IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I', NEW DELHI

BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND SH. YOGESH KUMAR US, JUDICIAL MEMBER

ITA No. 774/Del/2017
(Assessment Year : 2009-10)

SRF Limited Unitech Crest, Greenwood City Block – C, Sector – 45, Gurgaon – 122 003 **PAN No. AAACS 0206 P**	Vs.	ACIT Range – 9, LTU, New Delhi
(APPELLANT)		**(RESPONDENT)**

Assessee by	Shri Pradeep Dinodia, Shri R. K. Kapoor } C.A. Shri Ravi Kumar
Revenue by	Shri Mahesh Shah, CIT (DR) Shri Rajesh Kumar, CIT (DR)

Date of hearing:	10/01/2023
Date of Pronouncement:	23/02/2023

ORDER

PER ANIL CHATURVEDI, AM:

The present appeal is filed by the assessee directed against the order dated 27.09.2016 of the Commissioner of Income Tax (Appeals)-44, New Delhi [for short, CIT(A)] under section 143(3) r.w.s 144C of the Income Tax Act, 1961 [for short, 'the Act'] for Assessment Year 2009-10.

2. Brief facts of the case as culled out from the material on record are as under:-

3. Assessee is a company which is stated to be engaged in various businesses like Manufacturing of Nylon Tyre Cord Fabric, Manufacture of Belting Fabrics, Production of Flouro chemicals and Chloromethane, Manufacture of Packaging Films. Assessee filed its original return of income for A.Y. 2009-10 on 29.09.2009 declaring total income of Rs.165,32,86,704/-. Assessee, thereafter, revised its return of income on 31.03.20211 declaring total income at Rs.166,02,98,495/-. The case of the assessee was selected for scrutiny and thereafter notices u/s 143(2) and 142(1) were issued and served on the Assessee.

4. On the basis of the information available on record, AO noticed that assessee had undertaken International Transactions (IT) with its Associated Enterprises ('AEs') during the year under consideration. As the value of international transactions entered into by the assessee was more than Rs.15 crore, AO made reference to TPO for determining the Arm's Length Price (ALP) of the international transactions entered into by the assessee with Associated Enterprises ('AEs'). TPO vide order dated 28.01.2013 passed u/s 92CA(3) proposed enhancement of income of the assessee by Rs.36,03,975/-on account of the international transactions. AO thereafter passed a draft assessment order u/s 144C of the Act vide order dated 18.03.2013 and computed the

total taxable income at Rs.168,87,52,470/-. AO has noted that a show-cause letter was issued and served to the assessee along with the draft order passed u/s 144C of the Act asking the assessee as to whether it had any objections to the enhancement of income proposed in the draft order as per TPO's recommendation. AO noted that assessee vide letter dated 26.03.2013 has stated that it does not wish to file any objection before DRP. Accordingly, AO passed order u/s 143(3) r.w.s 144C of the Act vide order dated 08.04.2013 determining the total taxable income at Rs.168,87,52,470/-.

5. Aggrieved by the order of AO, assessee carried the matter before CIT(A) who vide order dated 27.09.2016 in Appeal No.114/2014-15/CIT(A)-44 granted partial relief to the assessee. Aggrieved by the order of CIT(A), assessee is now in appeal and has raised the following grounds:

1. *"That on the facts and circumstances of the case and in law, the Commissioner of Income-tax (Appeals)-44, New Delhi ["the CIT(A)"] in upholding the disallowance under section 14A of the Income tax Act, 1961 ("the Act") did not appreciate that the Assessing Officer in disallowing Rs.1,22,44,820/- as against suo-moto disallowance of Rs.26,32,820/- did not record requisite satisfaction as to why the suo- moto disallowance was incorrect.*

1.1 *That on the facts and circumstances of the case and in law, the CIT(A) has erred in holding that interest of Rs. 1083.21 Lacs on working capital loan and NOD deposits & other WCDL/cash credit be taken into account to compute the disallowance under section 14A of the Act read with Rule 8D(ii) of the IT Rules for the reason that use of said loans for the purposes of investment cannot be ruled out.*

1.2 That on the facts and circumstances of the case and in law, the CIT(A) has erred in holding that investment in ICICI Prudential Mutual Fund and Reliance Liquidity Fund was not made out of proceeds from CERs (Certified Emission Reduction).

2. That on the facts and circumstances of the case and in law, the CIT(A) has erred in upholding adjustment of Rs.36,03,975/- under section 92CA(3) of the Act on account of interest on loan to Appellant's 100% subsidiary - SRF Overseas Ltd., Dubai.

2.1 That on the facts and circumstances of the case and in law, the CIT(A) in upholding the addition did not appreciate that foreign currency loan cannot be benchmarked with reference to interest rate on rupee loan.

2.2 That on the facts and circumstances of the case and in law, the CIT(A) did not appreciate that the TPO in proposing the addition of Rs.36,03,975/- did not consider the alternate comparable data submitted by the Appellant.

3. That on the facts and circumstances of the case and in law, the CIT(A) erred in holding that CERs of Rs.3,48,37,38,617/- was a Revenue receipt and is taxable under section 2(24)(v) read with section 28(iv) of the Act.

4. That on the facts and circumstances of the case and in law, the CIT(A) erred in holding that goodwill of Rs.3,68,94,006/- was created subsequent to the purchase of business from SRF Polymers Ltd. and therefore, the Appellant was not entitled to depreciation of Rs.46,11,751/- on the goodwill.

5. That on the facts and circumstances of the case and in law, the CIT(A) has erred in confirming the disallowance of Rs.1,04,00,000/- being donation paid to schools of SRF Vidyalay and SRF Foundation.

6. Without prejudice, on the facts and circumstances of the case and in law, the CIT(A) has erred in holding that the following claims made without filing the revised return were rightly not considered by the Assessing Officer and such claims can also not be entertained by the CIT(A):

(i) the amount of Rs.3,48,37,38,617/- received on account of CERs transferred was a capital receipt not liable to tax under the provisions of the Act;

(ii) allowance of depreciation of Rs.46,11,751/- on goodwill;

7. That on the facts and circumstances of the case and in law, the CIT(A) has erred in admitting the claim of deduction of Rs.1,04,00,000/- paid to SRF Vidyalay and SRF Foundation for the reason that the claim was made without filing the revised return and that such a claim cannot be entertained in appellate proceedings by the CIT(A).

8. That on the facts and circumstances of the case and in law, the CIT(A) has erred in not entertaining and adjudicating the following grounds:

(i) 50% additional depreciation of Rs.11,05,29,041/-on assets put to use for less than 180 days in the immediately preceding assessment year.

(ii) Denial of benefit of indexation in calculating long term capital gain on sale of mutual fund units, which resulted in excess taxability of gain of Rs. 1,12,52,269/-.

(iii) Treating TUF subsidiary of Rs.2,64,67,432/-, a capital receipt as revenue receipt.

That the Appellant craves leave to add, alter, amend or vary any of the ground either at or before the hearing of the appeal."

6. Assessee, thereafter, has raised additional ground which reads as under:

"9. The Hon'ble ITAT may be pleased to grant the claim of 'Education Cess' (@ 3%) amounting to Rs.1,63,59,238/- u/s 37 of the Act paid/payable by the assessee under normal provisions of the Act."

7. Assessee, thereafter, has once again raised an additional ground with the prayer that the additional ground may be treated as Ground No. 10. The additional ground which the assessee is proposing as Ground No 10 reads as under:

> *"10. That on the facts and circumstances of the case and in law, the capital receipts on account of Certified Emission Reduction (CER's) /"Carbon credits" amounting to Rs 3,48,37,38,617/- may held to be excluded from the computation of "book profits" u/s 115JB of the Income Tax Act, 1961"*

8. With respect to the admission of additional grounds, it is submitted that the additional grounds of appeal raised are pure question of law and since all the material facts relevant to the issue are already on record, the same be admitted and adjudicated alongwith the other grounds of appeal in the interest of justice.

9. On the issue of the admissibility of additional ground of appeal, Learned DR strongly objected to the plea for admission of additional ground.

10. Having heard the rival submissions and on perusing the materials available on record we find that the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. 229 ITR 383 after considering the decision in the case of Jute Corporation of India Ltd. 187 ITR 688 (SC) has held that there is no reason to restrict the power of Tribunal u/s 254 only to decide the grounds which arise from the order of the Commissioner of Income Tax (Appeals)

and that both the assessee and Department have a right to file an appeal/cross objections before the tribunal and the Tribunal should not be prevented from considering questions of law arising in assessment proceedings although not raised earlier. It has further held that the view that tribunal is confined only to issues arising out of the appeal before CIT(A) is too narrow a view to take of the powers of the tribunal. We therefore, following the aforesaid decision rendered by Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. (supra) admit the additional ground and proceed to dispose of the appeal.

11. **Ground No.1 and its sub grounds** are with respect to the disallowance u/s 14A of the Act.

12. During the course of assessment proceedings and on perusing the Balance Sheet of the assessee, AO noted that assessee had investment amounting to Rs.133,60.01 lakhs in the quoted and non quoted shares of listed companies, subsidiary companies, Bonds and Mutual Funds. He also noted that assessee had earned dividend income of Rs.84,91,010/- which has been claimed as exempt and assessee had *suo moto* disallowed Rs.26,32,820/- u/s 14A of the Act. AO was not satisfied with the working of *suo moto* disallowance made by Assessee. He was of the view that considering the quantum of investment and the amount of exempt income earned, the disallowance u/s 14A of the Act needs to be worked out in

accordance with Sub Section (2) and (3) r.w. Rule 8D of the I.T. Rules. He accordingly worked out the disallowance u/s 14A of the Act at Rs.122.45 lakhs and after giving credit of *suo moto* disallowance of Rs.26.33 lakhs made by the assessee, disallowed the balance amount of Rs.96,12,000/-.

13. Aggrieved by the order of AO, assessee carried the matter before CIT(A). Before CIT(A) it was *inter alia* submitted that no disallowance of interest is called for as the investment made during the year were out of free funds available in the form of the Reserves and Surplus. It was further submitted that loans that have been taken by the assessee are for specific business purposes and have not been used for making investments. It was therefore submitted that no disallowance on account of interest is called for. It was further submitted before CIT(A) that AO has worked out the interest disallowance by considering incorrect amount of opening investment at Rs.5851.23 lakhs instead of Rs 3851.23 lakhs. CIT(A) did not fully agree with the contentions made by assessee. He at para 3.3 of his order held that the interest on working capital and cash credit account cannot be said for specific business purposes and same was liable for computation of disallowance under Rule 8D(ii) of the I.T. Rules. He accordingly directed the AO to modify the computation of interest disallowance under Rule 8D(ii) of the I.T. Rules. Aggrieved by the order of CIT(A), assessee is now before us.

14. Before us, Learned AR reiterated the submissions made before AO and CIT(A) and further pointed to the audited Balance Sheet as at 31st March 2009 which is placed at page 47 of the paper book. From the aforesaid Balance Sheet, he pointed to the fact that as at 31st March 2009, the investments held by assessee were to the extent of Rs.13,360.01 lakhs as against which the interest free funds in the form of Share Capital and Reserves and Surplus was to the extent of Rs. 97,647.62 lakhs. He, thereafter, pointed to page 50 of the paper book which is the schedule for Reserves and Surplus and from that schedule, he pointed to the fact that even if the different Reserves depicted therein are excluded by considering them to be not free reserves, but still the General Reserve is of Rs.13,950.24 lakhs and surplus in Profit and Loss Account is to the extent of Rs.48,206.80 lakhs. He, therefore, submitted that since the availability of interest free funds are more than the investments, the presumption is that the investments are made out of free funds available with the assessee and are not out of borrowed funds. In support of his aforesaid contention, he placed reliance on the decision in the case of CIT vs. Reliance Utilities & Power Ltd. [2009] 313 ITR 340 (Bom). He further submitted that identical issue arose in assessee's own case in earlier years and in A.Y. 2012-13, the Co-ordinate Bench of Tribunal has decided the issue in assessee's favour. He pointed to the order of the Tribunal for A.Y. 2012-13 which is placed at page 435 of the case law compilation of the paper book. He, therefore, submitted that since the issues raised

in the year under consideration are identical to that of earlier years, no disallowance u/s 14A of the Act is called for.

15. Learned DR on the other hand took us through the order of lower authorities and supported the order of lower authorities.

16. We have heard the rival submissions and perused the material available on record. The issue in the present grounds is with respect to the disallowance u/s 14A r.w. Rule 8D (2)(ii) of the Income Tax Rules. The grievance of the assessee argued before us is only with respect to the disallowance of interest u/s 14A r.w.r 8D (2)(ii) of the Rules. On perusing the audited Balance Sheet of the assessee as at 31st March, 2009, we find that the aggregate investments of the assessee as at 31st March 2009 is Rs.13,360.01 lakhs as against which the balance of Share Capital account is Rs 6,170.55 lakhs, the General Reserve balance is Rs.13,950.24 and surplus in Profit and Loss account is of Rs.48,206.80 lakhs. Thus the aggregate of the Share Capital, the General Reserves and Surplus in Profit and Loss account, which can be termed as interest free funds available with the assessee as at 31st March 2009 is much in excess of the investments as on 31st March 2009. We find that Hon'ble Bombay High Court in the case of Reliance Utilities & Power Ltd. (supra) has held that where an assessee had own funds as well as borrowed funds, a presumption can be made that the advances for non-business purposes have been made out of the own funds and that the

borrowed funds have not been used for this purpose. We further find that identical issue arose before the co-ordinate Bench of Tribunal in assessee's own case in A.Y. 2012-13 also. The Co-ordinate Bench of Tribunal while deciding the issue in that year has deleted the additional disallowance made by AO for the reasons noted therein. Before us, Revenue has not placed on record any contrary binding decision in its support nor has pointed to any distinguishing feature of the case in the year under consideration and that of earlier years. Considering the totality of the aforesaid facts, we are of the view that no additional disallowance as made by AO in excess of the suo moto disallowance made by the assessee was warranted in the present case. We, therefore, direct the deletion of the additional disallowance made by AO. **Thus the ground of assessee is allowed.**

17. **Ground No.2 and the sub grounds are** with respect to the upholding the adjustment of Rs.36,03,975/- under section 92CA(3) of the Act on account of interest on loan to assessee's 100% subsidiary.

18. TPO noted that assessee had given a loan of 4 million USD to its subsidiary, M/s. SRF Overseas Ltd., Dubai and had charged interest at 6 months LIBOR + 2.5% per annum on the loan amount. TPO noted that the subsidiary company to whom the loan was given was incurring losses and was not rated by credit

rating agency. As per the information obtained by AO from CRISIL Ltd, the annualized average yield of AA- Rated Company was 10.83%. According to the TPO, since the subsidiary company was a loss making company, the annualized average yield should be the average for the companies with credit rating of BBB+, BBB- & BBB which works out to 14.29%. According to the TPO, the markup that should have been charged by the assessee from its AEs should be the difference of 14.29% and 10.83% which comes to 3.4%. Apart from that, according to TPO, a mark up towards the administrative cost at 0.50% also should have been charged by the assessee from its AE. TPO, therefore, proposed that interest that should have been charged by the assessee from its AE should be LIBOR+534 BPP but assessee had only charged LIBOR + 250 BPP. Assessee was show caused as to why an adjustment should not be made for the difference. Before TPO, assessee made detailed submissions which were not found acceptable by TPO. TPO, thereafter, computed the interest that should have been charged by the assessee from its AE to be Rs.36,03,975/-. Based on the adjustment suggested by TPO, AO in the draft assessment order proposed upward adjustment to the extent of Rs 36,03,975/-. Aggrieved by the order of AO, assessee carried the matter before CIT(A) who for the reasons noted by him in his order vide para 4.3 of his order, upheld the order of AO.

19. Aggrieved by the order of CIT(A), assessee is now in appeal before the Tribunal.

20. Before us, Learned AR reiterated the submissions made before AO and CIT(A) and further submitted that the issue raised by the assessee in the present appeal is fully covered in assessee's favour by the decision of Tribunal in assessee's own case for A.Ys. 2010-11 and 2014-15. He submitted that while deciding the issue for A.Y. 2014-15, the Hon'ble Tribunal vide order dated 13.12.2021 and by relying on the order of the Tribunal for A.Y. 2010-11 has decided the issue in assessee's favour. He pointed to the relevant finding of the Tribunal at pages 465 to 467 of the order. He submitted that the facts of the case in the year under consideration are identical to that of A.Y. 2010-11 and 2014-15 and therefore following the order for A.Y. 2014-15, the addition proposed by TPO and upheld by CIT(A) needs to be deleted.

21. Learned DR on the other hand did not factually controvert the submissions of Ld AR but however strongly supported the order of lower authorities.

22. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the adjustment of interest made on account of the amount lent by the assessee to its AEs. We find that identical issue arose before the Tribunal in assessee's own case in A.Y. 2014-15 and Co-ordinate Bench of Tribunal by following the

order of Tribunal in assessee's own case for A.Y. 2010-11 has decided the issue in favour of the assessee by observing as under:

> *"21. We have heard the rival submissions and perused the materials available on record. The issue in the present ground is with respect to interest for Foreign Currency Loan granted by the assessee to its AEs. We find that identical issue arose in assessee's own case in A.Y. 2010-11 and the Co-ordinate Bench of Tribunal in assessee's own case decided the issue observing as under:*
>
> > *"22. We have heard the rival contentions, perused the relevant findings and as well as material referred to before us at the time of hearing. There is no dispute that assessee has granted loan to its AE in foreign currency, i.e. USD. The Ld TPO applied the imputed interest rate @ 6.89% obtained from various Indian Banks u/s 133(6). It is now well settled in view of Jurisdictional High Court judgment in case of Cotton Naturals (I) Pvt. Ltd. (supra) that Indian lending rates cannot be applied in case of foreign currency lending. The appropriate rate for benchmarking is rate prevailing in the country where the loan has been utilized. Correctly stated by Ld. AR is that LIBOR is an international benchmark used globally as interest benchmark. Various courts have held that LIBOR is an appropriate benchmark for foreign currency loan granted to overseas AE(s). The AE has also availed loan in its home country rate of which is also denominated in LIBOR. In our view LIBOR rate should be used while undertaking the benchmarking analysis in respect of foreign currency loans extended to AE. Well the assessee has charged 250 basis points over an above such benchmark viz. LIBOR. Therefore, no addition is justified and the entire addition of Rs.2,18,98,274/- is hereby deleted."*
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> *22. Before us, Revenue has not pointed to any distinguishing feature in the facts of the case in the year under consideration and that of the earlier years. Revenue has also not placed any material on record to demonstrate that the aforesaid decision of the Co-ordinate Bench of Tribunal in assessee's own case for A.Y. 2010-11 has been stayed/ set aside/ overruled by higher judicial forum. In view of the aforesaid facts and relying on the decision of the Co-ordinate Bench of Tribunal for A.Y. 2010-11 and for similar*

reasons, we hold that no adjustment is called for. ***Thus the ground of assessee is allowed."***

23. Before us, Revenue has not pointed to any distinguishing feature in the facts of the case in the year under consideration and that of the earlier years. Revenue has also not placed any material on record to demonstrate that the order of Tribunal in assessee's own case for A.Y. 2010-11 & 2014-15 has been stayed/set aside/overruled by higher judicial forum. We, therefore, following the order of Tribunal in assessee's own case for A.Y. 2014-15 and for similar reasons hold that no adjustment on account of interest is called for in the present case. We, therefore, direct its deletion. **Thus the ground of assessee is allowed.**

24. **Ground Nos. 3 & 6(i) and Additional Ground No.10** are interconnected therefore considered together. These grounds are with respect to the treatment to the amount received on account of Carbon Emission Reduction (CERs) amounting to Rs.3,48,37,38,617/-.

25. Assessee is stated to have received Rs.3,48,37,38,617/- from transfer of 38,45,000 units of Carbon Emission Reduction (CER). According to assessee, the aforesaid amount was in the nature of capital receipt and should have been excluded while

computing the taxable income but however it had recognized it as Revenue receipt in the return of income.

26. During the course of assessment proceedings, assessee claimed before AO that the receipt on account of CER Certificates to be capital receipts and contended that the same should not be taxed. Before AO, assessee also relied on the decision of Hyderabad Tribunal in the case of M/s. My Home Power Ltd. vs. DCIT (2012) 27 taxman.com 27 and contended that in the aforesaid decision it has been held that carbon credit is in the nature of entitlement received to improve world atmosphere and environment reducing carbon, heat and gas emissions and therefore capital receipt. AO did not entertain the claim of the assessee for the reason that no revised return was filed by the assessee claiming the aforesaid amount as capital receipts. AO was of the view that the claim of the assessee cannot be allowed in the absence of revised return of income filed by the assessee and for the aforesaid conclusion, he relied on the decision of Hon'ble Supreme Court in the case of Goetze India Ltd. (200) 157 taxman-1 (SC).

27. Aggrieved by the order of AO, Assessee carried the matter before CIT(A). Before CIT(A), assessee sought the exclusion of receipts on account of CER certificates by treating it to be capital receipt. To support its contentions, before CIT(A), it was *inter alia* submitted by the assessee that the assessee had its refrigerant

manufacturing facility at Jhiwana, Rajasthan for the production of HCFC-22. Manufacture of HCFC-22 generates HFC-23, a green house gas. Assessee had an option to emit such green house gas (HFC-23) in the air without impacting its business of production of HCFC-22. The assessee, however, reduced the emission of green house gas namely HFC-23 in the atmosphere by Thermal Oxidation for reducing emission of green house gas for which it received Carbon Emission Reduction Certificates (CERs) in terms of Kyoto Protocol. During the year, assessee had transferred 38,45,000 Carbon Emission Reduction Certificates and had received Rs.348,37,38,617/- which was recognized as revenue and disclosed in the Profit and Loss account. It was assessee's contention that the aforesaid amount was a capital receipt and therefore it should have been excluded while computing the total taxable income.

28. CIT(A) has noted that assessee had not claimed the amount as capital receipt in the return of income that was filed by it nor had the Assessee filed revised return of income to claim the aforesaid amount as capital receipt. Since the issue was not considered by the AO in the assessment order and since it was claimed to be capital receipt for the first time before CIT(A), CIT(A) sought report from AO.

29. Before CIT(A), assessee made the submissions which were not found acceptable to CIT(A). CIT(A) was of the view that though

CIT(A) had co-terminus power of the assessing officer but he does not have the power to entertain such claim of deduction without the assessee filing revised return. On the merits of the issue, the reliance placed by the assessee on the decision of Tribunal in the case of M/s. My Home Power Ltd. (supra) was not found acceptable to CIT(A) as he was of the view that the decision in the case of My Home Power Ltd. (supra) was not applicable to the facts of the case of the assessee as the facts were distinguishable. While distinguishing the facts, he noted that in the case of the assessee, the production of green house gas namely HFC-23 was a byproduct of the business, the reduction of which had resulted into the issuance of carbon credit certificate whereas in the case of My Home (supra), it was a case where the assessee was in the business of power generation. He, thereafter by relying on the decision of Cochin Bench of Tribunal in the case of Apollo Tyres Ltd. held that the proceeds out of CER to be Revenue receipt and taxable u/s 2(24)(vd) r.w.s 28(iv) of the Act.

30. Aggrieved by the order of CIT(A), assessee is now before Tribunal.

31. Before us, Learned AR reiterated the submissions made before lower authorities and further submitted that the assessee had claimed the sale proceeds from the transfer of CER proceeds to be capital receipts and therefore not chargeable to tax. In support of his contentions that the receipts are capital receipts,

he also placed reliance on the decision of Hyderabad Tribunal of the case of My home Power Ltd. (ITA No. 1114/Hyd/2009 order dated 02.11.2012. He pointed to the copy of the Tribunal order in that case which is placed at pages 146 to 152 of Case law Paper book. He thereafter submitted that the aforesaid order of tribunal has been upheld by Hon'ble Andhra Pradesh High Court and reported in (2014) 46 Taxmann.com 314 (AP) wherein it has been held that carbon credit is in the nature of entitlement received to improve world atmosphere and environment reducing carbon, heat and gas emissions and therefore capital receipt in nature and thus not chargeable to tax in terms of Section 2(24), 28, 45 and 56 of the Act. He further submitted that the issue raised in the present ground is a fully covered issue in favour of the assessee by the various decisions of Tribunal in assessee's own case for A.Ys. 2006-07, 2007-08, 2008-09, 2010-11 & 2012-13. He submitted that in all those years, the Hon'ble Tribunal has held the receipt from transfer of CERs to be capital in nature and not chargeable to tax. He further pointed to the recent decision of Tribunal in assessee's own case for A.Y. 2006-07 decided on 07.02.2022, the copy of which placed at pages 494 to 524 of the paper book and from that, he pointed that the Co-ordinate Bench of Tribunal after considering the various decisions cited by the assessee and the Revenue has held the receipt to be capital in nature and not liable to tax. He further submitted that the Hon'ble Tribunal has further held that since the receipt is capital in nature it cannot be considered while computed the book profits

u/s 115JB of the Act. He, therefore, submitted that following the order in assessee's own case for A.Y. 2006-07, the issue be decided in assessee's favour.

32. Learned DR on the other hand did not controvert the factual submissions made by Learned AR but however supported the order of lower authorities.

33. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the treatment of receipt from transfer of CERs and whether the same is required to be added while computing the book profits and moreso when the claim is not made by filing the revised return of income.

34. It is an undisputed fact that the assessee in the return of income filed had offered the receipts on transfer of CEC credits as revenue receipts and thus offered it to tax but during the course of assessment proceedings before AO, assessee had claimed it to be capital receipt and had sought its exclusion from total income. The claim of the assessee was denied by the AO for the reason that the assessee had not filed revised return of income claiming the receipts to be capital receipts and for which AO had placed reliance on the decision of Hon'ble Apex Court in the case of Goetze India Ltd. (supra). The order of AO was upheld by CIT(A). On the issue of claim being made for the first time before the

Appellate Authorities, we find that Hon'ble Gujarat High Court in the case of CIT vs. Mitesh Impex [2014] 46 taxmann.com 30 (Gujarat), after considering various decisions cited in the decision, has held the decision of the Supreme Court in the case of Goetze (India) Ltd. (supra) is confined to the powers of the assessing officer and accepting a claim without revised return. It has further held that any ground, legal contention or even a claim would be permissible to be raised for the first time before the appellate authority or the Tribunal when facts necessary to examine such ground, contention or claim are already on record. The relevant observations of the Hon'ble High Court are as under:

> *"38. It thus becomes clear that the decision of the Supreme Court in the case of Goetze (India) Ltd. (supra) is confined to the powers of the assessing officer and accepting a claim without revised return. This is what Supreme Court observed in the said judgment while distinguishing the judgment in the case of National Thermal Power Co. Ltd.(supra) and that is how various High Courts have viewed the dictum of the decision in the case of Goetze (India) Ltd.(supra). When it comes to the power of Appellate Commissioner or the Tribunal, the Courts have recognized their jurisdiction to entertain a new ground or a legal contention. A ground would have a reference to an argument touching a question of fact or a question of law or mixed question of law or facts. A legal contention would ordinarily be a pure question of law without raising any dispute about the facts. Not only such additional ground or contention, the Courts have also, as noted above, recognized the powers of the Appellate Commissioner and the Tribunal to entertain a new claim for the first time though not made before the assessing officer. Income-tax proceedings are not strictly speaking adversarial in nature and the intention of the Revenue would be to tax real income.*

39. This is primarily on the premise that if a claim though available in law is not made either inadvertently or on account of erroneous belief of complex legal position, such claim cannot be shut out for all times to come, merely because it is raised for the first time before the appellate authority without resorting to revising the return before the assessing officer.

40. Therefore, any ground, legal contention or even a claim would be permissible to be raised for the first time before the appellate authority or the Tribunal when facts necessary to examine such ground, contention or claim are already on record. In such a case the situation would be akin to allowing a pure question of law to be raised at any stage of the proceedings."

35. Before us, Revenue has not placed on record any contrary binding decision in its support nor has placed any material on record to demonstrate that the decision rendered by Hon'ble Gujarat High Court in the case of Mitesh Impex (supra) has been over ruled/ setaside or stayed by higher judicial forum. In view of the aforesaid facts and relying on the decision of Hon'ble Gujarat High Court in the case of Mitesh Impex (supra), we are of the view that the CIT(A) was not justified in not deciding the claim made by the Assessee before him. That apart on the merits of the issue, we find that identical issue arose before the Co-ordinate Bench of Tribunal in assessee's own case in A.Y. 2006-07. The Co-ordinate Bench of Tribunal in ITA No 6693/Del/2018 order dated 07.02.2022 has decided the issue in favour of the assessee by observing as under:

"5.0 We have carefully considered the rival contentions and have perused the orders of the lower authorities and judgments relied upon by the revenue and the Ld. AR on the issue under consideration. As observed in various judgments, the 'Carbon credits' or CERs represent the 'privilege /entitlement' given to the businesses for its efforts resulting in reduction of emission of greenhouse gases. Such CERs are tradable commodity and one party to Kyoto protocol is benefited by selling such entitlement to other parties to Kyoto protocol which are in deficit. During the year under consideration, the assessee has also received certain sum on account of sale of certain CERs entitlement to other parties. All such parties are foreign parties and the amount has been received in foreign currency. The question that we are really required to adjudicate upon is whether such money received by the assessee on sale of CERs/ carbon credits is taxable under Income-tax Act or not. The Hyderabad bench of the Tribunal in case of My Home Power Ltd (Supra) while dealing with the similar issue held as under:

> *"24. We have heard both the parties and perused the material on record. Carbon credit is in the nature of "an entitlement" received to improve world atmosphere and environment reducing carbon, heat and gas emissions. The entitlement earned for carbon credits can, at best, be regarded as a capital receipt and cannot be taxed as a revenue receipt. It is not generated or created due to carrying on business but it is accrued due to "world concern". It has been made available assuming character of transferable right or entitlement only due to world concern. The source of carbon credit is world concern and environment. Due to that the assessee gets a privilege in the nature of transfer of carbon credits. Thus, the amount received for carbon credits has no element of profit or gain and it cannot be subjected to tax in any manner under any head of income. It is not liable for tax for the*

assessment year under consideration in terms of sections 2(24), 28, 45 and 56 of the Income-tax Act, 1961. Carbon credits are made available to the assessee on account of saving of energy consumption and not because of its business. Further, in our opinion, carbon credits cannot be considered as a by-product. It is a credit given to the assessee under the Kyoto Protocol and because of international understanding. Thus, the assessees who have surplus carbon credits can sell them to other assessees to have capped emission commitment under the Kyoto Protocol. Transferable carbon credit is not a result or incidence of one's business and it is a credit for reducing emissions. The persons having carbon credits get benefit by selling the same to a person who needs carbon credits to overcome one's negative point carbon credit. The amount received is not received for producing and/or selling any product, bi-product or for rendering any service for carrying on the business. In our opinion, carbon credit is entitlement or accretion of capital and hence income earned on sale of these credits is capital receipt. For this proposition, we place reliance on the judgement of the Supreme Court in the case of CIT vs. Maheshwari Devi Jute Mills Ltd. (57 ITR 36) wherein held that transfer of surplus loom hours to other mill out of those allotted to the assessee under an agreement for control of production was capital receipt and not income. Being so, the consideration received by the assessee is similar to consideration received by transferring of loom hours. The Supreme Court considered this fact and observed that taxability of payment received for sale of loom hours by the assessee is on account of exploitation of capital asset and it is

capital receipt and not an income. Similarly, in the present case the assessee transferred the carbon credits like loom hours to some other concerns for certain consideration. Therefore, the receipt of such consideration cannot be considered as business income and it is a capital receipt. Accordingly, we are of the opinion that the consideration received on account of carbon credits cannot be considered as income as taxable in the assessment year under consideration. Carbon credit is not an offshoot of business but an offshoot of environmental concerns. No asset is generated in the course of business but it is generated due to environmental concerns. Credit for reducing carbon emission or greenhouse effect can be transferred to another party in need of reduction of carbon emission. It does not increase profit in any manner and does not need any expenses. It is a nature of entitlement to reduce carbon emission, however, there is no cost of acquisition or cost of production to get this entitlement. Carbon credit is not in the nature of profit or in the nature of income."

"25. Further, as per guidance note on accounting for Self- generated Certified Emission Reductions (CERs) issued by the Institute of Chartered Accountants of India (ICAI) in June, 2009 states that CERs should be recognised in books when those are created by UNFCCC and/or unconditionally available to the generating entity. CERs are inventories of the generating entities as they are generated and held for the purpose of sale in ordinary course. Even though CERs are intangible assets those should be accounted as per AS-2 (Valuation of inventories) at a cost or market price, whichever is lower. Since CERs are recognised as inventories, the

generating assessee should apply AS-9 to recognise revenue in respect of sale of CERs."

26. Thus, sale of carbon credits is to be considered as capital receipt. This ground is allowed."

5.1 The above order of the Hyderabad Bench has been confirmed by the Hon'ble High Court of Andhra Pradesh. Next, the judgment of Hon'ble High Court of Gujarat in case of Gujarat Flourochemicals Ltd. [ITA Nos. 11/2019 & 28/2019], wherein the facts as noted by the Tribunal are similar with the facts of the assessee, has held the issue in favour of assessee. Undoubtedly, the facts of said case are similar to the case of the assessee which goes a long way to support the claim of the assessee.

5.2 The coordinate bench in case of Malana Power Co. Ltd. [ITA Nos. 2281/Del/2013, 1550/Del/2015 & 3957/Del/2015] while adjudicating the additional ground of carbon credits held as under:

"5. We have heard the rival submissions in respect of the assessee's plea for admission of additional grounds and it is our considered opinion that the additional grounds raise a purely legal issue, the facts of which are already available on record. It is well settled that legal ground can be raised any time as per the ratio laid down by the Hon'ble Supreme Court in the case of NTPC Ltd. Vs CIT reported in 229 ITR 383 (SC), therefore, these are admitted."

"6. Coming to the merits of the additional grounds of appeal raised by the assessee, we find that this issue is covered in favour of the assessee by the judgment of the Hon'ble Allahabad High Court in the case of Pr. Commissioner of Income Tax vs. L.H. Sugar Factory Pvt. Ltd. reported in 392 ITR 568 (All.) wherein the Hon'ble Allahabad

High Court had held that income from sale of carbon credits/profits from sale of carbon credits is capital in nature. We also find that ITAT Bangalore Bench in the case of Subhash Kabini Power Corpn. Ltd. vs. CIT reported in (2015) 37 ITR (T)106 (Bang .Trib.) had held that once the Assessing Officer had allowed the assessee's claim of deduction u/s 80-IA in respect of income derived from sale of carbon credits, such order was not amendable u/s 263 of the Act. This order of ITAT, Bangalore Bench was also upheld by the Hon'ble Karnataka High Court."

"6.1 Further, ITAT Hyderabad Bench in the case of CIT Vs. My Home Power Ltd. Hyderabad in ITA No. 1114/Hyd/2009 held that carbon credit receipts are capital in nature. This order of ITAT Hyderabad Bench was subsequently upheld by the Hon'ble Andhra Pradesh High Court in 365 ITR 82."

"6.2 Accordingly, respectfully following the ratio of the settled judicial precedent as aforementioned, we allow the additional grounds raised by the assessee and hold that the income from sale of carbon credits is capital in nature."

5.3 Coming to the judgments relied upon by the AO and the Ld. CIT(A) and which have been further relied by the Ld. DR, we are of opinion that such cases do not support the case of revenue. As pointed out by the Ld. AR,the order of the Cochin Bench of the Tribunal in the case of Apollo Tyres Ltd.{[2014] 47 taxmann.com 416 (Cochin Trib.)}had already been analyzed by the Hon'ble Allahabad High Court in the case of L.H. Sugar Factory Pvt. Ltd. (supra) which held it 'not to be good in law'. The other order of the ITAT Ahmedabad Bench in the case of Kalpataru Power Transmission Ltd.{[2016] 68 taxmann.com 237 (Ahm. Trib.)}has been overruled by the later judgment of same bench of Ahmedabad Bench of the Tribunal in the same case of Kalpataru Power

Transmission Ltd.[2019-TIOL-1424-ITAT-AHM].In view of the fact that case laws relied upon by the revenue have already been overruled by higher court or by the same court in later judgment, we are not inclined to consider those judgments while adjudicating the issue under consideration.

5.4 We also borrow some reasoning from the fact that Ministry of Finance has inserted a specific provision in form of section 115BBG in the Act which is effective from 1st April, 2018 and will accordingly apply from assessment year 2018-19 and subsequent years. The rate of taxation provided in said section is 10% (in addition to applicable surcharge and education cess). This also corroborates the case of the assessee that CERs are not regular business receipts arising from business of the assessee and this fact has also been recognized by the Government and, therefore, need arose to bring a special provision under the Act and that too at concessional rate of tax. Further, in any case, in view of amendment being applicable from assessment year 2018-19, the taxability in year concerned, which is AY 2006-07, is not governed by said provisions and hence the taxability of carbon credits need to be decided in light of extant judicial position.

5.5 We are in complete agreement with the Ld. AR that the issue in no longer res integra in view of several judgments of Hon'ble High Courts. In the following cases, the Hon'ble High Courts have decided the issue in favour of assessee by holding carbon credits as capital receipts not liable to tax:

i. Alembic Limited [ITA Nos. 553/2017 & 554/2017] (Gujarat High Court 28.08.2017)

ii. L.H. Sugar Factory Pvt. Ltd. [2016-TIOL-1942-HC-ALL-IT]

iii. Ambika Cotton Mills Ltd. [TS-144-HC-2021(MAD)]

iv. Lanco Tanjore Power Co. Ltd. [[2021] 434 ITR 671 (Madras)]

v. Tamil Nadu Newsprint & Papers Ltd. [[2021]

130 taxmann.com 213 (Madras)]

vi. *Arun Textiles Pvt. Ltd. [2016-TIOL-2212-HC-MAD-IT]*

vii. *Rajasthan State Mines and Minerals Ltd. [2017-TIOL-2297-HC-RAJ-IT]*

viii. *Shree Cement Ltd. [ITA No. 86/204 dated 22.08.2017]*

ix. *Subhash Kabini Power Corporation Ltd. {[2016] 69 taxmann.com 394 (Karnataka)}*

x. *Dodson Lind blom Hydro Power Pvt. Ltd. [2019-TIOL-531-HC-MUM-IT]*

xi. *My Home Power Ltd. {[2014] 46 taxmann.com 314 (Andhra Pradesh)}*

5.6 Further, we are not aware of any contrary judgment of any High Court on the issue nor the Ld. DR could point out any contrary judgment on the issue. Therefore, respectfully following the ratio of the Hon'ble High Courts as discussed above as well the orders of the ITAT including the jurisdictional bench of the Tribunal, we are of the view that carbon credits/CERs are in nature entitlement accrued to the assessee on account of its efforts to reduce the emission of harmful greenhouse gases. They have arisen due to environmental concerns and therefore cannot be said to be 'connected with' or 'incidental to' the business activities of assessee. The assessee is engaged in the business of refrigerants, engineering plastics and industrial yarns etc. and is not into the business of trading of carbon credits. All these findings of facts have been given by the coordinate bench in assessee's own case in subsequent years in AY 2007-08 and AY 2010-11 which have been placed before us. We, therefore, hold that carbon credits are not offshoot of business but offshoot of environmental concerns and hence not chargeable to tax. The receipts arising from transfer of carbon credits are in the nature of capital receipts not subjected to tax in terms of section 28(iv) read with section 2(24)(vd) of the Act. The claim of the assessee

raised in grounds of appeal from 1 to 3 is hereby allowed.

6.0 Connected with the above, another issue raised by the assessee, by way of additional ground of appeal no.4, is the exclusion of carbon credits from the book profits computed under section 115JB of the Act. It was submitted that the above additional ground is legal ground, all the facts are available on record. The learned authorised representative relied upon the several judicial precedents on this issue.

.....

6.4 It is a settled law that a capital receipt is not liable to tax under the Act unless it is specifically included in the definition of income u/s 2(24) of the Act and chargeable under any of the charging provisions of the Act. Once a particular receipt is treated as capital receipt, the same cannot be brought to tax in garb of 'minimum alternative tax' applicable on book profits computed u/s 115JB of the Act. The ratio of judgment delivered by the Hon'ble High Court of Calcutta in case of Ankit Metal & Power Ltd. [2019] 109 taxmann 93 (Cal) is worth mentioning. In Para no. 27, the Hon'ble Court held that:

> *"27. In this case since we have already held that in relevant assessment year 2010-11 the incentives 'Interest subsidy' and 'Power subsidy' is a 'capital receipt' and does not fall within the definition of 'Income' under Section 2(24) of Income Tax Act, 1961 and when a receipt is not on in the character of income it cannot form part of the book profit under Section 115JB of the Act, 1961. In the case of Appollo Tyres Ltd. (supra) the income in question was taxable but was exempt under a specific provision of the Act as such it was to be included as a part of the book profit. But where a receipt is not in the nature of income at all it cannot be included in book profit for the purpose of computation under Section 115JB of the Income Tax Act, 1961. For the aforesaid reason, we hold that the interest and power*

subsidy under the schemes in question would have to be excluded while computing book profit under Section 115 JB of the Income Tax Act, 1961."

6.5 Further ITAT, Lucknow Bench, in case of L.H. Sugar Factory Ltd. (ITA No. 717 & 418/LKW/2013 and others), held as under: -

"4. We have considered the rival submissions. We find that the issue in dispute as per Ground No. 1 of appeal is regarding nature of receipt on account of sale of carbon credit and in the case of CIT Vs. My Home Power Ltd. (Supra) also, the dispute before Hon'ble Andhra Pradesh High Court was this as to whether the amount received by the assessee on transfer of carbon credit is capital receipt or Revenue receipt. It was held by Hon'ble Andhra Pradesh High Court in that case that carbon credit is not an offshoot of business but an offshoot of environmental concerns and no assets is generated in the course of business but it is generated due to environmental concerns and therefore, it was held that the Tribunal has correctly held that this is a capital receipt and it cannot be business receipt of income and in this manner, Hon'ble Andhra Pradesh High Court has upheld the Tribunal's order in that case. The dispute in the present case is also regarding nature of receipt on account of transfer of carbon credit. Ld. DR of the Revenue could not point out any difference in facts in the present case and in the case of CIT Vs. My Home Power Ltd. (Supra) and therefore, respectfully following this judgment of Hon'ble Andhra Pradesh High Court, we decline to interfere in the order of Ld. CIT(A) on this issue. Accordingly, Ground No.1 of the Revenue is rejected."

6.6 We, therefore, respectfully following the aforesaid ratio of Hon'ble High Court hold that Carbon credits being the capital receipts cannot be brought to tax as book profits and are, thus, liable to be excluded from the computation of book profits u/s 115JB. The additional ground of appeal no.4 of the assessee is thus allowed."

36. Before us, Revenue has not pointed to any distinguishing feature in the facts of the case in the year under consideration and that of the earlier years. Revenue has also not placed any material on record to demonstrate that the order of Tribunal in assessee's own case for A.Y. 2006-07 has been stayed/set aside/overruled by higher judicial forum. In view of the aforesaid facts, we hold that the AO was not justified in considering the receipt from CERs to be revenue receipts. We, therefore, direct the AO to consider the receipts on transfer of CER to be capital receipt. Since the amount is held to be capital receipt, it cannot be considered for the purpose of computing book profit u/s 115JB of the Act. **Thus the grounds of assessee are allowed.**

37. **Ground Nos. 4 & 6(ii)** are interconnected and are with respect to claim of depreciation on goodwill.

38. CIT(A) while deciding the issue from para 6 of his order has noted that the claim of deprecation of goodwill was not made by assessee either in the return of income or during the assessment proceedings. CIT(A) remanded the matter to AO wherein AO has

opined that the claim of depreciation cannot be entertained as the claim was not made in the return of income or by filing revised return of income and for the aforesaid proposition, AO placed reliance on the decision of Hon'ble Apex Court in the case of Goetze India Ltd. vs. CIT (2006) 157 taxman.com 1.

39. Before CIT(A), assessee *inter alia* submitted that it had purchased business from SRF Polymers Ltd. on lump sum basis. The amount of goodwill appeared in the Balance Sheet as on 31st March 2009 which represents the total consideration paid for acquiring business which exceeds the value of assessment taken over by the assessee. Before CIT(A), assessee, relying on various decisions claimed that the deprecation on goodwill be allowed.

40. Learned CIT(A) did not agree with the contentions of the assessee. On the jurisdictional issue of admission of claim, he noted that CIT(A) was not empowered to admit the claim of deduction because assessee has not claimed the same in the return of income nor had the assessee claimed it by filing the revised return of income. On the merits of the claim of deduction, he noted that there was no mention of goodwill in the purchase agreement between the assessee and SRF Polymers Ltd. There was no valuation of assets prior to entering into an agreement for the transfer of assets, so as to suggest that the assessee has paid more consideration then the market value of the assets. He further noted that goodwill has been created by the assessee

subsequent to the purchase of assets and liabilities on lump sum sale. He, therefore, held that no goodwill was purchased by assessee from SRF Polymers Ltd. and it was mere a book entry created by the assessee subsequent to transfer of assets and therefore the depreciation on goodwill was not allowable. He thus upheld the order of AO. Aggrieved by the order of CIT(A), assessee is now before us.

41. Before us, Learned AR reiterated the submissions made before lower authorities and further submitted that assessee had acquired the Engineering Plastics Business and Industrial Yarn Business from SRF Polymers Limited on a "going concern basis" with effect from 1st Jan 2009 under a Business Transfer Agreement (BTA) at a consideration of Rs.15,031.26 lakhs. The consideration paid was allocated to the fixed assets on the basis of fair market value as determined by the registered valuer in his valuation report. The trademarks and technical knowhow acquired was valued on the basis of valuation report of the registered valuer. The net current assets were taken over at their respective book values less adjustments for allowances / write downs etc. He submitted that the excess of the consideration over the value of the total assets acquired amounting to Rs.368.94 lakhs was accounted as goodwill and reflected in the Profit and Loss account. To support his aforesaid contentions, he pointed to Note No.4 forming part of notes to accounts to the audited balance sheet and placed page 65 of the paper book. He thereafter

pointed to page 54 of the paper book being the schedule of fixed assets and pointed out that goodwill at Rs.368.94 lakhs was indeed reflected in the fixed asset schedule. He submitted that though it is a fact that the claim of depreciation was not made in the return of income or in the revised return of income but however during the course of assessment proceedings vide submission dated 12.03.2013, the assessee made the claim for depreciation. He submitted that the AO did not entertain the claim of the assessee during the assessment proceedings and therefore assessee has raised the claim before the CIT(A). He submitted that observation made by AO about the assets not being valued prior to entering into an agreement for the transfer of assets, the valuation being made after the purchase of business and goodwill being accounted for balancing figure is factually incorrect. He submitted that the business was purchased on lump sum basis and price was not paid for assets/items wise. He further submitted that it was also stated before lower authorities that it does not make any difference, whether the valuation was done prior to or after the purchase and in case of business purchase as a going concern, the basic principle to amount for goodwill is balance figure of price paid over and above the value of assets and liabilities purchased. Apart from the submissions made before lower authorities, he further submitted that issue is fully covered issue in favour of the assessee by decision of Hon'ble Tribunal own case for A.Ys. 2012-13 & 2013-14 wherein the Hon'ble Tribunal has upheld that

goodwill to be an intangible assets and eligible for depreciation and had granted depreciation. He, therefore, submitted that assessee is eligible for deprecation on goodwill and the same should be allowed to the assessee.

42. Learned DR on the other hand supported the order of lower authorities and further submitted that submissions of the Learned AR that the issue is covered by the decision of Tribunal in assessee's own case is not fully correct for reason that in the year under consideration, it was the first year of claim. He further pointed to para 4.2 of the remand report of the AO dated 04.08.2016 which are placed at pages 142 to 146 of the paper book and from para 4.2, he pointed out that AO has noted that the agreement for transfer of business dated 01.01.2009 in the given schedule of assets and liabilities goodwill is not mentioned which implies that there was neither any valuation of goodwill nor there was any sale of goodwill. He further submitted unless the valuation has been done of each and every asset of the company and, thereafter, goodwill, if any, is also valued and investment is earmarked as has been incurred towards of purchase of goodwill the question of apportioning of certain amount towards purchase of goodwill does not arise. He, therefore, submitted that this being the first year of the claim of depreciation of goodwill the matter may be restored back to the file of AO to examine the issue as to whether any goodwill was purchased by the assessee after

considering the purchase agreement and other relevant documents.

43. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the claim of depreciation on goodwill. On the issue of the claim being disallowed as it was made for the first time before CIT(A), we have herein above at para 34 & 35 have held that CIT(A) was not justified in not deciding the claim made by the assessee for the first time before him and CIT(A) should have decided the claim of the assessee. That apart, we find that the issue of goodwill also arose in the case of the assessee in A.Y. 2014-15 and 2012-13. We find that Co-ordinate Bench of Tribunal while deciding the issue for A.Y. 2014-15 (ITA No.6620/Del/2018 order dated 13.12.2021) by following the order of the Tribunal for A.Y. 2012-13 has decided the issue in favour of the assessee by observing as under:

> *"36. During the course of assessment proceedings, it was noticed that assessee had claimed depreciation on goodwill amounting to Rs 25,53,577/-. It was submitted that assessee had purchased three business namely Industrial Yarn Business at Manali (Tamilnadu), Engineering Plastic business at Manali (Tamilnadu) and Engineering Plastic business at Pantnagar (Uttrakhand) for a consideration of Rs.150,31,26,228/- as slump sale on 31st December 2008. It was submitted that the businesses was purchased from M/s SRF Polymers Limited on lump sum basis and the amount of goodwill appearing in the Balance Sheet as at 31.03.2009 represents the total consideration paid for acquiring business which exceeds the value of assets taken over by the assessee. Assessee also relied on various decisions in respect of its claim for depreciation. The submissions of the assessee were*

not found acceptable to AO. AO noted that the assessee had purchased three business for a consideration of Rs.150,31,26,228/- as slump sale without making its valuation. He noted that assessee, after the purchase had made valuation of the assets and liabilities which was determined at Rs.146,62,32,222/- and the balancing amount of Rs.3,68,94,006/- was treated as Goodwill. AO was of the view that the aforesaid amount of Goodwill was a balancing figure and was not Goodwill for which assessee had paid in excess of its valuation to its group companies. He was of the view that since the assets and liabilities has not been valued; no Goodwill can be purchased by the assessee. He accordingly disallowed the claim of depreciation on Goodwill amounting to Rs.25,53,577/-.

37. When the matter was carried before the DRP, DRP noted that in assessee's own case in earlier year, DRP vide order dated 13.07.2018 had upheld the action of AO with respect of disallowance. DRP therefore, following the order of its predecessor, upheld the action of AO. Pursuant to the action of DRP, AO in the final assessment order disallowed the claim of depreciation. Aggrieved by the order of AO, assessee is now before us.

38. Before us, Learned AR reiterated the submissions made before the lower authorities and further submitted that the issue of depreciation on goodwill is covered in favour of the assessee by the decision of Hon'ble Apex Court in the case of ***CIT vs. Smifs Securities Ltd. [2012] 24 taxmann.com 222 (SC)*** *wherein the Hon'ble Apex Court has held that goodwill amounts to intangible assets which are eligible for depreciation. He further submitted that identical issue arose in assessee's own case in A.Y. 2012-13 wherein the Hon'ble Tribunal has held the goodwill to be intangible assets and eligible for depreciation. He pointed to the copy of the relevant portion of the order which is at Page 117 of the Paper Book. He submitted that the Hon'ble Tribunal had allowed the claim of depreciation on goodwill but since it was an additional claim made before the Tribunal, the matter was set aside to AO for examination. In the year under consideration, he submitted that it is not a case wherein an additional claim has been made and therefore following the decision of Hon'ble Apex Court in the case of Smifs Securities Ltd. (supra), the claim of the assessee be allowed.*

39. Learned DR on the other hand took us to the findings of the AO and DRP and pointing to their findings submitted that the AO was fully justified in denying the claim of depreciation.

40. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the claim of depreciation on goodwill. We find that issue of depreciation on goodwill also arose in assessee's own case in A.Y. 2012-13 and the Co-ordinate Bench of Tribunal in ITA No.5784/Del/2016 order dated 24.04.2020 by relying on the decision of Hon'ble Apex Court in the case of Smifs Securities Ltd. (supra), held that assessee is eligible to claim depreciation on goodwill. However in that order since the claim of depreciation was made as an additional claim before the Tribunal, the matter was remitted to the AO for examination. In the year under consideration, we are of the view that since the claim was already made in the return of income and was denied by AO and DRP, we are of the view that ratio of the decision rendered by Hon'ble Apex Court in the case of Smifs Securities is squarely applicable to the facts of the case. We are therefore direct the AO to grant the depreciation of such goodwill. ***Thus the ground of assessee is allowed.****"*

44. Before us, Learned DR has inter alia contended that since the issue of goodwill is arising in the year under consideration for the first time, the issue may be remitted back to AO for verification and adjudication. We do not find merit in the aforesaid contention of the Learned DR in view of the fact that the issue of depreciation also arose before the tribunal in assessee's own case in A.Y. 2012-13 (ITA No.5784/Del/2016 order dated 24.02.2020) wherein the coordinate Bench of Tribunal by relying on the decision of Hon'ble Apex Court in the case of SMIFS Securities (2012) 24 taxmann.com 222 (SC) had held that assessee is eligible for depreciation on goodwill but however since the issue was an additional claim, the matter was

restored to AO. We further find that the Co-ordinate Bench of tribunal while deciding the appeal of the assessee for A.Y. 2014-15 (ITA No.6620/Del/2018 order dated 13.12.2021) had held the assessee to be eligible for depreciation. Before us, no material has been placed by the Revenue to point out any judicial precedence to support his contention that when depreciation arising out of the same transaction has been allowed in other years, whether it can be denied in other years. Before us, Revenue has also not pointed to any distinguishing feature in the facts of the case in the year under consideration and that of the earlier years. Revenue has also not placed any material on record to demonstrate that the order of Tribunal in assessee's own case for A.Y. 2012-13 has been stayed/set aside/overruled by higher judicial forum. In view of the aforesaid facts, we are of the view that Assessee is eligible to claim depreciation on goodwill. We accordingly direct the AO to allow the claim of depreciation. **Thus the ground of assessee is allowed.**

45. **Ground Nos. 5 & 7** are interconnected and considered together which is with respect to the disallowance of Rs.1,04,00,000/- of donation paid to Schools of SRF Vidyalay and SRF Foundation.

46. Before us, Learned AR submitted that assessee had paid Rs.4,00,000/- to SRF Vidyalay Chennai School and Rs.1 crore was paid to SRF Foundation which runs schools in Delhi. He

submitted that in these schools, preference is given to the children of the employees of the assessee company. He submitted that the donation to schools was to get good talent as employee and long association of the employees and therefore such donation was in the nature of business expenditure. He submitted that in the computation of income filed by assessee, which is at page 88 of the paper book, assessee had *suo moto* disallowed the same (this amount is reflected as part of donation and charity amounting to Rs.14,722,683/-). He submitted that during the course of assessment proceedings, assessee relying on the decision rendered by Hon'ble Bombay High Court in the case of Mahindra & Mahindra Ltd. vs. CIT (2003) 261 ITR 501 (Bom) submitted that the expenses of Rs.1,04,00,000/- be allowed as expense incurred for business purposes. Learned AR submitted that AO did not entertain the claim in the assessment proceedings, therefore, assessee raised the claim before CIT(A). He submitted that Learned CIT(A) at para 7 of the order by placing reliance on the decision of Goetze India Ltd. (supra) held that since assessee has not made the claim in the return of income nor in the revised return of income, the claim cannot be entertained. He, accordingly, rejected the claim on jurisdictional ground. Aggrieved by the order of CIT(A), assessee is now before us.

47. Before us, Learned AR reiterated the submissions made before lower authorities and further submitted that CIT(A) has

factually erred in relying on the decision in the case of Goetze India Ltd. (supra) and not entertaining the claim of the assessee. He submitted that Hon'ble Bombay High Court in the case of CIT vs. Pruthvi Brokers & Shareholders (P) Ltd. (2012) 349 ITR 336 (Bom) has held that CIT(A) as well as the Tribunal have the jurisdiction to consider the additional claim and the additional claim need not be those which became available on account of change of circumstances of law but which were even available when the return of income was filed. He further submitted that identical issue arose before the Hon'ble Tribunal in the case of the assessee in A.Y. 2010-11 and the Hon'ble Tribunal vide order dated 24.02.2020 (ITA No. 356/Del/2015) has decided the issue in assessee's favour. To support of his aforesaid contentions, he pointed to the copy of the order of the Tribunal placed at page 372 onwards of the paper book and pointed to the relevant observations at page 394 of the paper book. He therefore submitted that since the facts of the case in the year under consideration and that of A.Y. 2010-11 are identical, the claim of the assessee be allowed.

48. Learned DR on the other hand supported the order of lower authorities.

49. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the disallowance of Rs.1,04,00,000/- of donation

paid to Schools of SRF Vidyalay and SRF Foundation. It is an undisputed fact that the claim for deduction was neither made by the assessee in the original return of income nor had the assessee filed revised return of income to claim such deduction. Assessee had made the claim before CIT(A), who by following the decision of Hon'ble Apex Court in the case of Goetze India (supra) denied the claim of the assessee and has not decided on merits.

50. We have hereinabove at para 34-35 while deciding on the issue of claim being disallowed as it was made for the first time before CIT(A), by relying on the decision of Hon'ble Gujarat High Court in the case of Mitesh Impex (Supra) held that CIT(A) was not justified in not deciding the claim made by the assessee before him for the first time. We for the same reasons hold that CIT(A) has erred in not deciding the claim made before him for the first time and should have decided the claim of the assessee. That apart, we find that an identical issue arose before the coordinate Bench of Tribunal in assessee's own case in A.Y. 2010-11 wherein the Co-ordinate Bench of Tribunal has decided the issue by observing as under :

> *"26.Next issue is the disallowance made by AO of an amount of Rs. 4,28,000/- paid by the assessee to SRF Vidyalaya School Chennai which has been claimed as business expenditure u/s 37(1) of the Income Tax Act, 1961 on the ground that school, which runs within the compound of textile business of the assessee, gives preference to children of employees of the company. The ld. AR submitted that assessee has taken the initiative to tap good talent across the industry and has taken a step towards the general welfare of the employees of the company.*

27. The assessee placed reliance on the judgment of the Hon'ble Mumbai High Court in the case of ***Mahindra & Mahindra Ltd. v. CIT*** *[TS-25-HC-2003 (Bom)] wherein it was held that such expense, being in the nature of staff welfare expenses should be treated as business expenditure. The relevant extract of judgment is reproduced hereunder:*

> *"The Tribunal has given a finding of fact which shows that M/s. Mahindra & Mahindra had paid Rs. 92,500 to an Education Society which runs the School in which children of the employees of the Company study. We do not wish to interfere with this finding of fact. The Tribunal has held that the amount should be allowed as business expenditure because it was incurred predominantly for staff welfare. In the circumstances, we answer the question in the affirmative i.e. in favour of the assessee and against the Department."*

28. We have heard the rival contentions, perused the relevant findings and as well as material referred to before us at the time of hearing. The payment has been made by the assessee to a school which runs within its compound. The school gives preference to the children of assessee's employees which provide an incentive to its employees. The ratio of the Hon'ble Bombay High in case of ***Mahindra & Mahindra Ltd. (Supra),*** *is clearly applicable on facts of the assessee's case, therefore, respectfully following the same, we hereby direct to delete the aforesaid disallowance of Rs.4,28,000/- being the payment made to SRF Vidyalaya School.*

.....

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

Claim 3-Donation to SRF Foundation:

62. During the year under consideration the assessee paid Rs. 50,000/- to SRF Foundation which runs school in Delhi as well as in Gurgaon, where preferences are given to children of employees of the company. The assessee however inadvertently disallowed Rs. 50,000/- paid to SRF Foundation while computing the taxable income, which was otherwise allowable u/s 37 of the Act.

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

51. Before us, Revenue has not pointed to any distinguishing feature in the facts of the case in the year under consideration and that of the earlier years. Revenue has also not placed any material on record to demonstrate that the order of Tribunal in assessee's own case for A.Y. 2010-11 has been stayed/set aside/overruled by higher judicial forum. In view of the fact that there is no finding by the lower authorities on the allowability of the expenses, we, following the order of the coordinate bench of Tribunal in assessee's own case and for similar reasons restore the issue back to the file of the AO and direct him to decide the claim of the assessee in accordance with law. The AO shall be free to call for such information and explanations as he deems fit to adjudicate the claim of the assessee. Assessee shall also be free to file such documents, explanations, submissions as it deems fit in respect of this claim. Needless to state that the AO shall grant

adequate opportunity of hearing to the assessee. **Thus the ground of assessee is allowed for statistical purposes.**

52. **Ground No.8 including the sub grounds** are with respect to non adjudication of the claim by CIT(A) of additional depreciation, seeking of indexation benefit for long term capital gains and treating the TUF subsidy as revenue receipts.

53. Before CIT(A), assessee had made claim for additional depreciation, seeking indexation benefit for Long Term Capital Gains and considering TUF subsidy as capital receipt. CIT(A) noted that all the aforesaid claims were neither made in the return of income nor during the course of the assessment proceedings. He was therefore of the view that the claims were not entertainable before him in view of the decision rendered by Hon'ble Apex Court in the case of Goetze India Ltd. (supra). He, accordingly denied the claims made by the assessee. Aggrieved by the order of CIT(A), assessee is now before Tribunal.

54. Before us, Learned AR submitted that CIT(A) has factually erred in relying on the decision in the case of Goetze India Ltd. (supra) and not entertaining the claim of the assessee. He submitted that Hon'ble Bombay High Court in the case of CIT vs. Pruthvi Brokers & Shareholders (P.) Ltd. (2012) 349 ITR 336 (Bom) has held that CIT(A) as well as the Tribunal have the jurisdiction to consider the additional claim and the additional

claim need not be those which became available on account of change of circumstances of law but which were even available when the return of income was filed.

55. With respect to the additional claim of depreciation, Learned AR submitted that during the year under consideration assessee had not claimed 50% additional depreciation of 11,05,29,041/- u/s 32(1)(iia) inadvertently on the assets put to use for less than 180 days in the immediately preceding assessment year while filing the return of income. The claim for additional depreciation was made before CIT(A) during the appellate proceedings. Learned AR submitted that CIT(A) did not entertain the additional claim for the reason that the claim was neither claimed in the return of income nor during the assessment proceedings. CIT(A) by relying on the decision of Hon'ble Apex Court in the case of Goetze India (supra) held that the claim was not entertainable before him.

56. On the merits, with respect to the claim of additional depreciation, Learned AR submitted that issue is fully covered in assessee's favour by decision of Hon'ble Tribunal in assessee's own case for A.Ys. 2014-15, 2010-11 & 2012-13. He pointed to the order of Tribunal in assessee's own case for A.Y. 2014-15 and pointed to the relevant paras which are placed from pages 486 to 488 of the order. He submitted that there are no change in the facts of the current year and that of A.Y. 2014-15 and therefore

following the decision of the Tribunal in that case the matter be decided.

57. With respect to denial of indexation benefit, it is submitted that Assessee had offered for taxation Rs.2,00,50,000/- under the head Long Term Capital Gain on sale of Mutual Funds. The aforesaid Mutual Fund were purchased on 27.06.2007 costing Rs.20,00,00,000/- and sold on 02.07.2008 for Rs.22,00,50,000/- consequently Long Term Capital Gain was worked out at Rs.200,50,000/-. During the course of appellate proceedings before CIT(A), it was submitted that the though the Long Term Capital Gain was eligible for indexation benefit u/s 48 of the Act but in the return of income, assessee had offered long term capital gains without taking the indexation benefit. It was submitted that if the indexation benefit u/s 48 is considered then the Long Term Capital Gain would work out to Rs.87,97,731/- instead of Rs.200,50,000/-. The CIT(A) was therefore requested to grant the benefit of indexation. CIT(A) by following the decision rendered by Hon'ble Apex Court in the case of Goetze India (supra) did not entertain the additional claim by stating that the claim was neither made in the return of income nor during assessment proceedings. It is the submission of the Learned AR that the CIT(A) neither considered the additional claim nor remanded the matter back to AO for fresh adjudication though the complete details were filed before CIT(A). With respect to the denial of benefit of indexation while calculation the Long Term

Capital Gain on sale of Mutual Fund units, he fairly submitted that the issue may be remitted to AO for his decision.

58. With respect to the treatment of Technology up-gradation fund (TUF) subsidy it is submitted Assessee had obtained loan of Rs.4000.00 lakhs from State Bank of India and Rs.3500.00 lakhs from State Bank of Mysore under the TUF scheme. As per the subsidy scheme, assessee was eligible for the interest subsidy @5%. It was submitted that while computing the taxable income assessee netted the interest subsidy received (Rs.2,64,67,432/-) with the interest expenditure (Rs.42,00,28,785/-)and the net interest expenditure of Rs.39,35,61,353/- was claimed as expenditure. It was submitted that since interest subsidy under TUF Scheme was a capital receipt and not taxable and therefore the benefit be allowed to the receipt of interest subsidy. He submitted that before CIT(A), assessee had raised additional ground with respect to treating the TUF subsidy of Rs.2,64,67,432/- as capital receipt for which the necessary details like loan agreements, working of interest and judicial precedents were submitted. He pointed to the aforesaid contentions made before CIT(A) in the letter addressed to CIT(A), the relevant pages being at from pages 135 to 140 of the paper book. He submitted that CIT(A) did not entertain the additional claim and rejected the claim of the assessee. The reason for rejecting the claim of the assessee was that the claim was neither made in the return of income nor during the assessment

proceedings CIT(A) followed the decision of Hon'ble Apex Court in the case of Goetze India Ltd. (supra).

59. On the merits of the claim with respect to the interest subsidy under Technology up-gradation fund (TUF), Learned AR submitted that the identical issue arose before the Tribunal in the case of the assessee in A.Y. 2012-13. He submitted that the issue was decided in Assessee's favour by the Tribunal. He pointed to the decision in assessee's own case for A.Y. 2012-13 order dated 24.02.2020 placed in the paper book. He thereafter submitted that interest subsidy received under TUF scheme was claimed as capital receipt i.e. A.Ys. 2013-14, 2014-15 & 2015-16 and the same has been accepted by Revenue. He placed on record the copy of the computation of income in assessment order for those years. He, therefore, submitted that the issue may be remitted back to the lower authorities for deciding the issue afresh.

60. Learned DR on the other hand did not controvert the factual submissions made by Learned AR but however supported the order of lower authorities.

61. We have heard the rival submissions and perused the material available on record. The issue raised in the present grounds is about CIT(A) not entertaining and adjudicating the claims made before him for the first time. On the issue of the claim being disallowed as it was made for the first time before

CIT(A), we have herein above at para 34 & 35 have held that CIT(A) was not justified in not deciding the claim made by the assessee for the first time before him and CIT(A) should have decided the claim of the assessee. We for the same reasons hold that CIT(A) has erred in not deciding the claim made before him for the first time and should have decided the claim of the assessee.

62. On the claim of additional depreciation, we find that identical issue of additional depreciation arose before the coordinate Bench of Tribunal in assessee's own case in A.Y. 2014-15 (ITA No.6620/Del/2018 order dated 13.12.2021). The claim of the assessee was restored back to the file of AO by observing as under:

> *"52.* ***Ground No.22.2*** *is with respect to claim of additional depreciation u/s 32(1)(iia) of the Act.*
>
> *53. Before us, Learned AR submitted that assessee had not claimed 50% additional depreciation amounting to Rs.58,14,99,012/- u/s 32(1)(iia) of the Act inadvertently on the assets put to use for less than 180 days in the immediately preceding assessment year while filing the return of income but same was claimed as an additional claim during the course of assessment proceedings. He submitted that additional claim of depreciation was not discussed by the AO in the order. When the matter was carried before the DRP, DRP relying on the decision rendered in the case of* ***Goetze (India) Ltd. (supra)*** *upheld the order of AO. Aggrieved by the order of DRP, assessee is now before us.*
>
> *54. Before us, Learned AR reiterated the submissions made before the lower authorities and further submitted that the issue is covered in favour of the assessee by the decision of Co-ordinate*

Bench of Tribunal in assessee's own case for A.Y. 2010-11 & 2012-13. He pointed to the relevant orders in the paper book. Learned AR therefore submitted that following the decision of Co-ordinate Bench of Tribunal in assessee's own case in earlier years the matter may be remitted back to the file of AO for verification and thereafter allowing the claim on merits.

55. Learned DR on the other hand did not seriously controvert the submissions made by Learned AR and also did not object to the prayer for remitting the issue back to AO for verification.

56. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the claim of additional depreciation u/s 32(1)(iia) of the Act. It is the case of the assessee that it did not claim the additional depreciation in the return of income but was claimed before the AO but however AO did not discuss the issue and when the matter was carried before the DRP, DRP also did not allow the claim of additional depreciation. We find that identical issue arose in assessee's own case in A.Y. 2010-11. The Co-ordinate Bench of Tribunal restored the issue back to the file of AO for considering the claim of assessee by observing as under.

> *"44. The facts as submitted are that assessee claimed additional depreciation @10% (half of 20%) amounting to Rs.18,67,13,454/- on assets being the plant and machinery put to use for less than 180 days during the relevant assessment year 2010-11. The assessee claimed that in respect of additional 180 days or more is not applicable. Therefore in view of assessee, it is eligible to claim to full additional depreciation @20% on value of assets put to use during the year irrespective of timing of such put to use during the balance 10% left unclaimed – Rs.18,67,13,454/-, the assessee filed an additional claim during assessment proceedings for A.Y. 2010-11 however the same was neither entertained by AO nor by DRP.*
>
> *45. The Ld. Counsel has placed reliance on following judicial pronouncements:*
>
> - *Apollo Tyres Ltd. vs. ACIT (2014) 64 SOT 203*
> - *CIT vs. Cosmo Films Ltd. (2012) (ITA 1404/2008)*

- *CIT vs. SIL Investment Ltd. (2012) (ITA No. 24319 (Del) 2010)*

- *TCPL Packaging Ltd. vs. Deputy Commissioner of Income Tax (2019-TIOL-907-ITAT-MUM)*

- *CIT vs. Kalpataru Power Transmission Ltd. [2019-TIOL-1424-ITAT-AHD]*

The coordinate Bench in case of CIT vs. Cosmo Films Ltd. (supra) while holding that remaining additional depreciation shall be allowed in the subsequent year observed as under :

> *"This additional benefit in the form of additional allowance under section 32(1)(iia) is onetime benefit to encourage the industrialization and in view of the decision of Supreme Court in the case of Bajaj Tempo Ltd. vs. CIT [1992] 196 ITR 188/62 Taxman 480, the provision related to it have to be constructed reasonably, liberally and purposively to make the provision meaningful while granting the additional allowance."*

Similarly in case of TCPL Packaging Ltd. (supra), the Mumbai Bench has held that remaining additional depreciation claimed can be allowed in immediately succeeding year which could not be allowed in the year of acquisition on the ground that new plant and machinery has been put to use for less than 180 days.

46. The Finance Act, 2015, has amended the law by inserting third proviso to section 32(1)(iia) – applicable w.e.f. 1st April 2016 to allow the claim of additional depreciation for assets put to use for less than 180 days in subsequent Assessment Year.

47. The AO is thus, directed to consider the claim of the assessee and give his findings thereon. For this purpose this issue is set aside to the file of AO. The AO shall be free to call for such information and explanation as he deems fit in order to adjudicate this claim of the assessee after granting reasonable opportunity to the

assessee of being heard. The assessee will be at liberty to file such documents, explanations, submissions as it deems fit in respect of this claim."

57. We further find that following the decision of the tribunal for A.Y. 2010-11, the claim was allowed in A.Y. 2012-13. Before us, no distinguishing features in the facts of the case in the year under consideration and that of the earlier years has been pointed out by Revenue. Revenue has also not placed any material on record to demonstrate that the ITAT orders in assessee's own case for earlier years has been stayed/ set aside/ overruled by higher judicial forum. We therefore, following the reasoning of the Co-ordinate Bench for A.Y. 2010-11 and for similar reasons set aside the issue back to the file of AO to consider the same on merits after considering the submissions made by assessee and in accordance with law. The AO shall be free to call for such information and explanations as he deems fit to adjudicate the claim of the assessee. Needless to state that AO shall grant adequate opportunity of hearing to the assessee and the assessee shall also be at liberty of file such documents, explanations and submissions as deemed fit in respect of its claim. ***Thus the ground of assessee is allowed for statistical purposes.***

63. Since the facts of the case in the year under consideration are identical to that of A.Y. 2014-15, we for the reasons given while deciding the issue A.Y. 2014-15 and for similar reasons, restore the issue back to the file of AO and direct him to decide the issue afresh in accordance with law. The AO shall be free to call for such information and explanations as he deems fit to adjudicate the claim of the assessee. Assessee shall also be free to file such documents, explanations, submissions as it deems fit in respect of this claim. Needless to state that the AO shall grant adequate opportunity of hearing to the assessee.

64. With respect to the issue of interest subsidy on TUF scheme, we find that identical issue arose in assessee's own case in A.Y. 2012-13 (ITA No.5784/Del/2016 order dated 24.02.2020) where the issue was restored back to the AO by observing as under:

> ***"Claim 2.Interest subsidy under Technology Upgradation Fund (TUF) Scheme:***
>
> *23. During the year, Assessee had obtained loan of Rs. 6,250 Lacs from SBI and Rs. 3,500 Lacs from State Bank of Mysore under TUF Scheme issued by the ministry of textile, Government of India. Whether the Loan was utilized as per the scheme is not under question. Under the TUF scheme, the assessee was eligible for 5% Interest subsidy calculated on the loan outstanding which amounted to Rs. 3,08,96,338/-. The assessee made such additional claim vide letter dated 16.02.2016 before the AO. The AO did not entertain the additional claim of the assessee. The DRP did not admit the additional claim of the assessee relying on the judgment in* ***Goetze (India) Limited vs CIT*** *284 ITR 323.*
>
> *24. Going into the details, the Ld. Counsel argued that the Objective of the subsidy/incentive under TUF scheme was expansion of capacities, modernisation and up-gradation of facilities and hence nature of subsidy was capital in nature not revenue in nature. The assessee also placed reliance upon the following judgments wherein such subsidy was held to be as a capital receipt:*
>
> - *CIT –vs.- Sh. Sham Lal Bansal (Hon'ble Punjab & Haryana High Court, ITA No. 472 of 2010)*
> - *PCIT v. Ankit Metal & Power Ltd. [416 ITR 591 2019] Cal High Court*
> - *CIT vs.- Ponni Sugars & Chemicals Ltd. reported in (2008) 306 ITR 392 (SC)*
> - *CIT vs.- Rasoi Ltd. [(2011) 335 ITR 438 (Cal.)]*
> - *CIT v. Chaphalkar Brothers [2017] 88 taxmann.com 178 (SC)/ (2018) 400 ITR 279 (SC)*
> - *DCIT vs.- Reliance Industries (2004) 88 ITD 273 (Mum.)(SB);*
> - *CIT vs. Birla VXL Lt d. (2013) 90 DTR 376 (Guj.)(HC);*
> - *Hydro Carbons & Chemicals vs.- ACIT (ITA No. 1982-*

86/Kol/09);

- *Indo Rama Synthetics (I) Ltd. vs. ACIT (2012) 33 CCH 526 (Del.)(ITAT).*
- *CIT v Gloster Jute mills Ltd ITA no. 766/Kol/2010*
- *Shree Balaji Alloys v. CIT [2011] 333 ITR 335/198 Taxman 122/9 taxmann.com 255 (J&K)*

25. The ld. AR has further submitted the department has in subsequent years accepted the assessee's claim of interest subsidy on TUF scheme as capital in nature as no addition has been made in subsequent years.

26. Ld DR relied upon the orders of authorities below.

27. We have heard the rival contentions, perused the relevant findings and as well as material referred to before us at the time of hearing. It is a settled position that purpose of subsidy or incentive and not the nomenclature of such incentive have to be seen for the purpose of deciding its nature as capital or revenue. In the judgment of ***Ponni Sugars & Chemicals Ltd.*** *(Supra), the Hon'ble Apex Court have held that character of the receipt of a subsidy in the hands of recipient assessee has to be decided with respect to the purpose for which subsidy is granted. If the subsidy is received to enable the assessee to run its business more profitably then such subsidy is revenue in nature. While, if the subsidy has been received by the assessee to set up a new unit or for expansion of existing unit then such subsidy would be capital in nature. We find form the objective of TUF scheme that interest subsidy under such scheme was granted for expansion of capacities, modernisation and up gradation of facilities. In case of CIT v. Sham Lal Bansal (Supra), the Hon'ble Punjab & Haryana High Court on similar facts held subsidy received under TUF Scheme as capital receipt. Since the issue under hand is related to additional claim which was not entertained by the lower authorities, we therefore allow the assessee's ground for entertainment of above additional claim and remit the issue back to the file of AO to decide the same in accordance with law after granting a reasonable opportunity of being heard to the assessee. The assessee*

shall be free to file such documents, explanations, submissions as it deems fit in respect of this claim."

65. Since the facts of the case in the year under consideration are identical to that of A.Y. 2012-13, we for the reasons given while deciding the issue A.Y. 2012-13 and for similar reasons, restore the issue back to the file of AO and direct him to decide the issue afresh in accordance with law. The AO shall be free to call for such information and explanations as he deems fit to adjudicate the claim of the assessee. Assessee shall also be free to file such documents, explanations, submissions as it deems fit in respect of this claim. Needless to state that the AO shall grant adequate opportunity of hearing to the assessee.

66. With respect to the claim of indexation benefit for the calculation of Long Term Capital Gain, we find that though the issue was raised by the Assessee before CIT(A) but however CIT(A) did not admit the claim for the reasons noted in the order and therefore there is no finding of the lower authorities on the issue. Since there is no finding by the lower authorities on the issue, we restore the issue back to the file of AO and direct him to decide the claim of the assessee in accordance with law. The AO shall be free to call for such information and explanations as he deems fit to adjudicate the claim of the assessee. Assessee shall also be free to file such documents, explanations, submissions as it deems fit in respect of this claim. Needless to state that the AO shall grant adequate opportunity of hearing to the assessee.

67. In the result, this ground of the assessee is allowed for statistical purposes.

68. **Additional Ground No.9** : Before us, Learned AR submitted that the assessee does not wish to press the additional ground. In view of the submissions of Learned AR the **ground of the assessee is dismissed.**

69. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 23.02.2023

Sd/-	**Sd/-**
(YOGESH KUMAR US)	**(ANIL CHATURVEDI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Date:- 23.02.2023

PY*

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

ASSISTANT REGISTRAR
ITAT NEW DELHI