival contention and perused the orders of the lower authority as well as perused the judicial precedents relied upon by both the sides. The facts shows that assessee has transferred low-pressure steam from eligible business to other business amounting to ₹ 1,028,618,630/-. The rate at which the low-pressure steam is supplied from eligible unit to non eligible unit is at cost. The assessee adopted "other method" as the most appropriate method. The learned transfer pricing officer objected to the same and initially stated that assessee should have adopted the cost plus method for the benchmarking of transfer of steam. However letter on when the assessee contended that if the assessee would have used the cost plus method,

the relevant deduction u/s 80 IA would have been much higher. Thereafter, the learned transfer pricing officer changed its stand and directed the assessee to submit a statement of cost of production of steam manufactured during the period 1/4/2013 to 31/3/2014. Assessee stated that it has submitted original set of records of the cost of production of steam transferred certified by the cost accountant. However letter on the learned transfer pricing officer on examining the process of power generation stated that the power plants are not installed for steam production but for power generation and as steam being byproduct do not have any cost. Therefore he rejected the most appropriate method applied by the assessee he further held that activity regarding production of steam shows that steam is produced as a result of burning of fuel in boiler. This steam is used for generation of electricity. Thus the entire cost of electricity absorbs entire cost of production of steam. Thus the resultant cost of excess steam is nil. Therefore he made an adjustment of ₹ 1,035,745,275 on this account. The learned dispute resolution panel also agreed with the view of the learned transfer pricing officer.

38. We are not in agreement with the findings of the lower authorities for the simple reason that the Institute of cost and works accountants has issued a guidance note “Guidance Note on Cost Accounting Standard on Cost of Utilities (CAS-8)” which provides guidance as to how the cost of utilities such as production of steam can be determined. According to that guidance note in paragraph number 5.1 it is stated that each type of utility shall be treated as a distinct cost object as Under:-

“5.1 Each type of utility shall be treated as a distinct cost object. As each utility is a distinct cost object, cost of each utility is to be collected and measured separately. For example power, steam, water, compressed air, oxygen, nitrogen, coke oven gas and the like are distinct utilities, and the cost is collected and measured for each utility separately. The costs are booked to each utility

through initial documents such as supplier 's bill, if directly identifiable with utility, payroll analysis sheet, stores requisition, etc. A separate cost statement is to be prepared for each utility.”

In paragraph number 5.3.2 it has provided as Under:-

“5.3.2 In case of Utilities generated for the purpose of inter unit transfers, the distribution cost incurred for such transfers shall be added to the cost of utilities determined as per paragraph 5.3.1.

If utilities generated are transferred to inter units of an entity, the cost of distribution of such utilities will be included in the cost of utility as determined under para 5.3.1. It will comprise cost of generating utility and cost of distribution facility. Distribution may be through a pipe line/transmission line. The cost of maintenance of pipe line/ Transmission line for transfer of utility will be added to the cost of utility.

In paragraph number 5.3.1 it is provided however cost of utilities are to be determined.

5.3.1 Cost of self generated utilities for own consumption shall comprise direct material cost, direct employee cost, direct expenses and factory overheads.

The cost of generating a utility may comprise water, fuel, power, direct expenses (such as boiler inspection fee) consumable stores, direct employee cost, repair and maintenance, depreciation, inter-utility transfer and factory overhead. For example: Cost of power generation will include cost of fuel such as furnace oil, coal, salaries and wages, consumable stores, repair and maintenance, depreciation and factory overhead. Unit cost is arrived at on the basis of the net aggregate consumption in different departments after adjusting transmission losses. In case of cogeneration (power and steam) where waste heat from TG (Turbine Generation) is

recovered in waste heat recovery unit and used for production of steam, due credit should be given to the Power plant and corresponding charge to SGP(Steam Generation Plant). Charging of power to the consuming cost object is generally done at the weighted average of the cost of power purchased , generated and distribution cost at the consuming point. Steam: A separate statement of cost of steam is prepared indicating the quantity of steam generated, cost of fuel, soft water, power, employee cost for operating staff, sundry supplies, chemical additives, deprecation and other works overhead. Unit cost of steam is arrived at on the basis of units consumed in different departments after adjusting distribution loss. Steam may be of high pressure, low pressure and medium pressure with multiple paths by which the steam pressure is reduced according to the purpose of use. Steam costs are highly dependent on the path that steam follows in the generation and distribution system. Raw water: Raw water is either purchased or obtained from ground wells/canal. The cost of water mainly consists of share of cost of power allocated through inter-utility transfer. The total cost of water should include employee cost, fuel, power, repair and maintenance of tube wells, depreciation, overhead. The total monthly cost of operating this department is divided by the quantity of K Ltr of water pumped during the month to determine the unit cost of water pumped. Cost of Soft Water: Water, if hard, requires treatment. The cost of soft water will include the cost of raw water, chemicals, cost of maintenance of settling tanks, employees cost, depreciation and the like. The cost of demineralised water is also arrived at on the above basis.

There is inter-utility transfer cost for a utility. For example water utility may be used in generation of steam and power. Power may be required for pumping water from tubewell. Inter-utility cost is to

be determined by the following method: a) repeated distribution method; b) matrix algebra through computer application (a) When Repeated Distribution Method is adopted, the utility costs are repeatedly allocated in the specified percentage until the figures become too small to be significant. Steps to be followed under this method are: I. The proportion at which the cost of a utility is to be distributed to production cost centres and other utilities centre is determined based on usage. II. Cost of first utility is to be apportioned to production cost centres and other utilities in the proportion as determined in step (a) above. III. Similarly cost of other utilities is to be apportioned. IV. This process as stated above is to be continued till the figures remaining undistributed in the utility are too small to be significant. The small amount left with utilities may be distributed to the production cost centres. b) Matrix algebra through computer application: Spread sheet software such as Excel provides facility for inter-division cost ascertainment and reapportionment of inter utility. This application may be used for determining inter-utility transfer cost. Quantitative records of production and distribution should be recorded for each utility to measure the unit cost of a utility. An illustration of steam cost is at Annexure 2.

39. In the annexure – 2 it is given and examples of the total steam cost to be determined in the manner when it is transferred to other units as Under:-

“Examples of Steam cost – Transfer to Other units Steam cost per tonne works out to Rs 471.09 as illustrated under Annexure 2. If steam is transferred to other unit, distribution cost will be in addition to the above cost as illustrated below 1 Steam generation cost as 5.3.1 above Rs 471.09 Per MT 2 Distribution cost :

Operation & Maintenance cost of distribution line Depreciation
 Other Total Distribution cost Per MT Rs 1.00 Rs 0.75 Rs 0.75 Rs
 2.50 3. Inter Unit transfer cost Rs. 473.59 Cost of a utility
 determined as per para 5.3.2 plus share of administrative overhead
 to be charged.”

40. Therefore, from the above analysis it is apparent that the learned revenue authorities have incorrectly held that there is no cost of production of steam.
41. Even otherwise steam is a commercially viable product and it is a form of power and therefore it cannot be said to be produced at nil cost. The assessee has submitted a detailed cost sheet duly certified by the cost accountant following the standards issued by the Institute of cost and works accountant for determining the exact cost of steam, it has also been certified by the chartered accountant and further a chartered engineer certificates is also provided. All these cost statement duly certified by the professionals were rejected by the learned revenue authorities without any basis.
42. Further in the case of the assessee sister concern in case of SRF Ltd the learned dispute resolution panel on the identical facts and circumstances has held that steam has a cost and therefore the arm’s-length price of steam cannot be determined at nil. It further held that the value of steam can be expressed in terms of equivalent units of electricity that would have been generated and such value is usually higher than the cost of steam.
43. Further in case of the assessee for assessment year 2015 – 16 the learned CIT – capital has rejected the action of the learned transfer pricing officer of determining the arm’s-length price of steam at nil and upheld the assessee’s approach of benchmarking the transfer price of steam at cost. This order has been accepted by the revenue and no further appeal has been filed. Therefore this issue becomes final with

respect to the determination of ALP of transfer of steam at cost by the eligible unit to non eligible unit.

- 44.** Further Honourable Gujarat High court in Principal Commissioner of Income Tax v. Jay Chemical Industries Ltd 2020] 120 taxmann.com 315 (Gujarat)/[2020] 275 Taxman 78 (Gujarat)/[2020] 422 ITR 449 (Gujarat) has held that:-

“13. It appears that during the year under consideration, the assessee had claimed deduction of Rs. 32,51,080/- under section 80IA(4) of the Act. This claim was on account of the operation of the Captive Power Plant. The assessee showed income from sale of Power to the tune of Rs. 1,23,10,500/- and the sale of vapour of Rs. 6,59,77,170/-. The Assessing Officer took the view that "Vapour" would not fall within the meaning of "Power". The case of the assessee is that "**steam**" is also a form of "power".

14. The case of the Revenue is that "**steam**" is only an intermediate raw material for the manufacturing process. In other words, the production of "**steam**" is only a byproduct, which is used by the assessee for its manufacturing activity.

15. In this regard, the CIT (A) recorded the following findings:

"2. The appellant has also claimed deduction under section 80 I-A on account of sale of **steam** to the chemical plant. "The **steam** was generated by the power plant in the boiler and part of it was also utilised for the chemical process of the non-eligible unit. The AO has held that the appellant was not entitled to the deduction on account of sale of **steam** to the power plant. It has been held by her that **steam** does not fall within the meaning of "power". In this reference she has made reliance on the judgment of honourable ITAT Ahmadabad in the case of *N R Agrawal*

Industries Ltd v. DCIT dated 26/07/2013. The appellant on the other hand has submitted that the value of **steam** should be considered for arriving the profit as the scheme is being generated for generation of electricity and after utilising the same for electricity generation the balance **steam** is used for the chemical process. Therefore, it is a byproduct and therefore, the deduction was admissible.

On a careful consideration of the facts related to the issue, it is noted that that appellant is generating **steam** at high-pressure and temperature and the **steam** is being fed into turbine and the **steam** which is coming out from turbine is utilised for the chemical process. The details on record to show that the turbine utilised by the appellant for generation of the power is a back pressure turbine. In back pressure turbine the intake is of high-pressure **steam** which is used for generation of power and the exhaust **steam** is also at certain pressure so that it can utilised for some other purpose. The design of the turbine is done in such a manner so that all energy of the **steam** is not utilised by the turbine for generation of power but certain part of it is released in the exhaust **steam** also. Therefore, the design of the turbine used by the appellant is in such a manner that the exhaust **steam** is at a certain pressure so that it can be utilised for some other work. Accordingly, this **steam** cannot be consider as a by product but it is intentionally being produced or generated for a specific purpose. Further the intention of the legislature was to provide deduction for generation of electricity and not for generation of **steam**. The intention is clearly evident from the perusal of the speech of the honourable Finance Minister while introducing the provisions for deduction in the budget. The use of word 'power' is intended for 'electricity' as the other relevant sections clearly mentioned the word 'electricity'. The honourable Bench of ITAT Ahmadabad while deciding the issue in N.R.Agrawal Industries Private Limited has discussed these aspects in detail and accordingly relying on the judgment it is held that the appellant is not entitled for deduction under section 80 I-A on sale of such **steam** to its chemical plant. Accordingly, the decision of the AO in this regard is upheld.

3. For the purpose of calculation the quantum of deduction and allocation of expenditure incurred for production of steam the appellant had given certain information-related to the heat value of steam (Enthalpy). The details given by the appellant were also forwarded to the AO and she has also given her comments on the same. In order to arrive at a logical conclusion it would be useful to understand the process involved. The appellant has installed a boiler which generates high-pressure steam at a very high temperature. The steam is first fed in the turbine where part of the heat energy of the steam is utilized in generating the electricity and the balance energy available in the steam coming out from the turbine is utilised in the chemical process. The appellant is incurring expenses such as coal consumption, boiler running, depreciation of boiler and other machinery and the building in which the whole generation plant is housed. The expenditure for the steam, which is utilised in generation of power, and the balance steam which is utilised by the chemical plant can be determined by distributing the same in proportion to the heat value (Enthalpy) of the inlet steam and the outlet steam of the turbine. As per the details available on record the heat value of the inlet steam at 65.5 KG/cm² is 793 kcal per KG whereas the heat value of the output steam at 3.5 KG/cm² is 653.7 kcal per KG. The quantity of input and output steam remains the same and only the calorific value of the heat value goes down as part of the energy is utilised for generation of power. Accordingly, the expenses can be apportioned in the ratio of enthalpy of the inlet and output steam. The same is worked out as under:—

| | | |
|--|-----------------|--|
| Total enthalpy of the steam coming out of the boiler | 793 kcal per KG | |
| The enthalpy of the steam coming out of the turbine | 653 kcal per KG | |
| The | 139 kcal | |

| | | |
|--|---------------------------------|--------------|
| enthalpy utilised by the turbine for generation of electricity | per KG | |
| Percentage of energy utilised in the generation of electricity | 17.66% | |
| Total expenses for | Boiler | 1800000 |
| Generation of steam to be allocated on a percentage basis | expenses | |
| | Boiler maint | 1 728903 |
| | Coal expenses | 3873389 4 |
| | Depreciation other than turbine | 1052294 5 |
| | Total expenses | 5278583 2 |
| Expenses for steam utilised for | 17.66% of 52785832 | |
| Generation of electricity | 9321977 | |

In addition to above expenses for generation of steam, the expenses of head office of the appellant company which looks after the management or the affairs of-the Company and also the power plant are also to be disallowed on proportionate basis. It is also noted that the appellant has taken loan from financial institutions for installing the power plant. The appellant is also paying huge amount of interest on the loan. Proportionate allocation of the interest expenditure should also be done and added to the cost of generation of steam. Since the details related to the expenses of head office as well as interest expenditures are not available before me, the AO is directed to work out the proportionate allocation of the interest expenditure should also be done and added to the cost of generation of steam. Since the details related to the expenses of head office as well as interest expenditure are not available before me, the AO is directed to work out the proportionate allocation of these expenses by obtaining suitable details from the AO. The details of following expenses are readily available from record:—

| | |
|----------------------------------|---------|
| Expenses for generation of steam | 9321977 |
| Depreciation on turbine | 1289189 |
| Electricity duty | 787872 |

The AO is also directed to verify the above figures. Accordingly the AO is directed to rework the deduction under section 80I-A claimed by the appellant as indicated in the preceding discussion."

16. The Tribunal, concurred with the aforesaid findings recorded by the CIT (A), by taking support of the decision of a Co-ordinate Bench of the ITAT, Mumbai, in the case of *West Cost Paper Mills (P.) Ltd. v. CIT*, [2014] 52 taxmann.com 268. As regards section 80IA of the Act, strong reliance has been placed on behalf of the Revenue on the decision of this Court in the case of *CIT v. Atul Ltd.* [2016] 74 taxmann.com 255. In *Atul Ltd. (supra)*, the assessee had established a new power plant by expending a sum of Rs. 14.62 Crore and claimed deduction under section 80IA. The Assessing Officer upon examination of such claim, arrived at

the conclusion that the production of power would require boiler and also a turbine since the boiler would manufacture steam which would be a raw material for the production of power with the aid of turbine and such a plant would be a new industrial undertaking capable of generating electricity. The case of the assessee was that in the existing power plant the assessee had excess steam production capacity which was to be utilised by the turbine installed in the new plant. The Assessing Officer ultimately rejected the case of the assessee on the ground that the turbine should be treated as an independent power generating unit and thereby disallowed the claim of deduction under section 80IA of the Act.

17. The assessee carried the matter in appeal. The CIT (A) held that no industrial undertaking would come into existence within the meaning of the provisions contained in section 80IA of the Act by transferring the boiler or by installing new machinery for the purpose of generation of the power. The appeal came to be dismissed and the assessee carried the matter before the Tribunal. The Tribunal dismissed the appeal.

18. It appears that the assessee preferred an application for rectification before the Tribunal contending that after the judgment was delivered by the Tribunal, the High Court, in the case of *Gujarat Alkalines and Chemicals Ltd. v. CIT* [2013] 350 ITR 94/[2012] 208 Taxman 31/20 taxmann.com 764 (Guj.) has delivered a judgment which would have a bearing on the issue decided by the Tribunal. The said application was opposed by the Revenue. However, the Tribunal allowed the application for rectification and recalled its earlier judgment. The Revenue came before this Court in appeal. This Court took the view while allowing the appeal of the Revenue that the claim of the assessee for deduction under section 80IA of the Act was not tenable in law.

19. This Court took notice of the fact that the assessee had installed turbine for power generation which relied on the excess steam production capacity of the plant. This Court ultimately

took the view that the installation of turbine for power generation could be said to setting up of a new industrial unit and therefore, the assessee would not be entitled for deduction of sum under section 80IA of the Act.

20. In our view, the facts in the case of *Atul Ltd. (supra)* are quite different and the ratio, as propounded in the same, will have no applicability to the case on hand, more particularly, the question No. 3 with which we are dealing with.

21. It is difficult for us to take the view as suggested by the learned standing counsel appearing for the Revenue that "steam" would not amount to power. The word "Power" used in Section 80IA(4) has not been defined under the Income-tax Act.

22. The word "Power" should be understood in common parlance as "Energy". "Energy" can be in any form being mechanical, electricity, wind or thermal. In such circumstances, the "steam" produced by the assessee can be termed as power and would qualify for the benefits available under section 80IA(4) of the Act."

45. Further Hon'ble Supreme Court in CIT v. Tanfac Industries Ltd., SLP (C) No. 18537 of 2009 [319 ITR 8 (st)] wherein while applying section 80-IA of the IT Act, the Hon'ble Supreme Court took a view that the value of steam used for captive consumption by the assessee was entitled to be deducted under section 80-IA of the Act.
46. Therefore it is apparent that
- i. steam is a valuable sources of power
 - ii. it has cost of production,
 - iii. There are methods and Costing Standards for determining the cost of production of steam.
 - iv. Assessee has transferred the steam from eligible units to non-eligible units at cost only.

v. Such cost is certified by the Cost Accountant, Chartered Accountant, and Chartered Engineers.

vi. It cannot have Nil cost

47. In view of above facts, we are of the view that Id Revenue authorities erred in holding that the steam does not have any cost and therefore steam transferred by assessee's eligible units to non eligible units at cost, which is determined by Cost accountants and Other professional, has the Arms length price of Rs Nil instead of cost of Rs 103745275/- . Therefore we allow ground number 3 of the appeal and direct the learned transfer-pricing officer to delete the addition of ₹ 1,035,745,275 which was made determining the arm's-length price of transfer of steam from eligible unit to non-eligible unit by considering the cost of production of the steam at Rs. Nil.
48. The ground number 4 is with respect to the disallowance u/s 14 A of the act. The learned authorised representative submitted that this issue is covered in favour of the assessee by the decision of the honourable Delhi High Court as well as the coordinate bench in assessee's own case for earlier years. He submitted that for assessment year 2008 – 09 the honourable Delhi High Court as well as for assessment year 2010 – 11 the coordinate bench has decided this issue in favour of the assessee. He submitted that the learned assessing officer has grossly erred in treating the entire amount of interest expenditure as indirectly attributable for earning the exempt dividend income by disregarding the fact that the interest expenses were directly relatable to specific purpose funds. Even otherwise he submitted that investment is made out of the surplus funds. He submitted that assessee has made an additional investment to the extent of ₹ 191.1 crores however there is no corresponding increase in the borrowings of the assessee and further the borrowings of the assessee have been reduced by ₹ 356.96 crore. Further, the assessee has used surplus in the form of shareholders fund

and reserve, which are 12.82 times of the investment made by the assessee, and therefore there cannot be any utilization of interest-bearing funds for making investment for earning exempt income. He further referred to several judicial precedents on this issue. He further stated that even otherwise interest expenses directly attributable to a particular purpose cannot be considered for the purpose of disallowance u/s 14 A of the income tax act unless there are other compelling reasons. In view of this, he submitted that the assessee has already offered the disallowance of ₹ 6,399,219/- being 0.50 percentage of the average value of investment towards the administrative expenditure against the total dividend income received of ₹ 91,388,245/-. He submitted that the working is based on which the assessee has worked out the disallowance is in line with the several judicial precedents of the honourable High Court.

49. The learned CIT DR vehemently supported the orders of the lower authorities with respect to the disallowance u/s 14 A of the act.
50. We have carefully considered the rival contention and perused the orders of the lower authorities. We have also considered the various judicial precedents cited before us. In fact undeniably the assessee has interest free funds available which are 12.82 times higher than the amount of investments. Thus Where assessee had its surplus fund against which investment was made, no question of making any disallowance of expenditure in respect of interest expenses under section 14A arose - *Principal CIT v. Sintex Industries Ltd.* [2017] 82 taxmann.com 171 (Guj.) [SLP dismissed in *Principal CIT v. Sintex Industries Ltd.* [2018] 93 taxmann.com 24/255 Taxman 171 (SC)]. Further for working out the portion of administrative expenditure, assessee has applied the factor of 0.5 % on the amount of investments which has yielded tax-free income during the year. We find that this stand of assessee is also in consonance with the decision of Honourable Delhi High court in *ACB India limited V Act 314 ITR 108 [Del]*. In view

of this we direct the ld AO to retain the disallowance offered by assessee as disallowance u/s 14 A of the Act only to the extent of Rs. ₹ 6,399,219/- which is offered by the assessee itself and delete the balance. Accordingly Ground no 4 of the appeal is allowed.

51. Ground number 5 is with respect to the addition made to the income of the assessee Under the head capital gains by invoking the provisions of Section 50 C of the income tax act of Rs 2 57,31,000/-. The learned authorised representative submitted that that the assessee has sold four plots of land at the market price according to the market condition and the valuation as per stem pollution authority is not the correct valuation. He further submitted that the stem pollution authorities have made the valuation as per the rates applicable to commercial properties where the impugned land sold by the assessee is situated in agricultural area. The stamp duty valuation rate taken for the commercial property and if they it is taken for the agricultural land there is no difference in the sale price offered by the assessee for the purpose of computation of capital gain. He further stated that assessee has submitted the valuation report, which has not been considered by the learned dispute resolution panel as well as the learned assessing officer while invoking the provisions of rule 50 C of the act. He further submitted that the assessee has objected the same before the learned assessing officer with respect to the adoption of the market value of the properties however the learned assessing officer did not consider the same and did not referred the matter to the valuation Officer with respect to the valuation of the of the said property. He further submitted that when assessee objects before the learned assessing officer about the adoption of stamp duty rate for the purpose of computation of the capital gain by invoking the provisions of Section 50 C of the act, the assessing officer is duty-bound to refer the same to the District valuation Officer for determining the fair value of the property. This has not been done and therefore the addition deserves to be deleted on this count itself.

52. The learned CIT DR submitted that assessee has objected to before the learned assessing officer with respect to the adoption of the fair market value in terms of the market value of the property for computation of capital gain at the fag and of the assessment proceedings and therefore same could not have been referred by the learned assessing officer to the valuation Officer. He otherwise submitted that the assessee does not dispute that transaction value of the sale of the property is less than the market value of the property. He submitted that there is no infirmity in the order of the learned assessing officer as it is mandated that if the sale consideration is lower than the fair market value of the property as determined for stem duty valuation, the learned assessing officer is duty-bound to adopt that rate for the purpose of computation of the capital gain which the learned assessing officer has done.
53. We have carefully considered the rival contention and perused the orders of the lower authorities. We have also considered the various judicial precedents cited before us. We find that assessee has objected before the LD AO against adoption of fair market value as deemed sales consideration of the agricultural land as per provision of section 50 C of the act. However despite this the LD AO did not refer the matter to the DVO to determine the fair market value of such properties. The provision of section 50C (2) provides that where the assessee claims before the ld AO that stamp duty value exceeds the fair market value, then the Ld AO is duty bound to refer the matter to the DVO for determining fair market value of that property. This fact is also noted by the ld DRP but upheld the action of the ld AO for the reason that assessee objected to adoption of stamp duty value as deemed consideration at a very late stage , so ld AO did not have enough time to refer the matter to DVO. Assessee also disputed that the stamp duty valuation is of the commercial properties where as the assessee has purchased agricultural land only. Therefore even otherwise the stamp duty rates of the property should be determined on the basis of it being

agricultural land. Assessee in terms of provision of section 50C (2) of the Act has objected against adoption of stamp duty rates as well as characteristics of the land before the Id AO, we set aside the whole issues back to the file of the Id AO with direction to the Id AO to refer mater to the district valuation officer to determine fair market value of the property and assessee is also direct to raise all the issue before Id AO as well as DVO about the real character of the property whether it is an agricultural land or otherwise. Needless to say, Id AO will give an opportunity of proper hearing to the assessee to substantiate its claim with respect to characteristic and also the valuation of the property. Thus, ground no 5 of the appeal is allowed with above direction.

54. With respect to ground number 6, the learned authorised representative submitted that that there is an addition of Rs 1 55,48,798/- made by the learned assessing officer u/s 115JB of the income tax act which was disallowed u/s 14 A of the act. He submitted that there is no provision for making the disallowance u/s 14 A of the act as per the expression to provisions of Section 115JB of the act. Even otherwise, he submitted that the issue is squarely covered in favour of the assessee by the decision of the special bench in case of Vireet Investments. He further submitted that the learned assessing officer has not made any addition/disallowances u/s 115JB of the act at the time of passing of the draft assessment order however, in the final assessment order he has made the adjustment, which is not permissible.
55. The learned CIT DR vehemently supported the order of the learned assessing officer.
56. We have carefully considered the rival contention and perused the orders of the lower authorities. We find that this issue is squarely covered in favour of the assessee by the decision of special bench in case of ACIT V Vireet Investments [P] Ltd [2017] 82 taxmann.com 415 (Delhi - Trib.) (SB)/[2017] 58 ITR(T) 313 (Delhi - Trib.) (SB)/[2017] 165 ITD 27 (Delhi - Trib.) (SB)/[2017] 188 TTJ 1 (Delhi - Trib.) (SB) where in

it has been held that the computation under clause (f) of *Explanation 1* to section 115JB(2), is to be made without resorting to the computation as contemplated under section 14A, read with rule 8D of the Income-tax Rules, 1962. Therefore action of ld AO of imputing disallowance u/s 14 A of the act as addition as per clause [f] of explanation [1] to section 115 JB is not proper. Even otherwise the assessee has already made adjustment as the above clause of explanation [1] of section 115 JB of the act of Rs 66.92 lakhs. Thus it is directed to be deleted. Thus Ground no 6 of the appeal is allowed.

57. At the time of the hearing of the above appeal the assessee raised an additional ground of appeal on the allowability of education cess is deductible expenditure u/s 37 (1) of the act. The additional ground raised is as Under

The Hon'ble ITAT may be pleased to grant the claim of 'Education Cess' (@3%) amounting to `1,33,41,210/- u/s 37 of the Act paid/payable by the assessee under normal provisions of the Act."

58. It is submitted that the above additional ground is legal ground, all the facts are available on record, no further facts are required to be investigated, this can be raised at any time during the course of the appellate proceedings, therefore same is be admitted. The learned authorised representative relied upon the several judicial precedents on this issue.

59. The learned departmental representative vehemently objected to the same stating that no such ground was taken before the lower authorities and therefore now it cannot be taken as an additional ground of appeal.

60. We have carefully considered the rival contention and find that the above ground has been an admitted in numerous cases cited before us of various coordinate benches where such ground has been admitted.

Even otherwise, we find that this is a legal ground, which can be raised at any time during the year, and therefore we admit the same.

61. The learned authorised representative contesting the legal ground submitted that an amount of 1,33,41,210/- may be pleased to allow u/s 37 of the Act as paid/payable on the basis of the judgments of the Hon'ble Rajasthan High Court (Jaipur Bench) in the case of Chambal Fertilizers & 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 may be placed on the Hon'ble ITAT judgment in case of Philips India Limited [TS-326-ITAT-2020(Kol)], Sicpa India Private Ltd. [TS-154-ITAT-2020(DEL)] and Reckitt Benckiser (India) Private Limited [TS-614-ITAT-2020(Kol)] for allowance of claim of education cess u/s 37 of the Act.
62. The Ld DR vehemently opposed the above claim and submitted that
- i. education cess is an additional surcharge on the tax levied
 - ii. the word "cess" has not been defined under the Act, however, way back the Hon'ble Supreme Court in the year 1967 in the case of Shinde Brothers, (AIR 1967 SC 1512) held that it is a tax only.
 - iii. Hon'ble Supreme Court has been referred in India Cement India Ltd. Vs. State of Tamil Nadu (1990) 1 SCC 12; wherein the Hon'ble Supreme Court after referring to the judgment in the case of Shinde Brothers (supra) held that ordinarily a cess is also a tax, but is a special kind of a tax. Further, in Union of India v. Mohit Mineral (P) Ltd. [TS512-SC-2018-NT], the Supreme Court held that the expression "cess" means a tax levied for some special purpose, which may be levied as an increment to an existing tax.
 - iv. Hon'ble Supreme Court in the case of CIT vs. K Srinivasan in 83 ITR 346 has held that, "The expression "income tax" used

in the Finance Act and the Income-tax Act includes surcharge and additional surcharge wherever provided in the Act. The surcharge, the special surcharge and the additional surcharge form part of the income-tax and super tax and are not separate taxes by themselves.

- v. there was never a controversy that cess is not surcharge or part of tax
- vi. Whether cess is an allowable expenditure or not in light of this CBDT Circular had never come up for interpretation, because prior to year 2004 there was no cess levied as additional surcharge or surcharge under the Income Tax Act, but there were many other kinds of cess levied under other taxing statutes and direct taxes
- vii. if cess is considered as part of surcharge, i.e., the additional surcharge on tax, then if income tax payable under the Act is not reckoned as allowable expenditure u/s.37.
- viii. A circular which has been issued in different context, need not be considered at all in the case of cess on Income Tax, its non withdrawal does not go against revenue.
- ix. Both the high courts have relied on this circular without considering whether the cess is on Indirect tax or direct tax in that circular.
- x. The courts have not at all considered how the expenditure on cess becomes an item of expenditure wholly and exclusively incurred for the purposes of business.
- xi. High court decision notwithstanding the decision of supreme court need not be followed and it loses binding precedent value.
- xii. Scheme of the act shows it is only income tax.
- xiii. Circulars if those are not in consonance of law should not be followed. Reliance on Decision of Hon Sc in Commissioner of

central Excise V Rattan Smelting and Wires CIVIL APPEAL
NO. 4022 OF 1999 dated 14/10/2008 stating that :-

“6. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.”

- xiv. It was submitted that above decision is of 5 judges bench and must be considered.
- xv. law declared by this Court is supreme law of the land under [Article 141](#) of the Constitution of India, 1950 (in short the `Constitution'). The Circulars cannot be given primacy over the decisions. Even the decision of honourable high court should not be followed, if honourable supreme court has decided otherwise.
- xvi. He extensively referred the provision of section 2 (28A), section 4 of the income tax act.
- xvii. He otherwise submitted that cess does not accrue during the year as it is determined only at the time of computation which happens in next year.

- xviii. That all the decision cited by the Id AR has merely followed the decision of Honourable High court without considering above arguments. Therefore, those should not be followed.
- xix. There is no claim in the return of income.
- xx. For past years assessee itself disallowed the same, so principle of consistency should also go against the assessee. There is no reason that such principle is applied against the revenue but not against the assessee.

63. We have carefully considered the rival contentions and pursued the various judicial precedents cited before us. We have appreciated the arguments of the Id DR . However the judicial precedents cited before us of Honourable Bombay and Rajasthan High court bind us. We find that this issue is squarely covered in favour of the assessee by the decision of Honourable Bombay high court in case of Sesa Goa Limited [2020] 117 taxmann.com 96 (Bombay)/[2020] 423 ITR 426 (Bombay)and Honourable Rajasthan High court in case of Chambal fertilizers Limited[2019] 107 taxmann.com 484 (Rajasthan). Therefore respectfully following the same, we direct the Id AO to allow assessee the deduction of cess u/s 37 (1) of the act. Accordingly, additional ground of appeal is allowed.

64. In the result appeal of assessee is partly allowed.

Order pronounced in the open court on : 28/10/2021.

Sd/-
(KUL BHARAT)
JUDICIAL MEMBER

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated : 28/10/2021.

MEHTA

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi

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|---|------------|
| Date of dictation | 28.10.2021 |
| Date on which the typed draft is placed before the dictating member | 28.10.2021 |
| Date on which the typed draft is placed before the other member | 28.10.2021 |
| Date on which the approved draft comes to the Sr. PS/ PS | 28.10.2021 |
| Date on which the fair order is placed before the dictating member for pronouncement | 28.10.2021 |
| Date on which the fair order comes back to the Sr. PS/ PS | 28.10.2021 |
| Date on which the final order is uploaded on the website of ITAT | 28.10.2021 |
| date on which the file goes to the Bench Clerk | 28.10.2021 |
| Date on which the file goes to the Head Clerk | |
| The date on which the file goes to the Assistant Registrar for signature on the order | |
| Date of dispatch of the order | |