

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI "I" BENCH: NEW DELHI**

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER &  
SHRI KUL BHARAT, JUDICIAL MEMBER**

**ITA No.961/Del/2015  
[Assessment Year : 2010-11]**

Maruti Suzuki India Ltd., Plot No.1, Nelson Mandela Road, Vasant Kunj, New Delhi-110070. <b>PAN-AAACM0829Q</b>	vs	DCIT, Circle-16(1), New Delhi.
<b>APPELLANT</b>		<b>RESPONDENT</b>

**ITA No.1507/Del/2015  
[Assessment Year : 2010-11]**

DCIT, Circle-16(1), New Delhi.	vs	Maruti Suzuki India Ltd., Plot No.1, Nelson Mandela Road, Vasant Kunj, New Delhi-110070. <b>PAN-AAACM0829Q</b>
<b>APPELLANT</b>		<b>RESPONDENT</b>
<b>Appellant by</b>		Shri Ajay Vohra, Sr.Adv., Shri Neeraj Jain, Adv. & Ms. Tejasvi Jain & Ms. Somya Jain, CA
<b>Respondent by</b>		Shri G.C.Srivastava, Adv., Shri Kalrav Mehrotra, Adv. & Shri Mayank Patawari, CA
<b>Date of Hearing</b>		11.11.2022
<b>Date of Pronouncement</b>		09.02.2023

**ORDER**

**PER KUL BHARAT, JM :**

The present cross appeals filed by the assessee and the Revenue for the assessment year 2010-11 are directed against the order of Ld. DCIT, Circle-16(1), New Delhi dated 20.01.2015. Both cross-appeals filed by the assessee and the Revenue are being disposed off by way of this consolidated order for the sake of brevity and convenience.

**ITA No.961/Del/2015 [Assessment Year : 2010-11]**

2. First we take up assessee's appeal in **ITA No. 961/Del/2015** pertaining to **Assessment Year 2010-11**. The assessee has raised following grounds of appeal:-

1. *"That on the facts and circumstances of the case the impugned assessment completed vide order dated 20.01.2015 passed under section 143(3) read with section 144C of the Income-tax Act, 1961 ('the Act'), is illegal and bad in law.*
  - 1.1. *That on the facts and circumstances of the case, the impugned assessment having been completed on the basis of directions issued by the Dispute Resolution Panel ("DRP") under section 144C(5) of the Act without judiciously and independently considering the factual and legal objections to the draft assessment order, is illegal and bad in law.*
  - 1.2. *That the DRP erred on facts and in law in not interfering with the draft order passed by the assessing officer holding that since appeals have been filed by the appellant and the Department on various issues, there is no warrant to interfere with the proposed additions/ disallowances.*
  - 1.3. *That the DRP erred on facts and in law in not directing the assessing officer to delete various additions/ disallowance, which were squarely covered in favour of the appellant by the appellate orders for the earlier years.*
2. *That the assessing officer erred on facts of the case and in law in completing the impugned assessment at an income of 4649,87,40,313/- as against income of Rs.3259,18,58,726/- declared by the appellant.*
3. *That the Assessing Officer/ DRP erred on facts and in law in not allowing an aggregate claim of deduction of statutory duties/ taxes of Rs.121,82,25,605/-paid under section 43B of the Act.*
  - 3.1. *That the Assessing Officer erred in making disallowance under section 43B of the Act following the assessment Orders for the*

*earlier assessment years despite admitting that in the earlier year(s) most of the issues have been decided in favour of the appellant.*

- 3.2. *That the Assessing Officer erred on facts and in law in holding that the deduction of liability to pay taxes/duties under section 43B is admissible only after such liability has been incurred under the Act.*
- 3.3. *That the Assessing Officer failed to appreciate that the assessee having admittedly paid Rs. 16,42,033/- as Excise Duty on vehicles and Rs.5,84,293/- as R& D cess on vehicles in the relevant assessment year, the same were allowable deduction u/s 43 B of the Act.*
- 3.4. *That the Assessing Officer has, without any basis or material, erroneously concluded that the aforesaid payments have been made in advance for the stocks still to be manufactured, without appreciating that as on 31.03.10 the appellant had finished stock of vehicles amounting to Rs.379.40 crores, which included accrued liability of excise duty and R&D cess amounting to Rs.23.67 crores and consequently, the same were, in any case, allowable deduction u/s 43B of the Act.*
- 3.5. *That the Assessing Officer erred on facts and in law in not allowing deduction under section 43B of the Act for a sum of Rs.54,19,86,424/- representing the customs duty paid in respect of inputs imported by the assessee company and, for which the corresponding exports had been made by the year end.*
- 3.6. *That the Assessing Officer erred on facts and in law in not allowing deduction under section 43B of the Act for a sum of Rs.2,76,77,437/- representing the amount of excise duty actually paid on purchased inputs included in RG 23A Part II.*
- 3.7. *That the Assessing Officer failed to appreciate that the aforesaid balances represented the amount of excise duty actually paid by the appellant to the suppliers of raw materials and other inputs for which liability had already been incurred and thus could not be considered as advance payment of excise duty.*
- 3.8. *That the Assessing Officer erred on facts and in law in not allowing deduction under section 43B of the Act for a sum of*

*Rs.27,29,78,059/- representing custom duty (CVD) paid to be adjusted against excise duty payable on finished products.*

- 3.9. That the Assessing Officer erred on facts and in law in not allowing deduction under section 43B of the Act for a sum of Rs6,18,68,222/- representing custom duty in respect of the goods in transit/under inspection.*
- 3.10. That the Assessing Officer erred on facts and in law in not allowing deduction under section 43B of the Act for a sum of Rs.30,48,61,320/- representing the custom duty paid and included in valuation o closing stock.*
- 3.11. That the Assessing Officer erred on facts and in law in not allowing deduction under section 43B of the Act for a sum of Rs. 61,76,617/- being Customs Duty paid under protest.*
- 3.12. That the Assessing Officer erred on facts and in law in not allowing deduction under section 43B of the Act for a sum of Rs. 4,51,200/- being Sales Tax paid under protest.*
- 3.13. That the Assessing Officer erred in not following the binding decisions of the High Court and the Tribunal in the appellant's own case for the earlier assessment years, in gross violation of principles of judicial propriety.*
- 4. That the Assessing Officer/ DRP has erred in law, on facts and in the circumstances of the case in not allowing the claim of the assessee for withdrawal of add back of Rs. 109,72,67,904/- made in the computation of taxable income, being the amounts disallowed in earlier years under section 43 B of the Act.*
  - 4.1 That the Assessing Officer has erred in law, on facts and in the circumstances of the case in failing to apply the fundamental rules of taxation that the same income cannot be taxed twice and that the AO is duty bound to determine the true figure of the assessee's taxable income in accordance with the provisions of the Act.*

- 4.2. *That the Assessing Officer has erred in not appreciating that similar withdrawal of add back under section 43B was allowed by the AO himself and confirmed by the DRP in AY 2007-08.*
5. *That the Assessing Officer erred on facts and in law in making further disallowance of expenses amounting to Rs. 32,57,05,335/- under section 14A of the Act.*
  - 5.1 *That the assessing officer erred on facts and in law in proceeding to make disallowance under section 14A simply on the basis of method/ formula prescribed in Rule 8D of the I.T. Rules, without appreciating that preconditions for applying the said rule as prescribed in sub-sections (2)/(3) of section 14A of the Act were not satisfied.*
  - 5.2 *That the Assessing Officer erred on facts and in law in not appreciating that there was no proximate nexus between any expenditure incurred and exempt dividend income.*
  - 5.3 *That the Assessing Officer erred on facts and in law in holding that suo-motu disallowance of Rs. 1,69,36,938/- made by the appellant in the return of income under section 14A of the Act was incorrect and not backed by the documentary evidence.*
  - 5.4. *That the assessing officer erred on acts and in law in disregarding the explanation given by the appellant or non-inclusion of interest expenses for the purposes of disallowance under section 14A of the Act.*
  - 5.6. *Without prejudice, the assessing officer erred in computing the disallowance u/s 14A read with Rule 8D of the Income Tax Rules.*
6. *That the Assessing Officer/ DRP erred on facts and in law in disallowing expenditure of Rs.444,43,46,454/- (Net of depreciation for the year) incurred on account of royalty (both lumpsum and running), holding the same to be capital expenditure.*
  - 6.1. *That the Assessing Officer erred, on facts and in law in not appreciating that royalty paid by the appellant to Suzuki Motor Corporation, Japan (hereinafter referred to as "SMC") was merely for*

*the limited right/license to manufacture and sell the licensed product for a specified duration in India and was therefore, revenue in nature.*

- 6.2. That the Assessing Officer erred on facts and in law in not appreciating that payment of royalty was directly linked and correlated with the production/ sales of cars and spares by the appellant and if there is no production/ sale of cars and spares, there will be no royalty payable to SMC.*
- 6.3. That the Assessing Officer erred on facts and in law in not appreciating that royalty payment (including cess) was held to be revenue expenditure in all the preceeding assessment years till assessment year 2005-06 and that there being no change in facts during the year under consideration, there was no warrant or justification to take a totally contradictory view in holding the same to be capital expenditure.*
- 7. That the Assessing Officer erred on facts and in law in disallowing Rs.33,89,08,734/- (Net of depreciation for the year) on account of R&D cess on royalty, holding that cess also partook the character of royalty, without appreciating that royalty was paid to SMC whereas R&D cess on royalty, being a statutory payment, was paid to the Indian Government.*
- 7.1. That the Assessing Officer erred in failing to appreciate that R&D cess, being a statutory payment, is governed by section 43B of the Act, which is a separate code in itself and overrides other provisions of the Act, and hence the payment of R&D cess is an allowable deduction under that section.*
- 7.2. That the Assessing Officer erred on facts and in law in not appreciating that R&D cess on royalty was always accepted to be revenue expenditure in all the previous assessments till assessment year 2005-06 and that there being no change in facts during the year under consideration, there was no warrant or justification to take a totally contradictory view and holding the same to be capital expenditure.*

- 7.3. *Without prejudice, the assessing officer erred on facts and in law in not appreciating that the appellant had suo-moto disallowed R&D cess paid on royalty to the extent of Rs. 1,39,45,180/- under section 43B. thereby resulting in a double disallowance to the extent of Rs. 1,39,45,180/-.*
- 7.4. *Without prejudice, the assessing officer erred in granting the alternative deduction of depreciation of Rs.93,92,54,794/- instead of Rs.145,22,90,555/-with respect to Royalty Paid to SMC and R&D Cess thereon resulting in short deduction of Rs.51,30,35,761/-.*
8. *That the Assessing Officer/ DRP has erred in law and on facts in disallowing deduction of Rs.43,11,000/- representing the excise duty paid by the appellant during the relevant previous year.*
- 8.1 *That the Assessing Officer failed to appreciate that the said amount of Rs.43,11,000/- constituted and represented excise duty actually paid by the appellant and was, therefore, allowable deduction under section 43B of the Act.*
- 8.2 *That the Assessing Officer/DRP erred on facts and in law in leveling false and baseless allegations of the appellant having, inter alia, hidden true nature of payment of excise duty, without appreciating that aforesaid amount had been paid by the assessee as excise duty and the same was duly certified by the tax auditors in the tax audit report.*
9. *That the Assessing Officer/ DRP has erred on facts and in law in making disallowance of Rs.33,00,89,403/-, being the expenditure provided on estimated basis on account of foreseen price increase (in short "FPI"), disregarding the consistent and accepted method followed by the appellant for last many years since inception.*
- 9.1 *That the Assessing Officer completely failed to appreciate that there was a clear contractual agreement/ understanding between appellant and suppliers under which the appellant was liable to pay additional amount of price for the supplies of various inputs received during the year and accordingly the said liability accrued during or*

*before the end of that year and estimated amount thereof was accordingly allowable as deduction from assessable income.*

- 9.2 *That the Assessing officer failed to appreciate that mere fact that the exact amount of additional price payable to suppliers was not quantified until the end of relevant accounting year did not at all mean that there was no accrual of liability in that year.*
- 9.3 *That the Assessing officer/ DRP erred on facts and in law in completely disregarding the evidence and material placed on record which conclusively established the existence of agreement/understanding between appellant and suppliers for the payment of additional price to them for supplies made during the accounting year ended on 31<sup>st</sup> March, 2010.*
- 9.4 *That the Assessing Officer erred on facts and in law in not taking cognizance of the fact that the entire amount of liability has either been paid or written back and offered to tax as its income in the succeeding assessment year.*
- 9.5 *That the DRP erred on facts and in law in alleging that calculation/ method/ basis of computing and claiming the liability on account of foreseen price increase was not furnished/ explained by the appellant.*
- 9.6 *Without prejudice, the Assessing Officer erred on facts and in law in not allowing the deduction of the amount disallowed in the preceding assessment year(s) but actually paid/ written back during the year under consideration.*
10. *That the Assessing Officer/ DRP has erred in law, on facts and in the circumstances of the case in making ad-hoc disallowance of Rs.21,83,04,695/- for alleged sharing of resources by the appellant with other group / subsidiary companies.*
- 10.1 *That the assessing officer / DRP erred in observing that the appellant had borne expenses incurred for other corporate entities, failing to appreciate that the entire expenses were incurred by the appellant for the purposes of its business and hence no part of the*

*expenditure incurred ought to be disallowed on account of sharing of resources.*

- 10.2 *That the assessing officer/ DRP further failed to appreciate that the disallowance of any part of the expenses incurred was ultimately tax neutral in as much as the expenses disallowed in the hands of the appellant would have to be allowed in the hands of the group/ subsidiary companies.*
- 10.3 *Without prejudice to the aforesaid, the quantum of disallowance computed by the assessing officer was very high as compared to expenses of Rs. 1.22 crores that could, if at all, reasonably be attributed towards sharing of expenses.*
11. *That the Assessing Officer/ DRP erred on facts and in law in disallowing Rs.11,30,00,000/-, being the expenditure incurred on account of discharging corporate social responsibility, without appreciating that such expenditure was incurred wholly and exclusively for the purposes of business.*
  - 11.1 *That the assessing officer/ DRP erred on facts and in law in holding that the expenditure incurred on corporate social responsibility is, even otherwise, capital in nature on the ground that the same resulted in enduring benefit to the appellant.*
  - 11.2 *Without prejudice, the assessing officer erred on facts and in law in not allowing depreciation under section 32 of the Act, consistent with his finding that the aforesaid expenditure is capital in nature.*
12. *That the Assessing officer/ DRP has erred on facts and in law in disallowing a sum of Rs.7,50,017/- being expenditure incurred on account of club membership fees, following the assessment orders for the earlier years, alleging that the appellant failed to justify the said commercial expediency.*
13. *That the assessing officer/ DRP has erred in law, on facts and in circumstances of the case in treating gains from sale and purchase of mutual funds as “business income” as against the same being declared under the head “capital gains” by the assessee.*

- 13.1. *That the assessing officer erred on facts and in law in assessing gain of Rs.125,66,52,966 on transfer of units of mutual fund as business income as against long-term capital loss of Rs.68,16,79,305 declared by the assessee after claiming benefit of indexation.*
- 13.2. *That the assessing officer erred on facts and in law in assessing short-term capital gain of Rs.3,32,97,441 as business income.*
- 13.3. *That the assessing officer erred on facts and in law in holding that investment in units of mutual funds and shares were made as a systematic business activity, without appreciating that such investments were made on capital account and not as “stock-in-trade”.*
- 13.4. *That the assessing officer erred on facts and in law in holding that the assessee had shown/ categorized the purchases of mutual funds as “investment” in the books of account in order to hoodwink the Department and conceal the real nature of the transactions.*
- 13.5. *That the DRP erred on facts and in law in holding that the appellant was unable to establish that the holding in shares/ securities were held as investments and not as stock in trade.*
14. *That the A.O./ DRP has erred in law, on facts and in circumstances of the case in disallowing the deduction of Rs.20,98,82,138/- claimed by assessee in respect of provision for warranty (Inadvertently mentioned in the order as gratuity).*
- 14.1. *That the AO erred on facts and in law in holding that the provision for warranty was made on an ad-hoc basis and not based on scientific valuation.*
15. *That the assessing officer erred on facts and in law in disallowing the purchases to the tune of Rs. 1,95,67,83,751 made by the assessee from SMC, on the ground that the assessee has failed to deduct tax at source from purchases made from SMC, by invoking the provisions of section 40(a)(i) of the Act.*

- 15.1. *That on the facts and circumstances of the case and in law the aforesaid disallowance is bad in law and not sustainable having being made in violation of principles of natural justice.*
- 15.2. *That the assessing officer erred on facts and in law in holding that SMC had a Permanent Establishment ["PE"] in India in terms of Article 5 of the India-Japan Tax Treaty "Treaty"] and income arising to SMC from sale of goods to the assessee was attributable to the activities of such alleged PE, and was liable to tax in India.*
- 15.3. *That the assessing officer erred on facts and in law in alleging that SMC had a place of management in India and hence, a fixed place PE in India in terms of Article 5(1) and 5(2) of the Treaty, on the ground that the executive directors on the board of the assessee who were Japanese nationals nominated (nominee directors) by SMC and held significant influence over the affairs of the assessee were employees of SMC and were deriving salary from SMC.*
- 15.4. *That the assessing officer erred on facts and in law in alleging that the nominee directors were looking after the interests of SMC in India and carrying on business of SMC in India.*
- 15.5. *That the assessing officer erred on facts and in law in alleging that SMC also had dependent agent PE in India since the nominee directors were taking commercial decisions in the interest of SMC.*
- 15.6. *That the assessing officer erred on facts and in law in alleging that the assessee also had service PE in India alleging that the nominee directors were rendering managerial services on behalf of SMC to the assessee.*
- 15.7. *Without prejudice, the assessing officer erred on facts and in law in not appreciating that there is no concept of service PE under the Treaty.*
- 15.8. *Without prejudice, the assessing officer erred on facts and in law in computing the profits attributable to the alleged PE of SMC in India at Rs. 1,95,67,83,751, and disallowing the same under section 40(a)(i) of the Act.*

- 15.9. *That the assessing officer erred on facts and in law by arbitrarily assuming 20% net profit margin on purchases made by assessee from SMC, out of which 50% profits have been alleged to be attributable to the alleged PE of SMC in India.*
- 15.10. *That the assessing officer erred on facts and in law in not appreciating that no disallowance under section 40(a)(i) of the Act was warranted as the said provisions were not applicable in view of the provisions of Article 24 of the Treaty.*
16. *That the assessing officer erred on facts and in law in making transfer pricing adjustment amounting to Rs.442,92,00,000/- on account of the alleged difference in the arm's length price of international transactions of payment of royalty entered into by the appellant on the basis of the order under section 92CA(3) of the Act.*
- 16.1. *That the TPO / DRP erred on facts and in law in holding that the international transaction of payment of royalty does not satisfy the arm's length principles as envisaged under the Act.*
- 16.2. *That the TPO / DRP erred on facts and in law in holding that the assessee was not liable to pay royalty to SMC towards use of SMC's trademark.*
- 16.3. *That the TPO / DRP erred on facts and in law in holding that out of the total royalty paid by the assessee, 46% was attributable to royalty towards payment for use of SMC's trademark and thereby ought to be disallowed.*
- 16.4. *That the TPO / DRP erred on facts and in law in rejecting Transactional Net Margin Method ('TNMM') as the most appropriate method for benchmarking the international transaction of payment of royalty.*
- 16.5. *That the TPO / DRP erred on facts and in law in not following any of the prescribed method for determination of the arm's length price of international transaction of payment of royalty.*

- 16.6. *That the TPO / DRP erred on facts and in law in failing to appreciate that at the time of entering into the license agreement, the appellant and SMC were unrelated parties.*
- 16.7. *That the TPO / DRP erred on facts and in law in not appreciating that brand 'Maruti Suzuki' was used by the appellant from its inception.*
- 16.8. *That the TPO / DRP erred on facts and in law in not appreciating that the use of brand 'Suzuki' was in the commercial interest of the appellant*
- 16.9. *That the TPO / DRP erred on facts and in law in holding that 'Suzuki' brand has piggybacked the brand 'Maruti' owned by the appellant*
- 16.10. *That the TPO / DRP erred on facts and in law in artificially splitting the single and inseverable license agreement entered into by the applicant with Suzuki Motor Corporation, Japan ('SMC').*
- 16.11. *That the TPO / DRP erred on facts and in law in not appreciating that all rights vested in the license agreement are inseverable and linked to the core right to manufacture and sell licensed products.*
- 16.12. *That the TPO / DRP erred on facts and in law in holding that co-branding of "Maruti- Suzuki" has resulted in the reinforcement of value of "Suzuki" brand and simultaneous impairment of "Maruti" trademark.*
- 16.13. *That the TPO / DRP erred on facts and in law in holding that "Suzuki brand in India is relatively weak".*
- 16.14. *That the TPO / DRP erred on facts and in law in not following the appellate order passed by the Hon'ble Tribunal for assessment year 2005-06 wherein similar Transfer Pricing adjustment on account of international transaction of payment of royalty was deleted.*
- 16.15. *That the TPO / DRP erred on facts and in law in holding, on the basis of conjectures and surmises that, the associated enterprise has charged separate royalty for the use of technology and for use*

*of brand name in the proportion in which it incurs expenditure on R&D and Brand promotion.*

*16.16. That the TPO / DRP erred on facts and in law in not appreciating that the royalty was the consolidated charge made by the appellant for obtaining right and license to manufacture motor vehicles in India using the technology and brand name of the SMC, Japan.*

*16.17. Without prejudice, the TPO / DRP erred in considering the consolidated financials of the associated enterprise for the purpose of segregating the payment of royalty for the use of technology and for the use of brand name.*

*17. That the AO has erred in law, on facts and in the circumstances of the case in allowing TDS credit of Rs.31,95,97,761/- only against Rs. 33,76,81,853/- claimed by the appellant in the revised return of Income and/or before DRP/AO, thereby allowing a short-credit of Rs. 1,80,84,092/-*

*18. That the assessing officer erred on facts and in law in charging interest under sections 234B and 234C of the Act.*

*18.1. That the assessing officer grossly erred in computing the interest under section 234B of the Act by first adjusting the interest computed under that section on the basis of the assessed income against the self assessment tax paid by the appellant.*

*The appellant prays leave to add, amend, alter, delete or forego any of the grounds either before or during the course of hearing.”*

3. The Ld. Counsel for the assessee raised an additional ground vide letter dated 20.06.2019 which reads as under:-

*“On the facts and circumstances of the case and in law, the assessing officer/CIT(A) ought to have restricted the levy of dividend distribution tax, on the dividend distributed/paid to Suzuki Motor Company, Japan and other the non-resident shareholder(s), to 10% in terms of Article 10 of the double taxation avoidance agreement [DTAA] between India and Japan, in case of dividend paid to Suzuki Motor Co., Japan and the DTAAAs with the*

*respective countries in case of other non-resident shareholders instead of 16.60875% charged in terms of section 115-O of the Act.”*

#### **BRIEF FACTS OF THE CASE**

4. Brief facts of the case are that the assessee is a limited company duly incorporated under the Companies Act and is engaged in the business of manufacture, purchase and sale of automobiles and the other activities related to pre-owned car sales, insurance, fleet management and car financing. The return of income was filed through electronic mode on 11.10.2010 declaring total income of Rs.3255,35,58,940/- and the revised return was filed on 28.03.2012 at an income of Rs.3259,18,58,726/-. The case was processed u/s 143(1) of the Income Tax Act, 1961 (“the Act”). Thereafter, the case was taken up for scrutiny assessment. Having taken into account, the transfer pricing adjustments a draft assessment order u/s 144C of the Act was passed on 29.03.2014 determining income at Rs. 4896,58,43,555/-. Aggrieved against it the assessee company filed its objections against the draft assessment order before Ld. Dispute Resolution Panel (“DRP”)-III, New Delhi who issued certain directions on 08.01.2015 u/s 144C(5) of the Act with regard to transfer pricing adjustments. In pursuance to the direction(s) of Ld. DRP, the Assessing Officer (“AO”) passed impugned assessment order on 20.01.2015 u/s 143(4) r.w.s 144C of the Act. Thereby, he assessed income of assessee company at Rs.4649,87,40,313/-. Thereafter, the AO passed a rectification order u/s 154 of the Act thereby after rectifying the error he assessed income at Rs.4591,24,91,796/-.

5. Pertinently, during the assessment proceedings, the AO noticed that the assessee had claimed deduction of Rs.121,82,25,605/- u/s 43B of the Act. In respect of PLA balance on excise duty on vehicles, PLA balance on R&D Cess

on vehicles etc. The AO therefore, considering the incurrance of liability to pay taxes/duties being the condition precedent for claiming deduction, he made disallowance u/s 43B of the Act amounting to Rs.121,82,25,605/-. The AO further made disallowance by invoking the provision of section 14A of the Act, he noticed that the assessee had disclosed exempt dividend income of Rs.156,03,20,325/- u/s 10(34) & 10(35) of the Act. The AO further observed that the assessee incurred interest expenses of Rs.21.7 crores, Rs.10.20 crores in foreign currency and interest on export credits. However, the assessee suo-moto made disallowance u/s 14A of the Act r.w. Rule 8D of the Income Tax Rules, 1962 ("the Rules") amounting to Rs.1,69,36,938/- only. The AO did not accept the disallowance made by the assessee instead he computed the disallowance u/s 14A as prescribed under Rule 8D of the Rules. Thereby, he made disallowance of Rs. 34,26,42,273/- and made addition of Rs.32,57,05,335/- after giving set off of suo-moto disallowance made by the assessee company u/s 14A of the Act read with rule 8D of the Rules. The AO further noticed that the assessee company claimed weighted deduction u/s 35(2AB) of the Act, on account of expenditure on in-house scientific research amounting to Rs.246,65,438,122/-. However, the AO did not make any addition on this issue in pursuance of the directions of the Ld. DRP. The AO further noticed that the assessee had made payment of Royalty amounting to Rs. 1035,49,95,272/- to Suzuki Motor Corporation ("SMC") in the year under consideration and had paid cess on Royalty amounting to Rs.43,79,33,132/-. The AO called upon the assessee as to why Royalty payment should not be treated as capital expenditure. In response thereto, the assessee filed its reply which was rejected by the AO on the basis that the benefit derived by the assessee on such royalty payment was of enduring in nature. Thus, he

disallowed payment of Rs.592,57,95,292/- and payment of R &D Cess of Rs.45,18,78,312/- being capital in nature. However, the AO granted partial relief of Rs.93,92,54,794/- rectifying the order u/s 154 of the Act qua depreciation allowance. Thus, the AO after allowing relief for depreciation, made addition of Rs.384,40,00,394/- in respect of royalty payment. The AO made further addition of Rs.442,92,00,000/- being the income determined by the Ld.TPO on account of royalty adjustment made by computing Arm's Length Price ("ALP"). The AO further made disallowance of Rs.43,11,000/- being expenditure claimed on account of payment of excise duty. The AO disallowed the provisional liability in respect of FPI as claimed by the assessee and made addition of Rs.33,00,89,403/-. The AO further made addition of Rs.21,83,04,695/- on account of disallowance of expenses on adhoc basis in respect of resources shared by the assessee with other group companies/subsidiary companies. The AO also disallowed the claim of expenditure on account of corporate social responsibility amounting to Rs.11,30,00,000/-. The AO further made disallowance in respect of expenditure debited on account of club membership amounting to Rs.7,50,017/-. Further, the AO in respect of transaction in Mutual Fund by following the direction of Ld.DRP made addition of Rs.128,99,50,407/- treating such transaction as business transaction made by the assessee company. The AO also disallowed the expenditure on account of warranty provision amounting to Rs.20,98,82,138/-. Further, the AO also made addition by invoking the provisions of section 40(i)(a) of the Act of Rs.195,67,83,751/- on account of non-deduction of tax at source on payment amounting to Rs.195,67,83,750/-. Thus, the AO computed the income of the

assessee at Rs.4649,88,15,313/- against the income at Rs.3259,18,58,726/- as declared in the revised return of income of the assessee.

6. Aggrieved against this, both the assessee and Revenue have preferred cross appeals before this Tribunal, assailing the assessment order and directions of Ld.DRP.

7. At the outset, Ld. Sr. Counsel Shri Ajay Vohra for the assessee submitted that majority of the issues raised by way of the grounds in assessee's appeal are covered by the decision of the Co-ordinate Benches of this Tribunal in assessee's own case pertaining to earlier assessment years. He submitted that **Ground Nos. 1 & 2** raised by the assessee are general in nature, would need no separate adjudication. Therefore, considering the submissions of Ld. Senior Counsel being general in nature are not adjudicated separately.

8. Further, Ld. Sr. Counsel for the assessee submitted that **Ground Nos. 3 to 3.2** raised by the assessee are against the disallowance made by invoking provisions of section 43B of the Act amounting to Rs.121,82,25,605/-. He contended that the Co-ordinate Bench of Tribunal vide order dated 24.08.2015 in respect of Assessment Year ("AY) 2006-07 in ITA No.5120/Del/2010 deleted the additions and similarly for AYs 2007-08, 2008-09 and 2009-10, the Tribunal vide orders dated 20.05.2016, 09.11.2017 and 17.10.2018 (in ITA Nos. 5720/Del/2011,6021/Del/2012 and ITA No.467/Del/2014) deleted the impugned disallowance made u/s 43B of the Act. He contended that facts are identical therefore, disallowance of Rs.121,82,25,605/- deserves to be deleted. He drew our attention to page Nos.768 to 776, 907 to 909, 1032 to 1034 and 1181 to 1188 of the Paper Book to buttress the contention. He submitted that

in the light of binding precedents, the impugned disallowance u/s 43B of the Act deserves to be deleted, as the facts are identical in this year as well.

9. On the other hand, Ld. Special Counsel for the Revenue, Shri G. C. Srivastava supported the order of authorities below. However, he could not controvert the submissions of Ld. Senior Counsel for the Assessee that the majority of the issues are covered in favour of the assessee by the decisions of the Co-ordinate Benches of this Tribunal in assessee's own case and also the decisions of the Tribunal on majority of issues related to deletion of impugned disallowances are now stood affirmed by the Hon'ble Jurisdictional High Court.

9.1. In re-joinder, Ld.Sr. Counsel for the assessee submitted that in the light of the binding precedents impugned additions made by AO deserve to be deleted.

10. We have heard the rival submissions and perused the material available on records and gone through the orders of the authorities below. We find that the AO had made disallowance of Rs.121,82,25,605/- in respects of different items by invoking the provision of section 43B of the Act and following the decision of his predecessor in the AY 2006-07, it is pointed out by the Ld. Senior Counsel for the assessee that the matter related to disallowance u/s 43B of the Act, the matter was carried in further appeal to the Tribunal and Hon'ble Delhi High Court and has been decided in favour of the assessee. It is contended that the assessee has also taken separate sub-grounds (item-wise) challenging the item wise disallowance. Considering the same we therefore, are not adjudicating this ground separately and the issues related to this ground would be dealt along with the respective sub-grounds as raised by the assessee.

11. **Ground Nos. 3.3 to 3.4, 3.5, 3.6 to 3.7, 3.8 to 3.9, 3.10, 3.11 to 3.12** have been separately taken by the assessee which are related to the issues raised in this ground. Therefore, each sub-ground shall be dealt separately for brevity and to avoid repetition.

12. **Ground No.3.13** is general in nature, would need no separate adjudication.

13. **Ground Nos. 3.3 to 3.4** raised by the assessee is against the disallowance of Excise duty on vehicles and R & D cess amounting to Rs.16,42,033/- and Rs.5,84,295/- respectively on the vehicles.

14. Ld. Sr. Counsel for the assessee submitted that the similar disallowance was made in AY 2009-10 and the Tribunal in ITA No. 467/Del/2014(supra) has been pleased to grant relief to the assessee in that year as well as in earlier years. It is further contended that the orders of the Tribunal have been affirmed by the Hon'ble Jurisdictional High Court. Therefore, he submitted that for the same reasoning, Ground Nos. 3.3 to 3.4 may be allowed. He took us through the consolidated chart of submissions as filed during the course of hearing. He submitted that the assessee had closing stock on 31<sup>st</sup> march,2010 of manufactured vehicles amounting to Rs. 379.4 Crores which sum included the accrued liability of excise duty and R&D cess amounting to Rs. 23.67 Crores. This amount of accrued liability had been debited in profit and loss account for the relevant assessment years and also included in the valuation of closing stock. He further reiterated the submissions as made in consolidated chart of submissions.

15. Ld. Special Counsel for the Revenue supported the order of authorities below. However, he could not controvert that the issue in question had already

been decided by the Co-ordinate Bench of the Tribunal in the earlier assessment year.

16. We have heard the rival submissions and perused the material available on records and gone through the orders of the authorities below. We find that the Co-ordinate Bench of the Tribunal in the earlier assessment year have considered the identical grounds raised by the assessee in respect of the disallowance in respect of excise duty and R & D Cess on vehicles u/s 43B of the Act and granted relief to the assessee. The Revenue has not brought to our notice any other binding precedents contrary to the decisions of the Tribunal in support of the impugned additions. We do not find any good reason to deviate from the decision of the Tribunal. Thus, Ground Nos.3.3 to 3.4 raised by the assessee are allowed and the AO is hereby, directed to delete the impugned disallowance.

17. **Ground No. 3.5** raised by the assessee is against the disallowance of Rs.54,19,86,424/- made u/s 43B of the Act in respect of Custom duty paid in respect of inputs imported by the assessee company.

18. Ld. Sr. Counsel for the assessee submitted that the issue is squarely covered by the judgement of Hon'ble High Court in the case of the assessee for *AY 1999-2000 in ITA No.250/2005; AY 2005-06 in ITA No.171/2012; AY 2005-06 in ITA No.172/2012 and AY 2006-07 in ITA No.381/2016*. Ld. Sr. Counsel for the assessee further contended that the assessee company has been consistently following exclusive method of accounting in respect of custom duty on import of components for export purposes. Accordingly, duties paid on purchase were not included in the cost of purchase and the value of closing stock in the P& L A/c. He contended that the addition of the duty, both in the

purchases as well as in the closing stock as per requirement of section 145A of the Act, is tax neutral event in as much as the same amount is both debited as well as credited to the P&L A/c. However, to give effect to the provisions of section 43B of the Act which mandates that duties paid by the assessee are allowable only on the payment basis, the custom duty paid by the assessee on import of components for export purpose whether or not the export against the same had actually taken place during the relevant year or not, is claimed as deduction in the return of the income. The AO however, disallowed the same following the assessment order for the AY 2005-06 wherein it was held that since the assessee is entitled for duty drawback which becomes immediately due on the date of export, the amount of custom duty on import is therefore, revenue neutral. Consequently, no deduction is allowable to the assessee company in respect of the same. He contended that the AO failed to appreciate that duty drawback does not accrue automatically on export of goods since the exporter is required to fulfill various conditions/requirements in order to claim the same. Duty drawback accrues only when the claim of the exporter assessee is sanctioned by the custom authorities. Further, he contended that duty drawback receivable is separately chargeable to tax as income of the assessee under section 28 of the Act. Further, he contended that the receipt of duty drawback is altogether different from allowability of deduction in respect of which duty is paid by the assessee on payment basis under section 43B of the Act. He further contended that without prejudice to the aforesaid, in case the AO's contentions were to be accepted then duty drawback income amounting to Rs.54,19,86,424/- declared by the assessee itself, being the amount of duty drawback received in the instant year but which allegedly accrued in the previous year, as per the principle adopted by the AO, should

not be taxable in the year under consideration. He contended that there is no justification for adopting two different and inconsistent methods while computing the income of the present year. The aforesaid sum was duly declared as the income of the immediately succeeding year on receipt of such amount, a method consistently adopted by the appellant company and accepted by the AO since inception. He contended that this issue has already been decided in favour of the assessee in the AYs 1999-2000, 2000-01, 2001-02, 2002-03, 2004-05, 2005-06, 2006-07, 2007-08, 2008-09 and 2009-10 by the Tribunal. He further contended that the decisions of the Tribunal have been affirmed by the Hon'ble Delhi High Court in AY 1999-2000 (ITA No.250/2005), 2000-01 (ITA No.976/2005), 2005-06 (ITA nos. 171 and 172/2012) and 2006-07 (ITA No.381/2016). He further contended that the Hon'ble Punjab & Haryana High Court in the case of *CIT vs Sriyansh Knitters P.Ltd.* 336 ITR 235 affirmed the finding of the Tribunal that duty drawback accrues in the year in which rate is fixed by the competent authority after verification of the claim of the assessee company and amount is quantified and not in the year of export.

19. Ld. Special Counsel for the Revenue supported the order of authorities below. However, he could not controvert that the issue is covered in favour of the assessee by the decision of the Co-ordinate Bench of the Tribunal and affirmed by the Hon'ble Delhi High Court.

20. We have heard the rival submissions and perused the material available on records and gone through the orders of the authorities below. The Revenue has not disputed the fact that the identical issue in earlier years has been decided in favour of the assessee by the Co-ordinate Benches of the Tribunal

and the same has been affirmed by the Hon'ble Jurisdictional High Court. The Revenue has not brought any contrary binding precedents in support of its contention. Therefore we do not see any good reason to affirm the finding of lower authorities, the Ground Nos.3.5 raised by the assessee is thus allowed and the AO is hereby directed to delete the impugned disallowance.

21. **Ground Nos. 3.6 to 3.7** raised by the assessee are against the disallowance of Rs. 2,76,77,437/- in respect of Excise duty actually paid on purchased inputs included in RG 23A Part II.

22. Ld. Counsel for the assessee submitted the issue is covered by the judgement of Hon'ble Supreme Court in the assessee's own case for AY 1999-2000 and AY 2000-01 vide order dated 07.02.2020. The Hon'ble High Court had decided the alternate claim in favour of the assessee and held that unutilized MODVAT credit of earlier year to the extent adjusted in the year under consideration shall be allowed as deduction in the relevant year. He contended that this claim was not disputed by the Department before the Hon'ble Supreme Court. He therefore, prayed that assessee may be allowed deduction of unutilized MODVAT credit of earlier AY 2009-10 to the extent adjusted in the assessment year under consideration 2010-11. He further submitted that Hon'ble High Court has further allowed deduction for amount representing additional countervailing duty which has been paid directly to the custom authorities. This claim had also not been contested before the Hon'ble Supreme Court. He therefore, prayed that the AO may be directed to allow deduction for amount forming part of RG 23A balance to the extent it has been directly paid to custom authorities. He further submitted that pursuant to the above orders of Hon'ble Delhi High Court, the Tribunal had restored the said

issue to the file of AO to verify the claim as per the directions of Hon'ble High Court and held that deduction be allowed for the amount forming part of RG 23A to the extent it had been directly paid to custom authorities. He placed reliance on the order of Hon'ble Delhi High Court in assessee's own case in *ITA No.31/2005 for AY 2009-10*.

23. Ld. Special Counsel for the Revenue supported the order of authorities below.

24. We have heard the rival submissions and perused the material available on records and gone through the orders of the authorities below. We find that under the identical facts, the Co-ordinate Bench of this Tribunal in assessee's case for the Assessment Year 2009-10 had remanded back the issue to the file of the AO to verify the claim as per direction of the Hon'ble High Court and if found in order deduction be allowed for the amount forming part of RG 23A to the extent, it has been directly paid to custom authorities. The Revenue has not brought to our notice any other contrary binding precedent. Therefore, for the same reasoning, the issue is restored to the file of the AO to verify and give relief of set off of duty forming part of RG 23A balance to the extent duty directly paid to custom authorities in the light of the judgment of Hon'ble High Court. Thus, Ground Nos.3.6 to 3.7 raised by the assessee are allowed for statistical purposes.

25. **Ground Nos. 3.8 to 3.9** raised by the assessee are against the disallowance of Rs.27,29,78,059/- in respect of custom duty paid to be adjusted against excise duty payable on finished products and disallowance of Rs.6,18,68,222/- in respect of custom duty of the goods in transit/under inspection u/s 43B of the Act.

26. Ld. Counsel for the assessee submitted that the issue is squarely covered in favour of the assessee by the various judicial precedents including the Judgement of Hon'ble Supreme Court rendered in the case of the case of *Samtel Color Ltd.in Civil Appeal Number 6449 of 2012* . The Reliance was also placed on the Judgement of Hon'ble Supreme Court rendered in the case of *Bereger Paints(India Ltd. Vs CIT 266 ITR 99*. He contended that this amount represents custom duty/CVD paid by the assessee during the relevant assessment year on import of components/raw material which were in transition on the last date of financial year. He contended that the similar disallowance was made in AYs 2006-07, 2007-08, 2008-09, 2009-10 and the Hon'ble Tribunal vide orders dated 24.08.2015, 12.07.2016, 12.07.2018 and 19.06.2019, allowed the claim of the assessee. He further submitted that the issue is squarely covered in favour of the assessee by the judgement of Hon'ble Supreme Court rendered in the case of *Samtel Color Ltd. in SLP Civil Appeal No.6449/2012* affirming the view of Hon'ble Delhi High Court in the case of *CIT vs Samtel Color Ltd. 184 Taxman 120* wherein, it has been held that custom duty paid is allowable deduction u/s 43B of the Act.

27. Ld. Special Counsel for the Revenue supported the order of authorities below.

28. We have heard the rival submissions and perused the material available on records and gone through the orders of the authorities below. The similar issues were decided by the Co-ordinate Bench in *ITA No.467/Del/2014* for the Assessment Year 2009-10 and also in earlier assessment years. Therefore, respectfully following the binding precedents as relied by the assessee(supra),

Ground Nos. 3.8 to 3.9 raised by the assessee are allowed. The AO is hereby directed to delete the impugned disallowance of custom duty.

29. **Ground No.3.10** raised by the assessee is against the sustaining the addition made by the AO in respect of disallowance of deduction under section 43B of the Act in respect of custom duty paid and included in valuation of closing stock.

30. Apropos to this Ground, Ld. Sr. Counsel for the assessee submitted that the issue is covered in favour of the assessee by the decision of Hon'ble Delhi High Court for AYs 1999-2000 (ITA No.250/2005), 2000-01 (ITA No.976/2005), 2001-02 (ITA No.519/2010) and also by the other decisions of the Co-ordinate Bench of the Tribunal pertaining to AYs 1999-2000, 2000-01, 2001-02, 2002-03, 2004-05, 2005-06. Ld. Sr. Counsel for the assessee submitted that in respect of custom duty paid on import of raw material/inputs, the assessee company followed inclusive method of accounting. Accordingly, the amount of custom duty paid on imported inputs/raw material is included in the purchase price, which is debited to the P&L Account. The said duty was also included and considered as part of value of closing stock, which was shown in the credit side of the P&L Account. He submitted that the Custom duty of Rs.30,48,61,320/- represented duty on import of raw material which was included in the value of closing stock as per the aforesaid inclusive method of accounting followed by the assessee. He submitted that the said method was also in consonance with the provisions of section 145A of the Act. Inclusion of custom duty, both in the value of purchase as well as in the value of closing stock, is tax neutral in as much as the very same amount is both debited and credited to the P&L Account. However, as per the mandate of Section 43B of

the Act, the custom duty so actually paid by the assessee is separately claimed as deduction on payment basis in the return of income. The AO however, disallowed the aforesaid amount holding the same to be merely advance payment, liability in respect of which has not crystallized and therefore, not allowable as deduction u/s 43B of the Act. Ld. Sr. Counsel for the assessee submitted that the Hon'ble Supreme Court in the case of *Berger Paints India Ltd. vs CIT 266 ITR 99* had held that customs and excise duties are allowable in the year of payment u/s 43B of the Act, and even if such duties are included in the value of closing stock, they would have to be separately allowed. It was further argued that the issue is also covered by the Judgment of Hon'ble Supreme Court in the case of *Samtel Color Ltd.* wherein the Hon'ble Court dismissed the *SLP in Civil Appeal No.6449/2012* filed by the Department against the order of Hon'ble Delhi High Court reported in *184 Taxman 120* and held that advance customs duty paid is allowable deduction u/s 43B of the Act. He contended that Hon'ble Karnataka High Court in the case of *CIT vs NCR Corporation India (P.) Ltd. 240 Taxman 598*, reiterated the principle laid down by the Hon'ble Apex Court in the case of *Berger Paints (supra)* and held that the entire amount of excise duty and customs duty paid by the assessee in a particular year are allowable as deduction irrespective of the fact that such duties were included in the value of closing stock. It was further held that the provisions of section 43B of the Act, while overriding all the other provisions of the Act, also override section 145A of the Act and further that provisions of section 145A does not in any manner dilute or nullify the effect of provisions of section 43B of the Act. Ld. Sr. Counsel for the assessee further submitted that the issue is also covered by the decision of Co-ordinate Bench of the Tribunal in assessee's own case for AYs 1999-2000, 2000-01, 2001-02, 2002-03, 2004-

05, 2005-06, 2006-07, 2007-08, 2008-09 and 2009-10 and the decision of the Co-ordinate Bench of the Tribunal have been affirmed by the Hon'ble Delhi High Court. He therefore, contended that impugned disallowance deserved to be deleted.

31. On the other hand, Ld. Special Counsel for the Revenue supported the orders of the authorities below and submitted that the assessee cannot be allowed to take benefit of both the provisions. The intent of section 43B of the Act is clear thereby, the payment is related to a particular year of the statutory dues and then only such payments are allowable.

32. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. The Revenue has not disputed the fact that similar issue also arose for consideration of the decision of the Co-ordinate Bench of the Tribunal in assessee's own case wherein the Tribunal has respectfully following the binding precedents as cited supra had decided the issue in favour of the assessee. The Revenue has not brought any contrary binding precedents to our notice to take a different view. Therefore, we do not see any reason to deviate from the finding of Co-ordinate Bench of the Tribunal. Thus, respectfully following the bindings precedents, we hereby direct the AO to delete the impugned disallowance. Ground No.3.10 raised by the assessee is allowed.

33. **Ground Nos. 3.11 to 3.12** raised by the assessee are related to the custom duty and the sales tax paid under protest.

34. Ld. Sr. Counsel for the assessee submitted that custom duty was paid under protest that represented the duty paid as per the additional demand raised by the statutory authorities, i.e. the Excise Department and the

Customs Department. Although, the assessee has disputed such additional demand however, it being in the nature of statutory liability, the same represented accrued/crystallized liability. He contended that in terms of the provision of section 43B of the Act, same deserves to be allowed as a deduction u/s 43B of the Act. The AO rejected the claim of the assessee following the assessment orders of the preceding years on the basis that the assessee had been contesting the validity and levy of such duties. Ld. Counsel for the assessee submitted that the issue is squarely decided in favour of the assessee by the judgement of Hon'ble Delhi High Court in the case of *CIT vs Dharampal Satyapal & Sons (P.) Ltd.* [2011] 50 DTR 287 and the decision of the Co-ordinate Bench of the Tribunal in the case of *Euro RSCG Advertising (P) Ltd. v. ACIT*: [2013] 154 TTJ 389 (Mum). He contended that the Co-ordinate Bench of the Tribunal in assessee's own case for AYs 1999-2000, 2000-01, 2001-02, 2002-03, 2005-06, 2006-07, 2007-08, 2008-09, 2009-10 has decided in favour of the assessee. Further, the Hon'ble Delhi High Court in the appeal for AY 1999-2000 in ITA No.250.2005 allowed the deduction for duty which was paid directly to the Custom Authority. He therefore, prayed that the amount paid in protest would be eligible for deduction u/s 43B of the Act.

35. On the other hand, Ld. Special Counsel for the Revenue opposed these submissions and submitted that the payment of custom duty and sales tax has not attained finality as the assessee itself has admitted the fact that the liability to pay custom duty and sales tax yet to attain finality therefore, the provision of section 43B of the Act, would not come to the rescue of the assessee. As per this provision, the statutory liabilities should have attained

finality and paid by the assessee for the relevant assessment year. In the absence of such, the AO would be justified in making the additions.

36. We have heard the rival submissions and perused the material available on records and gone through the orders of the authorities below. There is not dispute with regard to the fact that the assessee has made payment of custom duty of Rs.61,76,617/- and sales tax of Rs.4,51,200/- under protest. Ld. Counsel for the assessee has relied on the judgement of the Hon'ble Delhi High Court in the case of *CIT vs Dharampal Satyapal & Sons P.Ltd.* (supra) wherein Hon'ble Delhi High Court has held as under:-

8. *“Once this aspect is clarified, answer to the problem posed before us is no more liable to be sought. No doubt the Tribunal had directed the assessee to make aforesaid payment by way of pre-deposit for stay of the impugned demand and pre-addition for hearing the appeal. However, as mentioned above, indubitably this direction was given keeping in view the total excise duty demand raised by the adjudication authority under the excise law, therefore, it had direct nexus and co-relation. The fact is that the assessee had made the payment towards excise duty albeit on the direction of the CESTAT as pre-deposit which therefore, would not seize to have the character of excise duty as held in the case of Bharat Carbon & Ribbon Mfg. Co.(P.) Ltd. (supra). The ultimate decision in the appeal will have no bearing on the issue. Before us, the admitted position is that the said amount of Rs.7.5 crores is made against as a part payment against the excise duty demand raised by the excise authorities and since it was a statutory liability on that part, therefore, the conditions stipulated in s.43B of the I T Act are duly fulfilled and thus the assessee was entitled to claim the deduction thereof.”*

36.1. The short question that arises in this case is that whether deduction u/s 43B of the Act, is allowable to the assessee even if the statutory dues related to

custom duty and sales tax are paid under protest. As per clause (a) of section 43B of the Act, any sum payable by the assessee by way of tax, duty, cess or fee by whatever name called under any law for the time being force shall be allowed (irrespective of the previous year in which the liability to pay, same sum was incurred by the assessee according to the method of accounting regularly implied by him), only in computing the income u/s 28 of the Act of previous year in which such sum is actually paid. Therefore, the provision speaks about the amount actually paid in the previous year would be eligible for deduction irrespective of the previous year such duty is related. There is not dispute that the assessee has paid the statutory dues under protest. Under the identical facts, the Co-ordinate Bench of this Tribunal in the case of *Euro RSCG Advertising (P) Ltd. v. ACIT* (supra) has held that service tax liability alongwith interest paid on show cause notice issued by Service Tax Authority is allowable deduction u/s 43B of the Act in the year under in which the payment was made irrespective of the fact that such demand was paid under protest and the matter was sub-judiced to the authority. Further, Ld. Counsel for the assessee has pointed out that the Tribunal has decided the issue in favour of the assessee in assessee's own case related to AYs 1999-2000, 2000-01, 2001-02, 2002-03, 2005-06, 2006-07, 2007-08, 2008-09, 2009-10. The Revenue has not disputed this fact. We therefore, do not see any reason to take a different view. The AO is therefore, directed to allow deduction of the custom duty amounting to Rs.61,76,617/- and sales tax amounting to Rs.4,51,200/- paid under protest by the assessee. Thus, Ground Nos. 3.11 to 3.12 raised by the assessee are allowed.

37. **Ground Nos. 4 to 4.2** raised by the assessee are against the disallowing the claim of the assessee for withdrawal of add back of Rs.109,72,67,904/- as made in the computation of taxable income being the amounts disallowed in earlier years u/s 43B of the Act.

38. Ld. Sr. Counsel for the assessee reiterated the submissions as made in the chart. He contended that the appellant in the instant AY 2011-12 had offered an amount of Rs.109,72,67,904/- in its return of income. This amount represented received back/ adjusted the P&L Account which have already been claimed as deduction on payment basis u/s 43B of the Act in the preceding AYs. This amount was offered to tax by the appellant during the AY 2010-11 on the presumption that deduction would be allowed in preceding years on payment basis. He contended that the aforesaid total amount has not been allowed to the appellant on the payment basis in the preceding AYs and the appellant had prayed that it should be allowed the withdrawal of add back of the aforesaid amount. He submitted that by not allowing withdrawal of add back has resulted in the claim not being allowed in any year. He contended that in the light of ratio laid down by the Hon'ble Supreme Court in the case of Berger Paints (supra) to the extent the appellant's claim under section 43B of the Act, were allowed in the earlier assessment years out of the said amount of Rs.109,72,67,904/-, the same would be liable to be added to the assessable income of the present year. This was specifically and categorically conceded and admitted by the appellant. However, until and unless such amount of deduction u/s 43B of the Act, is actually allowed to the appellant in earlier assessment years, the appellant's claim for withdrawal of added back amount of Rs.109,72,67,904/- would necessarily have to be allowed in the relevant

assessment years he pointed out that such withdrawal of add back has also been allowed by the Co-ordinate Bench of the Tribunal in assessee's own case for the earlier assessment years. He further pointed out that the Revenue's appeal in AY 2004-05 on this issue has not been admitted by Hon'ble Delhi High Court vide order dated 28.01.2010. Therefore, he submitted that the authorities below were not justified in not allowing the claim of the assessee.

39. On the other hand, Ld. Special Counsel for the Revenue opposed these submissions and supported the orders of the authorities below.

40. We have heard the rival submissions and perused the material available on records and gone through the orders of the authorities below. We find that the Co-Ordinate Bench of this Tribunal in ITA No. 467/Del/2014 has under identical facts in the appeal for AY 2009-10 has restored the issue to the file of AO by observing as under

44. *".....Thus, the issue is squarely covered y the decision of the Tribunal in assessee's own case, therefore, we set aside this issue to the file of the Assessing Officer to decide it afresh as decided by the Tribunal in earlier Assessment Years. Needless to say, the assessee be given opportunity of hearing. Ground No.4 to 4.2 are partly allowed for statistical purposes."*

Therefore, taking a consistent view the issue is hereby restored to AO to decide the issue in the light of directions of the Tribunal in AY 2006-07 in Asseesse's own case. The grounds of appeal are allowed for statistical purpose.

41. **Ground No.5 to 5.6** raised by the assessee are against the disallowance made by AO by invoking the provision of section 14A of the Act r.w.Rule 8D of the Income Tax Rules, 1962 ("the Rules") amounting to Rs.32,57,05,335/-.

42. Ld. Sr. Counsel for the assessee, Shri Ajay Vohra submitted that during the year under consideration, the assessee had earned dividend income of

Rs.156,03,20,325/- which was claimed as exempt from tax u/s 10(34) & 10(35) of the Act. In the income tax return, the assessee had *suo-moto* offered for disallowance a sum of Rs.1,69,36,938/-. He contended that the sum was computed on a rational and scientific basis. However, the amount which was disallowed *suo-moto* was not actually incurred by the assessee company for earning of exempt income in view of the fact that the investments were made out of non interest bearing funds and other expenses were not required to be made as the investments were made largely in mutual funds and government securities. Hence, no separate infrastructure was needed. He contended that the AO had mechanically applied Rule 8D of the Rules without recording the requisite satisfaction having regard to the accounts of the assessee. Ld. Counsel for the assessee submitted that legal position is clear in this regard in terms of provision of section 14A of the Act only the expenditure incurred having relation with earning of exempt income, is not allowable as a deduction under the provision of the Act. The phrase “expenditure incurred” used in the aforesaid section refers to actual expenditure, which has proximate nexus with exempt income, and not some imaginary or notional expenses, for the purposes of disallowance under this section. The provisions of section 14A of the Act are applicable only if the AO at the first place finds that the assessee has actually incurred expenses, which have proximate nexus with earning of exempt dividend income and not otherwise. The action of assessing officer should not be based merely on surmises. The surmises cannot be allowed to replace credible evidence. He contended that the burden is on AO to prove proximate nexus of expenses with the earning of exempt before rejecting the claim of the assessee and computing the disallowance in accordance with Rule 8D of the Rules. He contended that the position of law is clear that it is from AY 2008-09,

the AO can compute disallowance u/s 14A of the Act in accordance with Rule 8D of the Rules, only if the AO having regard to the accounts of the assessee reaches a finding that the assessee has incurred expenses over and above the expenses *suo-moto* disallowed by him. In the absence of such finding, the AO would have no power to compute disallowance u/s 14A of the Act as per provision of Rule 8D of the Rules. In support of this, Ld. Counsel for the assessee has placed reliance on following judicial pronouncements:-

[i] *CIT vs Walfort Share & Stock Brokers* 326 ITR 1 (SC);

[ii] *Godrej & Boyce Mfg.Co.Ltd. vs DCIT* 328 ITR 81 (Bom.);

[iii] *Maxopp Investment Ltd.* 203 Taxman 364 (Del.);

[iv] *CIT vs Hero Cycles* 323 ITR 518 (P&H);

[v] *CIT vs Metalman Auto P.Ltd.* 336 ITR 434 (P&H);

[vi] *CIT vs Reliance Utilities and Power Ltd.* 313 ITR 340 (Bom.);

[vii] *CIT vs Reliance Industries Ltd.* 339 ITR 632 (Bom.);

[ix] *CIT vs Ms. Sushma Kapoor* 319 ITR 299 (Del).

43. Ld. Counsel for the assessee submitted that looking to the facts of the present case, no disallowance u/s 14A of the Act would be warranted. **Firstly**, the AO has not recorded any satisfaction as mandated u/s 14A of the Act and **Secondly**, without prejudice to aforesaid, no part of the expenditure incurred by the assessee could be regarded as attributable to earning of income. Ld. Counsel for the assessee further reiterated the submissions as made in the written chart and placed reliance on the case laws referred therein. In respect of the proposition that no disallowance could be made if the no satisfaction is recorded by the AO. Ld. Counsel for the assessee has placed reliance on the judgement of Hon'ble Madras High Court rendered in the case of *CIT vs Chettinad Logistics (P.) Ltd.* 248 Taxman 55 (Madras) and Revenue's SLP dismissed in *CIT vs Chettinad Logistics (P) Ltd.* 257 Taxman 2 (SC); Judgements of Hon'ble Delhi High Court in the cases of *CIT vs DLF Hotels Holding Ltd. in SLP (Civil) No.37851/2017 (SC)* and *Cheminvest Ltd. vs CIT* 378 ITR 33 (Del.). Ld. Counsel for the assessee contended that the only expenditure related to

earning of exempt income can be disallowed under any circumstances no imaginary and exorbitant figure can be adopted for such disallowance. Ld. Counsel for the assessee further submitted that the assessee is a cash reach company and had huge interest free funds available much in excess of investment so made. Hence, no interest expenditure could have been disallowed. He contended that the issue is covered in favour of the assessee in assessee's own case.

44. On the contrary, Ld. Special Counsel for the Revenue reiterated the submissions as made in the written submissions. For the sake of clarity, the relevant paragraphs of the written submission are reproduced as under:-

**4. “Ground No.5-5.6 on disallowance under section 14A of the Act**

- *At the outset, it is stated that for the assessment year under consideration, i.e. A.Y 2010-11, the pre-amended Rule 8D of the Income Tax Rules, 1962 shall apply, which is reproduced as under for sake of convenience:-*
- *Rule 8D (1) Where the Assessing Officer, having regard to the accounts of the assessee of a previous year, is not satisfied with—*
  - (a) *the correctness of the claim of expenditure made by the assessee; or*
  - (b) *the claim made by the assessee that no expenditure has been incurred, in relation to income which does not form part of the total income under the Act for such previous year, he shall determine the amount of expenditure in relation to such income in accordance with the provisions of sub-rule (2).*
- (2) *The expenditure in relation to income which does not form part of the total income shall be the aggregate of following amounts, namely:—*
  - (i) *the amount of expenditure directly relating to income which does not form part of total income;*

(ii) *in a case where the assessee has incurred expenditure by way of interest during the previous year which is not directly attributable to any particular income or receipt, an amount computed in accordance with the following formula, namely-*

*AX B/C*

*Where A= Amount of expenditure by way of interest other than the amount of interest included in clause (i) incurred the previous year;*

*B = the average of value of investment income from which does not or shall not form part of the total income, as appearing in the balance sheet of the assessee, on the first day and the last day of the previous year;*

*C = the average of total assets as appearing in the balance sheet of the assessee, on the first day and the last day of the previous year;*

(iii) *an amount equal to one-half per cent of the average of the value of investment, income from which does not or shall not form part of the total income, as appearing in the balance sheet of the assessee, on the first day and the last day of the previous year.”*

(3) *For the purpose of this rule, the “total assets” shall mean, total assets as appearing in the balance sheet excluding the increase on account of revaluation of assets but including the decrease on account of revaluation of assets.”*

*The disallowance will be made in respect of expenditure on interest relatable to exempt income, direct expenses and other expenses in accordance with the method provided under the Rules.*

- *It is the primary submission of the Ld.AR for the assessee company that the AO did not record any satisfaction before making the disallowance under section 14A of the Act. In this regard, it humbly submitted that the AO at in his final assessment order dated 20.01.2015 has expressly rejected the*

*method adopted by the assessee company for computing disallowance under section 14A of the Act. Your honours' kind attention is brought to Paras 5.8 to 5.9 of the said order wherein the AO has revisited the computation of disallowance suo-moto made by the assessee company and then rejected it for want of documentary evidence and explanation as to how the adhoc allocation rate of 10% was arrived at by the assessee company. The approach adopted by the assessee company is merely an estimated based out of unreasonable cost allocations.*

- *The assessee company has proportionately disallowed the salary and administrative cost by attributing them as cost incurred for earning of exempt income. It is interesting to note that the assessee company has indicated only four employees out of the total strength of 68 employees to handle the huge "Investment" activities which exceeds Rs.20,000 crores in terms of volume. There are transactions on day to basis. A dedicated team would obviously be needed for such kind of task which involves decisions with regard to where to invest, when to divest, where to switch and a host such activities. The "Treasury" management of such magnitude requires a team. In any case, no evidence could be led before the AO to justify the proportion of 5% or 10% of cost, the AO was fully justified in rejecting the offer of disallowance.*
- *It needs to be appreciated that the requirement of law is that the method of disallowance given in the Rules shall kick in if the AO is not satisfied with the claim of the assessee "having regard to the account" of the assessee. The claim of expenses attributable to "investment" activity does not emanate from accounts. No separate accounts are maintained. The claim represents a very casual and adhoc figure which has neither any rational basis nor any supporting material.*
- *A method provided in the Statute cannot be disregarded for a totally unsubstantiated, whimsical, conjectural figure (or working) given by the assessee. The AO has fully discharged*

his onus of reaching a satisfaction that the working of the assessee cannot be accepted. In such an event, there is not option before the AO but to apply the method given in the Rules.

- Further, the Ld.AR for the assessee company also stated that the matter is covered by the decision of the Hon'ble ITAT in earlier assessment years. This contention of the Ld.AR has also been dealt with by the Ld.AO in his order by stating that the judgements relied upon by the assessee company pertain to assessment year prior to A.Y.2008-09 when Rule 8D was introduced in the Statute and therefore, cannot be relied upon in the present case. Moreover, the Hon'ble ITAT in the case pertaining to A.Y 2009-10 has relied upon the decision for A.Y 2008-09 wherein it was held as under:-

6.15.....In these circumstances, we are of the considered opinion that the AO is justified in taking the view that the plea of the assessee that no expenditure was incurred or earning the exempt income cannot be accepted, and to proceed with the application of the formula prescribed under Rule 8D of the Rules, which is in force from the AY 2008-09.

6.16. Adverting to the arguments of the Ld.AR on the aspects of interest expenses relevant under Rule B(ii) of the Rules and the reckoning of the investment amount relevant for BD(iii), on a consideration of the same in the light of the principles of law laid down by the Court, as stated supra, we agree with the submission made on behalf of the assessee that insofar as the interest expense under Rule BD(ii) is concerned, it has to be determined after examination of the macro fund/cash flow position during the year and if the assessee had sufficient surplus funds available presumption should be drawn in favour of the assessee that surplus funds have been utilized for making investments, and while ITA No.6021/Del/2012 calculating the disallowance under Rule BD(III) has to be calculated in relation to the income which does not form part of the total income and this can be done only by taking into

*consideration the investment which has given rise to this income which does not form part of the total income after reducing the strategic long term trade investments. We therefore, deem it just and proper to set aside the impugned order on this score and send the matter to the file of AO form making disallowance u/s 14A, in accordance with the view taken above.”*

*Accordingly, the issue was referred back to the AO in the earlier years to recomputed the disallowance in accordance with the findings of the Hon’ble Tribunal.”*

45. We have heard the rival submissions and perused the material available on records and gone through the orders of the authorities below. The question be decided as to whether the AO was justified in rejecting the claim of the assessee regarding *suo-moto* disallowance of Rs.1,69,36,938/- in terms of section 14A of the Act and computing the disallowance to the tune of Rs.32,57,05,335/- after giving the set off of *suo-moto* disallowance made by the AO. The grievance of the assessee is that the AO has applied the provision of section 14A of the Act r.w. Rule 8D of the Rules in a arbitrary manner without taking into consideration mandate of law. The contention of the assessee is that the AO ought to have recorded his satisfaction having regard to the accounts of the assessee company. It is the submission of the assessee that invocation of provision of section 14A of the Act and computing disallowance as prescribed under Rule 8D of the Rules, is not merely a formality and cannot be invoked in a mechanical fashion. The AO has to bring on record as to why the disallowance is required to be made under Rule 8D of the Rules. If the AO fails to record such satisfaction in that event, disallowance made by the AO would be contrary to the statutory provisions and also the judicial pronouncements. The AO has noticed that the assessee claimed exempt dividend income

amounting to Rs.156,03,20,325/- u/s 10(34) and 10(35) of the Act and incurred interest expenses of Rs.21.7 crores, interest of 10.20 crores on foreign currency loans and interest of Rs.1.6 crores on export credits. The assessee itself has disallowed Rs.1,69,36,938/- u/s 14A of the Act r.w. Rule 8D of the Rules in computation of income. Before AO, it was stated that investments were made out of the internal resources therefore, no expenditure was incurred in relation to the investments. Similar disallowance was made by the AO in AYs 1999-2000, 2000-2001 have been deleted by the Tribunal. However, alternatively as a matter of abundant precaution and to avoid further litigation, the assessee had disallowed an amount of salary and administrative expenses of Rs.1,69,36,938/- incurred indirectly relatable for exempt income by way of dividend income following the objective method of computation. The AO has recorded that the assessee made investments in equity shares of Indian companies, the dividend income from whom is exempt under section 10(34) and investment in Mutual Fund, the dividend income from which was exempted u/s 10(35) of the Act. The assessee claimed exempt dividend income of Rs.2,89,90,987/- from Indian companies and exempt dividend income of Rs.153,13,29,138/- from Mutual Fund. Total investment in these assets was Rs.3173.3 crores in AY 2009-10 and Rs.7176.6 crores in AY 2010-11. However, the Assessing Authority did not accept the contention of the assessee on the basis that the assessee could have repaid the particular amount of loan on which the assessee is making huge interest repayment by not making the aforesaid investment. Further, the assessee was incurring huge principle cost as the assessee would have substantial return from the above investment if they have been invested elsewhere. Further, the AO in para 5.9 of the assessment order observed that the computation of disallowance made by the

assessee was examined and was not accepted on the basis that same was on estimate basis and was not backed up by any documentary evidence. The AO was of the view that the assessee has incurring huge interest expenses. It could have lowered its interest liability by not investing in these assets. Therefore, he was of the view that part of the interest expenses claimed u/s 36 clause (1)(iii) of the Act was liable to be disallowed. We have given our thoughtful consideration to the material placed on record, as per section 14A, the AO would be justified to make disallowance in the manner prescribed under Rule 8D of the Rules if he is satisfied having regard to the accounts of the assessee. It is well settled law that provision of section 14A of the Act are inacted to make disallowance of the expenditure if it is claimed in P&L Account which was in fact incurred for earning of the exempt income. Rules, 8D of the Rules, prescribed the method of disallowance related to the interest expenditure and administrative expenses. If the assessee has claimed interest expenses as a deduction in terms of section 36(1)(iii) of the Act in its P&L Account. The AO is required to examine and after considering the accounts of the assessee whether any interest income related to earning of exempt income has been claimed by the assessee in the P&L Account for the purpose of disallowance u/s 14A of the Act. In the present case, it is brought on record that the assessee is having sufficient own fund to make investments. Merely because the assessee could have deployed such funds for the repayment of loans in our considered view, should not be the basis for making disallowance by the AO. It is the assessee who has to take a call for making investments out of its own funds. The AO is not empowered to regulate business behavior of the assessee. Therefore, in our considered view, the AO was not justified in making the disallowance of interest expenses under Rule 8D of the Rules.

45.1. Ld. Sr. Counsel for the assessee during the course of hearing, pointed out from the balance sheet of the company that it was having sufficient interest free funds to make investment if we take the interest expenditure as NIL then the computation would be  $\frac{1}{2}$  % of average value of investment as on first day and last day of previous year which is computed at Rs.18,65,15,000/-. However, the assessee has made disallowance to the extent of Rs.1,69,36,938/-. We do not agree to this submission of Ld. Counsel for the assessee regarding disallowance of administrative expenses as per Rule 8D. Looking to the volume of investment made by the assessee company, the assessee company was required to give justification for the *suo-moto* disallowance made in this regard as to why the disallowance as per Rule 8D of the Rules, should not be made. The contention of the assessee is that for making investment the surplus interest free fund was utilized and no separate infrastructure is required to maintain for overseeing the transaction made out of surplus fund. We are of the considered view that the assessee was required to justify the *suo-moto* disallowance as to why the provision of Rule 8D of the Rules should not be made applicable on the facts of the present case. Therefore, we restore this issue to the file of AO for a limited purpose to verify the claim of the assessee regarding administrative expenses incurred for maintaining such huge investment. Thereafter, AO would make disallowance as per law. Thus, Ground Nos. 5 to 5.6 raised by the assessee are partly allowed for statistical purposes.

46. **Ground Nos. 6 to 6.3** raised by the assessee are against the finding of AO and Ld.DRP regarding expenditure of Rs.444,43,46,5/- incurred on account of royalty holding same to be capital expenditure.

47. Ld. Sr. Counsel for the assessee reiterated the submission as made in the written chart. It is contended that during the year under consideration, the appellant had made royalty payment of Rs.1035,49,95,272/- including lump sum royalty of Rs.1857,36,000/- to Suzuki Motor Corporation, Japan (“SMC”) for use of licensed information for the engineering, design and development, manufacture, testing, quality control, sale and after sales service of products and parts. The said payment was claimed as revenue expenditure. The AO in the final assessment order treated the same as capital expenditure on the basis of adjustment for Rs.442.92 crores made by the TPO. He contended that the impugned action of the AO in holding the royalty payment to be capital in nature is not tenable in law since the payment under the agreement allowable as Revenue expenditure. He submitted that expenditure is regarded as capital in nature, if the same results in (i) acquisition of capital asset(s); or (ii) benefit of enduring nature in the capital field or adds to the profit earning apparatus of the assessee. He contended that law is well settled that the expenditure was incurred in pursuance to the agreement. There is no acquisition of new asset or benefit of enduring nature in the capital field, the same cannot be regarded as in the nature of capital expenditure. He contended that in terms of provision of section 37 of the Act, expenditure which has been incurred wholly and exclusively for the purposes of business is allowable deduction while computing business income, if the expenditure is, inter alia, not in the nature of capital expenditure. He contended that in the present case since the payment of royalty by the assessee under the aforesaid agreement does not result in acquisition of any new assets or benefit of enduring nature in the capital field, the same cannot be regarded as in the nature of capital expenditure. He contended that there is no ownership rights-only limited right

to use technology provided by SMC. In terms of Articles 2.02, 2.03 and 2.04, the ownership/proprietary rights in the technical know-how, at all times, continued and still continues to vest in SMC and the appellant was not authorized to transfer, assign or convey the licensed/know how/technical information to any third party and therefore, the appellant only acquired limited right to use and exploit the know-how, for carrying on manufacturing/business operations. Further, the conditions in the agreement stipulated in Article 3.10 as to non-partibility, confidentiality and the secrecy of the know-how also indicate that the appellant obtained mere right to use the know-how during the currency of the agreement, without anything more. Even improvements to the technical knowledge/information belong to the owner, i.e. SMC. He contended that the Courts have held in various cases that payment made for obtaining access to information and restricted license to the limited use of know-how, should be treated as revenue expenditure. Reliance was placed upon the judgements of Hon'ble Supreme Court in the case of *CIT vs Ciba India Ltd.* 69 ITR 602 (SC); *Alembic Chemical Works Co.Ltd. vs CIT* 177 ITR 377 (SC); *CIT vs Shriram Pistons and Rings Limited-CC 1215/2009 (SC)* [dismissing the SLP filed by the revenue against the order of the Delhi High Court in ITA No.167/2008) was dismissed by the Hon'ble Supreme Court]; and *Shriram Refrigeration Industries Ltd. vs CIT* 127 ITR 746 (Del.). He submitted that there are series of decisions by the Hon'ble Apex Court, Hon'ble Delhi High Court and other High Courts in this regard. He drew our attention to the judgements of the Hon'ble High Court in the case of *CIT vs Hero Honda Motors Ltd.* 372 ITR 481 wherein the High Court has held that royalty payment made to a foreign company for merely acquiring right to use technical know-how whereas ownership and intellectual property rights in know-how remained with

foreign company, was allowable revenue expenditure. He further contended that there is not exclusive in as much as in terms of Article 2.01(b)(ii), SMC granted license for non-exclusive use outside India, meaning thereby, that the owner of the trademark reserved with itself, the right to allow the user of the very same trademark to any other person. It was further submitted that in terms of Article 2.01(b)(i), the exclusive license granted to the appellant within India by SMC only ensures that SMC would not grant similar license(s) to any other person in the same territory for manufacture of the specified products. Such an exclusive license only eliminates competition thereby securing profitability of the appellant. The same does not result in acquisition of any new asset or any enduring advantage in the capital field. The exclusive license only enables the business of the appellant to be carried on more efficiently and profitably, while leaving the fixed capital untouched. He further relied upon the decisions of *CIT vs Ciba India Ltd.* 69 ITR 692 (SC); *CIT vs IAEC (pumps) Ltd.* 232 ITR 316 (SC); *Shriram Refrigeration Industries Ltd. vs CIT* 127 ITR 746 (Del.); *Triveni Engineering Works Ltd. vs CIT* 136 ITR 340 (Del.); *CIT vs Bhai Sunder Dass & Sons (P.) Ltd.* 158 ITR 195 (Del.); *CIT vs Hero Honda Motors Ltd.* 372 ITR 481 (Del.) apart from other case laws. Further submission was made that there was no enduring benefit in the capital field. He contended that the appellant only had the right to use the trademark on non-exclusive basis. In terms of Article 7.04 and 7.05, the appellant is always exposed to the risk of premature termination of the agreement by the licensor. On termination of the agreement, the appellant carries the risk of not getting the upgraded technology from owner i.e. SMC in the present case. The mere fact that the agreement with the licensor did not specifically debar the appellant from using the knowledge after the termination of the agreement does not, it is respectfully

submitted, mean that the appellant acquired any advantage of capital in nature so as to be treated as capital expenditure, considering the rapid stride in technological advancement and the fast technological obsolescence. The advantage of the continued utilization of the special knowledge and technical know-how alongwith the specific drawing, business and other information, in light of the quick changing technology does not result in any enduring advantage in the capital field. Apart from submission made earlier that the appellant was a mere licensee, entitled to use the technical know-how of SMC. Reliance in this regard was placed on the following judicial pronouncements:-

- \* *CIT vs Avery India Ltd. 207 ITR 813 (Cal.);*
- \* *Praga Tools Ltd. vs CIT 123 ITR 773 (FB)(AP);*
- \* *CIT vs Tata Engineering Ltd. 1123 ITR 538 (Bom);*
- \* *Trivenii Engineering Works Ltd. vs CIT 136 ITR 340 (Del.);*
- \* *ACIT vs SHama Engine Valves Ltd. 138 ITR 216 (Del.);*
- \* *CIT vs J.K.Synthetics Ltd. 176 Taxman 355 (Del.) and other case laws.*

47.1. Therefore, he prayed that the AO should be directed to allow the entire royalty payment as allowable revenue expenditure as has been decided by the Co-ordinate Bench of the Tribunal in assessee's own case for AYs 2006-07, 2007-08, 2008-09, 2009-10.

48. On the other hand, Ld. Special Counsel for the Revenue opposed these submissions and supported the orders of the authorities below. Ld. Counsel for the assessee submitted that looking to the facts of the present case, the assessee is getting enduring benefit therefore this payment would certainly fall

under the capital field. He further strongly supported the order of Ld.DRP and AO.

49. We have heard the rival submissions and perused the material available on records and gone through the orders of the authorities below. The identical issue came up for consideration before the Co-ordinate Bench of the Tribunal for AYs 2006-07, 2007-08, 2008-09, 2009-10 in assessee's own case. The Tribunal in ITA No.467/Del/2014 was pleased to decide the issue in favour of the assessee by observing as under:-

9.8. *“Following the above decision for AY 2006-07, which is on an identical issue in the case of assessee itself, this Tribunal for the AY 2007-08 hold that the amount of royalty considered by the Assessing Officer as capital expenditure should be allowed as a revenue expenditure, and at the same time, depreciation allowed by the Assessing Officer on this amount should be taken back. This tribunal specifically held that the terms of the agreement considered by the Hon'ble Jurisdictional High Court in CIT vs. Hero Honda Motors Ltd. (2015) 372 ITR 481 (Del), are considerably matching with the Agreement under consideration. On the face of this observation, without the same being disturbed by the higher forums, we find it difficult to countenance the argument of the Ld. DR that the ratio decidendi of the Delhi High Court decision in Hero Honda Motors Ltd. (supra) would not be applicable in the facts of the instant case. We, therefore, respectfully following the same hold that the amount of royalty considered by the Assessing Officer as capital expenditure should be allowed as a revenue expenditure, and at the same time, depreciation allowed by the Assessing Officer on this amount should be taken back. Grounds No 9 to 9.3 are, accordingly, allowed.”*

*Thus, this issue is squarely covered in favour of the assessee by the decision of the Tribunal for the earlier Assessment year i.e. A.Y. 2008-09. Therefore, in absence of any contrary material*

*brought to our notice by the Ld. DR against the order of the Tribunal, we allow these grounds. Hence Ground No. 7 to 7.3 are allowed.*

59. *In result, Ground No. 7 to 7.3 are allowed.*”

50. The facts are identical as were in ITA No.467/Del/2014 as the Revenue has not brought any other binding precedents. We therefore, following the decision of the Co-ordinate Bench of the Tribunal in ITA No.467/Del/2014 (supra), direct the AO to delete the disallowance. Thus, Ground Nos. 6 to 6.3 raised by the assessee are allowed.

51. **Ground Nos. 7 to 7.4** raised by the assessee are against the disallowance of R&D cess on royalty holding that the cess also partake character of the royalty without appreciating that royalty was paid to SMC wherein R&D cess was paid to the Indian Government.

52. Ld. Sr. Counsel for the assessee reiterated the submissions as made in the written chart. He contended that during the year under consideration, the appellant company claimed net deduction of Rs.43,79,33,132/- on account of R&D cess on royalty. The expenditure on R&D cess on royalty for the year amounted to Rs.45,18,78,312/- on which a sum of Rs.1,39,45,180/- was disallowed u/s 43B of the Act by the appellant in return of income. The AO has disallowed the entire payment of R&D cess on the ground that since the entire royalty expenditure is a capital expenditure therefore, cess on royalty also need to be capitalized. Also the benefit of *suo-moto* disallowance made by the assessee u/s 43B of the Act was denied by the AO. The AO computed the disallowance out of R&D cess amounting to Rs.33.89 crores. Ld. Counsel for the assessee submitted that at the outset, it may be noted that as per the provision of Land Research and Development, cess is imposed on import of technology by the Government of India to pay R&D cess on the payment of

royalty. Such R&D cess being a statutory payment, is governed by section 43B of the Act which is separate code in itself and overrides other provisions of the Act. Undisputedly, the R&D cess has actually been paid to the Government within the time limits prescribed by section 43B of the Act. He contended that section 43B of the Act allows payment of statutory dues on payment basis. Any expenses which is laid out or expended wholly and exclusively for the purposes of the business of the assessee and which is not in the nature of capital expenditure or personal expenses are allowable under the Act. Without prejudice, he submitted that the AO failed to consider that adding back the amount already disallowed by the appellant under section 43B of the Act, would lead to double disallowance to the extent of Rs.1,04,58,885/-. It was further submitted that if it is held that royalty payment paid by the assessee is a revenue expenditure, the R&D cess should also be considered as revenue expenditure. Further, he pointed out that the similar issue was decided in favour of the assessee by the decision of the Delhi Bench of the Tribunal in AY 2006-07 reported in *Maruti Suzuki India Ltd. vs ACIT 173 TTJ 513 [AYs 2007-08, 2008-09, 2009-10]*. He further pointed out that the Department appeal filed against the order of Tribunal for AY 2006-07 was not admitted by the Hon'ble Delhi High Court in *ITA No.381/Del/2016*. Against the said order of High Court, the Department has not gone into appeal before Hon'ble Supreme Court on this issue. Hence, this issue has attained finality in favour of the assessee.

53. On the other hand, Ld. Special Counsel for the Revenue opposed these submissions and supported the orders of the authorities below.

54. We have heard the rival submissions and perused the material available on records and gone through the orders of the authorities below. We find that

identical ground was raised by the assessee in the earlier AY in ITA No.467/Del/2014 for AY 2009-10. The Tribunal decided the issue in favour of the assessee by observing as under:-

62. *“We have heard both the parties and perused the relevant material available on record. We find that in assessee’s own case for A.Y. 2008-09, the Tribunal held as under:*

***Ground No 10 to 10.2 disallowance of Rs.16,93,68,741/- on account of R&D Cess on Royalty***

*10. Case of assessee in respect of Disallowance of R&D Cess paid, is that as per provisions of Research and Development Cess Act, 1986, R&D cess is imposed on import of technology by the Government of India, which is definitely not a related party of the appellant company, and the assessee has been instructed by the Government of India’s approval for remittance of royalty to pay R&D cess on the payment of royalty. R&D cess, being a statutory payment, is governed by section 43B, which is a separate code in itself and overrides the other provisions of the Act. Further according to the assessee, this issue is dependent and interlinked to the issue of royalty expenditure, and if it is held that royalty payments by assessee are revenue expenditure, then the R&D cess should also be considered as a revenue expenditure.*

*Ld. DR submitted that the issue of R&D Cess paid by the assessee is decided in favour of the assessee by the Delhi Bench of the Tribunal in assessee’s own case for the AY 2006-07 and AY 2007-08.*

*10.1. This issue is based on Ground No. 9 above, i.e. capitalisation of Royalty expenditure. The ITAT has also decided this issue in favour of the assessee on the basis of its decision on Ground No. 9. Since the decision of the ITAT in Ground No. 9 is not acceptable, therefore, its decision on this*

*issue is also not acceptable. It is further averred that these are continuous issues forming part of the assessment order for AY 2006-07 and 2007-08 also, and are at present pending adjudication before Hon'ble Delhi High Court.*

*10.2. In the Order for the AY 2007-08, a coordinate Bench of this Tribunal found that this issue has been decided in the case of assessee itself in the appeal before the ITAT for the assessment year 2006-07 and in that case it was held that:*

*“9. The next ground is disallowance of R&D cess paid amounting to Rs.9,68,47,294/-. Relevant discussion has been made by the AO on page 26 of his final order. The assessee treated the amount of royalty and cess on royalty as revenue expenditure. The AO disallowed a sum of Rs.9.68 crore after proportionately allowing deduction to the extent of depreciation allowed by him on royalty. There is no dispute on the nature of cess, which is on royalty and has been treated both by the assessee as well as the AO as part and parcel of royalty and accordingly claimed/disallowed in line with the treatment of royalty. Since we have allowed deduction for the entire amount of royalty paid by the assessee during the year by deleting the TP adjustment and also overturning the action of the AO in treating the remaining half part as capital expenditure, the consequential amount of cess on royalty payment automatically becomes deductible. We, therefore, direct to allow deduction of Rs.9.68 crore.”*

*10.3. This Tribunal followed the above reasoning for the AY 2007-08 also. Since the related facts of the present assessment year are similar to those in the assessment year 2006- 07 and 2007-08 on an identical issue, we, while respectfully following the same direct the Assessing Officer to allow the deduction as directed by the ITAT in the appeal for*

*the assessment year 2006-07 and 2007-08 after affording opportunity of being heard to the assessee. Grounds 10 to 10.2 are allowed accordingly.”*

*Thus, the issue is squarely covered in favour of the assessee by the decision of the Tribunal in assessee’s own case for A.Y.2008-09. Therefore, in absence of any contrary material brought to our notice by the Ld. DR against the order of the Tribunal, we allow these grounds. Hence Ground No. 7.4 to 7.7 are allowed.”*

55. We do not see any reason to take a different view. Therefore, respectfully following the decision of Co- ordinate Bench in earlier Assessment Years, we hereby, direct the AO to delete the impugned disallowance and allow the claim of the Assessee Company. Thus, Ground Nos. 7 to 7.4 raised by the assessee are allowed.

56. **Ground Nos. 8 to 8.2** raised by the assessee in respect of disallowance of Rs.43,11,000/- representing the excise duty paid by the assessee during the relevant previous year.

57. Ld. Sr. Counsel for the assessee submitted that during the year, the assessee had paid excise duty of Rs.43,11,000/- being provision for MODVAT on quantity difference on inputs disallowed in earlier assessment years now it is claimed on payment basis u/s 43B of the Act. He contended that the AO disallowed the aforesaid claim of the assessee on the ground that the assessee would not have been liable to make the aforesaid payments of Rs.43,11,000/- to the Excise Department if it had been able to establish that all consumptions claimed by it, were for the purposes of manufacturing. He contended that in this regard, it is to be noted that payment made by the assessee is clearly in the nature of excise duty, which is clearly admissible as deduction on payment basis under section 43B of the Act. He further contended that that similar

duty payment for assessment year 2000-01, the Excise Tribunal (CESTAT) has held that there is no shortage of stocks of raw material and the minor discrepancy is the result of accounting error due to use of large quantity of inputs procured from several hundred suppliers. He submitted that admittedly, even otherwise also the issue is also covered in favour of the assessee company by the orders of the Hon'ble Tribunal in appellant's own case for AYs 2000-01, 2001-02, 2002-03, 2007-08, 2008-09 and 2009-10.

58. Ld. Special Counsel for the Revenue opposed these submissions and supported the orders of the authorities below. He contended that every year is an independent year and needs to be viewed independently.

59. We have heard the rival submissions and perused the material available on records and gone through the orders of the authorities below. We find that the identical ground was raised by the assessee in earlier assessment year except change into figures and the Co- Ordinate Bench of this Tribunal in ITA No.467/Del/2014 had decided the issue in favour of the assessee by observing as under:-

66. *"We have heard both the parties and perused the relevant material available on record. We find that in assessee's own case for A.Y. 2008-09, the Tribunal held as under:*

**Ground Nos.13 to 13.3 disallowance Rs.58,61,136/- on account of Expenditure on Excise duty:**

*13. In respect of disallowance Rs.58,61,136/- on account of Expenditure on Excise duty, case of the assessee is that during the relevant assessment year, the assessee paid excise duty of Rs.58,61,136/-, being provision for MODVAT on quantity difference on inputs disallowed in earlier years now claimed on payment basis u/s 43B of the Act, but the assessing officer disallowed the*

*aforesaid claim on the ground that assessee would not have been liable to make the aforesaid payments of Rs.58,61,136/- to the Excise Department if it had been able to establish that all consumptions claimed by it were for the purposes of manufacturing. Assessee submits that the payment made by them is clearly in the nature of excise duty, which is admissible as deduction on payment basis under section 43B of the Act.*

*13.1. Ld. AR submits that the issue is also covered in favour of the assessee by the orders of the Tribunal in the assessee's own case for AYs 2000-01, 2001-02, AY 2002-03 and AY 2007-08.*

*13.2. Per contra, it is the argument of the Ld. DR that this issue is related to the disallowance u/s. 43B for the year immediately preceding the previous year, and the ITAT has allowed this expenditure following the same principle laid down earlier to allow relief to the assessee on the issue of excise duty and customs duty. According to the Ld. DR, if this proposition is accepted in the current year, it shall defeat the very purpose of making the disallowance in the previous year and moreover, Revenue has not accepted the proposition of ITAT in allowing relief to the assessee and in that sense is a live issue. Accepting the decision of tribunal on this issue shall give finality to this issue for that particular year only. It is further averred that these are continuous issues forming part of the assessment order for AY 2005-06, 2006-07 and 2007-08 also, and are at present pending adjudication before Hon'ble Delhi High Court.*

*13.3. On a perusal of the decision, we find that this issue is substantially involved in Ground Nos. 14 to 14.3 in the assessee's appeal for AY 2007-08, and on this aspect, a coordinate Bench of this Tribunal held as under:*

*"27.3 We find that in its order dated 16.10.2012 in the case of assessee itself for the assessment year 2002-03, an identical issue has been decided in favour of the assessee by the ITAT following its earlier orders. Relevant para No. 50 thereof is being reproduced hereunder:*

50. We have heard both the sides on this issue. This issue is covered in favour of the assessee by the decision of ITAT in assessee's own case for assessment years 2000-01 and 2001-02. The relevant para of the order for assessment year 2001-02 is reproduced hereunder:

“22. In regard to Ground No. 9 which is against the action of CIT(A) in deleting the disallowance of the Excise Duty paid by the assessee representing the reversal of the excise MODVAT availed in inputs on clearance of finished goods, it was fairly conceded by both the sides that this issue was squarely covered by the decision of the co-ordinate bench in assessee's own case for assessment year 2000-01 in ITA No. 678/Del/2004. Respectfully following the decision of the Co-ordinate Bench of this Tribunal in assessee's own case for assessment year 2000- 1, the findings of the CIT(A) on this issue stands confirmed.

23. It is also noticed that this Excise Duty is paid against the order of the Settlement Commission and is in the nature of reversal of MODVAT availed on the inputs and not in the nature of penalty or fines. In the circumstances, the ground of appeal as raised by the Revenue on this issue stands dismissed.”

27.4. In view of the above finding of the ITAT on the issue and of the Excise Tribunal in the assessment year 2000-01 that shortage of stock of raw-material and the minor discrepancy was the result of accounting error due to use of large quantity of inputs procured from several hundred suppliers, we hold that the assessee was justified in claiming Rs.77 lacs on

*account of expenditure on excise duty on payment basis under sec. 43B of the Act. The Assessing Officer is accordingly directed to allow the claim. Ground Nos. 14 to 14.3 are thus allowed.”*

*13.4. When the facts are similar and a particular view is taken by a coordinate Bench of this Tribunal for the earlier years, it is not desirable to deviate from the same in a subsequent year in the absence of any change of circumstances, as such by respectfully following the same, we direct the Assessing Officer to allow the deduction of Rs.58,61,136/- representing the excise duty paid by the appellant during the relevant previous year. Grounds No 13 to 13.3 are allowed accordingly.”*

*Thus, the issue is squarely covered in favour of the assessee by the Tribunal in assessee’s own case for A.Y. 2008-09. Therefore, in absence of any contrary material brought to our notice by the Ld. DR against the order of the Tribunal, we allow these grounds. Hence Ground No. 8 to 8.2 are allowed.”*

60. We find that there is no change into facts and circumstances of the present case. Therefore, respectfully following the decision of the Co-ordinate Bench of the Tribunal in assessee’s own case for the AY 2009-10, we hereby direct the AO to delete the disallowance.

61. **Ground Nos. 9 to 9.6** raised by the assessee against the disallowance of Rs.33,00,89,403/- being the expenditure provided on estimated basis on account of Foreseen Price Increase (“FPI”).

62. Ld. Sr. Counsel for the assessee, Shri Ajay Vohra vehemently argued that the assessee had accounted for liability on account of FPI based on scientific analysis of increase in input prices, on the purchases already made by the company at provisional prices, and on which the final price is yet to be settled

with the supplier. FPI amounting to Rs.33,00,89,403/- was debited to consumption of raw material and components in the P&L Account in accordance with mercantile system of accounting, the same was claimed as business deduction in the computation of income. He draw our attention to pages 711 to 713 of the Paper Book in respect of vendor wise details of Rs.33,00,89,403/- made during the relevant year. He further submitted that this practice was in consonance with the provisions of the Companies Act and generally accepted accounting principles and practices of Institute of Chartered Accountants of India. He submitted that the AO however, disallowed the aforesaid claim of the assessee on the ground that assessee has quantified the liability without acknowledging the quantified liability to the creditors. He further submitted that liability for FPI was provided in the books of accounts on a scientific analysis of increase in price of components due to change in input cost. He contended that liability of FPI was estimated by the purchase department with substantial degree of accuracy as they are in constant touch with suppliers and have knowledge of the claims of suppliers, trend of the cost of inputs, etc. He contended that since the liability on account of FPI was an ascertained liability representing additional purchasing price of the goods. Since the liability accrued during the relevant assessment year, even though was finally paid in the following assessment years, the same was allowable deduction. In support of this contention Ld. Senior Counsel for the assessee relied upon the various case laws. He submitted that the aforesaid method of accounting regularly followed by the assessee and claims were accordingly made which has been duly accepted by Revenue in all the preceding years except in AY 2003-04 and 2007-08. There has been no change in method of accounting or estimation. He submitted that the issue now is squarely covered

by the decision of Co-ordinate Bench of the Tribunal in assessee's own case for AYs 2007-08, 2008-09, 2009-10 wherein the Tribunal held that provision for foreseen price increase made by the appellant represented an accrued/crystallized liability, which is an allowable business deduction. He pointed out that the Tribunal vide its order dated 19.06.2019 in MA No.718/Del/2018, directed the AO to delete the said disallowance.

63. On the other hand, Ld. Special Counsel for the Revenue supported the orders of the authorities below and submitted that the deduction would not be admissible to the assessee he placed reliance on the findings of the authorities below.

64. We have heard the rival submissions and perused the material available on records and gone through the orders of the authorities below. We find that identical ground was raised by the assessee in the earlier AY in ITA No.467/Del/2014 for AY 2009-10. The Co-ordinate Bench decided the issue in favour of the assessee by observing as under:-

*7. "We have heard both the parties and perused the material available on record. Considering the corrigendum dated 12.17.2018 for Assessment Year 2008-09 passed by the Tribunal in assessee's own case, we are hereby substituting earlier directions which should be read as under:-*

*Page 145 of the order dated 17.10.2018*

*"Thus, the issue is identical in assessee's own case for A.Y. 2008-09. Therefore, we are remanding back this issue to the file of the Assessing Officer with direction to decide the issue afresh after giving opportunity of hearing to the assessee. Hence, Ground No.9 to 9.5 are partly allowed for statistical purposes.*

*And issuing the fresh direction as under:-*

*“Following the reasoning adopted by the Co-ordinate Bench of this Tribunal Bench for the Assessment Year 2007-08 & 2008-09 vide corrigendum dated 12.07.2018, we direct the Assessing Officer to delete the disallowance of Rs.36.38 crores on account of provisional liability relating to expenditure on account of FPI-OE components. Ground Nos. 9 to 9.5 are disposed of accordingly.”*

65. We do not see any reason to deviate from the reasoning of Co-ordinate Bench the AO is hereby directed to delete the disallowance. Thus, Ground Nos. 9 to 9.6 raised by the assessee are allowed.

66. **Ground Nos.10 to 10.3** raised by the assessee are against the adhoc disallowance of Rs.21,83,04,695/- in respect of sharing of resources.

67. Ld. Sr. Counsel for the assessee submitted that the AO was not justified in making the adhoc disallowance purely on the basis of conjectures and surmises. He submitted that under the identical facts, the Tribunal had disallowed the disallowance made by the AO in AY 2009-10 in ITA No.467/Del/2014.

68. On the contrary, Ld. Special Counsel for the Revenue opposed these submissions and supported the orders of the authorities below. He submitted that the AO has pointed out that there was sharing of resources. Therefore, it cannot be concluded that there was no expenditure related to other entity, was shown in Profit & Loss Account by the assessee.

69. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. The identical ground was raised by the assessee in the AY 2009-10 and the Tribunal after following the order of earlier AY, remanded back to the AO for decision afresh. On a careful reading of the

decisions of the Tribunal in earlier years, it is evident that the relief was granted to the assessee. The Revenue has not brought any contrary decision to support its contention. Therefore, we hereby, set aside the impugned disallowance and restore the issue to the file of AO to make correct disallowance if any, after giving due opportunities to the assessee. Thus, Ground Nos.10 to 10.3 raised by the assessee are allowed for statistical purposes.

70. **Ground Nos.11 to 11.2** raised by the assessee are against the disallowance of expenditure of Rs.11,30,00,000/- incurred on account of discharging Corporate Social Responsibility (“CSR”).

71. At the outset, Ld.Sr. Counsel for the assessee submitted that the issue is covered by the decision of Co-ordinate Bench of the Tribunal in assessee’s own case for AY 2009-10. He drew our attention to para 76 to 79 of the Tribunal’s order. He submitted that CSR refers to obligations of businessmen to pursue those policies or to follow those lines of relations which are desirable in terms of the objectives and values of our society. An expense incurred merely for discharging corporate social responsibility is also an expenditure incurred to achieve long term growth, create goodwill and secure a sustainable competitive advantage. He submitted that the assessee has incurred an amount of Rs.11.30 crores towards CSR activities in respect of maintenance of Children’s park at India Gate. The assessee further sponsored National Road Safety Mission to create awareness amongst persons about the road safety. He further submitted that realizing the gravity of the problem and the need for an efficient and effective driving training infrastructure in the country. The appellant initiated road safety initiatives offering a well-structured and

scientifically designed driving training programme to the public. He further submitted that Community development and employee volunteering initiatives have helped in developing a cohesive relationship between the community and the company. He submitted that the appellant had adopted four villages around Manesar Manufacturing plant for overall development of the villages. Further, the assessee also made contribution in ITI project and to upgrade ITIs in the county to meet the future requirement of skilled manpower and to give better training to the students. The appellant through ITI, Gurgaon and Maruti Driving School, Gurgaon provided training and vocational programmes to the villagers. He submitted that this expenditure is allowable as a business deduction under the provisions of section 37(1) of the Act. he took us through the provision of section 37(1) of the Act and also made submission regarding history of legislation. Ld. Counsel for the assessee placed reliance on the judgement of the Hon'ble Supreme Court in the case of *Sri Venkata Satyanarayana Rice Mill Contractors Co vs. CIT 223 ITR 101 (SC)* and the judgement of Hon'ble Delhi High Court rendered in the case of *CIT vs Ranbaxy Laboratories Ltd. in ITA No.743/2008 (Del.)* and the decision of Co-ordinate Bench of the Tribunal in assessee's own case pertaining to AY 2009-10.

72. On the other hand, Ld. Special Counsel for the Revenue opposed these submissions and supported the orders of the authorities below. He submitted that there is no infirmity into the orders of the authorities below as the expenditure should be related to the business of the assessee but the expenditure as claimed by the assessee does not relate to and is not for the purpose of business of the assessee. The assessee has failed to demonstrate the business advantage to the assessee by making such expenditure.

73. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. We find that Co-ordinate Bench of the Tribunal under the identical facts has decided the issue by observing as under:-

78. *“We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the Ld. AR submitted before us that the CSR expenditure is allowable as a business deduction under the provisions of the Income Tax Act (‘the Act’). In this regard, the Ld. AR pointed out to provisions of section 37(1) of the Act, and submitted that under section 37(1) of the Act the fundamental condition for allowability is that the expenditure must be incurred ‘for the purpose of business’. The said expression is, much wider than ‘for the purpose of earning income’. For any expenditure to be eligible for deduction, such expenditure must be incurred for the purposes of business, irrespective of fact whether incurring of such expenditure is voluntarily and without any compelling necessity or mandatory. It is, in this regard, also relevant to refer to the legislative history of section 37(1) of the Act, wherein the Income Tax Bill of 1961 initially proposed to lay down that ‘necessity’ of the expenditure would be a condition for claiming deduction under that section. The implication of the aforesaid is that the fact that somebody other than the assessee is also benefitted by the incurring of the expenditure does not come in the way of the expenditure being allowed by way of deduction under section 37(1) of the Act. What is important for the purpose of allowability of deduction under section 37(1) of the Act is that the expenditure must be incurred for the purpose of business. Again, the words, ‘for the purpose of business’ should not be limited to the meaning of ‘earning profit alone’. It is also important to note that the purpose has to be seen from the point of view of the businessman and should not be seen with reference to narrow objective of earning profits immediately. Certain expenditure may not reap profits immediately,*

*but may be advantageous in the long run, by creating goodwill and brand image. These submissions of the Ld. AR are supported by the Income Tax statute. But at the same time, it can be seen that Explanation 2 has been inserted in section 37 of the Act by the Finance (No.2) Act, 2014 w.e.f. 1.04.2015 to provide that CSR expenses referred in section 135 of the Companies Act, 2013 shall not be deemed to be incurred for the purpose of business. The aforesaid Explanation inserted w.e.f. 1.04.2015. Therefore, in the present assessment year the said explanation will not be applicable. Hence, the expenditure has to be allowed because ultimately the assessee was publicizing its product at the prominent places by maintaining them such as parks and this has direct impact on the sales promotions of the assessee company. Therefore, Ground No. 11 to 11.12 are allowed.”*

74. The facts are identical and there is no change into facts and circumstances of the present case. We therefore, respectfully following the binding precedent, direct the AO to delete the disallowance.

75. **Ground No.12** raised by the assessee is against the disallowance of club expenditure amounting to Rs.7,50,017/-.

76. Ld. Counsel for the assessee submitted that this issue is also covered by the decision of the Tribunal in assessee's own case for AYs 2001-02, 2002-03, 2003-04, 2004-05, 2005-06, 2006-07, 2007-08, 2008-09, 2009-10. He submitted that the assessee company had debited an amount of Rs.7,50,017/- on account of club membership fee to P& L Account. The said expenditure was incurred on subscription to club provided to various employees and directors. The AO has in the impugned assessment order, disallowed the said expenditure of Rs.7,50,017/- by holding that same cannot be considered as business expenditure. He submitted that the impugned expenditure was incurred for business purpose on the ground of commercial expediency and

there is no element of personal benefit for either to the employee or director. The Tax Auditors have amply clarified this position vide clause 17(b) of the Tax Audit Report. Ld. Counsel for the assessee placed reliance on the various judicial pronouncements and also the decisions of the Tribunal in assessee's own case for AYS 2001-02, 2002-03, 2004-05, 2005-06, 2006-07, 2007-08, 2008-09, 2009-10.

77. On the other hand, Ld. Special Counsel for the Revenue opposed these submissions and submitted that for claiming expenditure, the assessee has to prove that such expenditure related to the business of the assessee and was incurred for furtherance of business interest of the assessee. However, the assessee has not produced any evidence in support of his claim. Hence, the assessee has failed to prove that such expenditure incurred for business expediency.

78. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. We find that the Revenue has not disputed that the identical ground was raised in earlier years and the Co-ordinate Bench of the Tribunal has elaborately examined the allowability of the expenditure. We do not see any reason to deviate from the decision of Co-ordinate Bench of the Tribunal. For the same reasoning, the AO is directed to allow this expenditure and delete this addition. Thus, Ground No.12 raised by the assessee is allowed.

79. **Ground Nos. 13 to 13.5** raised by the assessee are against the treating gains from sale and purchase of mutual funds as "business income" as against the same being declared under the head "capital gains" by the assessee.

80. Ld. Sr. Counsel for the assessee drew our attention to the orders of the authorities below. He reiterated the submissions as made in the written submissions. He contended that during the year under consideration, the gains arising from purchase and sale of investment in mutual funds were covered under the head “capital gains”, either as “long term” or “short term” on the basis of period of holding. He further contended that the assessee claimed long term capital gain of Rs.3.32 crores, net of short term capital loss of Rs.5,41,404/-. The AO however, in the impugned assessment order for the AY 2010-11 without appreciating the facts in right perspective and considering the case laws treated the capital gains as “business income” by following the assessment order of the earlier years wherein the disallowance was made on the ground that the investments were made as a systematic business activity and not with an intention to earn dividend income or capital appreciation. He contended that the AO determined taxable business income of Rs.125,66,52,966/- in respect of units of mutual fund held for more than 12 months as against long term capital loss of Rs.68,16,79,305/- declared by the assessee after claiming benefit of indexation. Similarly, short term capital gain of Rs.3.38 crores has also assessed as business income by the AO. However, the AO did not allow set off of the short term capital loss amounting to Rs.5,41,404/- without specifying any reason. He further contended that it is noteworthy that for the purpose of assessability of profit derived from sale of shares/mutual funds, it is predominantly the intention of the assessee which is relevant. The issue whether shares/securities/units are held by an assessee as “investment” or as “stock in trade” and whether profit derived from the sale of shares/securities is assessable as “capital gains” or “business income”, depends upon the intention of the assessee, which inter alia required to be

ascertained predominantly objective of acquiring the shares, method of classification in the books of accounts, method of valuation, period for which shares/securities are held, source of acquisition/investment, nature of business of the assessee and nature of transactions. Reliance was placed upon the judgements of Hon'ble Supreme Court rendered in the cases of *Raja Bahadur Kamakhya Narain Singh 77 ITR 253 (SC)*; *Sutlej Cotton Mills Supply Agency Ltd. 100 ITR 706 (SC)*; and *Karam Chand Thapar & Bros. (P) Ltd. vs CIT 82 ITR 899 (SC)*.

81. To buttress the contention that the Hon'ble Supreme Court clarified in the aforesaid judgement that the nature of asset, whether "stock in trade" or "capital asset" depends upon the intention with which the same was acquired i.e. with a view to deal/trade in same or to enjoy benefit including capital appreciation as a result of holding the same. Merely because the investment is realized subsequently on receiving a higher price would not characterize the investment as that of trading nature. He also drew our attention to Instruction No.1827, dated 31.08.1989 issued by Central Board of Direct taxes ("CBDT") which provided guidelines to the AO for determining whether a person is a trader or investor in stocks. He further contended that various tests laid down by the Courts in this regard may be referred for guidance determining the nature of the asset in the hands of the assessee. Further, the aforesaid instruction was updated by CBDT vide Circular No.4 of 2007, dated 15.06.2007 291 ITR (St.) 384 while following the *ratio decidendi* emanating from various decisions rendered by the Courts, laid down various guidelines for determination of investment in shares as "capital asset" or "stock in trade". He contended that in the light of the various case laws and the CBDT instructions,

the AO is required to determine the nature of capital gain arising on transfer of an asset is the intention at the time of purchase. If the intention at the time of purchase was to merely resell at profit, the asset would be in the nature of stock-in-trade. On the other hand, if the intention at the time of acquisition is to hold the asset for use and/or earn income therefrom, then the character of such asset would be “capital asset”/ “investment” and income from its sale would be “capital gains” and not business income. He further placed reliance on the judgement of Hon’ble Gujarat High Court in the case of *CIT vs Rewashankar A.Kothari* 283 ITR 338. He then submitted that important fact to be taken into account are that the appellant is a pure investor and the appellant is not registered with any authority or body as being engaged in the business of dealing in shares/securities. This goes to demonstrate that the assessee is an investor and not trader. He further contended that investment in shares/mutual funds is always reflected under the head “investment”/ “Capital asset” in the books of account as opposed to “stock in trade”. Hence, the assessee has classified his investment in its books of accounts. He contended that Accounting Standard 13 on “Accounting for Investment” being followed. He submitted that as per Accounting Standard 13 on “Accounting for Investments” issued by the Institute of Chartered Accountants of India (“ICAI”), the definition of “Investments” is that “an enterprise for earning income by way of dividends, interest, and rentals, for capital appreciation or for other benefits to the investing enterprise. Assets held as stock-in-trade are not “investments”.” He contended that the appellant has consistently followed the Accounting Standard 13 and valued the investment at cost and not at lower of cost or net realizable value. The accounting treatment followed by the assessee has always been accepted by the Revenue in the earlier year(s). He contended

that shares/securities been held as “stock in trade” and not as “investments”, cost of purchases and sales would have separately been shown in the profit and loss account. He further contended that purchase and sale of shares/securities is not recognized/shown as a separate business segment in the audited annual accounts of the appellant. Further, he contended that the entire investment has been made by the appellant out of own funds, and not out of borrowed funds, as is generally/normally the case with a trader in shares. This factum is duly accepted by the AO in the impugned assessment order. He submitted that the assessee had received substantial amount of income as dividend. During the year under consideration, the assessee received dividend income of Rs.156.03 crores. The entire transactions entered into by the appellant were delivery based and the assessee did not enter into any derivative/speculative trade. It was also pointed out that the assessment for the preceding assessment years 2008-09 and 2009-10, nature of the investment were accepted to be on capital account by the AO in regular assessment completed u/s 143(3) of the Act. He then placed reliance on the principles of consistency. He contended that there is no change into facts and circumstances that the assessee had disclosed similar gains arising on the sale of shares as “capital gains” in the preceding assessment years as well. The profits arising from sale of shares was always accepted to be taxable under the head “capital gains”. He placed reliance on various case laws rendered in the case of *Radhasoami Satsang vs CIT 193 ITR 321 (SC)* and *CIT vs Excel Industries Ltd. 358 ITR 295 (SC)*. He submitted that in view of the principles of consistency, transaction of sale of shares/mutual fund must be accepted under the head “capital gains”.

82. On the contrary, Ld. Special Counsel for the Revenue opposed these submissions and supported the orders of the authorities below. He further reiterated the submissions as made in the written note. The sum and substance of the submissions of Ld. Counsel for the Revenue are that the assessee had entered into frequent and large transactions for the purchase and sale of quoted and unquoted mutual funds during the assessment year. Accordingly, an amount of Rs.3,38,38,845/- as short term capital gain and Rs.68,16,79,305/- as long term capital loss has been claimed. The AO has examined the transactions in detail. He submitted that a detailed examination of the claim of long term capital loss against a gain of Rs.125,66,52,966/- and the claim of short term capital gain was rejected by the AO after considering the submissions of the assessee and has made an elaborate discussion for disallowing such claim. The AO has considered various judicial pronouncements and CBDT circulars. He submitted that the assessee has claimed that the view of the Circular No.6/2016 dated 29.02.2016 and the letter dated 02.05.2016 of the CBDT on taxability of income/loss from unlisted securities. In this regard, he contended that the AO at the time of assessment has examined this aspect and was of the view that under the facts and circumstances of the present case, the transaction(s) are business activity. He further contended that examination of such transaction as investment/business activity is an exercise in factual determination and depends on the facts and circumstances of the case. In the present case, the transactions have been undertaken for a few days or weeks in the case of short term gains and for one year to 13 months in the case of long term gains. The period of holding, the volume, the frequency does not display the intent of making investment despite these being so classified in the accounts. He

contended that the accounting treatment may be relevant but is not conclusive of the nature of transaction, as observed by the AO. The details of purchase and sale of shares and mutual funds given by the AO belies the claim that these were in the nature of investment. He submitted that the reasoning of the AO is sound and deserves to be upheld on merits. He contended that the effect of CBDT circular is entirely different. It does not alter the merits of the case and only seeks to reduce litigation by accepting the claim of the assessee if they maintain consistent stand in future years.

83. In re-joinder, Sr. Counsel for the assessee contended that it is a well-settled law if an issue which has been examined in earlier years and there is no change into facts and circumstances of the case, the Revenue cannot change its stand.

84. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. It is not in dispute that the AO in earlier years has allowed the claim of the assessee regarding treatment of transactions related to sale and purchase of mutual funds/securities etc. as the investment. In the year under consideration, the AO has taken a different stand and treated the surplus arising out of the sale of mutual funds/securities as income from business. It is also not in dispute that the investment made by the assessee is out of non-interest bearing fund. The AO did not accept the contention of assessee made during the course of assessment proceedings on the basis that most of the investments were held for a period of 13 months in respect of long term capital gain and in respect of short term capital gain also there was frequent sale and purchases. He was also view of the fact that looking to the volume of transaction, the total purchase price of mutual fund is

Rs.1004,58,57,202/- in respect of long term capital gain and Rs.1587,10,65,228/- in respect of short term capital gain which is substantial by any standard. Hence, he treated the transaction as the business activity of the assessee. Law is well settled now that intent is required to be examined whether it is for investment or otherwise for business of course to arrive at any conclusion certain factors need to be kept in mind. If such factors point towards business activity certainly then any surplus arising would partake character of business profit however, if it for parking surplus fund or is mandatorily made under government policy or otherwise then it will fall in category of investment. Therefore, Considering the totality of the facts, to verify the claim of the assessee that the transaction in question are pure investments by the assessee, the impugned disallowance is hereby set aside and the issue is restored back to the file of AO for decision afresh. The AO would consider all the objections of the assessee in the light of binding precedents. The Ground Numbers 13 to 13.5 are allowed for statistical purpose only.

85. **Ground Nos. 14 to 14.1** raised by the assessee are against the disallowance of provision for warranty.

86. Ld. Sr. Counsel for the assessee submitted that the identical issue has been decided in favour of the assessee by the Hon'ble Delhi High Court in AYs 1994-95 to 1996-97 and 1997-98 to 1998-99. The Revenue had not preferred any appeal hence, the issue has been duly settled and attained finality. Ld. Counsel for the assessee reiterated the submissions as made in the written submissions. He submitted that the assessee is engaged in the business of manufacture and sale of automobiles. In accordance with the marketing strategy adopted and practiced in this kind of trade, the products of the

assessee are sold alongwith warranty. The warranty is for a specific period ranging from one to three years from the date of sale. The appellant is therefore under an obligation to repair/replace free of cost, during the warranty period, any component of the vehicle which suffers from manufacturing defect. He contended that in the impugned assessment order, the AO disallowed the aforesaid provision on the ground that the said provision was created on adhoc basis to lower the tax liability and was not based on any scientific valuation. He contended that that action of the AO is without appreciating the facts and position of law. He contended that the policy in respect of warranty is that when the dealer services a vehicle and a defect is identified, the part is replaced free of cost to the customer. Subsequently, the dealer raises a claim against the assessee being the cost of the spare part replaced. This claim is made on the basis of the price of that part as sold by the assessee to the dealer. It is submitted that when the company receives the claim of warranty from the dealer, it reimburses the same to the dealer. He further submitted that during the relevant period, the appellant debited net sum of Rs.20,98,82,138/- to the Profit & Loss Account towards provision for warranty and provision for product recall claim on accrual basis in respect of sales made during the year. He submitted that the AO however, accepting the settled law that “warranty provision” cannot be disallowed u/s 37(1) of the Act, disallowed the said expenditure on the premise that there is no scientific basis for estimation adopted by the appellant. He submitted that the provision for warranty had been made: (a) as per mercantile system of accounting; and (b) scientifically on the following basis in respect of unexpired portion of warranty. In order to calculate the warranty provision for the period, the average warranty cost per vehicle is calculated keeping in view the past experience and on the basis of

actual warranty claims lodged during the period divided by the average number of vehicles dispatched during the warranty period. Actual warranty claims received from the customers during the year are directly debited to warranty cost account. He submitted that provision for the estimated expenditure to be incurred over the years is necessarily to be made in order to match the costs of rendering services/cost of goods supplied with the revenues. Matching costs with revenues is a fundamental principle of accrual method of accounting. The expenses likely to be incurred against the income booked are necessarily to be provided in order to match revenues with costs and reflect a true and fair view of the business operations for the year. Ld. Counsel for the assessee submitted that the provision of Rs.20,98,82,138/- was made towards warranty costs on accrual basis in accordance with the requirements of Accounting Standard-9 issued by the Institute of Chartered Accountants of India. He submitted that it has been held in various judicial pronouncements that provision for warranty debited to the Profit and Loss Account, not being in the nature of unascertained or contingent liability is deductible business expenditure. He placed reliance on the judgement of Hon'ble Supreme Court in the case of *Rotork Controls India Ltd. v s CIT 314 ITR 62*; judgement of Hon'ble High Court in the case of *CIT vs Vinitex Corporation (P.) Ltd. 278 ITR 337*; judgement of Hon'ble Madras High Court in the case of *CIT vs Beema Mfrs (P) Ltd. 130 Taxman 400*. He further submitted that the issue is otherwise covered in favour of the assessee by the judgement of Hon'ble Delhi High Court in assessee's own case in *ITA Nos. 991 & 992/2011 for the AYs 1998-99 and 1997-98* vide order dated *01.09.2011*. Further, he pointed out that the judgement of Hon'ble Delhi High Court in assessee's own case for *AYs 1994-95*

to 1996-97 reported in 255 CTR 140, holds the grounds as the Department has not filed any SLP against the order.

87. On the contrary, Ld. Special Counsel for the Revenue submitted that basis adopted by the assessee is not scientific and without supported by relevant evidences.

88. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. The Revenue has not disputed the fact that the identical issue was raised by the assessee in AYs 1994-95, 1997-98 and 1998-99 and the Hon'ble Jurisdictional High Court has decided the issue in favour of the assessee. The Revenue has not pointed out any change into facts and circumstances of the present case for the year under consideration. We therefore, respectfully following the judgement of Hon'ble Jurisdictional High Court in assessee's own case in *ITA Nos. 991 & 992/2011* for the AYs 1998-99 and 1997-98 vide order dated 01.09.2011. Therefore, we hereby, direct the AO to allow the claim of the assessee and delete the addition.

89. **Ground Nos. 15 to 15.10** raised by the assessee are against the disallowance of purchases of Rs.195,67,83,751/- on account of non-deduction of tax from payment made to SMC by invoking the provision of section 40(a)(i) of the Act.

90. Ld. Counsel for the assessee submitted that these disallowances were made first payment aggregating to Rs.1956.78 crores to SMC on account of purchase of goods outside India on FOB basis. He contended that the appellant vide reply dated 19.03.2014, submitted that all purchases made by the appellant from SMC are on FOB basis and the property therein transfer to the appellant outside India. Further, such purchases were are at arm's length.

In the absence of any PE of SMC in India, income arising to SMC in relation to sale of goods to the appellant is not liable to tax in India. Therefore, the question of deducting tax at source by the appellant from payment thereof, does not arise. Further, without prejudice, the TDS provisions are not applicable in respect of payments of purchase price in view of the non-discrimination provisions contained in Article 24 of Indo-Japan tax Treaty. He further submitted that AO in the final assessment order has however, disallowed Rs.195,67,83,751/- u/s 40(a)(i) of the Act for failure to withhold tax on purchase price paid by appellant to SMC. The aforesaid amount has been arrived at by the AO by arbitrarily assuming that the Japanese directors nominated by SMC, who are Japanese nationals, constituted place of management of SMC in India, dependent agent PE and service Permanent Establishment ("PE") of SMC under Article 5 of the Treaty and the income arising to SMC from sale of goods to assessee was attributable to such PE and was liable to tax in India. He submitted that the finding of the AO that SMC had a PE in India. The income arising to SMC from sale of goods to the appellant was attributable to such PE and hence liable to tax in India, consequently, the appellant was required to withhold tax from payment of purchase price u/s 195 of the Act and default in withholding tax invited disallowance of purchase price u/s 40(a)(i) of the Act, has no factual and legal basis. He submitted that the AO held that SMC had a place of management in India and hence, dependent agency PE in terms of Article 5(7) of the Treaty and service PE since managerial services have been allegedly provided by the employees of SMC. Insofar as the finding that SMC has a place of management in India and dependent agency PE, the same is solely based on the contention that SMC had 54.21% shares of the appellant and the nominee directors on the

appellant's board, who are also employees of SMC and deriving salary from SMC are looking after the interest of SMC and are acting on behalf of SMC in its dealings with the appellant, including in matters relating to purchase of goods by the appellant from SMC. He further submitted that in terms of paragraph 1 of Article 7 of the Treaty, business profits arising to a Japanese enterprise shall be taxable in India only if the Japanese enterprise has a PE in India. Therefore, in absence of PE in India, no part of the business profits arising to the Japanese enterprise would be taxable in India. He drew our attention towards the relevant contents of the Treaty.

91. Ld. Counsel for the assessee submitted that there is no place of management of SMC in India. He further submitted that merely because some of the Directors are nominated by the SMC does not mean that company will have service PE in India. Ld. Counsel for the assessee submitted that finding of the AO are misconceived and contrary to the settled position of law. Ld. Counsel for the assessee submitted that admittedly there is no fixed place of business of SMC. He submitted that it had been consistently held that employees of foreign parent company seconded to the Indian subsidiary and working under the direction, control and supervision of the Indian company do not constitute a PE of the foreign company in India. Reliance was placed on the judgement of Hon'ble Supreme Court in the case of *Carborandum Co. vs CIT 108 ITR 335 (SC)*. Further, reliance was placed on the decision of Coordinate Bench of the Tribunal in *HCL Infosys Systems Ltd. vs DCIT 76 TTJ 505* and the judgement of Hon'ble Delhi High Court in the case of *Director of Income Tax vs HCL Infosys Systems Ltd. 274 ITR 261 (Del.)*. He submitted that the Directors have been nominated in the Board of Directions of the appellant by

SMC to ensure that the commercial interest of the appellant are looked after. The nominee Directors and senior management personnel are paid salary in Japan to retain lien over their employment by SMC and are not working under the direction, supervision and control of SMC, which discharging their functions as directors of the appellant. The directors who are Japanese nationals do not render any services in India for and on behalf of SMC in the appellant's dealing with SMC and do not carry on SMC's business in India. If that was the case then every subsidiary in India of the foreign company would automatically result in fixed place PE of the foreign company. He submitted that pursuant to an application filed by SMC requesting the National Tax Administration of Japan to enter into a Mutual Agreement with the Indian Competent Authorities and determine whether SMC has a PE in India, the National Tax Administration of Japan vide order dated 06.04.2001 held that SMC does not have a PE in India. Accordingly, since the facts pertaining to the earlier years are identical to the facts of the present case pertaining to the earlier years are identical to the facts of the case in the AY 2010-11 therefore, the order dated 06.04.2001, is applicable to SMC and hence, it cannot be said to have a PE in India. He further submitted that applying the rule of consistency, the fact that in the past, the Japanese directors and senior management personnel on the Board of the appellant have not been alleged to be PE of SMC in India, the Revenue is precluded now from agitating the same in the subject assessment year. In view of the aforesaid, the action of the AO in holding that the SMC had place of management calls for being reversed. He further submitted that Article 5(7) of the Indo Japan Tax Treaty states that where a person other than an agent of an independent status is acting on behalf of a Japanese enterprise in India, such person shall be deemed to

constitute a PE of the Japanese enterprise if : **(a)** the person has and habitually exercises in India an authority to conclude contracts on behalf of the Japanese enterprise; **(b)** he has no such authority but habitually maintains in India stock of goods or merchandise from where he regularly delivers stock of goods or merchandise on behalf of that enterprise and some additional activities conducted in that State on behalf of the enterprise have contributed to the sale of goods or merchandise; or **(c)** he habitually secures orders in India, wholly or almost wholly for the Japanese enterprise. He further submitted that the assessee is legally and economically independent of SMC and it is acting in the ordinary course of business in respect of transaction with SMC and its activities are not devoted wholly or almost wholly on behalf of SMC. He further submitted that no income arose in India as sale of goods was made outside India. Ld. Counsel for the assessee submitted that without prejudice, in terms of section 5(2) of the Act, a non-resident is liable to tax in India in respect of, inter alia, income which accrues or arises or which is deemed to accrue or arise in India. He drew our attention to the provision of section 9 of the Act defines the concept of income deemed to accrue or arise in India. To buttress the contention that there was accrual of income in India as the entire transactions took place in India. The delivery of goods was made outside India hence, the entire transaction was executed outside the territory of India. He further submitted that in view of the facts and circumstances of the present case and judicial pronouncements, no disallowance is called for.

92. Ld. Senior Counsel submitted that moreover the action of the AO in disallowing the purchase to the extent of Rs.195,67,83,751/- and not the sum chargeable to tax in relation thereto merely because a certificate u/s 195(2) of

the Act was not obtained, is clearly contrary to the aforesaid decisions of the Hon'ble Supreme Court and the circulars of CBDT. He further submitted that the AO had disallowed a sum of Rs.196,67,83,751/- u/s 40(a)(i) of the Act, being the tax required to be withheld from amount paid by appellant to SMC for purchase of goods. The aforesaid amount has been arrived by the AO by arbitrarily assuming 20% net profit margin on purchases amounting to Rs.1956,78,37,510/- made by appellant from SMC, out of which 50% profits have been alleged to be attributable to the alleged PE in India. He submitted that without prejudice to the contention that SMC has no PE in India, only profits from activities carried on in India could, if at all, be attributed to the alleged PE of SMC in India and brought to tax in India. No part of profits from the SMC's activities carried on outside India can be attributed to the alleged PE of SMC in India and the assessee's case the goods have been manufactured outside India and purchases made out of India. He placed reliance on the judgement of Hon'ble Supreme Court in the case of *CIT vs Ahmedbhai Umarbhai & Co. 18 ITR 472 (SC)*. He placed reliance on the judgement of Hon'ble Supreme Court in the case of *Anglo-French Textile Co. Ltd. vs CIT 25 ITR 27 (SC)* and the judgement of Hon'ble Supreme Court in the case of *DIT vs Morgan Stanley & Co. 292 ITR 416 (SC)*.

93. To buttress the contention that the AO has on adhoc and arbitrary basis assumed that the profit of SMC at 20% of sales to the appellant on conjectures and surmises attributed 50% of the same to the alleged PE of the appellant in India. He further submitted that in the case of *DIT vs Morgan Stanley & Co.* (supra), the Hon'ble Supreme Court held that "the income attribution to the PE has to be done with reference to analysis of functions performed, assets

employed and risks assumed. He further submitted that no opportunity was provided to the assessee to make submissions, provide information/details in relation to the profit earned by SMC from supply of the goods. He further placed reliance on the decision of the Co-ordinate Bench of the Tribunal in the case of *Convergys Customer Management Group Inc. vs ADIT 159 TTJ 42*. Thereafter, he submitted that looking to the facts and circumstances of the present case, the authorities below grossly erred in making the impugned disallowance by invoking the provision of section 40(a)(i) of the Act. Ld. Counsel for the assessee further reiterated the submissions as made in the consolidated chart of submissions.

94. On the other hand, Ld. Special Counsel for the Revenue opposed these submissions and supported the orders of the authorities below. He submitted that it is wrong to submit on the part of the assessee that it does not have PE in India, as can be seen from the admitted fact that the SMC is holding shares of the assessee company to the extent of more than 50% and SMC has also nominated Directors on the Board of the assessee company. Hence, it cannot be inferred that decision making by the Board could not have been influenced in favour of the SMC. Therefore, he submitted that the authorities below were justified in invoking the provisions of section 40(i)(a) of the Act.

95. In re-joinder, Ld. Counsel for the assessee submitted that the issue is well settled by the decisions as rendered by the various judicial pronouncements as related by the assessee. He further contended that without prejudice, it is submitted that the profit of the PE comes out to Rs.1.82 crores and at the most of the aforesaid amount can be disallowed u/s 40(a)(i) of the Act. In support of this, Ld. Counsel for the assessee placed reliance on the

judgement of Hon'ble Supreme Court in the case of *Anglo French Textile Company Ltd. vs CIT 23 ITR 101 (SC)* and *CIT vs Bertrams Scotts Ltd. 31 Taxman 444 (Cal.HC)*.

96. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. The contention of the assessee against the disallowance are multifold; firstly, the transaction took place outside India and there was no transfer of title of goods within territory of India; secondly, there was no service PE as claimed by the AO; thirdly, there was no dependent agency; and fourthly, the issue is squarely covered by the decision of the Co-ordinate Bench and also the judgement of the Hon'ble Supreme Court and finally even it is assumed there was PE and the transaction took place within the territory of India. Even in that event, the attribution of profit is erroneous and contrary to the settled position of law. In this regard, it was submitted that the AO had disallowed a sum of Rs.1956,78,37,510/- made by the assessee to SMC out of which 50% profits have been alleged to be attributable to the alleged PE in India. However, had the AO correctly attributed the profit, it would have come at Rs.1.82 crores only and without prejudice to the submissions, the amount of disallowance could be restricted to this extent.

97. The issue needs to be examined whether the AO was correct in holding that the assessee was required to deduct tax on the payments made to SMC. The broad submissions of the assessee are that in the light of the principle of consistency, the disallowance is unjustified. Moreover, there is no dependent or service PE and the entire transaction took place off shore. The assessee also placed upon the judgement of Hon'ble Delhi High Court in the case of *DIT vs Ericson AB 204 taxman 192 [2011]* wherein Hon'ble Delhi High Court answered

the question in favour of the assessee, holding that having regard to the fact that goods manufactured outside India as passing of property from seller to buyer. Hence, the assessee had not earned income through or from any business connection.

98. After considering the totality of facts and in the light of the judicial pronouncements we find merit in the contention of the assessee even if it is assumed that there was PE even then correct attribution of profit is required to be made. To meet the ends of justice we hereby set aside the issue to the file of AO. The impugned disallowance is hereby set aside. The AO is hereby directed to decide the issue afresh after adjudicating all the objections of the assessee. The Ground Numbers 15 to 15.10 are allowed for statistical purpose only.

99. **Ground Nos. 16 to 16.17** raised by the assessee are against the adjustment proposed by TPO and made by the AO in respect of the royalty payment transfer pricing adjustment amounting to Rs.442,92,00,000/- on account of the alleged difference in the arm's length price of international transactions of payment of royalty entered into by the appellant on the basis of the order under section 92CA(3) of the Act.

100. At the outset, Ld. Counsel for the assessee submitted that this issue is also covered by the decision of the Tribunal in assessee's own case for AY 2005-06 in ITA No.5237/Del/2011, AY 2006-07 in ITA No.5120/Del/2010, AY 2007-08 in ITA No.5720/Del/2011; AY 2008-09 in ITA No.6021/Del/2012 and AY 2009-10 in ITA No.467/Del/2014. Ld. Counsel for the assessee submitted that during the year under consideration, the assessee had *inter alia* entered into the transaction of payment of royalty of Rs.1,035.49 crore to SMC (the associated enterprise) in consideration for the right to manufacture and sell

various models of motor cars. He contended that TNMM and OP/Sales was considered as the Profit Level Indicator ("PLI"). Since the operating profit margin (OP/Sales) of the assessee at 10.94% was higher than the average of the operating profit ratio of comparable companies at -0.17% the international transactions entered into by the assessee were considered as having been entered at arm's length price, applying TNMM. The TPO further disregarded the benchmarking analysis undertaken by the assessee and held that the international transaction of payment of royalty does not satisfy the arm's length principle; the assessee was not justified in paying any royalty to SMC towards use of SMC's trademark; and out of the total royalty paid by the assessee, 43.5% was attributable to royalty towards payment for use of SMC trademark and therefore, it ought to be disallowed. The TPO accordingly held that Rs.43.5% (in the ratio of R&D and marketing expenditure incurred by the Associated Enterprise) of the total royalty paid by the assessee is towards use of trademark. Hence, the TPO made adjustment of Rs.442.92 crores being 43% of the total royalty paid by the assessee. Ld. Counsel for the assessee submitted that identical addition was made in earlier years and the Tribunal was pleased to hold in favour of the assessee. He further submitted that Hon'ble Delhi High Court in the case of *Magneti Marelli Powertrain India Pvt.Ltd. (ITA No.350/2014)* wherein the Hon'ble High Court held that technical knowhow fee paid by the assessee is to be benchmarked applying TNMM at the entity level. Further, he placed reliance on the decision of the Hon'ble Delhi High Court in the case of *Gruner India Pvt Ltd. (ITA No.708/2016)* and also the decision of the Co-ordinate Bench of the Tribunal in the case of *TS Tech Sun India Pvt.Ltd. (ITA no.1943/Del/2017)*, apart from other case laws mentioned in the written submissions. He submitted that in the light of the judicial

precedents, the Tribunal in assessee's own case has deleted the adjustment. He submitted for the same reasoning, the impugned adjustment deserves to be deleted.

101. On the other hand, Ld. Special Counsel for the Revenue supported the orders of the authorities below. He contended that looking to the facts and the substance of matter is that on account of share holding and directors being nominated by SMC it can be very well construed that it has PE in India therefore, any payment of any kind by such PE needs to be at Arms Length. He therefore, strongly relied on the findings of AO.

102. We have heard the rival contentions and perused the material available on record. The identical ground was also raised by the assessee in ITA No.467/Del/2014 pertaining to AY 2009-10. For the sake of clarity, Ground No.16 raised by the assessee in ITA No.467/Del/2014 [AY 2009-10] is reproduced as under:-

*“That the Assessing Officer erred on facts and in law in making transfer pricing adjustment amounting to Rs.311,73,59,562/- in relation to the international transaction of payment of royalty entered into by the appellant.”*

103. The Tribunal after considering the submissions made by the parties, decided the issue in favour of the assessee by observing as under:-

88. *“We have heard both the parties and perused all the relevant material available on record. The Tribunal held that there is a direct nexus between the revenue of the taxpayer and the payment of royalty and the Revenue cannot challenge or dispute the benefit derived by the taxpayer from payment of such royalty. The Tribunal while deleting the adjustment made by the TPO held as under:*

*"12. Another contention of the TPO that the Goodyear Brand was weak and therefore does not require payment of royalty, is not brought out from the records. The AR of the assessee has made elaborate submission and placed evidence on record to show that 'Goodyear' brand is considered to be one of the top most acclaimed brand across the globe. Therefore, there is no merit in the allegation of the TPO that Goodyear brand has no worth and therefore, the payment made by the assessee for use of Goodyear brand is unwarranted.*

.....

*16. In light of the above, we conclude that there exists a direct nexus between the revenue earned by the assessee and the payment of royalty made to the associated enterprise for using brand name, and therefore, it would be incorrect to analyze the transaction of payment of royalty in isolation. Further the Ld. DR had raised a contention that the assessee has not demonstrated how the payment for royalty beneficial to the taxpayer. We are of the opinion that, ascertaining whether a service has actually benefitted the assessee is not within the prerogative of the tax authorities."*

*Thus, the issue is identical with the earlier assessment year and in the present year as well, there is a direct nexus between the revenue of the taxpayer and the payment of royalty. Therefore, the Revenue cannot dispute the benefit derived by the taxpayer from payment of such royalty. Hence Ground No. 16 to 16.14 are allowed."*

104. The facts are identical in this case as well and the Revenue has not brought to our notice any change into facts and circumstances of the case or any other binding precedents. Therefore, respectfully following the decision of the Co-ordinate Bench of the Tribunal in ITA No.467/Del/2014 (AY 2009-10) in assessee's own case, we hold that the AO was not justified in making transfer

pricing adjustment. We hereby, direct the AO to delete the same. Thus, Ground Nos.16 to 16.17 raised by the assessee are allowed.

105. **Ground No.17** raised by the assessee is against not allowing credit of TDS certificates.

106. Ld. Sr. Counsel for the assessee submitted that a sum of Rs.1,80,84,092/- is required to be deleted on account of the fact that the AO did not give credit of this amount. He drew our attention to para 18 to 18.1 of the AO's order.

107. Ld. Special Counsel for the Revenue opposed these submissions and supported the orders of the authorities below.

108. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. The AO is hereby directed to verify the claim of the assessee regarding additional TDS certificate and give credit of the same in accordance with law. Thus ground of appeal raised by the assessee is hereby, allowed.

109. **Ground Nos. 18 to 18.1** raised by the assessee are against the charging of interest u/s 234B, 234C and 234D of the Act.

110. Ld. Sr. Counsel for the assessee submitted that this issue is covered in favour of the assessee by the decision of the Tribunal for AYs 2007-08, 2008-09 and 2009-10. He submitted that the AO had computed interest u/s 234B of the Act incorrectly. He submitted that the interest u/s 234B of the Act is firstly, computed on the assessed income upto the date of payment of first self assessment tax prior to filing the original return. Thereafter, computing interest as aforesaid, self assessment tax paid by the appellant is first adjusted

against the interest calculated as aforesaid. He further submitted that AO erred in first adjusting the self assessment tax against the interest leviable u/s 234B of the Act calculated on the basis of assessed income. He further submitted that the AO to be directed to make correct computation as per the *CBDT Circular No.549 dated 31.10.1989: 182 ITR (St.) 40*, which is binding on the Income Tax Department.

111. Ld. Special Counsel for the Revenue opposed these submissions and supported the orders of the authorities below.

112. In re-joinder, even otherwise, the issue is covered by the decision of the Co-ordinate Bench of the Tribunal.

113. We have heard the rival contentions and perused the material available on record. We find merit into the contention of Ld Senior Counsel for the Assessee. We therefore, direct the AO to re-compute the interest in accordance with law this ground of Assessee's appeal is allowed for statistical purpose only.

**ITA No.1507/Del/2015 [Assessment Year 2010-11]**

114. Now, we take up Revenue's appeal in **ITA No.1507/Del/2015** for the **Assessment Year 2010-11**. The Revenue has raised following grounds of appeal:-

1. *“Whether on the facts and circumstances of the case & in law, the DRP erred in allowing the deduction u/s 35(2AB) on the basis of order of approval for in house R & D facilities signed by Scientist 'G' for or on behalf of Secretary DSIR by relying on the decision of Mumbai Bench of ITAT in the case of Ferment Biotech Ltd. v. ACIT [ITA No. 4888/Mum/2012].*

2. *Whether on the facts and circumstances of the case & in law, the DRP was justified in directing the AO to allow the claim of the assessee subject to verification whether any order of approval of in house R & D facilities was issued for the relevant assessment year disregarding the fact that Rule 6( 1B) mandates Secretary, DSIR as the prescribed authority and there is no specific further sub-delegation provided in the Rule whereas such further sub-delegation is to be specifically provided as in the case of 3<sup>rd</sup> proviso to Rule 6(5).*
3. *That the order of the DRP is erroneous and is not tenable on facts and in law.*
4. *That the appellant craves leave to add, alter, amend or forgo any ground(s) of appeal either before or at the time of hearing of the appeal.”*

115. The only effective ground in this appeal is against the deduction of claim made u/s 35(2AB) of the Act.

116. Ld. Standing Counsel for the Revenue supported the assessment order and contended that Ld.DRP grossly erred in directing the allowance of deduction u/s 35(2AB) of the Act. He contended that Ld.DRP failed to appreciate the fact that the requisite approval for in house R&D facilities was signed by Scientist “G” for or on behalf of Secretary, Department of Scientific & Industrial Research. He contended that Scientist “G” was not a competent person. Therefore, the AO was justified in declining the claim of deduction u/s 35(2AB) of the Act.

117. Ld. Sr. Counsel for the assessee opposed these submissions and supported the direction of Ld.DRP. He reiterated the submissions as made in the written submissions filed on behalf of the assessee company. It was contended that notwithstanding that the approval of Form No.3CM is not

granted by the Secretary, DSIR but by some Nodal Officer on/or behalf of the Secretary. Therefore, the weighted deduction u/s 35(2AB) of the Act could not have been denied as the assessee fulfilled the requisite conditions. He drew our attention to the provision of section 35(2AB) of the Act. For the sake of clarity, section 35(2AB) of the Act is reproduced as under:-

***Expenditure on know-how.***

*35AB.“(1) Subject to the provisions of sub-section (2), where the assessee has paid in any previous year relevant to the assessment year commencing on or before the 1st day of April, 1998 any lump sum consideration for acquiring any know-how for use for the purposes of his business, one-sixth of the amount so paid shall be deducted in computing the profits and gains of the business for that previous year, and the balance amount shall be deducted in equal instalments for each of the five immediately succeeding previous years.*

*(2) Where the know-how referred to in sub-section (1) is developed in a laboratory, university or institution referred to in sub-section (2B) of section 32A, one-third of the said lump sum consideration paid in the previous year by the assessee shall be deducted in computing the profits and gains of the business for that year, and the balance amount shall be deducted in equal installments for each of the two immediately succeeding previous years.*

*(3) Where there is a transfer of an undertaking under a scheme of amalgamation or demerger and the amalgamating or the demerged company is entitled to a deduction under this section, then, the amalgamated company or the resulting company, as the case may be, shall be entitled to claim deduction under this section in respect of such undertaking to the same extent and in respect of the residual period as it would have been allowable to the amalgamating company or the demerged company, as the case may be, had such amalgamation or demerger not taken place.*

*Explanation.—For the purposes of this section, "know-how" means any industrial information or technique likely to assist in the manufacture or processing of goods or in the working of a mine, oil well or other sources of mineral deposits (including the searching for, discovery or testing of deposits or the winning of access thereto)."*

118. Further, it was contended that Rule 6 of the Income Tax Rules, 1962 ("the Rules") lays down the procedure for making application and obtaining approval in the prescribed form i.e. Form No.3CM and the prescribed authority is required to grant approval in Form No.3CM. He contended that a perusal of the provision of law, it can be conclusively inferred that the only requirement in the aforesaid provision is that R&D facilities should be approved by DSIR and such approval should be granted in Form 3CM. In support of this contention, Ld. Counsel for the assessee relied upon the judgement of Hon'ble Gujarat High Court in the case of *CIT vs Claris Lifesciences Ltd. [2010] 326 ITR 251 (Guj.)*. Further reliance was placed on the judgement of Hon'ble Delhi High Court in the case of *CIT vs Sandan Vikas (India) Ltd. [2011] 335 ITR 117 (Del)*. He contended that in the case in hand, there is no dispute that R&D facilities have been approved. The only dispute was in respect of the requisite certificate was not signed by the Secretary, DSIR but it was signed by the Scientist "G", DSIR i.e. head of R&D. He contended that the aforesaid reasoning for disallowing R&D expenses is not legally sustainable. He contended that the assessee fulfilled all requisite conditions. Ld. Sr. Counsel for the assessee contended that the AO referred to the settled legal position that if any Act was required to be done in law by a particular authority then such Act can only be performed by the said authority and no one else. He contended that there is no dispute so far this legal position is concerned. However, it is to be appreciated that in the present case, a certificate was issued by the DSIR in the Ministry of

Science & Technology, Government of India. Therefore, he further contended that it is the position of law that Rules cannot be construed in such a manner as to make the substantive provision of the Act, as redundant and unworkable.

119. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. We find that Ld.DRP vide impugned direction directed the AO as under:-

***Decision of the DRP:***

*“During the hearing it was explained by the applicant that it claimed weighted deduction of Rs.246,65,38,122/- under section 35(2AB) of the Act on account of expenditure on scientific research as per the approval received from Department of Scientific & Industrial Research (“DSIR”) for the F.Y 2009-10, relevant to the assessment year 2010-11.*

*In the draft assessment order dated 29.03.2014 passed by the assessing officer for the assessment year 2010-11, the assessing officer held that the requisite certificate from DSIR was not proper inasmuch as the same was not signed by the Secretary, DSIR, but was signed by Scientist ‘G’, DSIR (Head of RDI), for and behalf of DSIR. Consequently, the assessing officer has proposed disallowance of the entire deduction of Rs.246,65,38,122/- claimed by the assessee. Elaborating the above argument it was added that provisions of section 35(2AB) of the Act provided that where a company was engaged in the business of bio-technology or any business of manufacture or production or any other article or thing, not specified in the list of Eleventh Schedule of the Act and incurred any expenditure on scientific research (not being expenditure in the nature of cost of any land and building) on in-house research and development facility approved by the prescribed authority, i.e., Secretary, DSIR, then the assessee shall be allowed sum equal to VA times of the expenditure so incurred. Clause 4 of section 35(2AB) of the Act provides that prescribed authority shall submit its report*

*in relation to the approval of the said facilities to the Director General in such form and within such time as may be prescribed.*

*Rule 6 of the Income Tax Rules, 1962 (the “Rules”) lays down the procedure for making application and obtaining approval in the prescribed form, which is Form No.3CK and the prescribed authority is required to grant approval in form No.3CM.*

*It is thus, clear that for the purpose of claiming deduction on scientific research expenditure under section 35(2AB) of the Act, the R&D facility of the assessee was to be approved by the prescribed authority and for that purpose, the rules provide that application should be made by the assessee in prescribed form. Thereafter, on consideration of the application filed by the assessee, approval is to be granted in the prescribed form.*

*In the present case, there is no dispute that the R&D facility has been approved; the only dispute being that the certificate issued on behalf of DSIR is not proper inasmuch as the same is not signed by the Secretary, DSIR, but is signed by Scientist ‘G’, DSIR (Head of RDI), for and behalf of DSIR.*

*The above, submissions were duly considered by the DRP. The applicant was, in law, required to file application for approval in the prescribed form, which was undisputedly complied with by the applicant. Further, on the application so filed, DSIR also granted approval and the applicant was well within its right to believe that the certificate granted after due compliance of the internal procedure/ guidelines of DSIR was proper. The authority who actually signed the certificate of approval was not material so long as the certificate conferring eligibility on the applicant remained valid. In the instant case the eligibility of the applicant for enjoying the benefit was not assailed by the AO. The only quarrel was that the certificate was not signed by the Secretary, DSIR. In our considered view the certificate having been granted in the prescribed form i.e. form No.3CM rendered the applicant eligible for the claim in respect of R&D expenditure.*

**Mumbai Bench of Tribunal in the case of Ferment Biotech Ltd. v. ACIT : ITA No. 4888/Mum/2012** held that deduction under section 35(2AB) of the Act in respect of scientific research expenditure incurred on in-house scientific research facility (R&D facility) cannot be denied to the assessee, even though the order of approval in Form 3CM is not granted by the Secretary, DSIR, but by some Nodal officer on/or behalf of the Secretary, DSIR, provided all other conditions of approval are fulfilled by the assessee. The pertinent observations are reproduced as under:

"10. Once the assessee has filed the application in the prescribed form before the prescribed authority, then insofar as the assessee is concerned, it has fulfilled its obligation. However, there is a rider that such an application form has to be approved or has to be passed by the prescribed authority in form 3CM. These conditions are essential but such a strict interpretation may defeat the very purpose of the legislation intent, if the assessee has complied with all the other conditions and procedures. The purpose of this section r/w relevant rule is to promote scientific research and development facilities which contribute to the technical advancement. If the proper process has been followed by the assessee, then whether the order of approval has been granted by the Secretary, DSIR, or by some Nodal Officer on/or behalf of the Secretary, DSIR, it does not make any difference if all the conditions for granting of approval are satisfied. In this case, it is evident from the documents submitted by the learned Counsel for the assessee subsequent years that the DSIR has granted order of approval in form No. 3CM which has been signed by the Scientist-G for and on behalf of the Secretary, DSIR. Once the DSIR has authorized any of its Nodal Officer to issue order of approval on or behalf of the Secretary, then for the purpose of section 35(2AB), it can be taken that the approval has been granted by the prescribed authority itself. Whether the order has been signed by the Secretary or by any

*of the Nodal Officer on his behalf will not make any difference because it is not the fault of the assessee. In such a case, claim for deduction cannot be denied to the assessee.*

*11. In the present case, however, the assessee could not show us whether, any approval of in house R & D facilities has been issued in prescribed form by the DSIR, even if it is signed by any authority like Scientist-G for on/or behalf of the Secretary, DSIR. In the subsequent years, if such an order is available, then the assessee has to show that the order of the approval for in house R & D facility has been granted by the DSIR covering the present assessment year. Therefore, we set aside the impugned order passed by the learned Commissioner (Appeals) and restore the issue back to the file of the Assessing Officer with a direction to verify this fact and to examine whether any order of approval of in house R & D facilities has been issued for the relevant assessment year. The assessee will provide all the necessary information and evidence. If such an order is available and even if it is signed by the "Scientist- G" on behalf of the Secretary, DSIR, then also it should be taken as if the same has been issued by the prescribed authority. " (emphasis supplied).*

*Having regard to the aforesaid view of the Mumbai Bench of Tribunal the claim of the applicant is allowed subject to the fact that the Assessing Officer shall verify this fact and examine whether any order of approval of in house R & D facilities was issued for the relevant assessment year. The applicant shall provide all the necessary information and evidence. If such an order is available and even if it is signed by the "Scientist-G" on behalf of the Secretary, DSIR, then also it should be taken as if the same was issued by the prescribed authority. The objection is therefore partly allowed for statistical purposes."*

120. We find that Ld. DRP followed the decision of Co-ordinate Bench of the Tribunal in ITA No.4888/Mum/2012 wherein Co-ordinate Bench of the Tribunal was pleased to direct the AO to verify the fact and to examine whether any order of approval for in house in R&D facility was issued for the relevant

Assessment Year. The assessee was also directed to provide all necessary evidences if such an order is available and even if it is signed by the Scientist “G” on behalf of the Secretary, DSIR, has been issued by the prescribed authority. We do not see any reason to deviate from the view of the Co-ordinate Bench in ITA No.4888/Mum/2012 (supra). Moreover, the Revenue has not brought any other binding precedents to our notice therefore, we do not see any reason to interfere in the finding of Ld.DRP, the same is hereby affirmed. Thus, grounds raised by the Revenue are rejected.

121. In the result, the appeal of the Revenue in **ITA No.1507/Del/2015** is dismissed.

122. In the final result, appeal of the assessee in **ITA No.961/Del/2015** [Assessment Year 2010-11] is allowed for statistical purposes and the appeal of the Revenue in **ITA No.1507/Del/2015** [Assessment Year 2010-11] is dismissed.

Order pronounced in the open Court on 09<sup>th</sup> February, 2023.

**Sd/-**

**(SHAMIM YAHYA)**  
**ACCOUNTANT MEMBER**

**Sd/-**

**(KUL BHARAT)**  
**JUDICIAL MEMBER**

*\* Amit Kumar \**

Copy forwarded to:

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

ASSISTANT REGISTRAR  
ITAT, NEW DELHI