IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "J", MUMBAI

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
MS. PADMAVATHY S, ACCOUNTANT MEMBER

ITA Nos. 467 & 480/M/2020
Assessment Years: 2011-12 & 2012-13

M/s. Wartsila India Pvt. Ltd., 10th Floor, We Work, L&T Seawoods Tower 1, B Wing, Sector 40, 46, Konkan Rail Vihar Rd., Seawoods, Navi Mumbai – 400 706 **PAN: AAACW0345D**	Vs.	Deputy Commissioner of Income Tax-15(3)(1), Room No.451, 4th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Present for:
Assessee by : Shri J.D. Mistri, A.R.
Revenue by : Shri Manoj Kumar, CIT D.R.

Date of Hearing : 22 . 06 . 2023
Date of Pronouncement : 28 . 06 . 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

Since common question of law and facts have been raised in both the inter-connected appeals, the same are being disposed of by way of composite order to avoid repetition of discussion.

2. Appellant, M/s. Wartsila India Private Limited (hereinafter referred to as 'the assessee') by filing the present appeals sought to set aside the impugned order even dated 19.09.2019 passed by the

Commissioner of Income Tax (Appeals) [CIT (A)] qua the assessment years 2011-12 & 2012-13 on the grounds inter alia that:-

"Grounds of A.Y. 2011-12

"A. ADDITION IN RESPECT OF DELAYED RECOVERY OF EXPENSES MADE BY THE TRANSFER PRICING OFFICER UNDER SECTION 92CA(3) OF THE ACT RS.94,12,025/- (PARA 13 OF THE ORDER)

1. On the facts and in the circumstances of the case and in law, the Honorable Commissioner of Income Tax (Appeals) 58 (hereinafter referred to as the "the CIT (A)") erred in confirming the action of learned Deputy Commissioner of Income Tax-Range 15(3X1) (hereinafter referred to as the "the learned DCIT") and the learned Transfer Pricing Officer (hereinafter referred to as TPO) in adding an amount of Rs.94,12,025/- to the total income being adjustment u/s.92CA(3) of the Income Tax Act, 1961 (the Act) in respect of delayed recovery of expenses beyond thirty days from Associated Enterprises (AE's'), without considering the facts of the case and the submission of Appellant in this respect.

2. On the facts and in the circumstances of the case and in law, the Honourable CIT(A) erred in confirming the action of the learned TPO/ DCIT in re-characterizing a legitimate business transaction as deemed loan in the absence of any statutory provisions.

3. On the facts and in the circumstances of the case and in law, the Honourable CIT(A), the learned TPO/ DCIT failed to take cognizance of the fact that the Appellant had not recovered any interest from the third parties on account of the delayed payment and therefore not even from AE's.

4. On the facts and in the circumstances of the case and in law, the Honourable CIT(A), the learned TPO/DCIT failed to take cognizance of the fact that the Appellant was a debt free company, it had not paid any interest to its creditors or suppliers on delayed payments, and hence no separate adjustment for interest on recovery of expenses is warranted in the hands of the Appellant.

5. Without prejudice to the above, on the facts and in the circumstances of the case and in law, the Honourable CIT(A) erred in confirming the action of the learned TPO/ DCIT in adopting adhoc and arbitrary approach to determine the mark up to be imputed on the recovery of expenses without undertaking any benchmarking analysis.

6. Without prejudice to the above, on the facts and in the circumstances of the case and in law, the Honourable CIT(A) erred in concluding that the learned TPO has used CUP method in determining Arm's length Price in respect of recovery of expenses from AE's though no specific method is stated in the Order u/s.92CA(3) of the Act.

7. Without prejudice to the above, on the facts and in the circumstances of the case and in law, the Honourable CIT(A) erred in confirming the action of the learned TPO/ DCIT in not following the methods prescribed u/s.92C(1) of the Act while making addition in respect of Interest on delayed recovery of expenses from AE's beyond thirty days.

8. Without prejudice to the above, on the facts and in the circumstances of the case and in law, the Honourable CIT(A) erred in directing the learned DCIT to calculate Interest on delayed recovery of expenses from AE's beyond thirty days at LIBOR-300% following the decision of ITAT Mumbai Bench in case of DCIT v. Tech Mahindra Limited (ITA No. 1176/Mum/2010); though in the aforesaid judgment Interest is held to be computed at LIBOR+0.8

9. In view of the above, the learned DCIT be directed to delete the adjustment made u/s.92CA(3) of the Act in respect of delayed recovery of expenses from AE's beyond 30 days.

B DISALLOWANCE UNDER SECTION 14A OF THE INCOME TAX ACT, 1961 Rs.73,27,236/- (PARA 17 OF THE ORDER)

10. On the facts and in the circumstances of the case and in law, the Honorable CIT (A) erred in confirming the action of the learned DCIT; in invoking the provisions of Rule 8D of the Income Tax Rules, 1962 for computing the disallowance under section 14A of the Income Tax Act, 1961 (the Act) amounting to Rs 73,27,236/-, without considering the facts, circumstances and the submissions of the Appellant.

11. In view of the above, the learned DCIT be directed to restrict the disallowance under section 14A of the Act to Rs.5,63,250/- as worked out by Appellant.

C. GENERAL

1. The Honorable CIT (A)'s Order being contrary to the law, evidence and facts of the case, should be set aside, quashed or modified on the grounds deduced above.

2. The Appellant craves leave to add, modify or delete any ground at or before the hearings."

"Grounds of A.Y. 2012-13

A. ADDITION IN RESPECT OF DELAYED RECOVERY OF EXPENSES MADE BY THE TRANSFER PRICING OFFICER UNDER SECTION 92CA(3) OF THE ACT RS.62,33,133/- (PARA 13 OF THE ORDER)

1. On the facts and in the circumstances of the case and in law, the Honorable Commissioner of Income Tax (Appeals) 58 (hereinafter referred to as the "the CIT (A)") erred in confirming the action of learned Deputy Commissioner of Income Tax - Range 15(3)(1) (hereinafter referred to as the "the learned DCIT") and the learned Transfer Pricing Officer (hereinafter referred to as "TPO") adding an amount of Rs.62,33,133/- to the total income being adjustment w/s.92CA(3) of the Income Tax Act, 1961 (the Act') in respect of delayed recovery of expenses beyond thirty days from Associated Enterprises ('AE's'), without considering the facts of the case and the submission of Appellant in this respect.

2. On the facts and in the circumstances of the case and in law, the Honourable CIT(A) erred in confirming the action of the learned TPO/ DCIT in re-characterizing a legitimate business transaction as deemed loan in the absence of any statutory provisions.

3. On the facts and in the circumstances of the case and in law, the Honourable CIT(A), the learned TPO/ DCIT failed to take cognizance of the fact that the Appellant had not recovered any interest from the third parties on account of the delayed payment and therefore not even from AE's.

4. On the facts and in the circumstances of the case and in law, the Honourable CIT(A), the learned TPO/DCIT failed to take cognizance of the fact that the Appellant was a debt free company; it had not paid any interest to its creditors or suppliers on delayed payments, and hence no separate adjustment for interest on recovery of expenses is warranted in the hands of the Appellant.

5. Without prejudice to the above, on the facts and in the circumstances of the case and in law, the Honourable CIT(A) erred in confirming the action of the learned TPO/ DCIT in adopting adhoc and arbitrary approach to determine the mark up to be imputed on the recovery of expenses without undertaking any benchmarking analysis.

6. Without prejudice to the above, on the facts and in the circumstances of the case and in law, the Honourable CIT(A) erred in concluding that the learned TPO has used CUP method in determining Arm's length Price in respect of recovery of expenses from AE's though no specific method is stated in the Order u/s.92CA(3) of the Act.

7. Without prejudice to the above, on the facts and in the circumstances of the case and in law, the Honourable CIT(A) erred in directing the learned DCIT to calculate Interest on delayed recovery of expenses from AE's beyond thirty days at LIBOR+300% following the decision of ITAT Mumbai Bench in case of DCIT v. Tech Mahindra Limited (ITA No. 1176/Mum/2010); though in the aforesaid judgment Interest is held to be computed at LIBOR+0.8%.

8. In view of the above, the learned DCIT be directed to delete the adjustment made u/s.92CA(3) of the Act in respect of delayed recovery of expenses from AE's beyond 30 days.

B. DISALLOWANCE UNDER SECTION 14A OF THE INCOME TAX ACT, 1961 R55,61,916- (PARA 17 OF THE ORDER)

9. On the facts and in the circumstances of the case and in law, the Honorable CTT (A) erred in confirming the action of the learned DCIT; in invoking the provisions of Rule 8D of the Income Tax Rules, 1962 for computing the disallowance under section 14A of the Income Tax Act, 1961 (the Act) amounting to Rs.55,61,916/-, without considering the facts, circumstances and the submissions of the Appellant.

10. In view of the above, the learned DCIT be directed to restrict the disallowance under section 14A of the Act to Rs.6,50,683/- as worked out by Appellant.

C. GENERAL

11. The Honorable CIT (A)'s Order being contrary to the law, evidence and facts of the case, should be set aside, quashed or modified on the grounds deduced above.

12. The Appellant craves leave to add, modify or delete any ground at or before the hearings."

3. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : M/s. Wartsila India Ltd. (the assessee) during the year under consideration undertakes technical project assignment for the entire range of power plants, including design engineering, procurement, installation and commission. It manufacturers high capacity medium speed diesel engines and DG sets in the range of 0.5 MW to 7.5 MW. The business operations of the assessee are organized under three broad business segments i.e.

trading business, project business/manufacturing business and technical services business. During the year under consideration the assessee entered into 14 international transactions with its Associated Enterprises (AEs) out of which 13 have been accepted at Arms Length Price (ALP) by the Transfer Pricing Officer (TPO) except one transaction namely transaction of recovery expenses to the tune of Rs.12,42,56,957/- & Rs.10,30,20,412/- for A.Y. 2011-12 & 2012-13 respectively and proceeded to benchmark the same.

4. Declining the contentions raised by the assessee the TPO proceeded to make adjustment of Rs.94,12,025/- & Rs.62,33,13,312/- for A.Y. 2011-12 & 2012-13 respectively on account of ALP by making addition of mark up @ 10% in the transactions in which the assessee has not received recovery within a period of 30 days.

5. During the year under consideration the Assessing Officer (AO) also proceeded to make disallowance of Rs.74,13,382/- (Rs.74,13,382/- (–) Rs.5,63,250/- suo-moto disallowance made by the assessee) under section 14A read with rule 8D to the total income of the assessee and thereby framed the assessment under section 143(3) read with section 144C(1) of the Income Tax Act, 1961 (for short 'the Act').

6. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has partly allowed the same. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the assessee has come up before the Tribunal by way of filing the present appeals.

7. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

Transfer Pricing Grounds:
Grounds No.1 to 9 (A) of A.Y. 2011-12 &
Grounds No.1 to 8 (A) of A.Y. 2012-13

8. The assessee during the TP proceedings claimed that the transaction qua the recovery of expenses are primarily on account of domestic telephone expenses, travel expenses, marketing and commission expenses, air ticket charges, freight and forwarding etc. which are incurred for and on behalf of Wartisla Group companies paid by the assessee on behalf of its AEs, for which Wartisla India has charged actual cost to its AEs. The TPO proceeded to call upon the assessee to explain whether the assessee has charged any mark up on these expenses, if not, show cause as to why an appropriate mark up should not be charged.

9. The Ld. TPO by declining the contentions raised by the assessee that since these expenses were paid on behalf of the AEs and there is no element of services rendered involved in the same, these expenses are passed through third party expenses which are recovered at cost without mark up, proceeded to mark up at 10% and added the same to compensate the AE for its services as well as the cost of provision of services as well as financial cost suffered by the assessee because the credit period extends from zero days to 515 days. The TPO added a mark up of 10% to the expenses which

the assessee company has not received within 30 days and thereby made the addition of Rs.94,12,025/-.

10. The Ld. A.R. for the assessee challenging the impugned adjustment contended inter-alia that the TPO without adhering to any benchmarking by applying the five methods provided under section 92C(1) of the Act made adhoc adjustment @ 10%; that no services have been rendered/involved qua the transactions in question; and that the assessee is a cash rich company and does not charge any interest on any party. The Ld. A.R. for the assessee further contended that during the last three years Tribunal has held that since there is no services rendered qua the transaction in question no TP adjustment is sustainable and brought on record the order passed by the Tribunal in A.Y. 2008-09, 2009-10 & 2010-11 available from page 9 to 50 of the paper book.

11. However, on the other hand, the Ld. D.R. for the Revenue relied upon the order passed by the Ld. CIT(A) and contended that every assessment year is to be decided on its own facts.

12. We have perused the order passed by the co-ordinate Bench of the Tribunal for A.Y. 2008-09 & 2009-10 available at page 9 to 34 which is on the identical facts where ALP of transaction as to reimbursement of some expenses on cost to cost basis was made on adhoc basis without applying any method provided in section 92C of the Act. Grounds raised in A.Y. 2008-09 & 2009-10 in assessee's own case and operative part of the order passed by the Tribunal (supra) is extracted for ready perusal as under:

> *"A. ADDITION IN RESPECT WITH ADJUSTMENTS MADE BY THE TRANFER PRICING OFFICER UNDER SECTION 92CA(3) OF*

THEACT RS.2,44,896/- (PARA 4 OF THE ORDER 1. On the facts and in the circumstances of the case and in law, the Honorable Commissioner of Income Tax (Appeals) - 15 (hereinafter referred to as the "the CIT (A)") erred in confirming the action of learned Assistant Commissioner of Income Tax - Range 3(3) (hereinafter referred to as the "the learned ACIT") and the learned Transfer Pricing Officer (hereinafter referred to as TPO) in adding an amount of Rs.2,44,893/- to the total income through an adjustment made to the Arm's Length Price with regards to international transactions entered into by the Appellant with its Associated Enterprises, without considering the facts of the case and the submission of Appellant in this respect. 2. In view of the above, the learned ACIT be directed to allow the whole of the above adjustment made."

13. So following the order passed by the Co-ordinate Bench of the Tribunal in assessee's own case in A.Y. 2008-09 & 2009-10, we are of the considered view that the TPO without resorting to the benchmarking by applying any of the five methods provided under section 92C proceeded to add 10% mark up on adhoc basis which cannot be termed as benchmarking under the Act, hence not sustainable in the eyes of law. So the addition made by the TPO/AO and sustained by the Ld. CIT(A) is ordered to be deleted. Grounds (A&B) No.1 to 9 of A.Y. 2011-12 & Grounds (A&B) No.1 to 8 of A.Y. 2012-13 are determined in favour of the assessee.

Corporate Grounds:

Grounds (B) No.10 & 11 of A.Y. 2011-12 & Grounds (B) No.9 & 10 of A.Y. 2012-13

14. In A.Y. 2011-12 the AO noticed that the assessee has earned dividend income of Rs.8,25,02,356/- and made suo-moto disallowance of Rs.5,63,250/- under section 14A during the year under consideration. The AO by not accepting the disallowance made by the assessee under section 14A made a disallowance of Rs.74,13,382/- as under:

	Particulars	*Amount*
1A)	*The amount of expenditure directly relating to income which does not form part of total income*	*0*
2A)	*Total Interest Paid (Other than interest directly relating to Income which does not form part of Total, Income*	1,68,728
B)	*Average value of investment, Income from which does not form part of Total Income = Average of opening day and closing day of the previous year i.e. [1,48,33,58,010 + 1,44,75,36,571]/2 = Rs, 1, 46,54,47,291/-*	
C)	*Average Value of Total Assets = Average of opening day and closing day of the previous year i.e. [3,07,77,17,821 + 2,66,28,16,398]/2=Rs,2,87,02,67,110/-*	
D)	*Disallowance [A *B/C)*	86,146
B)	*0.5% of average value of investment*	73,27,236
	Total Disallowance u/s. 14A r. w.r 8D	74,13,382

15. AO made disallowance of Rs.74,13,382/- minus Rs.5,63,250/- suo-moto disallowance made by the assessee, net disallowance comes to Rs.68,50,132/-. The Ld. CIT(A) has given part relief by directing the AO to recompute disallowance under section 14A by considering the fact that if the assessee is having a positive net worth then relief should be given.

16. The Ld. A.R. for the assessee challenging the impugned addition made by the AO/Ld. CIT(A) contended inter-alia that since the assessee has not incurred any interest expenses on its investment nor has made any borrowing no addition on account of interest paid is sustainable; that assessee is a cash rich company and there is no question of incurring any interest expenses; that no proper satisfaction has been recorded by the AO while disallowing the computation of disallowance made by the assessee and further contended that identical issue has been decided in favour of the assessee in A.Y. 2009-10 vide order dated 24.04.2019 passed in ITA No.696 & 1440/M/2017.

17. However, we find, Ld. D.R. for the Revenue supported the order passed by the AO as well as Ld. CIT(A) and relied upon the

decision rendered by Hon'ble Delhi High Court in case of Indiabulls Financial Services Ltd. (supra).

18. The Ld. A.R. for the assessee contended that the assessee has worked out the expenditure disallowable under section 14A on actual basis which are available at page 86 of the paper book and extracted for ready perusal as under:

"The Assessee has on its own estimated and worked out expenditure disallowable u/s.!4A of the Act, as under:

Particulars	Rs.	Rs.
Interest		NIL
Estimated Administrative expenses of team managing investments:		
Salaries etc. (as worked out hereunder)	5,25,151/-	
Other administrative expenses	38,099/-	5,63,250/-
Total expenses of team managing investments disallowed in the Computation and Return of Income filed		5,63,250/-

Name of employee	**Designation**	**Annual Salary (Rs.)**	**Working hours in a year**	**Hourly cost (Rs.)**	**Estimated time spent in considering and making decisions on investment/ dis-investment**	**Yearly time spent in investments (Hours)**	**Yearly cost (Rs.)**
Mr. Satyanarayan Panigrihgi	**Senior Manager**	**5,39,994/-**	**1760**	**307/-**	**4 to 5 Hours Daily**	**990**	**3,03,9307-**
Mr. Vipin Khanna	**Chief, Financial Officer**	**42,78,199/-**	**1760**	**2,431/-**	**1.5 to 2 Hours Weekly**	**91**	**2,21,221/-**
Salaries etc, of the team managing investments							**5,25,151/-**

19. In A.Y. 2012-13 the assessee has earned dividend income of Rs.31,03,282/- on which it has made suo-moto disallowance of Rs.6,50,683/- under section 14A of the Act. The AO by rejecting the working of disallowance of section 14A made by the assessee proceeded to make the disallowance of Rs.59,86,836/- (Rs.59,86,836/- (–)Rs.6,50,683/- suo-moto disallowance made by

the assessee) under section 14A read with rule 8D computed as under:

	Particulars	*Amount*
1A)	*The amount of expenditure directly relating to income which does not form part of total income*	*0*
2A)	*Total Interest Paid (Other than interest directly relating to Income which does not form part of Total, Income*	*10,90,000*
B)	*Average value of investment, Income from which does not form part of Total Income = Average of opening day and closing day of the previous year i.e. [1,44, 75,36,571 + 77,72,30,000]/2 = Rs, 1, 11,23,83,286/-*	
C)	*Average Value of Total Assets = Average of opening day and closing day of the previous year i.e. [2,66,28,16,398 + 3,04,41,30,000]/2=Rs,2,85,34,73,199/-*	
D)	*Disallowance [A *B/C)*	*4,24,920*
B)	*0.5% of average value of investment*	*55,61,916*
	Total Disallowance u/s. 14A r. w.r 8D	*59,86,836*

20. The Ld. CIT(A) partly decided the issue in favour of the assessee by returning following findings:

> *"17. The reasons recorded and submission is duly considered. The issues before me are judicially settled ones. Considering the settled judicial position the Assessing Officer is directed to compute disallowance under rule 8D(2)(I) after elimination of investment that did not earn income [Maxopp Investment Ltd. vs Commissioner of Income Tax New Delhi CIVIL APPEAL NOS. 104-109 of 2015 dated on 12 February, 2018 and ACIT vs Vireet Investment Pvt Ltd ITA No 502/Del/2012 followed] No disallowance under rule 8D(2)(ii) will be needed in view of decision Thus HDFC Bank Vs DCIT (Writ Petition 1253 of 2016](Bom) r.w. IT Appeal No. 330 of 2012 dated 23.07.2014 (Bom).. is appellant is a company with positive net worth. Taking into account the above finding / decision, the Assessing Officer is directed to re-compute disallowance, if any, after giving assessee opportunity of being heard."*

21. The Ld. A.R. for the assessee challenging the impugned disallowance contended that no objective satisfaction has been recorded by the AO rather proceeded to make the disallowance on ad-hoc basis even by ignoring the fact that the assessee is a cash rich company and has not incurred any borrowed fund to make investment in question.

22. Undisputedly the assessee has not incurred any interest expenses during A.Y. 2011-12 & 2012-13 qua the investment made on which dividend income has been earned. This fact has also been accepted by the Ld. CIT(A) in the impugned order. So in view of the matter disallowance on account of interest made by the AO under rule 8D2(ii) for A.Y. 2011-12 & 2012-13 in view of the decision rendered by Hon'ble Bombay High Court in case of HDFC Bank vs. DCIT [Writ Petition No.1253 of 2016 (Bom)] r.w. IT Appeal No.330 of 2012 dated 23.07.2014 (Bom), as the assessee has a cash rich company and has not borrowed any fund for making such investment, is not sustainable, hence ordered to be deleted.

23. So far as question of recording valid satisfaction by the AO in order to ignore the working of disallowance given by the assessee is concerned, there is no standard operating procedure given under the Act. When the AO has recorded all the facts as to not agreeing with the working given by the assessee as to making disallowance qua administrative expenses it is a valid satisfaction recorded by the AO.

24. Hon'ble Delhi High Court in case of Indiabulls Financial Services Ltd. vs. Dy. CIT (2016) 76 taxmann.com 268 (Delhi) has decided this issue by holding that "Where Assessing Officer after carrying out elaborate analysis and following steps enacted in statute, had determined amount of expenditure incurred for earning tax exempt income, merely because he did not expressly record his dissatisfaction about assessee's calculation, his conclusion could not be rejected."

25. So in view of the matter, we are of the considered view that computation of disallowance made by the AO cannot be rejected on technical ground that valid satisfaction has not been recorded rather every disallowance made by the AO is to be examined objectively.

26. So far as administrative expenses are concerned, the Ld. CIT(A) has duly thrashed the issue by holding that "*the Assessing Officer is directed to compute disallowance under rule 8D(2)(I) after elimination of investment that did not earn income [Maxopp Investment Ltd. vs Commissioner of Income Tax New Delhi CIVIL APPEAL NOS. 104-109 of 2015 dated on 12 February, 2018 and ACIT vs Vireet Investment Pvt. Ltd ITA No.502/Del/2012 followed]*"

27. So we find no reason to interfere into the identical findings returned by the Ld. CIT(A) in A.Y. 2011-12 & 2012-13 directing the AO to re-compute the disallowance under rule 8D2(iii) after elimination of investment that did not earn income in the light of the decision rendered by Hon'ble Delhi High Court in case of ACIT vs Vireet Investment Pvt. Ltd (supra). We are of the considered view that the AO has rightly invoked the provisions contained under rule 8D of the IT Rules.

28. However, we are agreed with the alternative argument addressed by the Ld. A.R. for the assessee that if rule 8D is to be invoked then only investments yielding exempt income during the years under consideration should be considered for disallowance under rule 8D2(iii) of the Rules. The assessee has given the working for disallowance to be made under section 14A qua the

only investment yielding exempt income available at page 88 of the paper book for A.Y. 2011-12 and 93 of the paper book for A.Y.2012-13 which are extracted as under for ready perusal:

Wartsila India Private Limited

Assessment Year : 2011-12

PAN : AAACW 0345 D

Details of amount to be disallowed as per Section 14A of the Income Tax Act, 1961 as per the decision given by Delhi Special Bench of the Income Tax Appellate Tribunal in the case of ACIT, Circle 17(1), New Delhi Vs. Vireet Investment Pvt. Ltd. (ITA No. 502/Del/2012)

Particulars	Closing balance of Investments on which	Opening balance of Investments on which dividend is	Dividend received in current year (Rs.)
Long Term Investments			
Coastal Wartsila Petroleum Private Limited	98,20,000	98,20,000	-
Malaysia Captive Power Limited	2,80,30,000	2,80,30,000	-
Caparo Power Private Limited	1,83,38,750	19,000	-
	5,61,88,750	3,78,69,000	-
Current Investments			
Birla Sunlife Ultra Short Term Fund - Institutional-Daily Dividend	7,10,22,676	-	21,85,376
Birla Sun Life Cash Manager-IP-Daily Dividend Reinvestment	7,20,79,579	-	25,56,807
ICICI Prudential Long Term Floating Rate Plan - C - Weekly Dividend Reinvestment	5,17,27,593	-	17,27,593
ICICI Prudential Floating Rate Plan D - Daily Dividend	4,03,75,895	-	3,75,895
[illegible]	[illegible]	[illegible]	[illegible]
Kotak Floater Long Term - Daily Dividend	[illegible]	[illegible]	[illegible]
L & T Freedom Income Short Term Plan Institutional	[illegible]	[illegible]	[illegible]
Reliance Liquid Fund - Institutional Plan	7,06,86,409	-	6,78,878
Reliance Money Manager - Institutional Option Daily Dividend	3,50,79,065	-	17,47,280
Religare Ultra Short Term Fund - Institutional Daily Dividend	19,62,42,143	-	39,36,246
Tata Floater Fund - Daily Dividend	[illegible]	[illegible]	25,85,935
UTI Treasury Advantage Fund - Institutional Plan - Daily Dividend - Regular - Reinvestment	[illegible]	[illegible]	53,499
[illegible] Floating Rate Fund - Short Term Plan - Institutional Daily Dividend - Reinvestment	[illegible]	20,18,80,560	46,11,950
Birla SunLife Short Term Opportunities Fund - Inst Weekly Dividend	[illegible]	[illegible]	[illegible]
Birla SunLife Floating Rate Fund - Long Term - Institutional Weekly Dividend	[illegible]	[illegible]	[illegible]
Baroda Pioneer Treasury Advantage Fund	[illegible]	[illegible]	[illegible]
DWS Cash Opportunity Fund - Institutional Plan	-	1,02,16,257	32,424
HDFC Floating Rate Income Fund - Short Term Plan	-	10,79,87,978	30,10,468
ICICI Prudential Ultra Short Term Plan Premium Plus	-	9,28,14,852	10,90,133
IDFC Money Manager Fund - Investment Plan Inst Plan B	-	12,61,41,004	17,34,072
Kotak Floter Debt Fund	-	13,21,74,174	18,54,628
LICMF - Saving Plus Fund	-	12,97,97,056	25,46,430
LICMF Floating Rate Fund - Short Term Plan	-	7,07,62,078	6,08,828
[illegible] Liquidities Fund - Institutional	-	13,75,16,894	49,39,482
[illegible] Manager SHIP	-	2,50,42,760	82,241
	1,39,13,47,821	1,14,97,80,800	4,89,13,139
Opening Balance of Investments			1,14,97,80,800
Closing Balance of Investments			1,39,13,47,821
Average Value of Investments			1,27,05,64,311
Amount to be Disallowed U/s 14A of the Income Tax Act,1961 0.5% of the Average Value of Investments			63,52,822

Wartsila India Private Limited

Assessment Year : 2012-13

PAN : AAACW 0345 D

Details of amount to be disallowed as per Section 14A of the Income Tax Act, 1961 as per the decision given by Delhi Special Bench of the [illegible] New Delhi Vs. Vireet Investment Pvt. Ltd. (ITA [illegible]

[illegible]	Closing balance of investments on which Company has earned Dividend (Rs.)	Opening balance of investments on which Company has earned Dividend(Rs.)	Dividend received in current year (Rs.)
Long Term Investments			
Coastal Wartsila Petroleum Private Limited	98,20,000	98,20,000	-
Malanpur Captive Power Limited	2,80,30,000.00	2,80,30,000	[illegible]
Caparo Power Private Limited	6,49,80,000.00	1,83,38,750	[illegible]
	10,28,30,000	**5,61,88,750**	-
Current Investments			
Liquid Fund			
[illegible] Floating Rate Fund - Short Term Plan - Institutional Plan - [illegible] Dividend Reinvestment	10,03,57,704	-	3,57,704
[illegible] Short Term Fund - Institutional Daily Dividend Reinvestment	15,00,12,582	-	70,12,582
BNP Paribas Overnight Fund - Institutional Daily Dividend	2,00,14,656	-	2,02,406
J.P. Morgan India Treasury Fund - Super Institutional Daily Divident Plan Reinvestment	9,72,19,138	-	22,19,138
Kotak Floater [illegible]	[illegible]	[illegible]	[illegible]
L & T [illegible]	[illegible]	[illegible]	[illegible]
Reliance Liquid Fund [illegible]	[illegible]	[illegible]	[illegible]
Religare Liquid Fund [illegible]	[illegible]	[illegible]	[illegible]
Birla Sunlife Ultra Short Term Fund [illegible]	[illegible]	[illegible]	[illegible]
Birla Sun Life Cash Manager [illegible]	[illegible]	[illegible]	[illegible]
ICICI Prudential Long Term Floating Rate Plan - C - Weekly Dividend Reinvestment	-	5,17,27,593	2,73,023
ICICI Prudential Floating Rate Plan D - Daily Dividend Reinvestment	-	4,03,75,895	11,03,193
HDFC Money Manager Fund - TP - Super Inst Plan G - Daily Dividend	[illegible]	[illegible]	[illegible]
Kotak Floater Long Term - Daily Dividend	[illegible]	[illegible]	[illegible]
L & T Freedom Income Short Term Plan Institutional Daily Dividend Reinvestment	[illegible]	[illegible]	[illegible]
Reliance Liquid Fund - Cash Plan - Daily Dividend Option	-	7,06,86,409	6,82,902
Reliance Money Manager - Institutional Option Daily Dividend	-	3,30,79,065	11,75,229
Religare Ultra Short Term Fund - Institutional Daily Dividend	-	19,62,42,149	48,50,955
Tata Floater Fund - Daily Dividend	-	20,50,88,935	63,57,967
UTI Treasury Advantage Fund - Institutional Plan (Daily Dividend Option) - Reinvestment	-	4,03,53,439	14,05,619
UTI Floating Rate Fund - Short Term Plan - Institutional Daily Dividend Plan	-	14,57,32,081	47,01,005
	67,44,01,635	**1,39,13,47,821**	**4,47,47,650**

Opening Balance of Investments	**1,39,13,47,821**
Closing Balance of Investments	**67,44,01,635**
Average Value of Investments	**1,03,28,74,728**
Amount to be Disallowed U/s 14A of the Income Tax Act,1961	
0.5% of the Average Value of Investments	**51,64,374**

29. In view of the matter Grounds No.9 & 10 of A.Y. 2011-12 & Ground No.10 of A.Y. 2012-13 raised by the assessee are partly allowed and the AO is directed to recompute the disallowance under rule 8D2(iii) of the Rules in view of the working given by the assessee extracted in the preceding paras in the light of the decision rendered by Hon'ble Special Bench of the Tribunal in case of ACIT vs. Vireet Investment Pvt. Ltd. 165 ITD 27 by considering the dividend bearing investments for computing the disallowance under section 14A of the Act read with rule 8D of the Rules.

30. So far as question of following the order passed by the co-ordinate Bench of the Tribunal in the earlier years as contended by the Ld. A.R. for the assessee is concerned every assessment year is to be examined separately on the basis of facts and circumstances of the each case.

31. The assessee by moving applications sought to raise additional grounds in A.Y. 2011-12 and A.Y. 2012-13 as under:

"Additional Grounds of A.Y. 2011-12

BI. ALLOWANCE OF DEDUCTION FOR EDUCATION CESS AND RIGRER AND SECONDARY EDCECATION CESS AGGREGATING TO RS4744128 UNDER THE HEAD INCOME FROME BUSINESS AND PROFESSION

1. On the facts and circumstances of the case and in law, the Appellant craves leave to raise Additional Ground of appeal to claim deduction of Education Cess and Higher and Secondary Education Cess aggregating to Rs.67,64,120/- as per the decision of Hon'ble jurisdictional Bombay High Court in case of Sesa Goa Limited vs. Joint Commissioner of Income Tax [Tax Appeal no.17 of 2013 and Tax Appeal no. 18 of 2013] and decision of Hon'ble Delhi Income Tax Appellate Tribunal in case of Havells India Lad. v. ACIT (ITA No.4695/DEL/2012).

2. In view of the above, the learned DCIT be directed to allow the deduction of Education Cess and Higher and Secondary Education

Cess aggregating to Rs.67,64,120/- while computing tax liability for the captioned year.

B2. GRANT OF REFUND OF EXCESSIVE DIVIDEND DISTRIBUTION TAX PAID BY THE ASSESSEE BY APPLYING THE BENEFICIAL PROVSION OF DOUBLE TAXATION AVOIDANCE AGREEMENT BETWEEN INDIA AND FINLAND RS.3,09,90,098/-

3. On the facts and circumstances of the case and in law, the appellant craves to aid Additional Ground of Appeal to claim the benefit of Double Taxation Avoidance Agreement between India and Finland for applying beneficial rate of tax on payment of dividend to shareholders as per the decision of Hon'ble Income Tax Appellate Tribunal in case of Giesecke & Devrient [India] Private Limited vs. The Addl, C.I.T [ITA No.7075/DEL/2017].

4. In view of the above, the learned DCTT be directed to grant the fund of the excessive Dividend Distribution Tax paid by the Appellant of Rs.3,09,90,098/-."

"Additional Grounds of A.Y. 2012-13

In the above matter, the Appellant begs before the Honourable Bench to permit it to take of the following Additional Grounds of Appeal in the above matter, as Ground Number B1 and B2, which should be considered as independent of, and with prejudice to, the other Grounds of Appeal:

B1. ALLOWANCE OF DEDUCTION FOR EDUCATION CESS AND HIGHER AND SECONDARY EDUCATION CESS AGGREGATING TO RS.44,91,237 UNDER THE HEAD INCOME FROM BUSINESS AND PROFESSION

1. On the facts and circumstances of the case and in law, the Appellant craves leave to raise Additional Ground of appeal to claim deduction of Education Cess and Higher and Secondary Education Cess aggregating to Rs. 44,91,237/- as per the decision of Hon'ble jurisdictional Bombay High Court in case of Sesa Goa Limited vs. Joint Commissioner of Income Tax [Tax Appeal no.17 of 2013 and Tax Appeal no. 18 of 2013] and decision of Hon'ble Delhi Income Tax Appellate Tribunal in case of Havells India Ltd. v. ACIT (ITA No. 4695/DEL/2012).

2. In view of the above, the learned DCIT be directed to allow the deduction of Education Cess and Higher and Secondary Education Cess aggregating to Rs.44,91,237/-while computing tax liability for the captioned year.

B2. GRANT OF REFUND OF EXCESSIVE DIVIDEND DISTRIBUTION TAX PAID BY THE ASSESSEE BY APPLYING THE BENEFICIAL PROVSION OF DOUBLE TAXATION AVOIDANCE AGREEMENT BETWEEN INDIA AND FINLAND RS.4,20,92,453/-

3. On the facts and circumstances of the case and in law, the appellant craves to raise Additional Ground of Appeal to claim the benefit of Double Taxation Avoidance Agreement between India and Finland for applying beneficial rate of tax on payment of dividend to shareholders as per the decision of Hon'ble Income Tax Appellate Tribunal in case of Giesecke & Devrient [India] Private Limited vs. The Addl. C.LT [ITA No. 7075/DEL/2017].

4. In view of the above, the learned DCIT be directed to grant the refund of the excessive Dividend Distribution Tax paid by the Appellant of Rs.4,20,92,453/-."

on the ground inter-alia that recently the assessee has come across certain judicial precedent which confers the benefit on the assessee and; that grounds raised are the legal grounds which do not require collection of any new evidence.

32. The Ld. D.R. for the Revenue opposed the application on the ground that these grounds have never raised before the Lower Revenue Authorities and prayed for dismissal of the application.

33. We are of the considered view that it is settled principle of law that legal ground can be raised at any stage of the proceedings. Moreover grounds raised by the assessee are necessary for complete adjudication of the issues at hand hence additional grounds raised by the assessee for A.Y. 2011-12 & 2012-13 are allowed.

Additional Ground No.B1(1) of A.Y. 2011-12 & 2012-13

34. The assessee by raising additional ground sought to allow the deduction for education cess and higher & secondary education cess to the tune of Rs.67,64,120/- & Rs.44,91,237/- for A.Y. 2011-

12 & A.Y. 2012-13 respectively under the head "income from business and profession".

35. Undisputedly the assessee has not claimed deduction for education cess and higher & secondary education cess before any of the Lower Revenue Authorities rather same has been claimed first time before the Tribunal. It is also not in dispute that Hon'ble Bombay High Court in case of Sesa Goa Ltd. vs. JCIT (2022) 423 ITR 426 held that education cess is allowable deduction. It is also not in dispute that now by virtue of explanation 3 to section 40(a)(ii), inserted by Finance Act, 2022 w.e.f. 01.04.2005, that the term "tax" shall include and shall be deemed to have always included any surcharge or cess, by whatever name called, on such tax.

36. In the backdrop of the aforesaid undisputed legal and statutory position the Ld. A.R. for the assessee contended that explanation 3 to section 40(a)(ii) of the Act with retrospect effect does not remove the "substratum or foundation" of the judgment of Hon'ble Bombay High Court and Hon'ble Gujarat High Court rendered in case of Sesa Goa Ltd. (supra) and Chambal Fertilisers & Chemicals Ltd. vs. CIT ITA No.52 of 2018 dated 31.07.2018 respectively. The Ld. A.R. for the assessee further contended that when the Hon'ble High Court has interpreted the provisions contained under section 40(a)(ii) as well as its legislative history and held that "cess" was different from "tax", and insertion of explanation 3 to section 40(a)(ii) can only be applied prospectively. The Ld. A.R. for the assessee further contended that in many cases Tribunal has decided a similar question of prospective or

retrospective application of the provisions of the Act viz. Rajeev Kumar Agarwal v Addl. CIT (2014) 149 ITD 363 (Agra), Bellandur C.Jayaramareddy v. ACIT (2022) 136 taxmann.com 94 (Bang), Mitra Guha Builders (India) Co. v. DCIT (2016) 65 taxmam.com 243 (Kol), Punjab Educational Society v. ITO (2018) 168 ITD 109 (Amr), DCIT v. Esaote India (NS) Ltd. (2018) 172 ITD 299 (Ahm), Nuclear Power Corporation of India Ltd. v. CIT (LTU) (2019) 101 taxman.com $24 (Mum), Station Headquarters (Army) v. ACIT (CPC) (2019) 178 ITD 211 (Jodh), Bharati Shipyard Ltd. v. DCIT (2011) 132 ITD 32 (Mum), A.V.V.N. Prasad Reddy v. ITO (2020] 118 taxman.com 537 (Vish), Muradul Haque v. ITO (2020)184 ITD 58 (Del). Joseph Mudaliar v. DCIT (2021) 11 ITD 719 (Mum), ARSS Infrastructure Project Ltd. v. DCIT (2021) 187 ITD 727 (Cuttack), etc.

37. However, on the other hand, the Ld. D.R. for the Revenue has vehemently opposed the contention raised by the Ld. A.R. for the assessee by contenting that since the amendment to section 40(a)(ii) is clarificatory in nature it certainly has retrospective effect and relied upon the order passed by co-ordinate Bench of Tribunal on identical issue cited as Cypress Semiconductor Technology India (P.) Ltd. vs. DCIT (2022) 142 taxmann.com 480 (Bangalore – Trib.), decision rendered by Hon'ble Supreme Court in case of Joint Commissioner of Income Tax vs. M/s. Chambal Fertilisers & Chemicals Ltd. in civil appeal of 2022 (@SLP(C) No.7379 of 2019) and decision rendered by Hon'ble Supreme Court in case of CIT vs. K. Srinivasan (1972) 83 ITR 346 (SC).

38. First question raised by the Ld. A.R. for the assessee to be determined by the Bench is "*As to whether Parliament of India while inserting explanation 3 to section 40(a)(ii) by virtue of Finance Act, 2022 was empowered to remove the substratum or foundation?"* of the judgment rendered by Hon'ble Bombay High Court in case of Sesa Goa Ltd. (supra).

39. Without going into the merits of this contention raised by Ld. A.R. for the assessee, we are of the considered view that the Tribunal being a statutory authority is not empowered to go into the constitutionality of amendment made by the Parliament vide Finance Act, 2022 by inserting explanation 3 to section 40(a)(ii) of the Act. The Assessee may agitate this issue before the competent constitutional court. Even otherwise this issue has already been decided by the Hon'ble Supreme Court of India in case of CIT vs. K. Srinivasan (supra) wherein the question to be determined was framed as under:

> *"Whether the words "Income tax" in the Finance Act of 1964 in sub-s (2) and sub-s. (2)(b) of s. 2 would include surcharge and additional surcharge."*

40. Hon'ble Supreme Court answered the above question in affirmative as under:

> *"In our judgment it is unnecessary to express any opinion in the matter because the essential point for determination is whether surcharge is an additional mode or rate for charging income tax. The meaning of the word "surcharge" as given in the Webster's New International Dictionary includes among others "to charge (one) too much or in addition" also "additional tax. Thus the meaning of surcharge is to charge in addition or to subject to an additional or extra charge. If that meaning is applied to s. 2 of the Finance Act 1963 it would lead to the result that income tax and super tax were to be charged in four different ways or at four different rates which may be described as (/)*

> *the basic charge or rate (In part I of the First Schedule): (i) Sur-charge: (i) special surcharge and (v) additional surcharge calculated in the manner provided in the Schedule. Read in this way the additional charges form a part of the income tax and super tax".*

41. Second question raised by the Ld. A.R. for the assessee to be determined by the Bench is:

> "*As to whether insertion of* explanation 3 to section 40(a)(ii) of the Act by virtue of the amendment is prospective or retrospective in nature?"

42. We are prima-facie of the view that insertion of explanation 3 to section 40(a)(ii) of the Act is retrospective in nature being of clarificatory in nature.

43. The Ld. A.R. for the assessee contended that no doubt earlier defect in the legislation can be removed by the legislature retrospectively or prospectively by a legislative process and a previous section can also be validated but such legislation cannot have retrospective effect in order to overturn a judicial pronouncement. For the sake of brevity it is again reiterated that this issue is of constitutional in nature and is required to be determined by the constitutional court. So far as question of applying the amendment carried out in section 40(a) by inserting explanation 3 to section 40(a)(ii) of the Act is concerned apparently it is clarificatory in nature as is evident from bare provisions of the explanation 3 to section 40(a)(ii) of the Act which are extracted as under:

> *"11. The Finance Act, 2022, inserted Explanation 3 to section 40(a)(ii), which reads as under: "Explanation 3.-For the removal of doubts, it is hereby clarified that for the purposes of this sub-clause, the term "tax" shall include and*

shall be deemed to have always included any surcharge or cess, by whatever name called, on such tax;

12. The Finance Act, 2022 stipulates that above Explanation "shall be inserted and shall be deemed to have been inserted with effect from the 1st April 2005".

44. Co-ordinate Bench of the Tribunal in case of M/s. Kanoria Chemicals & Industries Ltd. vs. Addl. CIT in ITA No.2184/Kol/2018 order dated 26.10.2021 and Cypress Semiconductor Technology India (P.) Ltd. (supra) has dealt with the identical issue and proceeded to hold that in view of the decision rendered by Hon'ble Supreme Court in case of CIT vs. K. Srinivasan (supra) when surcharge and additional surcharge subsequently known as cess are part of the income tax as discussed in the preceding paras the assessee has rightly not claimed the deduction in its return of income. Now from the explanation 3 to section 40(a)(ii) of the Act it is abundantly clear that the term "tax" shall include and shall be deemed to have been included any surcharge or cess by whatever name called on such tax and this explanation shall be inserted and shall be deemed to have been inserted w.e.f. 01.04.2005, meaning thereby having retrospective effect.

45. It is also undisputed fact that education cess was brought in the statute book for the first time by the Finance Act, 2004 vide which additional surcharge was renamed as education cess. So when provisions contained under Finance Act, 2004 and Finance Act, 2011 provide that education cess is an additional surcharge levied on the income tax, the issue is squarely covered by the

decision rendered by Hon'ble Supreme Court in case of CIT vs. K. Srinivasan (supra).

46. All the contentions raised by the Ld. A.R. for the assessee regarding explanation 3 to section 40(a)(ii) of the Act have been duly replied with by the co-ordinate Bench of the Tribunal in case of M/s. Kanoria Chemicals & Industries Ltd. (supra) and Cypress Semiconductor Technology India (P.) Ltd. (supra) which are based on the decision of Hon'ble Supreme Court in case of CIT vs. K. Srinivasan (supra). So in view of what has been discussed above, we are of the considered view that the assessee is not entitled for deduction for education cess and higher and secondary education cess under the head "income from business and profession". So additional ground B(1) raised by the assessee in A.Y. 2011-12 & 2012-13 are decided against the assessee.

Additional Ground No.B1(1) of A.Y. 2011-12 & 2012-13

47. The assessee by raising additional grounds sought refund of Excessive Dividend Distribution Tax (DDT) paid by the assessee by applying the beneficial provision of Double Taxation Avoidance Agreement between India and Finland to the tune of Rs.3,09,90,098/- and Rs.4,20,92,453/- for A.Y. 2011-12 & 2012-13 respectively by relying upon the decision rendered by the co-ordinate Bench of the Tribunal in case of Giesecke & Devrient [India] Private Limited vs. The Addl, C.I.T [ITA No.7075/DEL/2017].

48. Undisputedly the assessee has offered and paid DDT as per provisions contained under section 115-O of the Act and same has

been assessed in the course of assessment and appellate proceedings before the Ld. CIT(A). It is also not in dispute that the assessee has declared dividend of Rs.65,44,57,705/- and has paid DDT on the same to the tune of Rs.10,75,48,224/- at the effective rate of 16.431% as per provisions contained under section 115-O of the Act and detailed in clause 29 of the tax audit report.

49. The Ld. A.R. for the assessee in support of its claim raised the following submissions as per synopsis filed during the course of argument which are as under:

> "***Our Submissions***:
>
> *1. During the year under consideration, the Appellant has declared Dividend of Rs.65,44,57,705/- and has paid Dividend Distribution Tax ("DDT") thereon of Rs. 10,75,48,224/- at the effective rate of 16.431% under the provisions of section 115-0 of the Act. The complete details of Dividend in this regard evidenced at Cluse 29 of the Tax Audit report, copy of which has been submitted in the course of assessment proceedings.*
>
> *2. In this connection, the Appellant invites Your Honour's attention to the Circular No.763, dated 18-2-1998 issued by the Central Board of Direct Taxes ('CBDT) while introducing the DDT provisions.*
>
> *3. Your Honour will appreciate that the intention stated for introduction of DDT provisions, as per the said Circular is that these provisions introduce a new system of collecting tax on profits distributed by companies by way of dividends as against the existing method of levying tax on dividend income which involves a lot of paperwork and double taxation, once in the hands of the company and again in the hands of the shareholders.*
>
> *A copy of such Circular is enclosed herewith as Exhibit-1 for Your Honours ready reference.*
>
> *Accordingly, Your Honour shall further appreciate that the DDT has been introduced for administrative convenience in collection of tax on the dividend income on behalf of the shareholder.*
>
> *4. Moreover, the Appellant invites Your Honour's kind attention to the Explanatory Memorandum to the Finance Act, 2002, in connection with abolition of DDT and taxation of dividends in the hands of shareholder, which stated that the dividend is income in the hands of shareholders*

and not in the hands of Company and therefore, the tax incidence was shifted on the

5. From the above discussion, Your Honour shall appreciate that the DDT payment by the company is on behalf of its shareholders.

6. The Appellant would further like to submit before Your Honour that the all shareholders of the Appellant i.c. Wartsila Group of companies holds 99.99% shares and are tax resident of Finland.

7. Your Honours attention is invited to provisions of section 90(2) of the Act, wherein the Company has an option to be governed by the provisions of the Act or the India-Finland Tax Treaty, whichever are more beneficial.

8. The taxability of dividend income is dealt with in Article 10 of the Tax Treaty entered into between India and Finland. Article 10(2) of the India-Finland Tax Treaty inter-alia provides that the dividends may be taxed in the resident contracting state of the dividend paying company and according to the laws of that state and in case the beneficial owner of the dividends is a resident of the other contracting state, the tax so charged shall not exceed 10% of the gross amount of the dividends.

9. Further, Your Honour's kind attention is invited to the Protocol to India-Finland Tax Treaty, which provides that if after the coming into force of India-Finland Tax Treaty, under any agreement signed between India and Organisation of Economic Co-operation and Development (OECD) member country, India limits its taxation at source on dividends to a rate lower or a scope more restricted than the rate or scope as provided in this Tax Treaty, then such restricted rate or scope would also be applicable to this Tax Treaty.

10. As discussed in the foregoing paras that DDT is the tax on shareholders, the said interpretation is further fortified by the language of the Protocol of the India-Hungary Tax Treaty on dividend taxation. The Protocol states as below:

"When the Company paying dividends is a resident of India, the tax on distributed profits shall be deemed to be taxed in the hands of the shareholders and it shall be taxed in the hands of the shareholders and it shall not exceed 10 percent of the gross amount of dividend."

11. Accordingly, the above language manifests that the DDT being the shareholders tax needs to be restricted to the Tax Treaty rate. 12. Further, the extract of the Protocol in India-Finland DTAA(emphasis provided) is extracted below for Your Honours ready reference:

"II. Ad Articles 10, 11 and 12

It is agreed that if after coming into force of this Agreement, any agreement or convention between India and a Member State of the Organisation for Economic Cooperation and Development provides that India shall exempt from tax dividends, interest, royalties or fees for technical services (either generally or in respect of specific categories of dividends, interest, royalties or fees for technical services) arising in India, or limit the tax charged in India on such dividends, interest, royalties or fees for technical services (either generally or in respect of specific categories of dividends, interest, royalties or fees for technical services) to a rule lower than that provided for in paragraph 2 of Article 10 or paragraph 2 of Article 11 or paragraph 2 of Article 12 of the Agreement, such exemption or lower rate shall be made applicable to the dividends, interest, royalties or fees for technical services (either generally or in respect of those specific categories of dividends, interest, royalties or fees for technical services) arising in India and beneficially owned by a resident of Finland and dividend interest, royalties or fees for technical services arising in Finland and beneficially owned by a resident of India under the same conditions as if such exemption or lower rate had been specified in those paragraphs. The competent authority of India shall inform the competent authority of Finland without delay that the conditions for the application of this paragraph have been met and issue a notification to this effect for application of such exemption or lower rate,"

13. Further, Your Honours kind attention is invited to the decision of Hon'ble Delhi High Court in case of Steria India Limited v. CIT (TS-416-HC-2016) wherein the Hon'ble Delhi High Court has observed that the benefit of "Most favoured nation" ("MFN") clause is self-operational and integral part of the tax treaty and accordingly benefits of the same could be obtained.

14. Further, we invite your attention to the Protocol in India-Spain DTAA (emphasis provided) which is extracted below for Your Honours ready reference to bring out the difference in language in both Tax Treaties:

7. The competent authorities shall initiate the appropriate procedures to review the provisions of Article 13 (Royalties and fees for technical services) after a period of five years from the date of its entry into force. However, if under any Convention or Agreement between India and a third State which is a Member of the OECD, which enters into force after 1-1-1990, India limits its taxation at source on royalties or fees for technical services to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of incomes, the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention with effect from the date on which the present Convention comes into force or the relevant Indian Convention or Agreement, whichever enters into force later."

15. The Company also relies on the India-Slovenia Tax Treaty and India-Lithuania tax Treaty (both OECD member countries) which places restriction on taxation of dividend in form of DDT at 5%.

16. Accordingly, Your Honour shall appreciate that the above restricted scope on taxation of dividend as available under the India-Hungary Tax Treaty read with India-Slovenia Tax Treaty and India Lithuania Tax Treaty can be incorporated under the India-Finland Tax Treaty by virtue of the Protocol to the India-Finland Tax Treaty thereby restricting the DDT rate to 5%.
17. Therefore, the Appellant most respectfully submits before Your Honour that the DDT payment made by the Company being the tax of dividend income, on behalf of its shareholders, should not exceed 5% of the dividend income as per provisions of the India-Finland Tax Treaty read with Protocol, and India-Slovenia and India-Lithuania Tax Treaties.

18. As per the decision of ITAT Special Bench in the case of Deputy Commissioner of Income Tax v. Total Oil India Private Limited (104 ITR 1) it is held as a general principal that DDT shall be payable at the rate mentioned in Section 115-0 of the Act and not at the rate of tax applicable as specified in the relevant DTAA with reference to dividend income. However, the Bench also took note of the sovereign's prerogative to extend the Treaty protection to domestic company paying DDT. Citing the specific provisions in the Protocol of the DTAA between India and Hungary, the Bench concluded that India-Hungary DTAA is an example where the Treaty partners have extended the Treaty protection to DDT by specifically providing for it in the Protocol to DTAA and hence in such cases the domestic company paying dividend can claim benefit of beneficial rate of tax as per the DTAA.

19. Considering the above, the Appellant requests Your Honour to kindly consider the above claim and direct the Assessing Officer to issue a refund of Rs.7,48,20,339/-, being 11.431% representing the excess amount of total tax paid of Rs.10,75,48,224/-. The said refund will arise since the Company has already paid a DDT amounting to Rs.10,75,48,224/- as against the DDT required to be paid as per the Tax Treaty read with Protocol thereto at the tax rate of 5%, which works out to Rs.3,27,27,885/-.

Without prejudice to the above, the Company submits the following before Your Honour.

20. The Company places its reliance on the India-Hungary tax treaty (an OECD member country) which clarifies the scope of taxation of dividend article through the protocol.

21. The Article 10(2) of India-Hungary tax treaty reads as under.

"However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed 10 per cent of the gross amount of the dividends. This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid."

22. Further, the restricted scope of dividend taxation, as per the protocol to the India-Hungary Tax Treaty is extracted herewith for your Honours ready reference:

"When the Company paying dividends is a resident of India, the tax ion distributed profits shall be deemed to be taxed in the hands of the shareholders and it shall be taxed in the hands of the shareholders and it shall not exceed 10 percent of the gross amount of dividend.

23. Accordingly, the above restricted scope on taxation of dividend as available under the India-Hungary tax treaty can be incorporated under the India-Sweden tax treaty by virtue of the Protocol to the India-Sweden tax treaty thereby restricting the DDT rate to 10%.

24.In view of the above the Company on a without prejudice basis, submits before Your Honour that the tax on the dividend should be restricted to a rate of 10% as per the India - Sweden tax treaty read with protocol thereto, as discussed above.

25. Further, the Company would like to submit that the DDT field in Form ITR-6 is a 'not editable' field and hence refund in the ITR Form could not be claimed by the Company.

26.Considering the above, the Company requests Your Honour to kindly consider the above claim and direct the Assessing Officer to issue a refund of Rs.4,20,92,453/-, being 6.431% representing the excess amount of total tax paid of Rs.10,75,48,224/-. The said refund will arise since the Company has already paid a DDT amounting to Rs.10,75,48,224/- as against the DDT required to be paid as per the Tax Treaty read with protocol thereto at the tax rate of 10%, which works out to Rs.6,54,55,770/-

The statement showing the basis of such computation can be referred to at Pg.95 of the Paperbook.

Considering the entirety of facts and circumstances of the present case and submissions made, Your Honors would agree that excessive Dividend Distribution Tax paid ought to be allowed as refund to the Appellant."

50. In the light of the aforesaid submissions made by the assessee the Ld. A.R. for the assessee contended inter-alia that DDT payment is made by the company on behalf of its shareholders; that all the shareholders of the assessee company hold 99.99% shares and are tax residents of Finland and as per section 90(2) of the Act the company has an option to be governed by the provisions of the Act or the India-Finland Tax Treaty, whichever are more beneficial; that taxability of dividend income is dealt with in Article 10 of the Tax Treaty entered into between India and Finland, which inter-alia provides that the dividends may be taxed in the resident contracting state of the dividend paying company and according to the laws of that state and in case the beneficial owner of the dividends is a resident of the other contracting state, the tax so charged shall not exceed 10% of the gross amount of the dividends. The Ld. A.R. for the assessee has also drawn our attention towards protocol to India-Finland Tax Treaty, which provides that DDT is the tax on shareholders and the DDT being the shareholders' tax needs to be restricted to the tax treaty rate.

51. However, on the other hand, to repel the argument addressed by the Ld. A.R. for the assessee the Ld. D.R. for the Revenue contended that as per Article 10(2) & (4) of treaty deals with dividend and not DDT.

52. From the aforesaid arguments addressed by the Ld. A.R. for the assessee and the Ld. D.R. for the Revenue the sole question arises for determination in this case is:

> *"As to whether dividend distribution tax in case of the assessee is to be charged @ 'tax treaty rate' or as per*

provisions contained under section 115-O as has been paid by the assessee."

53. The answer to the aforesaid question has been given by the decision rendered by the Special Bench of the Tribunal in case of DCIT vs. Total Oil India Pvt. Ltd. (2023) 104 ITR 1 (Mumbai) (Trib) by returning following findings:

> *"81. If domestic company has to enter the domain of DTAA, the countries should have agreed specifically in the DTAA to that effect. In the Treaty between India and Hungary, the Contracting States have extended the Treaty protection to the dividend distribution tax. It has been specifically provided in the protocol to the Indo Hungarian Tax Treaty that, when the company paying the dividends is a resident of India the tax on distributed profits shall be deemed to be taxed in the hands of the shareholders and it shall not exceed 10 per cent of the gross amount of dividend. While making Reference in the case of Total Oil (supra), the ld. Division Bench has made the following observations on this aspect:*
>
> > *"(f) Wherever the Contracting States to a tax treaty intended to extend the treaty protection to the dividend distribution tax, it has been so specifically provided in the Dy Cit 11 (3)(1), Mumbai vs Total Oil India Pvt Ltd., Mumbai on 20 April, 2023 tax treaty itself. For example, in India Hungry Double Taxation Avoidance Agreement [(2005) 274 ITR (Stat) 74; Indo Hungarian tax treaty, in short], it is specifically provided, In the protocol to the Indo Hungarian tax treaty it is specifically stated that "When the company paying the dividends is a resident of India the tax on distributed profits shall be deemed to be taxed in the hands of the shareholders and it shall not exceed 10 per cent of the gross amount of dividend". That is a provision in the protocol, which is essentially an integral part of the treaty, and the protocol to a treaty is as binding as the provisions in the main treaty itself. In the absence of such a provision in other tax treaties, it cannot be inferred as such because a protocol does not explain, but rather lays down, a treaty provision. No matter how desirable be such provisions in the other tax treaties, these provisions cannot be inferred on the basis of a rather aggressively creative process of interpretation of tax treaties. The tax treaties are agreements between the treaty partner jurisdictions, and agreements are to be interpreted as they exist and not on the basis of what ideally these agreements should have been.*
> >
> > *(g) A tax treaty protects taxation of income in the hands of residents of the treaty partner jurisdictions in the other treaty*

partner jurisdiction. Therefore, in order to seek treaty protection of an income in India under the Indo French tax treaty, the person seeking such treaty protection has to be a resident of France. The expression 'resident' is defined, under article 4(1) of the Indo French tax treaty, as "any person who, under the laws of that Contracting State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature". Obviously, the company incorporated in India, i.e. the assessee before us, cannot seek treaty protection in India- except for the purpose of, in deserving cases, where the cases are covered by the nationality non-discrimination under article 26(1), deductibility non-discrimination under article 26(4), and ownership non-discrimination under article 24(5) as, for example, article 26(5) specifically extends the scope of tax treaty protection to the "enterprises of one of the Contracting States, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State". The same is the position with respect of the other non-discrimination provisions. No such extension of the scope of treaty protection is envisaged, or demonstrated, in the present case. When the taxes are paid by the resident of India, in respect of its own liability in India, such taxation in India, in our considered view, cannot be protected or influenced by a tax treaty provision, unless a specific provision exists in the related tax treaty enabling extension of the treaty protection.

(h) Taxation is a sovereign power of the State- collection and imposition of taxes are sovereign functions. Double Taxation Avoidance Agreement is in the nature of self-imposed limitations of a State's inherent right to tax, and these DTAAs divide tax sources, taxable objects amongst themselves. Inherent in the self-imposed Dy Cit 11 (3)(1), Mumbai vs Total Oil India Pvt Ltd., Mumbai on 20 April, 2023 Indian Kanoon - http://indiankanoon.org/doc/125941536/ 45 restrictions imposed by the DTAA is the fact that outside of the limitations imposed by the DTAA, the State is free to levy taxes as per its own policy choices. The dividend distribution tax, not being a tax paid by or on behalf of a resident of treaty partner jurisdiction, cannot thus be curtailed by a tax treaty provision."

82. We are of the view that the above exposition of law is correct and we agree with the same. Therefore, the DTAA does not get triggered at all when a domestic company pays DDT u/s.115O of the Act. CONCLUSION: 83. For the reasons give above, we hold that where dividend is declared, distributed or paid by a domestic company to a non-resident shareholder(s), which attracts Additional Income Tax (Tax on Distributed Profits) referred to in Sec.115-O of the Act, such additional income tax payable by the domestic company shall be at the rate mentioned in Section 115 O of the Act and not at the rate of tax

applicable to the non-resident shareholder(s) as specified in the relevant DTAA with reference to such dividend income. Nevertheless, we are conscious of the sovereign's prerogative to extend the treaty protection to domestic companies paying dividend distribution tax through the mechanism of DTAAs. Thus, wherever the Contracting States to a tax treaty intend to extend the treaty protection to the domestic company paying dividend distribution tax, only then, the domestic company can claim benefit of the DTAA, if any. Thus, the question before the Special Bench is answered, accordingly."

54. So by following the order passed by Special Bench of the Tribunal in case of Total Oil India Pvt. Ltd. (supra), we are of the considered view that the contentions raised by the Ld. A.R. for the assessee not tenable as the assessee has rightly offered and paid dividend distribution tax as per provisions contained under section 115-O of the Act. So additional ground No.B(2) for A.Y. 2011-12 & 2012-13 raised by the assessee are hereby dismissed.

55. In view of what has been discussed above, both the appeals filed by the assessee are partly allowed.

Order pronounced in the open court on 28.06.2023.

Sd/-	**Sd/-**
(MS. PADMAVATHY S)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 28.06.2023.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.