

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'I-2' NEW DELHI**

**BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT & SHRI
SAKTIJIT DEY, JUDICIAL MEMBER**

ITA No.476/Del/2021
Assessment Year: 2016-17

Whirlpool of India Ltd., Plot No. 40, Whirlpool House, Sector 44, Gurgaon (Hr.)-122002	Vs.	Additional Joint/Deputy/Assistant Commissioner of Income-tax/ Income-tax Officer, National e- Assessment Centre, New Delhi
PAN :AAACW13361		
(Appellant)		(Respondent)

Applicant by	S/Shri Neeraj Jain & Ramit Katyal, Adv.
Respondent by	Shri R.D. Barman, CIT DR

Date of hearing	20.05.2022
Date of pronouncement	11.07.2022

ORDER

PER SAKTIJIT DEY: JUDICIAL MEMBER:

By filing this application, the assessee has assailed the final assessment order dated 30.03.2021 passed under Section 143(3)

read with Section 144C(13) of the Income-tax Act, 1961 for the assessment year 2016-17.

2. Ground Nos. 2 to 3, being general grounds, are not pressed, hence, dismissed.

3. In ground nos. 3.1 to 3.15, the assessee has raised a common issue relating to addition of Rs.84,37,751 on account of difference in the arms length price (ALP) of advertisement, marketing and promotion (AMP) expenses allegedly incurred on behalf of AE.

4. Briefly, the facts are, the assessee, a resident company, is a subsidiary of Whirlpool USA and is engaged in the business of production, sales and distribution of Whirlpool appliances. During the previous year under consideration, assessee entered into a number of international transactions with AEs and applied Transactional Net Margin Method (TNMM) to bench mark the transaction.

5. Having carried out the economic analysis, as aforesaid, the assessee claimed the international transaction with the AE to be at arm's length. The TPO, though, accepted assessee's benchmarking of the international transactions with the AE, however, he noticed that the assessee has incurred expenditure of

Rs.60,75,36,000 towards AMP which works out to 1.39% of the sales. Therefore, he called upon the assessee to show-cause why the transaction relating to AMP expenditure should not be benchmarked separately, since, by incurring such expenditure the assessee has promoted the brand/market intangibles owned by the foreign AE. In its reply, assessee strongly objected to proposed action of the TPO and submitted that AMP expenditure incurred by the assessee cannot be treated as an international transaction as per the definition contained under Section 92B of the Act. The TPO, however, was not convinced with the submissions of the assessee. He held that while incurring AMP expenditures since, the assessee has promoted the brand and marketing intangible of the overseas AE, it has to be treated as international transaction.

6. Having held so, he proceeded to determine the ALP of transaction by applying Bright Line Test (BLT) method and proposed an adjustment of Rs.63,54,65,205 on protective basis. Without prejudice, he made an alternative analysis purportedly under – TNMM and proposed an adjustment of Rs.89,75,858 on substantive basis. In the draft assessment order, the Assessing Officer added back the adjustment of Rs.89,75,858 proposed on substantive basis.

7. Being aggrieved, the assessee raised objections before learned DRP. While deciding the issue, learned DRP, though, took note of the fact that identical issue arising in case of Maruti Suzuki and some other assesseees have been decided against the department by the Hon'ble Delhi High Court, however, learned DRP observed that against the decision of the Hon'ble Delhi High Court, Revenue has filed special leave petitions which are pending before the Hon'ble Supreme Court.

8. Having so observed, the learned DRP noted that identical issue arising in assessee's own case in assessment years 2014-15 and 2015-16 was decided against the assessee by the DRP. Thus, following their earlier decision as aforesaid, learned DRP upheld the adjustment proposed by the TPO.

9. Before us, learned counsel for the assessee submitted that the assessee has incurred the AMP expenses relating to the product manufactured and sold by it in India. He submitted, the AMP expenses are related to promotion of assessee's own products and specifications and features of such product manufactured and sold in India and has nothing to do with AE. It was submitted, merely because the assessee has used the logo/brand of the AE, which is incidental, it cannot be said that

AMP expenses were incurred for promoting the brand of the AE. He submitted, without establishing existence of arrangement or understanding between the assessee and the AE for incurring AMP expenses, it cannot be said that assessee has incurred such expenses for AE giving rise to an international transaction. He submitted, while deciding identical issue in assessee's own case in assessment year 2008-09, Hon'ble Delhi High Court has held that there should be tangible evidence on record to demonstrate that there exists an international transaction in relation with incurring of AMP expenses to promote the brand of the AE. Thus, he submitted that the issue is squarely covered in favour of the assessee. Without prejudice, he submitted, the BLT method applied by the TPO has been rejected by the Hon'ble Delhi High Court on numerous occasions. Finally, he submitted, in assessee's own case in assessment years 2014-15 and 2015-16 the issue has been decided in favour of the assessee by the Tribunal.

10. Learned Departmental Representative submitted, the facts of the impugned assessment year are different from the preceding assessment years. Therefore, the decision of the Hon'ble Delhi High Court and the Tribunal in earlier years would not apply.

Proceeding further, he submitted, in the impugned assessment year, the TPO has made the substantive addition by using Transactional Net Margin Method (TNMM) which was not the case in the preceding assessment years. Thus, he submitted, the issue stands in a different footing in the impugned assessment year. Without prejudice, he submitted, if the bench is of the view that the decision in the preceding assessment years are applicable to the facts of the impugned assessment year, then considering the fact that Revenue's Special Leave Petition (SLP) on identical issue is pending before the Hon'ble Supreme Court, the matter may be restored to the Assessing Officer for taking a decision after the issue is decided by the Hon'ble Supreme Court.

11. We have considered rival submissions and perused the material available on record. We have also applied our mind to the decisions cited before us. At the very outset, we must address the contention of learned Departmental Representative that factually the issue stands on a different footing in the impugned assessment year than the preceding assessment years. On perusal of the facts and material on record, we do not find any merit in the aforesaid submission of the learned Departmental Representative. On a perusal of the order passed by the TPO, it is

very much clear that he has proceeded to determine the AMP expenses both on protective as well as substantive basis based on principles laid down in certain judicial precedents, guidelines etc. While doing so, he has also observed that against certain favourable decisions rendered in respect of the assessee by the Hon'ble Delhi High Court, Revenue has preferred SLP before the Hon'ble Supreme Court. Therefore, there is nothing different in the factual position in the impugned assessment year compared to the preceding assessment years. This fact becomes very much clear once we peruse the directions of learned DRP. More particularly, the observations of learned DRP in paragraphs 4.3.17 and 4.3.19, as under:

“4.3.17 It is noted that during AY 2014-15 and AY 2015-16, in the same case the DRP observed that the matter as to whether AMP spend is an “international transaction”, is pending before the Hon'ble Supreme Court for final decision and hence after considering the TPO's legal discussion and recording their own analysis of the case laws, it was held that the TPO's action of making AMP adjustment was to be upheld. For the sake of brevity and convenience, the DRP's directions in AY 2014-15 and AY 2015-16, is not being reproduced here.

4.3.19 As the factual matrix of the case remains the same as in earlier years i.e. AY 2014-15 and AY 2015-16 the Penal finds no reason to deviate from the observation of the Panel for these years. The Panel therefore upholds the action of the TPO to treat AMP expenses as international transaction. The objection is disposed off accordingly.”

12. As could be seen, in no uncertain terms, learned DRP has observed that the factual matrix of the case in the impugned assessment year remains same as in earlier years i.e. assessment years 2014-15 and 2015-16. Thus, in sum and substance, it has to be concluded that there is no difference in factual position between the preceding assessment years and the impugned assessment year, in so far as, the disputed issue is concerned. Having held so, we proceed to examine how this issue has been decided in preceding assessment years in assessee's own case.

13. It is observed, for the first time, this issue cropped up in assessee's own case in assessment year 2008-09. The TPO while determining the ALP of international transaction between the assessee and the AE held that AMP expenditure incurred by the assessee is basically to promote the brand of the AE, hence, would come within the ambit of international transaction. Accordingly, he determined the ALP of AMP expenses and proposed an adjustment. When the matter travelled to the Tribunal, following the decision of Special Bench of the ITAT in case of LG Electronics, the Tribunal held that overall AMP expenses had to be analyzed to find out what portion of it was

spent on brand building for the foreign AE and then disallowance should be made for such amount with proper mark-up by way of TP adjustment. Accordingly, the issue was restored back to the AO to do the exercise. Revenue contested the aforesaid decision of the Tribunal before Hon'ble Delhi High Court. After hearing the parties at length, the Hon'ble Delhi High Court referred to various judicial precedents including the decision in case of Maruti Suzuki India Ltd. and held that the Revenue was unable to make out a case that there is an international transaction involving AMP expenses between the assessee and its AE.

14. It is further observed, following the aforesaid decision of the Hon'ble Delhi High Court, the Tribunal held that AMP expenses incurred by the assessee cannot be treated as international transaction. However, considering the fact that the issue is pending before the Hon'ble Supreme Court by way of an SLP filed by the Revenue, the Tribunal restored the issue back to the Assessing Officer to decide afresh after considering the decision of the Hon'ble Supreme Court. In the context of the aforesaid decision of the Tribunal, learned Departmental Representative has submitted before us to remit the issue to the Assessing Officer. However, we have observed, while deciding identical issue

in assessee's own case in assessment year 2015-16 in ITA No. 9191/del/2019 dated 20.1.2020, the Tribunal has decided the issue in favour of the assessee without restoring it back to the Assessing Officer. The observations of the co-ordinate bench in this regard are as under:

“8. Ld. DR does not controvert any of the submissions made on behalf of the assessee nor does he bring to our notice any change of facts and circumstances of the case to say that this consistent view taken by the Delhi High Court and the Tribunal is not applicable to the facts of the present year. In view of this settled view taken in assessee's own case right from 2008-09 to 2014-15, facts being identical, while respectfully following the same we hold that the transfer pricing adjustment cannot be sustained and has to be deleted we accordingly allow grounds No. 3 to 3.21.”

15. Therefore, respectfully following the aforesaid decision of the Tribunal in assessment year 2015-16, we delete the adjustment. Grounds are allowed.

16. Ground nos. 4 to 4.4 are in respect of disallowance of AMP expenses under Section 37 of the Act. As could be seen, in tune with the order passed by the TPO, the Assessing Officer held that since the AMP expenses amounting to Rs.60,67,69,273 was incurred for promoting the brand of the AE, it cannot be regarded as the expenditure incurred wholly and exclusively for the

purpose of assessee's own business. Accordingly, he disallowed the expenses.

17. Learned counsel for the assessee submitted, the issue is squarely covered by the decisions of the Hon'ble Delhi High Court and the Tribunal in assessee's own case in preceding assessment years.

18. The learned Departmental Representative could not controvert the aforesaid submission of the assessee.

19. Having considered rival submissions, we notice that while deciding identical issue in assessment year 2008-09 the Hon'ble Delhi High Court has taken a view favourable to the assessee, while dismissing the appeal filed by the Revenue. The aforesaid decision of the Hon'ble Delhi High Court has been consistently followed by the Tribunal while deciding the appeal for assessment years 2009-10 to 2015-16. In the latest order passed for the assessment year 2015-16, the Tribunal has held as under:

“12. We have gone through the order of the Hon'ble High Court wherein it was held that merely because there is an incidental benefit to Whirlpool USA, it cannot be said that the AMP expenses incurred by the assessee were for promoting the brand of Whirlpool USA. It was further held that the fact that somebody other than the assessee is also benefited by the expenditure, should not come in the way of an expenditure being allowed by way of deduction under section 10(2)(xv) of the Income-tax Act, 1922 and therefore

the Hon'ble High Court held the issue in favour of the assessee. We also find from the orders in assessee's own case for assessment years 2009-10 to 2014-15 that the Tribunal followed the above decision of the Hon'ble High Court.

13. While respectfully following the above consistent view taken by the Hon'ble High Court and the Tribunal in assessee's own case for the assessment years 2008-09 to 2014-15 we hold the issue in favour of the assessee. Grounds No. 4 to 4.4 are allowed."

20. Facts being identical, respectfully following the consistent view of the Hon'ble Delhi High Court and co-ordinate benches, we delete the disallowance. These grounds are allowed.

21. In ground no.5, assessee has challenged the disallowance of Rs.26,20,527, being expenditure incurred on credit card.

22. Briefly, the facts are, in course of assessment proceedings, the Assessing Officer noticed that the assessee has claimed deduction of Rs.7,60,46,644 towards expenditure incurred on credit card. After calling for necessary details and verifying them, Assessing Officer observed that the assessee has not provided details of transaction or statement issued by the CITI Bank. Thus, alleging that the assessee failed to establish that the expenses were incurred for the purpose of business, the Assessing Officer disallowed the deduction claimed. Before learned DRP, assessee

furnished copies of CITI Bank credit card statement. Therefore, learned DRP directed the Assessing Officer to verify the statement with the actual vouchers and allow claim of deduction to the extent they are reconciled. While complying with the directions of learned DRP, Assessing Officer held that assessee was unable to reconcile the difference of Rs.26,20,527. Accordingly, he restricted the disallowance to that extent.

23. Before us, learned counsel for the assessee submitted, before the authorities below, the assessee has furnished all necessary details to reconcile the difference between the statement of credit card and actual vouchers. In this context, he drew our attention to the factual paper book. He submitted, the Assessing Officer has not explained how difference works out to Rs.26,20,527. He submitted, the actual difference between the AIR information and assessee's record is only to the extent of Rs.1,35,450 and not what has been disallowed by the Assessing Officer. Without prejudice, he submitted, no disallowance can be made based on AIR information. Finally, he submitted, while considering similar nature of dispute in assessee's own case in assessment year 2015-16, the Tribunal has restored the matter

back to the Assessing Officer to verify the evidences filed by the assessee.

24. The learned Departmental Representative relied upon the observations of the Assessing Officer.

25. We have considered rival submissions and perused the material available on record. It is evident, in compliance with the directions of learned DRP, the Assessing Officer has accepted major part of the expenditure incurred by the assessee. However, he disallowed an amount of Rs.26,20,527 alleging a difference between the payment actually made as per the assessee and payment as per AIR information, which the assessee failed to reconcile. Before us, it is the contention of the learned counsel for the assessee that the actual difference would work out to an amount of Rs.1,35,450. Keeping in view the aforesaid submission of the learned counsel for the assessee, we restore the issue back to the Assessing Officer for verifying the factual details filed by the assessee and thereafter restrict the disallowance to the actual difference which the assessee will be unable to reconcile. This ground is allowed for statistical purposes.

26. In ground no. 6, the assessee has challenged disallowance of Rs.41,60,000, being expenditure on account of daughter's marriage fund.

27. Briefly, the facts are, in course of assessment proceedings, the Assessing Officer noticed that the assessee has claimed deduction of Rs.41,60,000 as expenditure on account of daughter marriage fund.

28. Being of the view that such expenditure does not come within the purview of Section 37(1) of the Act, Assessing Officer disallowed the expenditure.

29. Learned DRP upheld the disallowance following direction given in assessee's own case in assessment year 2015-16.

30. We have considered rival submissions and perused the material available on record. It is a common point between the parties that the Tribunal has decided identical issue in favour of the assessee in assessment year 2015-16. As could be seen from the facts on record, the assessee incurs certain expenditure, being payment made to employees to meet some part of the marriage expenditure of their daughter. It is observed while deciding identical issue in assessee's own case in assessment

year 2015-16, the Tribunal has restored the issue back to the Assessing Officer with the following observations:

“21. Ground No. 9 relating the disallowance of Rs.35 lacs being the expenditure on account of the expenditure amount paid to the employees of the assessee at the time of marriage of their daughter. It is the submission of the Ld. AR that considering the location and eligibility of the employees, the assessee has been making a provision in the books of accounts and such provision is offered for taxation at the time of filing the return and the actual amount paid during the year is claimed as expenditure. According to the Ld. AR it has been the practice of the assessee quite for a long time and all through these years no disallowance was made by the learned Assessing Officer. Learned Assessing Officer, however, disallowed the expenditure claimed by the assessee on the basis that the assessee is not a company registered under section 25 of the Companies Act so as to carry out welfare activities and the expenditure incurred in marriage of the employees’ daughters is not wholly and exclusively for the purpose of business of the assessee.

22. Basing on the decision of the Hon’ble Apex Court in the case of Shahzada Nand & Sons vs. CIT 108 ITR 358, Ld. AR submitted that the ex-gratia compensation paid to an employee is an allowable expenditure. He further submitted that under section 37(1) of the Act, deduction is admissible for expenditure incurred wholly and exclusively for the purpose of business and such expenditure is justified by business consideration and incurred out of commercial expediency is allowable deduction. He drew our attention to details of the expenditure incorporated at page Nos. 485 to 490 of the paper book in respect of the beneficiaries of this expense.

24. Insofar as the alliance of this expense in the earlier years is concerned, it is the submission of the Ld. DR that no such material is available with him right now and he further submitted that, be that as it may, the details furnished by the assessee are to be verified with reference to

the expenditure so incurred by the assessee in the earlier assessment years. He therefore prays that the matter may be remitted to the file of the learned Assessing Officer for verification of all these details.

25. Considering the request of the Revenue we deem it just and necessary that the allowance of this expenditure in the earlier years needs verification vis a vis the details furnished by the assessee. We therefore set aside the issue to the file of the learned Assessing Officer to carry out such an exercise of verification. Ground No. 9 is accordingly allowed for statistical purposes.”

31. Facts being identical, respectfully following the decision of the co-ordinate bench in assessment year 2015-16, we restore the issue to the Assessing Officer with similar directions. This ground is allowed for statistical purposes.

32. In Ground no. 7, assessee has challenged disallowance of loss claimed of Rs.80,00,000. In course of assessment proceedings, the Assessing Officer noticed that the assessee has claimed expenditure of Rs.80,00,000 under the head “extraordinary item” in the statement of profit and loss account. Being of the view that such claim is not allowable, the Assessing Officer disallowed it and the disallowance was also upheld by the learned DRP.

33. Before us, learned counsel for the assessee submitted that during the previous year relevant to assessment year under

dispute, there was a major flood in Chennai resulting in flooding of goods owned by the assessee. He submitted, as a result of flooding the assessee incurred loss on account of finished goods, consumables, spare parts etc. aggregating to Rs.14,91,33,256. He submitted, out of total loss of Rs.14,91,33,256, the assessee has recovered an amount of Rs.35,00,000 towards the insurance claim till end of March 2016. Further the assessee had received an amount of Rs.6,05,95,925 from sales of stock. Out of the balance amount of Rs.5,50,37,331, net insurance claim receivable by the assessee as on 31.03.2016 was Rs.4,70,37,331. Thus, the assessee suffered a net loss of Rs.80,00,000, which is an allowable expenditure. In this context, he drew our attention to notes to the financial statement and submitted that the loss may be allowed.

34. Strongly relying upon the observations of the Assessing Officer and learned DRP, the learned Departmental Representative submitted, when assessee's claim has not been settled by the insurer in the impugned assessment year, assessee's claim cannot be allowed.

35. We have considered rival submissions and perused the material available on record. The facts on record clearly reveal

that the loss of Rs.80,00,000 claimed by the assessee is only in the nature of a provision and is a projected figure. No material has been placed on record before us to demonstrate that the insurer has settled the claim in the financial year relevant to assessment year under dispute. On a specific query from the bench, learned counsel for the assessee has submitted that the insurance claim was settled in the next financial year relevant to assessment year 2017-18. Learned counsel was not able to furnish any documentary evidence, being any communication received from the insurer to demonstrate that the claim was settled at a particular amount in the impugned assessment year. This being the factual position emerging on record, it cannot be said that loss, if any, has crystallized in the impugned assessment year. In view of the aforesaid, we do not find any reason to interfere with the decision of the departmental authorities. Ground raised is dismissed.

36. In ground no. 8, the assessee has challenged disallowance of Rs.13,271, being interest paid on account of short payment/delay in deposit of TDS.

37. This issue was argued at some length by learned counsel for the assessee. However, when he was confronted with some judicial

precedents holding a view against the assessee, he submitted that due to smallness of the amount involved, he would not like to press the ground.

38. In view of the aforesaid submission of learned counsel for the assessee, this ground is treated as not pressed, hence, dismissed.

39. In ground no.9, assessee has challenged disallowance of Rs.1,41,16,000, being credit balance written back and treated as income under Section 41(1) of the Act.

40. Briefly, the facts are, based on the tax audit report filed by assessee, assessing officer held that a sum of Rs.1,41,16,261 is to be treated as profit chargeable to tax under Section 41(1) of the Act. Learned DRP upheld the decision of the assessing officer.

41. Before us, it is the specific contention of learned counsel for the assessee that the amount in dispute has already been considered as a part of other income and credited to the profit and loss account and offered to tax. In this context, he drew our attention to the schedule of other income at page 118 of the paper book. Thus, he submitted, that assessee having already offered the amount to tax, it cannot be added again.

42. Learned Departmental Representative submitted, the issue may be restored back to the assessing officer for verifying assessee's claim.

43. Having considered rival submissions, we restore the issue to the assessing officer for factually verifying assessee's claim that amount in dispute has already been offered to tax as part of other income. In case, assessee's claim is found to be correct, addition should be deleted. This ground is allowed for statistical purposes.

44. In ground no.10, assessee has challenged disallowance of Rs.3,29,83,096 out of the expenditure claimed towards travelling and conveyance.

45. While examining the expenditure claimed by assessee on travelling and conveyance, assessing officer disallowed 10% out of such expenditure purely on ad hoc basis.

46. Learned DRP upheld such disallowance.

47. Before us, learned counsel for the assessee submitted, not only assessee maintains regular books of account but the accounts are also audited. He submitted, in course of assessment proceedings, assessee has furnished complete details of all the expenditure incurred on travelling and conveyance. He submitted, without properly verifying

the evidences filed by assessee, assessing officer has disallowed a part of the expenditure. Thus, he submitted, disallowance made should be deleted.

48. Learned Departmental Representative strongly relied upon the observations of the assessing officer and learned DRP.

49. We have considered rival submissions and perused the material on record.

50. It is evident, the assessing officer has rejected a part of the expenditure incurred on conveyance and traveling purely on ad hoc basis. He has not pointed out any deficiency either in the accounts maintained by the assessee or the evidence furnished. When assessee's books of account are under statutory audit, such ad hoc disallowance in absence of any valid reasoning is unsustainable. Accordingly, we delete the disallowance. This ground is allowed.

51. In ground no.11, assessee has challenged disallowance of Rs.16,42,981, being expenses on account of presents/gifts and Rs.57,32,496 on account of personnel compensation cost and personnel relocation expenses.

52. In course of assessment proceedings, assessing officer after verifying the details of the aforesaid expenditure incurred by the assessee, was of the view that they were not incurred wholly and exclusively for the purpose of business. Accordingly, he disallowed them.

53. Learned DRP upheld such disallowance.

54. Before us, learned counsel for the assessee submitted, the expenditure on account of relocation, presents and gifts were incurred by assessee for the benefit and welfare of the employees. Hence, expenses cannot be regarded as not wholly and exclusively incurred for the purpose of business. He submitted, complete details relating to such expenditure were furnished in course of assessment proceedings. No deficiencies were found by assessing officer. Thus, he submitted, the disallowance made should be deleted.

55. Learned Departmental Representative strongly relied upon the observations of the assessing officer and Learned DRP.

56. We have considered rival submissions and perused the material available on record.

57. As could be seen, the relocation expenses are incurred by the assessee at the time of relocation/transfer of the employees from one state to another. The expenditure on account of gifts and presents are incurred by assessee towards gifts given to employees, trade partners, distributors etc. at the time of festivals or office celebrations or at the time of marriage of the employees. Thus, considering the nature of expenditure incurred by assessee, it cannot be said that they are not wholly and exclusively for the purpose of business. After all, from the nature of expenditure incurred, it is very much clear that they are for the benefit of employees. That being the factual position emerging from record, disallowance made is unsustainable. Accordingly, we delete them. This ground is allowed.

58. In ground no.12, the assessee has raised the issue of relief from double taxation under Section 90/91 of the Act.

59. We have heard the parties and perused the material available on record.

60. As could be seen, Learned DRP while deciding assessee's objection on the issue has directed the assessing officer to allow foreign tax credit as per law. Assessing Officer has disallowed

assessee's claim of foreign tax credit, on the reasoning that the assessee failed to furnish any certificate from the parties indicating the details of income and quantum of tax withheld thereon. It is the allegation of the Assessing Officer that, though, in the reply dated 10.03.2021, the assessee stated that statement of reconciliation of income received from foreign sources along with the copy of certificate received from the parties are enclosed, however, no such enclosure was found on e-filing portal. Thus, in absence of the required documentary evidences, Assessing Officer disallowed the claim of foreign tax credit.

61. Before us, learned counsel for the assessee submitted, during the year under consideration, two of the overseas associated enterprises of assessee had withheld tax aggregating to Rs.1,17,50,021. He submitted, before the departmental authorities, assessee had furnished the details of tax deducted by the AEs. In this regard, he drew our attention to the details furnished in the paper book.

62. Further, he submitted, while deciding identical issue in assessee's own case in assessment year 2015-16, Tribunal has remitted the matter to verify the certificates. Thus, he submitted, in

this year also, the issue may be restored back to the Assessing Officer for verification.

63. Learned Departmental Representative has no objection for restoration of the issue to the Assessing Officer.

64. Having considered rival contentions and perused the material on record, we find, assessee's claim of foreign tax credit was disallowed by the Assessing Officer in absence of certificates showing deduction of tax at source.

65. Considering the submissions of the parties and also the fact that similar nature of dispute arising in assessment year 2015-16 was restored back to the Assessing Officer by the Tribunal, we are inclined to restore the issue back to Assessing Officer for fresh adjudication after factual verification. Needless to mention, assessee must be provided reasonable opportunity of being heard before deciding the issue.

66. In ground no.13, assessee has raised the issue of deduction of education cess as business expenditure.

67. At the outset, we must observe, issue raised in this ground does not arise either out of the assessment order or the order of the first

appellate authority. Therefore, this is in the nature of an additional ground. Since, the issue raised in this ground does not require investigation into the fresh facts and can be decided based on facts and material available on record, we admit the ground for adjudication.

68. We have considered rival submissions and perused the material available on record.

69. Assessee's claim of deduction of education cess is founded on the ratio laid down in certain judicial precedents, as referred to in the written submission filed before us. However, in the Finance Act, 2020, Explanation 3 has been inserted below Section 40(a)(ii) of the Act with retrospective effect from 01.04.2005. The said provision reads as under:

“Explanation 3. For the removal of doubts, it is hereby clarified that for the purposes, to this sub-clause, the terms ‘tax’ shall include and shall be deemed always in sur-charge or cess, by whatever name call on such tax.”

70. Thus, after insertion of Explanation 3 to Section 40(a)(ii) of the Act, as noted above, education cess, being part of income-tax, cannot be allowed as expenditure. Admittedly, the decisions relied upon by learned counsel for the assessee are prior to the

amendment made to section 40(a)(ii) of the Act by insertion of Explanation 3.

71. In view of the aforesaid, assessee's claim of deduction of education cess has to be disallowed. Accordingly, we do so. This ground is dismissed.

72. In the result, the appeal is partly allowed.

Order pronounced in the open court on 11th July, 2022

**Sd/-
(G.S. PANNU)
PRESIDENT**

**Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER**

Dated: 11th July, 2022.
Mohan Lal

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi

Sl. No.	Particulars	Date
1.	Date of dictation:	14.06.2022
2.	Date on which the draft of order is placed before the Dictating Member:	16.06.2022
3.	Date on which the draft of order is placed before the other Member:	
4.	Date on which the approved draft of order comes to the Sr. PS/PS:	04.07.2022
5.	Date of which the fair order is placed before the Dictating Member for pronouncement:	05.07.2022
6.	Date on which the final order received after having been singed/pronounced by the Members:	11.07.2022
7.	Date on which the final order is uploaded on the website of ITAT:	12.07.2022
8.	Date on which the file goes to the Bench Clerk	12.07.2022
9.	Date on which files goes to the Head Clerk:	
10.	Date on which file goes to the Assistant Registrar for signature on the order:	
11.	Date of dispatch of order:	