

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'A' BENCH : BANGALORE**

**BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER  
AND  
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

<b>IT(TP)A No. 200/Bang/2021</b>
<b>Assessment Year : 2016-17</b>

M/s. Praxair India Pvt. Ltd., Mercury 2B Block, 6 <sup>th</sup> Floor, Prestige Technology Park, Outer Ring Road, Marathahalli, Bangalore – 560 103. <b>PAN: AAACP9993J</b>	<b>Vs.</b>	The Deputy Commissioner of Income Tax, Circle – 3(1)(1), Bengaluru.
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee by	:	Shri T. Suryanarayana, Senior Advocate
Revenue by	:	Shri Binod Kumar Singh, CIT DR

Date of Hearing	:	24-08-2022
Date of Pronouncement	:	14-11-2022

**ORDER**

**PER BEENA PILLAI, JUDICIAL MEMBER**

Present appeal is filed by assessee against order dated 31/03/2021 passed by National e-Assessment Centre, Delhi for A.Y. 2016-17 on following grounds of appeal:

*“The grounds hereinafter taken by the Appellant are without prejudice to one another.*

*I. Transfer Pricing*

*1. The learned Assessing Office ("AO"), learned Transfer Pricing Officer ("learned TPO") and the Honorable Dispute Resolution Panel("DRP")grossly erred in adjusting the transfer price by INR 304,03,79,433/- with respect to the*

*international transaction rendered by the Appellant under section 92CA of the Income-tax Act, 1961 (the Act").*

*2. The learned AO/ learned TPO/ Hon'ble DRP have erred in not accepting the transfer pricing analysis undertaken by the Appellant in accordance with provisions of the Act read with Income-tax Rules, 1962 ("the Rules").*

*3. The learned TPO erred in law and facts by holding that the payment of interest to Associated Enterprise ("AE:) on Compulsory Convertible Debentures ("`CCD") is not at arm's length and thereby erred in making an addition of INR 2,56,46,77,836/- thereby:*

*a. Erred in transgressing their jurisdiction by questioning a genuine transaction and referring to irrelevant arguments and BEPS action plans, and thereby, concluding that CCDs are colorable instrument used to erode the base and shift profits.*

*b. Erred in determining the ALP for payment of interest on CCDs as 'Nil' as against the interest payment made at 9% and 12%.*

*c. Erred in not appreciating the fundamental difference between a CCD and an Equity while determining the ALP for payment of interest on CCD.*

*d. Erred in not appreciating that CCDs are nothing but debt till the date of conversion.*

*e. Erred in placing reliance in FEMA/FDI Regulations to re-characterize the CCDs to Equity thereby failed to appreciate that the treatment of CCDs under FEMA/FDI Regulations cannot determine/change the character of the instrument when it comes to other regulations including the Act.*

*f. Erred in arbitrarily determining the ALP of payment of interest to AE on CCDs as "Nil" on ad-hoc basis and thereby not following the provisions relating to determination of ALP as prescribed in the Income-tax Act and Income-tax Rules ("Rules").*

*g. Failed to appreciate that the CCD were already accepted as debt in the scrutiny assessment proceedings for the assessment years of AY 11-12 to AY 13-14 and erred in not following the principles of Res Judicata having already accepted the requirement for payment of interest in the same CCDs during the previous assessment years of AY 11-12 to AY 13-14.*

*h. Erred in disregarding the independent benchmarking analysis undertaken by the Assessee identifying the comparable transactions involving the CCDs to*

*demonstrate the arm's length nature of interest payment on CCDs.*

*4. The learned TPO/ learned AO/ Hon'ble DRI ' failed to take cognizance of the fact that the CCDs were repaid by the Assessee in the future year and therefore, erred in concluding that the same were to be converted into equity.*

*5. The learned AO/ learned TPO/ Hon'ble DRP erred in restricting the royalty payment to 1% of net sales to its AE and thereby:*

*a. Erred in making an addition of INR 47,57,01,597/- to the total income of the Appellant*

*b. Erred in stating that no direct/primary evidences was furnished to justify the payment of royalty to its Associated Enterprise.*

*c. Failed to appreciate that the transfer of technology is a continuous process and thereby erred in stating that technology was transferred only during the initial year of operation and the Assessee has not received any new technology which necessitates the payment of royalty.*

*d. Erred in disregarding the external CUP search performed by the Appellant which is provided as a supplementary analysis to demonstrate the arm's length nature of the international transaction pertaining to payment of royalty.*

*e. Erred in disregarding the internal CUT search performed by the Appellant which is provided as a supplementary analysis to demonstrate the arm's length nature of the international transaction pertaining to payment of royalty.*

*f. Erred in not appreciating the similar licensing arrangement entered among group companies as these agreements provide persuasive value and support that the licensing of intangibles and services has been compensated as per the group policy.*

*g. Erred in restricting royalty payment to 1% of net sales on ad-hoc basis using Comparable Uncontrolled Price Method ("CUP") despite not following the provisions prescribed in clause (a) of the sub-rule (1) of Rule 10B of the rules for determination of ALP in relation to an international transaction under CUP.*

*6. Without prejudice. the learned AO/ learned TPO/ Hon'ble DRP erred in ignoring the justification of ALP of payment towards royalty using TNMM as provided in the TP Report and erred in not appreciating the fact that OECD guidelines and the Tribunal rulings have approved of*

*aggregation of closely linked transactions by applying TNMM.*

## *II. Corporate Tax*

*7. Disallowance of expenditure under section 14A of the Act by applying the provisions of Rule 8D of the Income-tax Rules, 1962 ("the Rules")*

*7.1. The learned AO/Honourable DRP erred in disallowing expenditure amounting to INR89,46,750 under section 14A of the Act read with Rule 8D of the Rules, despite the fact that no expenditure has been actually incurred/debited to the profit and loss account on this account. The learned AO / Honourable DRP ought to have observed that applicability of section 14A of the Act is triggered only if there is any expenditure incurred in this regard.*

*7.2. The learned AO/Honourable DRP erred in invoking section 14A inspite of the fact that no dividend/ exempt income has been earned during the year from such investments.*

*7.3. The learned AO/ Honourable DRP erred in not appreciating that the investments made in JSW Steel Limited of an amount of INR 100,000; in Jindal Praxair Oxygen Company Private Limited ("JPOCPL") (now known as JSW Industrial Gases Private Limited) of an amount of INR 1,78,31,00,000; and in TVH Energy Resources Private Limited ('TVH Energy') of an amount of INR 45,00,000 are historical in nature and as such no expenditure has been incurred towards the same.*

*7.4. The learned AO/ Honourable DRP erred in not appreciating the fact that investment in JPOCPL was acquired by way of swap of shares during Financial Year ('FY') 2010-11 and not by way of actual cash outflow. Further, investment in JSW Steel Limited and in TVH Energy was made in the previous years, out of the own funds of the Appellant.*

*Additionally, investment in TVH Energy was done during the FY 2015-16, of an amount of INR 25,00,000 and in Renew Wind Energy Karnataka Private Limited of an amount of INR 8,00,000, out of the cash flow from operating activities generated during the subject AY.*

*7.5. The learned AO/ Honourable DRP erred in invoking provisions of section 14A of the Act, inspite of the fact that the investments were made for business reasons and not with the objective of earning any dividend/ exempt income.*

*7.6. The learned AO/ Honourable DRP has erred in not considering the order of the Commissioner of Income-tax (Appeals) in Appellant's own case in AY 2008-09 which*

*directed the learned AO to delete the disallowance under section 14A of the Act on the basis that original investments in the Appellant's case were not geared or intended for earning exempt income such as dividend. Being investments made for business reasons, they are to be treated on a different footing from investments made only for earning exempt income. On Appeal by the Department, the Honourable ITAT has dismissed the grounds, in view of the categorical finding of the CIT(A).*

*7.7. The Honourable DRP erred in holding that the Appellant has not maintained separate books of account in regard to the investments made that are eligible to earn exempt income. The DRP also erred in stating that based the books of accounts maintained by the Appellant it is not possible to ascertain expenditure incurred in earning exempt income without appreciating the fact that it has not incurred any expenditure during the year towards the investments.*

*8. Addition of INR89,46,750 as per clause (f) of Explanation 1 to section 115JB of the Act for computing book profits*

*8.1. The learned AO/ Honourable DRP has erred in adding INR 89,46,750 as per clause (f) of Explanation 1 to section 115JB of the Act for computing book profits without appreciating the fact that —*

*i. The computation provisions of section 14A(2)/(3) of the Act read with Rule 8D cannot be applied to the book profit computation and only the amount of actual expenditure incurred (being an amount debited to the profit and loss account) which is relatable to the exempt income should be added to the book profits.*

*ii. Section 115JB is a complete code by itself and no adjustments other than those which are prescribed in section 115JB of the Act itself can be made to the book profits.*

*8.2. The learned AO/ Honourable DRP erred in not placing reliance on the decision of Special Bench of the Delhi Tribunal in the case of ACIT Vs. Vireet Investment Pvt. Ltd. [2017] 82 taxmann.com 415.*

*8.3. The learned AO erred in applying the provisions of section 14A to Chapter XII-B of the Act without having regard to the restriction that the provisions of section 14A of the Act is restricted to computing the total income under Chapter IV of the Act.*

*8.4. The learned AO/ Honourable DRP erred in not considering the order of the Commissioner of Income-tax (Appeals) in Appellant's own case in AY 2008-09*

*which directed the learned AO to delete the disallowance under section 14A of the Act in computation of book profits under section 115JB of the Act on the basis that section 115JB of the Act is a complete code by itself and the importing of such disallowances into the scope of adjustment of book profit is not permissible.*

*9. Short credit of tax deducted at source*

*The learned AO erred in giving credit of tax deducted at source of INR 77,61,556 instead of INR 5,85,89,000 as claimed by the Appellant in Return of Income.*

*10. Consequential interest under section 244A of the Act*

*The learned AO erred in not providing the Company with consequential interest under section 244A of the Act.*

*11. Penalty proceedings under section 271(1)(c) of the Act*

*The learned AO erred in law and on the facts and circumstance of the case by initiating penalty proceedings under section 271(1)(c) of the Act for furnishing inaccurate particulars of income.*

*The appellant craves leave to add, alter, rescind and modify the grounds herein above or produce further documents, facts and evidence before or at the time of hearing of this appeal.*

*For the above and any other grounds which may be raised at the time of hearing, it is prayed that necessary relief may be provided.”*

## **2. Brief facts of the case are as under:**

2.1 Assessee is a manufacturer and sale of industrial gas and construction of air separate units. It is also a subsidiary of M/s. Praxair India Ltd., Mauritius. For the year under consideration, it filed its return of income on 30/11/2016 declaring a loss of Rs.315,09,87,295/-. The case was selected for scrutiny and the Ld.AO from the details filed by the assessee observed that assessee had international transaction with its associated enterprise, the details of which are as under:

International Transactions as per 3CEB			
Particulars	Payable	Receivable	Method used

Sale of goods		48,339,693	TNMM
Purchase of materials	570,079,099		TNMM
Purchase of assets			TNMM

2.2 The Ld.TPO observed that assessee has paid interest on Compulsory Convertible Debentures (CCDs) issued by assessee to its AE. The assessee in the TP study had aggregated the transaction of payment with other transactions and bench marked by applying TNMM as the most appropriate method. It computed its margin and held it to be at arms length. The Ld.TPO recharacterised the transaction of CCDs with as ECB loans and proposed to determine the ALP at Nil.

2.3 The Ld.TPO then noted that during the year assessee had paid Rs.63,42,68,796/- being 4% on net sales as royalty to its AE. The Ld.AO after verifying all the details filed by the assessee restricted the payment of royalty to 1%. He thus proposed the following transfer pricing adjustment in the hands of the assessee.

Issues	Adjustment
1. Adjustment under interest payment to CCD	Rs.256,46,77,836/-
2. Adjustment under Royalty	Rs.47,57,01,597/-
Total	Rs.304,03,79,433/-

On receipt of the transfer pricing order, the Ld.AO passed draft assessment order in which he incorporated the aforesaid TP adjustment and further made addition by disallowing certain expenditure u/s. 14A r.w.Rule 8D amounting to Rs.89,46,750/-.

2.4 On receipt of the draft assessment order, assessee filed its objections before the DRP. The DRP considered the issue alleged by assessee at length, however dismissed the contentions of

assessee and upheld the proposed addition by the Ld.AO. Pursuant to the directions of the DRP, the Ld.AO passed the impugned order making additions in the hands of the assessee.

Aggrieved by the impugned order passed by the Ld.AO, assessee is in appeal before this *Tribunal*.

**3. Ground nos. 1 & 2** raised by the assessee are general in nature and therefore do not require adjudication.

**4. Ground nos. 3-4** is in respect of the addition made by the Ld.AO with regard to payment of interest on CCDs by recharacterising the same to be external commercial borrowings.

4.1 The Ld.AR submitted that this issue is covered by the decision of *Coordinate Bench of this Tribunal* in assessee's own case in *ITA No. 506/Bang/2016 vide order dated 06/12/2021 for A.Y. 2011-12* and in *ITA No. 2209/Bang/2016 vide order dated 25/02/2022 for A.Y. 2012-13*, wherein *Coordinate Bench of this Tribunal* has considered identical arguments advanced by both sides.

4.2 The Ld.DR on the contrary relied on the orders passed by authorities below.

4.3 We have perused the submissions advanced by both sides in the light of records placed before us.

4.4 We note that the *Coordinate Bench of this Tribunal* for A.Y. 2012-13 has followed the decision in assessee's own case for A.Y. 2011-12 which is as under:

*17. We have heard the rival submissions and perused the materials on record. We notice that the coordinate bench of the Tribunal in assessee's own case (Supra) on the issue of interest on CCDs has held that -*

*8.6 We have heard rival submissions and perused the material on record. The assessee during the financial year*

2009-2010, entered into a debenture subscription agreement with its AEs, Praxair International Finance. In the agreement, the term "issue price" is defined as "CCD will be issued at par at Rs.10 each". Further, the subscription considered shall be converted into INR as per the prescribed exchange rate and the number of CCDs allotted to the holders will be the subscription consideration as converted into INR, divided by face value of the CCD instrument. The debenture certificates issued clearly reflect the face value of debenture at INR at Rs.10 each. The CCDs are recorded in the financial statements in INR. The CCDs were also subsequently repaid in INR. The true copy of the statement setting out the details of payment and demand deposit transaction clearly demonstrate that the remittance is in INR.

8.6.1 The TPO and DRP erred in treating CCDs as ECBs and benchmarked the interest rate against LIBOR rate. The CCDs is a hybrid instrument and cannot be per se treated as ECB / loan. The Hyderabad Bench of the Tribunal in the case of *Adama India (P.) Ltd. v. DCIT* (supra) had held that CCDs cannot be categorized as a loan. The relevant finding of the Tribunal reads as follows:-

"8. We have considered the issue and examined the rival contentions. There is no dispute with reference to the fact that the CCDs were issued in Indian Rupees. Accordingly, following the principles laid down by the Coordinate Benches and the Hon 'ble High Court as relied on by the assessee in the submissions, we have to hold that TPO has wrongly treated the issuance of CCDs as a loan, by treating it as an external commercial borrowing, ignoring the fact that loan is a debt, whereas CCD is hybrid instrument in nature basically, categorised as equity in nature. It was accepted by the Hon'ble Supreme Court in the case of *Sahara India Real Estate Corporation Limited and Sahara Housing Investment Corporation Limited & Ors. Vs. Securities and Exchange Board of India & Anr.* in Civil Appeal No. 9813 of 2011 dt. 31-08-2012 (supra) while assigning the jurisdiction to SEBI as an 'equity instrument'. Further, the policy of Govt. of India and also RBI effective from 01- 04-2010 also indicate that issuance of CCD is part of FDI being quasi-equity in nature and considering the same as a loan would be completely, against regulations laid by DIPB, RBI and FEMA. It is to be reiterated that issuance of CCDs was denominated in Indian Rupees and not foreign currency. Therefore, TPO has erred in considering LIBOR as benchmark rate which

is in complete contradiction to the principles on the issue. The following judicial precedents supports that the rate interest has to be considered in the currency in which loan has originated.

i. India Debt Management Pvt. Ltd., IT(TP)A No. 7518/Mum12014;

ii, CIT Vs. Cotton Naturals (I) Ltd., ITA No. 23312014 (Delhi-HC);

iii. M/s. Brahma Center Development Pvt. Ltd., Vs. [TO, ITA No. 3 73/Del/2016 (ITA T Del).

By respectfully following the Co-ordinate Bench and Hon'ble High Court decisions, we agree with the assessee's contentions that the CCDs cannot be categorised as a loan and LIBOR plus two hundred basis points benchmark cannot be accepted on the facts of the case."

8.6.2 The Hon'ble Delhi High Court in the case of [CIT v. Cotton Naturals \(I\) Put. Ltd.](#) (supra) had held that the interest rate should be the market determined interest rate applicable to the currency concerned in which the loan has to be repaid. The relevant finding of the Hon'ble High Court reads as follows:-

"39. The question whether the interest rate prevailing in India should be applied, for the lender was an Indian company/assessee, or the lending rate prevalent in the United States should be applied, for the borrower was a resident and an assessee of the said country, in our considered opinion, must be answered by adopting and applying a commonsensical and pragmatic reasoning. We have no hesitation in holding that the interest rate should be the market determined interest rate applicable to the currency concerned in which the loan has to be repaid. Interest rates should not be computed on the basis of interest payable on the currency or legal tender of the place or the country of residence of either party. Interest rates applicable to loans and deposits in the national currency of the borrower or the lender would vary and are dependent upon the fiscal policy of the Central bank, mandate of the Government and several other parameters. Interest rates payable on currency specific loans/ deposits are significantly universal and globally applicable. The currency in which the loan is to be repaid normally determines the rate of return on the money lent, i.e. the rate of interest. Klaus Vogel on Double Taxation Conventions (Third Edition) under [Article 11](#) in paragraph 115 states as under:-

"The existing differences in the levels of interest rates do not depend on any place but rather on the currency concerned. The rate of interest on a US \$ loan is the same

*in New York as in Frankfurt—at least within the framework of free capital markets (subject to the arbitrage). In regard to the question as to whether the level of interest rates in the lenders State or that in the borrowers is decisive, therefore, primarily depends on the currency agreed upon (BFH BSt.B 1. II 725 (1994), re 1 § AStG). A differentiation between debt-claims or debts in national currency and those in foreign currency is normally no use, because, for instance, a US \$ loan advanced by a US lender is to him a debt-claim in national currency whereas to a German borrower it is a foreign currency debt (the situation being different, however, when an agreement in a third currency is involved). Moreover, a difference in interest levels frequently reflects no more than different expectations in regard to rates of exchange, rates of inflation and other aspects. Hence, the choice of one particular currency can be just as reasonable as that of another, despite different levels of interest rates. An economic criterion for one party may be that it wants, if possible, to avoid exchange risks (for example, by matching the currency of the loan with that of the funds anticipated to be available for debt service), such as taking out a US \$ loan if the proceeds in US \$ are expected to become available (say from exports). If an exchange risk were to prove incapable of being avoided (say, by forward rate fixing), the appropriate course would be to attribute it to the economically more powerful party. But, exactly where there is no 'special relationship', this will frequently not be possible in dealings with such party. Consequently, it will normally not be possible to review and adjust the interest rate to the extent that such rate depends on the currency involved. Moreover, it is questionable whether such an adjustment could be based on [Art. 11 \(6\)](#). For Art. 11 (6), at least its wording, allows the authorities to 'eliminate hypothetically' the special relationships only in regard to the level of interest rates and not in regard to other circumstances, such as the choice of currency. If such other circumstances were to be included in the review, there would be doubts as to where the line should be drawn, i.e., whether an examination should be allowed of the question of whether in the absence of a special relationship (i.e., financial power, strong position in the market, etc., of the foreign corporate group member) the borrowing company might not have completely refrained from making investment for which it borrowed the money.*

40. *The aforesaid methodology recommended by Klaus Vogel appeals to us and appears to be the reasonable and proper parameter to decide upon the question of*

*applicability of interest rate. The loan in question was given in foreign currency i.e. US \$ and was also to be repaid in the same currency i.e. US \$. Interest rate applicable to loans granted and to be returned in Indian Rupees would not be the relevant comparable. Even in India, interest rates on FCNR accounts maintained in foreign currency and different and dependent upon the currency in question. They are not dependent upon the PLR rate, which is applicable to loans in Indian Rupee. The PLR rate, therefore, would not be applicable and should not be applied for determining the interest rate in the extant case. PLR rates are not applicable to loans to be re-paid in foreign currency. The interest rates vary and are thus dependent on the foreign currency in which the repayment is to be made. The same principle should apply."*

*8.6.3 In the instant case, admittedly, the CCDs are issued in JNR, interest is paid in INR and CCD's are repaid also in INR. Therefore, placing reliance on the judgment of the Honble Delhi High Court in the case of [CIT v. Cotton Naturals \(I\) Pvt. Ltd.](#) (supra), we hold that the TP study of the assessee to justify the interest rate by arriving at average rupee cost and comparing the same with SBI prime lending rate is correct. It is ordered accordingly.*

*18. Respectfully following the decision of the coordinate bench of the Bangalore Tribunal we uphold the TP study done by the assessee to arrive at the interest rate of 9% and 12% calculated based on the average rupee cost comparing the same with SBI prime lending rate. The assessee's claim in this ground is allowed."*

4.5 Respectfully following the decision of the coordinate bench of the Bangalore Tribunal we uphold the TP study done by the assessee to arrive at the interest rate of 9% and 12% calculated based on the average rupee cost comparing the same with SBI prime lending rate.

**Accordingly, ground nos. 3-4 raised by assessee stands allowed.**

**5. Ground nos. 5-6** is in respect of the adjustment made by the Ld.TPO with respect to the payment of royalty at 1%.

5.1 The Ld.AR submitted that this issue is covered by the decision of *Coordinate Bench of this Tribunal* in assessee's own

case in *ITA No. 506/Bang/2016 vide order dated 06/12/2021 for A.Y. 2011-12* and in *ITA No. 2209/Bang/2016 vide order dated 25/02/2022 for A.Y. 2012-13*, wherein *Coordinate Bench of this Tribunal* has considered identical arguments advanced by both sides.

5.2 The Ld.DR on the contrary relied on the orders passed by authorities below.

5.3 We have perused the submissions advanced by both sides in the light of records placed before us.

5.4 We note that the *Coordinate Bench of this Tribunal* for A.Y. 2012-13 has followed the decision in assessee's own case for A.Y. 2011-12(supra) which is as under:

*"12. We have heard the rival submissions and perused the materials on record. We notice that the coordinate bench of the Tribunal in assessee's own case (Supra) has held that -*

*"7.4 We have heard rival submissions and perused the material on record. The Tribunal in assessee's own case for assessment year 2009-2010 in IT(TP)A No.315/Bang/2014 (order dated 31.03.2017) and for assessment year 2010-2011 in IT(TP)A No.361/Bang/2015 (order dated 04.06.2018) had restored the issue of determination of ALP for payment of royalty to the files of the TPO. The TPO, pursuant to the Tribunal's order, passed orders accepting the payment of royalty at 4% to be at arm's length. The relevant portion of the TPO's order for assessment year 2009-2010 reads as follows:-*

*"3. In view of above direction of the ITAT, the assessee was asked to submit the details with respect of all comparables vide letter dated 19.06.2017. In response of the same the submission was filed by the assessee on 11.06.2017 which have been considered.*

*As per submission, assessee has stated that out of the total 17 comparable agreements, the related party relationship between licensor and licensee existed in 07 comparable agreements and remaining 10 comparables agreements have unrelated party relationship for which the average royalty rate is computed at 4.10. Submission of the assessee has been considered. As the*

*average rate of royalty paid by the comparables is more than payment made by the assessee, i.e. at 4%, payment towards royalty is being treated to be at arm's length."*

*7.5 The relevant portion of the TPO's order for assessment year 2010-2011, reads as follows:-*

*"6. In view of above direction of the ITAT, the assessee was asked to submit the details with respect of all comparables vide letter dated 27.11.2018. In response of the same the submission was filed by the assessee on 12.12.2018 which have been considered. As per submission, assessee has stated that out of the total 17 comparable agreements, the related party relationship between licensor and licensee existed in 07 comparable agreements and remaining 10 comparables agreements have unrelated party relationship for which the average royalty rate is computed at 4.10%. Submission of the assessee has been considered. As the average rate of royalty paid by the comparables is more than payment made by the assessee, i.e., at 4%, payment towards royalty is being treated to be at arm's length.*

*7. Taking all these into consideration, the Royalty payment @ 4% made by the taxpayer to its AE is considered at Arm's Length, hence no adjustment on account of royalty payment is required to be made 7.6 In view of the above orders of the TPO, accepting the payment of royalty at 4% to be at arm's length, we hold that the payment of royalty at 4% in the year under consideration is to be treated as being at arm's length. Accordingly ground 3 is allowed."*

*13. Considering the decision of coordinate Bench in assessee's own case (supra) we allow this ground in favour of the assessee and hold that payment of royalty @ 4% is at arm's length."*

5.5 Respectfully following the above, we allow this ground in favour of assessee and hold the payment of royalty by assessee to be at arms length.

**Accordingly, this ground raised by assessee stands allowed.**

**6. Ground no. 7** is in respect of the disallowance of expenditure u/s. 14A r.w.Rule 8D.

6.1 It is submitted by the Ld.AR that there is no exempt income earned by the assessee for year under consideration. It is also

submitted by the Ld.AR that similar issue has arose in the case of the assessee for A.Ys. 2011-12 and 2012-13(supra) wherein the disallowance u/s. 14A stood deleted as there was no exempt income earned by assessee.

The Ld.DR relied on orders passed by authorities below.

6.2 We have perused the submissions advanced by both sides in the light of records placed before us.

6.3 We note that *Coordinate Bench of this Tribunal* for A.Y. 2012-13 has deleted the disallowance u/s. 14A by following the view taken by this *Tribunal* for A.Y. 2011-12 in assessee's own case as under:

*"21. We have heard the Ld DR and perused the materials on record. We notice that the coordinate bench of the Tribunal in assessee's own case (Supra) has held that -*

*9.2 We have heard rival submissions and perused the material on record. It is an undisputed fact that the assessee did not earn any exempt income during the year under consideration. It is a settled position that in the absence of any exempt income, no disallowance can be made u/s 14A of the Act. In this context, reliance is placed on the judgment of the Hon'ble jurisdictional High Court in the case of CIT and Anr. v. Quest Global Engineering Services Pvt. Ltd. (supra), wherein it was held as follows:-*

*"14. Now we may advert to the second substantial question of law. It is pertinent to note that for Assessment Year 2009-10 the assessee has not earned dividend income. The aforesaid fact has not been disputed by the revenue. It is also relevant to mention that Circular No.5/2014 dated 11.02.2014 is not applicable in the instant case as the instant case pertains to Assessment Year 2009-10. The aforesaid Circular has no retrospective operation. It is noteworthy that aforesaid Circular was not even relied by the parties. This court in COMMISSIONER OF INCOME TAX VS. KINGFISHER INVESTMENT INDIA LTD. vide judgment dated 29.09.2020 inter alia held that disallowance under Section 14A read with Rule 8D has to be made even when taxpayer in a particular year has not earned any exempt income. This court relied on the*

*decision of the Supreme Court in MAXOPP INVESTMENT LTD supra which was reproduced in Paragraph 5 of the decision and reliance was also placed on Circular dated 11.02.2014 issued by Central Board of Direct Taxes (CBDT). However, the aforesaid decision was subsequently considered by this court in judgment dated 16.01.2021 passed in I.T.A.No.271/2017 (PRINCIPAL COMMISSIONER OF INCOME TAX VS. NOVEL SOFTWARE DEVELOPMENT) in which it was held that decision of this court in KINGFISHER FINVEST LTD. was distinguishable as the basis of the aforesaid decision of this court was the decision of the Supreme Court in MAXOPP INVESTMENTS LTD. supra and it was held that the aforesaid decision does not deal with applicability of Section 14A of the Act. However, eventually this court agreed with the view taken by High Court of Madras in CIT VS. CHETTINAD LOGISTICS P LTD., (2017) 80 TAXMANN.COM 221 (MAD.) AND KEM INVEST LTD. VS. CIT, (2015) 16 TAXMANN.COM 118 (DELHI) and held that since no exempt income has accrued to the assessee therefore, the provisions of Section 14A of the Act do not apply to the fact situation of the case. Therefore, it has become necessary for us to clarify the view taken in the two decisions viz., KINGFISHER FINVEST INDIA LTD. AND MIS NOVEL SOFTWARE INDIA (P) LTD. supra. At this stage, we may refer to Paragraph 40 of the decision of the Supreme Court in MAXOPP supra, the relevant extract of which reads as under: It is to be kept in mind that in those cases where shares are held as 'stock-in-trade', it becomes a business activity of the assessee to the deal in those shares as a business proposition. Whether dividend is earned or not becomes immaterial. In fact, it would be a quirk of fate that when the investee company declared dividend, those shares are held by the assessee, though the assessee has to ultimately trade those shares by selling them to earn profits. The situation here is therefore, different from the case like Maxopp Investment Ltd. where the assessee would continue to hold those shares as it wants to retain control over the investee company. In that case, whenever dividend is declared by the investee company that would necessarily be earned by the assessee and the assessee alone. Therefore, even that the time of investing into those shares, the assessee knows that it may generate dividend income as well and as and when such dividend income is generated that would be earned by the assessee. In contrast, where the shares*

*are held as stock-in-trade, this may not be necessarily a situation. The main purpose is to liquidate those shares whenever the share price goes upon order to earn profits. In the result, the appeals filed by the revenue challenging the judgment of the Punjab and Haryana High Court in State Bank of Patiala also fail, though law in this respect has been clarified hereinabove. 15. From perusal of the relevant extract of the Supreme Court, it is evident that the decision in MAXOPP INVESTMENT LTD. supra deals with applicability of Section 14A of the Act. Therefore, the observations made with regard to applicability of Section 14A in MIS NOVEL SOFTWARE INDIA (P) LTD. are factually incorrect and we hasten to clarify the same. However, from relevant extract of Paragraph 40, it is evident that only expenses proportionate to earning of exempt income could be disallowed under Section 14A of the Act and the decision of MAXOPP INVESTMENT LTD is an authority for the aforesaid proposition that the provision is relatable to earning of actual income. The object of Section 14A is to curb the practice to claim deduction of expenses incurred in relation to exempt income against taxable income and at the same time avail of the tax incentive by way of exemption of exempt income without making any apportionment of expenses incurred in relation to exempt income. The High Court of Madras has relied on the decision of the Supreme Court in COMMISSIONER OF INCOME TAX VS. WALFORT SHARE AND STOCK BROKERS (2010) 326 ITR 1 wherein it has been held that Section 14A is relatable to income of actual income or not notional or anticipated income. Therefore, the conclusion arrived at by us in MIS NOVEL SOFTWARE INDIA (P) LTD. is affirmed but for different reasons. It is also clarified by us that while recording the conclusion in KINGFISHER FIN VEST LTD. that disallowance under Section 14A has to be made even taxpayer has not earned any exempt income, this court has misread the ratio of the decision of the Supreme Court in MAXOPP INVESTMENT LTD supra and therefore, the aforesaid view being contrary to the law laid down by the Supreme Court is not a binding precedent. In view of preceding analysis, the second substantial question of law is also answered against the revenue and in favour of the assessee. In the result, we do not find any merit in this appeal, the same fails and is hereby dismissed."*

*9.3 The Hon'ble Bombay High Court in the case of India Debt Management (P.) Ltd. (supra) has held that when*

*the IT(TP)A No.506/Bang/2016 M/s.Praxair India Private Limited. 15 assessee does not receive any dividend income, no disallowance can be made u/s 14A of the Act. The relevant finding of the Hon'ble High Court of Bombay, reads as follows:-*

*"7. Regarding question (b) -: The issue is no longer res-intigra. The facts are that the assessee had not earned any exempt, income during the year under consideration. As held earlier Delhi High Court which judgment is also followed repeatedly by our Court, in case of [Chemvinvest Ltd. v. CIT](#) [2015] 61 taxmann.com 1181234 Taxman 761/375 ITR 33 (Delhi), in such a case disallowance of expenditure under [section 14A](#) of the Act would not be permissible. The decision of Delhi High Court was carried in the appeal by the revenue. The SLP has been dismissed by the Supreme Court." 9.4 In the light of the aforesaid judicial pronouncements, the disallowance made u/s [14A of the Act](#), ought to be deleted, since the assessee was not in receipt of any exempt income during the relevant assessment year.*

*9.4 In the light of the aforesaid judicial pronouncements the disallowance made u/s. [14A of the Act](#) ought to be deleted, since the assessee was not in receipt of any exempt income during the relevant assessment year*

*22. Considering the binding effect of the decision of the coordinate bench of the Bangalore Tribunal we allow this ground in favour of the assessee to hold that the disallowance made u/s. [14A](#) is to be deleted as the assessee was not in receipt of any exempt income during the relevant assessment year."*

6.4 Respectfully following the above view, as there is no difference in facts, we direct the Ld.AO to delete the addition made u/s. 14A r.w.Rule 8D as assessee do not have any exempt income for the year under consideration.

**Accordingly, this ground raised by assessee stands allowed.**

**7. Ground no. 8** is in respect of the addition made to the books profits by applying the provisions of section 14A. This issue is no longer resintegra by virtue of the decision of *Hon'ble Special Bench of Delhi Tribunal* in case of *ACIT vs. Vireet Investments Pvt. Ltd.* reported in (2017) 82 taxmann.com 415 and the decision of

*Hon'ble Karnataka High Court in case of CIT vs. Gokaldas Images Pvt. Ltd. reported in (2020) 122 taxmann.com 160.*

7.1 We refer to the observations of *Hon'ble Karnataka High Court (supra)* which is as under:

*“10. The Commissioner of Income Tax (Appeals) has held that as per [Section 115JB](#) of the Act, the assessee being a company is liable to tax on book profits in accordance with the aforesaid provision and there is no exemption granted to the non dividend company in this regard. However, the tribunal by placing reliance on decision of the Supreme Court in APOLLO TYRES, 255 ITR 273 (SC) has held that Assessing Officer while determining book profits under [Section 115JB](#) of the Act cannot tamper with the profits as per profit and loss account prepared in accordance with the [Companies Act](#) except in the manner provided in Explanation 1 to [Section 115JB](#) of the Act. Thus, it has been held that the additions made by the Assessing Officer while determining the book profits under [Section 115JB](#) of the Act cannot be sustained. Any disallowance computed under [Section 14A](#) of the Act pertain to computation of income under normal provisions of the Act and cannot be read into the provisions of [Section 115JB](#) of the Act pertaining to computation of book profits by levy of Minimum Alternate Tax (MAT) and there is no express provision in clause (f) of Explanation 1 to [Section 115JB](#) of the Act to that extent. For the aforementioned reasons, the third substantial question of law is answered against the revenue and in favour of the assessee.”*

7.2 Respectfully following the above, we direct the Ld.AO to delete the disallowance u/s. 14A while computing book profits u/s. 115JB of the Act.

**Accordingly, this ground raised by assessee stands allowed.**

**8. Ground no. 9** is in respect of the direction sought for granting the credit of tax deducted at source. The Ld.AR submitted that the assessing officer has given a short credit of TDS of Rs.77,61,556/- instead of Rs.585,89,000/- as claimed by the

assessee in the return of income. We direct the Ld.AO to verify the same and consider the claim in accordance with law.

**Accordingly, this ground raised by assessee stands allowed for statistical purposes.**

**9. Ground no. 10** is in respect of interest charged u/s. 244A of the Act. It is submitted that the Ld.AO has not provided the consequential interest u/s. 244A of the Act. We direct the Ld.AO to verify the same and consider in accordance with law.

**10. Ground no. 11** is premature and do not require adjudication.

**In the result, the appeal filed by the assessee stands allowed as indicated hereinabove.**

**Order pronounced in the open court on 14<sup>th</sup> November, 2022.**

Sd/-  
(LAXMI PRASAD SAHU)  
Accountant Member

Sd/-  
(BEENA PILLAI)  
Judicial Member

Bangalore,  
Dated, the 14<sup>th</sup> November, 2022.  
/MS /

Copy to:

- |               |                        |
|---------------|------------------------|
| 1. Appellant  | 4. CIT(A)              |
| 2. Respondent | 5. DR, ITAT, Bangalore |
| 3. CIT        | 6. Guard file          |

By order

Assistant Registrar,  
ITAT, Bangalore