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

SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 1746/MUM/2017
(Assessment Year: 2012-13)

SKF India Limited,
Mahatma Gandhi Memorial Building,
Netaji Subhash Road, Charni Road,
Mumbai - 400002
[PAN: AAACS0684H]

..... **Appellant**

Vs

The Deputy Commissioner of Income-tax – 4(3)(2), Mumbai
Room No. 649, Aayakar Bhavan,
M.K. Road, New Marine Lines,
Mumbai - 400020

..... **Respondent**

Appearance

For the Appellant/Assessee	:	Ms. Sailee V. Gujarathi
For the Respondent/Department	:	Shri Gaurav Batham

Date

Conclusion of hearing	:	24.05.2023
Pronouncement of order	:	21.08.2023

O R D E R

Per Rahul Chaudhary, Judicial Member:

1. The present appeal is directed against the Assessment Order dated, 31/01/2017, passed under Section 144C(13) read with Section 143(3) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'], as per directions, dated 28/12/2016, issued by the Dispute Resolution Panel-2, Mumbai (hereinafter referred to as 'the DRP') under Section 144C(5) of the Act pertaining to the Assessment Year 2012-13.

2. The Appellant has raised following grounds of appeal:

"1:0 Re: Adjustment of Rs. 64,35,00,000/- in relation to international transaction of intragroup services.

1:1 The Assessing Officer/ the Transfer Pricing Officer/ the Dispute Resolution Panel ("DRP") have erred in making an upward transfer pricing adjustment of Rs. 64,35,00,000/- to the total income of the Appellant by holding that the international transaction of availing of intragroup services entered into by the Appellant with its Associated Enterprises ("AES") were not at an arm's length.

1:2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, the international transaction relating to availing of intragroup services was at an arm's length and the stand taken by the Assessing Officer / the Transfer Pricing Officer/ the Dispute Resolution Panel in this regard is misconceived, erroneous, illegal and contra legem.

1:3 The Appellant submits that the Assessing Officer/ the Transfer Pricing Officer/the Dispute Resolution Panel have erred in arriving at various unwarranted and erroneous conclusions unsupported by any relevant material and have also failed to consider various materials and evidence adduced and the submissions made by the Appellant to substantiate the arm's length nature of the transaction relating to availing of intragroup services

1:4 The Appellant submits that the Assessing Officer be directed to delete upward adjustment of Rs. 64,35,00,000/- made by him to Appellant's total income and to re- compute its total income and tax liability accordingly.

2:0 Re: Direct Tax grounds

2:1 Adjustment under section 145A of the Act - Rs.3,58,02,147

(a) The learned AO/Hon'ble DRP erred in making an addition of Rs.3,58,02,147 to the total income of the appellant reflecting the difference between the cenvat element of Rs.12,73,89,600 in closing stock of goods us on 31 March 2012 less the cenvat element of Rs.9,15,87,453 in the opening stock of goods as on 1 April 2011.

(b) The learned AO failed to appreciate that the method of accounting followed by the Appellant for valuing closing stock is in accordance with the guidelines prescribed by the Institute of Chartered Accountants of India (ICAI) and generally accepted accounting principles.

(e) Without prejudice, the learned AO ought to have appreciated that on proper consideration of the provisions of section 145A, a similar adjustment on account of cenvat element should also have been made on the amount of purchases.

2:2 Addition in respect of bad debts written off- Rs. 21,98,678

(a) The learned AO/ Hon'ble DRP erred in disallowing an amount of Rs.21,98,678 in respect of bad debts written off during the previous year relevant to the assessment year under consideration.

(b) The learned AO/Hon'ble DRP failed to appreciate the submissions dated 16 February 2016 and 22 March 2016 furnished during the assessment proceedings providing details / information in respect of the bad debts written off during the year.

(c) The Hon'ble DRP failed to appreciate the additional evidence submitted by the assessee vide letter dated 14 September 2016 furnishing details in respect of the bad debts written off during the year.

2:3 Addition in respect of transactions reported in the Annual Information Return (AIR) - Rs.5,08,58,004

(a) The learned AO erred in making an addition of Rs.5,08,58,004 in respect of transactions reported in the AIR on the basis that the Appellant had failed to reconcile the said transactions with its books of account

(b) The learned AO erred in not appreciating the directions of the Hon'ble DRP and not providing additional details to the Appellant in respect of the transactions reported in the AIR. The learned AO has erred in not analyzing the facts in totality as directed by the Hon'ble DRP and has hastily made the addition of Rs.5,08,58,004.

(c) The learned AO failed to appreciate the detailed submissions made by the assessee vide letter dated 27 January 2017 pursuant to the Hon'ble DRP's directions dated 28 December 2016.

(d) The learned AO erred in making addition of Rs.5,08,58,004 merely on conjunction and surmise without proving that the appellant has received the alleged income but not accounted in the books.

(e) The Hon'ble DRP erred in not following the Hon'ble Income-tax

Appellate Tribunal's order for the AY 2011-12 and directing the learned AQ to furnish requisite additional information to enable the Appellant to reconcile the ITS details.

2:4 Short credit of Tax Deducted at Source

The learned AO ought to have granted credit for taxes deducted at source at Rs.5,02,73,196 as against Rs.5,00,64,081 granted in the assessment order dated 31 January 2017.

2:5 Levy of interest under section 234B and 234C of the Act

(a) The learned AO erred in levying interest of Rs. 12,25,65,078 under sections 234B of the Act. The appellant denies liability to interest under section 234B of the Act.

(b) The learned AO erred in levying interest at an erroneous amount of Rs 7,19,241 under sections 254C of the Act.

2:6 Initiation of proceedings for the levy of penalty under section 271(1)(c) of the Act

The learned AO erred in initiating proceedings for the levy of penalty under section 271(1)(c) of the Act.

3:0 Re: General grounds

The Appellant craves leave to add, alter, amend, substitute and/or modify in any manner whatsoever all or any of the foregoing grounds of objections at or before the hearing of the appeal.

First Additional Ground [Ground No. 5 & 6]

2.1. The Appellant has also raised the following additional grounds of appeal vide letter dated 06/12/2018:

"Ground 5

On the facts and circumstances of the case, and in law, the Learned Assessing Officer ('AO') ought to have held that the rate of dividend distribution tax (DDT) in respect of dividend paid by Appellant's to its parent company, AB SKF and to its shareholder, SKF Forvaltning Ltd, who are tax residents of Sweden should be capped at the rate of tax on Dividend Income as per Article 10 of the Agreement for Avoidance of Double Taxation (DTAA) signed between India and Sweden read with the beneficial provisions of a DTAA or a Protocol between India

and third state which is a member state of Organisation for Economic Co-operation and Development ('OECD') as per the provisions of Most Favoured Nation Clause (MFN) contained in Protocol to India-Sweden DTAA.

It is further prayed that the excess of DDT paid over and above the rate of tax prescribed in DTAA in respect of dividend paid to AB SKF and to SKF Forvaltning Ltd should be refunded to the Appellant Company.

Ground 6

On the facts and circumstances of the case, and in law, the Learned AO ought to have held that the rate of DDT in respect of dividend paid by Appellant to its non-resident share holder SKF U.K. Limited, which is a resident of United Kingdom, should be capped at the rate of tax on Dividend Income as per Article 10 of the DTAA signed between India and United Kingdom.

It is further prayed that the excess of DDT paid over and above the rate of tax prescribed in DTAA in respect of dividend paid to SKF U.K. Limited should be refunded to the Appellant Company.

The Appellant craves leave to add, alter, supplement, amend, vary, withdraw or otherwise modify the ground mentioned herein above at or before the time of hearing."

Second Additional Ground [Ground No. 7 to 7.8]

2.2. The Appellant has also raised the following additional grounds of appeal vide letter dated 24/09/2020:

"7:0 Re: Deduction in respect of education cess paid for the assessment year under consideration

7:1 The Learned Assessing Officer (AO) ought to be directed to allow a deduction of Rs.2,90,04,338 in respect of education cess and secondary and higher education cess paid for the assessment year under consideration while computing the total income of the Appellant.

7:2 The Learned AO failed to appreciate that education cess and secondary and higher education cess paid pursuant to Finance Act, 2011 cannot be disallowed under section 40(a)(ii) of the Act.

7:3 Based on the facts and in the circumstances of the case and in law, the Learned AO has failed to appreciate that the tax authorities are under obligation to charge, levy and collect only

the legitimate tax and if Appellant due to any reason fails/ commits a mistake in showing any income which is otherwise not taxable or shown any income in the return, the authorities are bound to assess the Appellant in respect of correct income.

7:4 The Learned AO ought to have appreciated that education cess and secondary and higher education cess in not on account of any tax levied on the profits or gains of any business or profession as referred under section 40(a)(ii) of the Act. 7:5 The Appellant places reliance on decision of the jurisdictional Bombay High Court and Hon'ble Mumbai ITAT in the case of Sesa Goa Ltd. v/s JCIT (ITA No. 17 and 18 of 2013] and Voltas Ltd. v. ACIT ITA No. 6612/Mum/2018] respectively, wherein it has been held that education cess and secondary and higher education cess is an allowable deduction in computing the taxable income of an assessee.

7:6 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, education cess on income-tax for the year under consideration, though not claimed as a deduction by the Appellant while filing its return of income for the year under consideration, ought to have been allowed while assessing its income for the year under consideration.

7:7 The Appellant prays that in view of the Hon'ble Supreme Court decision, in the case of National Thermal Power Co. Ltd v. Commissioner of Income Tax [1998] 229 ITR 383, the above ground be admitted and relief on the same be granted.

7.8 The Appellant submits that the Learned AO be directed to re-compute the Appellant's total income and tax thereon after allowing deduction of Rs. 2,90,04,338 for education cess and secondary and higher education cess paid for the year under consideration."

3. Brief facts of the case are that the Appellant-Company is a public limited company engaged in the business of manufacturing & sale of ball & roller bearings, hub bearings & textile machinery components.

3.1. The Appellant filed its return of income for the Assessment Year 2012-13 on 30.11.2012 declaring total income of INR 310,89,44,600/- The case of the Appellant was selected for scrutiny. During the assessment proceedings, the Assessing Officer noted that the

Appellant had entered into international transactions with Associated Enterprises (AEs) and therefore, made a reference to the Transfer Pricing Officer (TPO) for computation of Arm's Length Price (ALP) under Section 92CA(1) of the Act. The TPO vide order dated, 29.12.2015, passed under Section 92CA(3) of the Act proposed upward transfer pricing adjustment of INR 64,35,00,000/-.

3.2. On 31/03/2016, the Assessing Officer passed Draft Assessment Order under Section 143(3) read with Section 144C of the Act proposing the aforesaid transfer pricing adjustment. In addition the Assessing Officer also proposed, inter alia, the following additions/disallowance in the Draft Assessment Order, dated 31/03/2016:

(a) Addition of INR 3,58,20,147/- under Section 145A of the Act

(b) Disallowance of Bad Debt of INR 21,98,678/-

(c) Addition of INR 6,12,41,634/- on account of non-reconciliation of AIR transaction

3.3. The Appellant filed objections before the DRP against the above additions/disallowances proposed in the Draft Assessment Order. However, the DRP rejected the objections vide order dated 28/12/2016. Therefore, vide Final Assessment Order, dated 31/01/2017, passed by the Assessing Officer under Section 144C(13) read with Section 143(3) of the Act, the Assessing Officer determining total income of the Appellant at INR 310,89,44,600/-.

3.4. Being aggrieved, the Appellant has filed the present appeal raising grounds reproduced in paragraph 2 above.

4. <u>Ground No. 1 to 1.4</u>

4.1. Ground No. 1 to 1.4 pertains to the transfer pricing adjustment pricing adjustment of INR 64,35,00,000/-.

4.2. When the appeal was taken up for hearing, the Ld. Authorised Representative for the Appellant invited our attention to letter, dated 22/05/2023, filed on behalf of the Appellant seeking revision/amendment of Ground No. 1 raised in the present appeal on account of resolution of dispute through Mutual Agreement Procedure (MAP) in terms of Article 26 of the Agreement For Avoidance of Double Taxation And Prevention Of Fiscal Evasion between India and Sweden. As per communication of resolution of dispute under MAP for Assessment Year 2011-12 and 2012-13, dated 29/09/2022, on account of payment of intra-group services to the Swedish Associate Enterprises (AEs) by the Appellant were subjected to MAP. The Ld. Authorised Representative for the Appellant submitted the following bifurcation of the aforesaid transfer pricing adjustment forming subject matter of MAP proceedings which are no longer pressed before the Tribunal:

A. Covered under MAP proceedings and Not pressed before the Tribunal

Sr. No.	Name and address of the associated enterprises with whom the international transaction has been entered into	Description of the transaction	Amount (INR In Lakhs)
1	Aktiebolaget SKF (Sweden)	Business Support & Consultancy	4.86
		Service Charges	3,303.52
		Data cost	2,476.57
2	SKF Sverige AB (Sweden)	Business Support & Consultancy	21.83
		Service Charges	3.20
3	SKF Treasury Centre (Sweden)	Support Service	161.20
4	SKF Mekan AB (Sweden)	Business Support & Consultancy	7.58
		Sub-Total (A)	**5978.77**

B. Adjustments not applied under MAP and pressed before Tribunal

Sr. No.	Name and address of the associated enterprises with whom the international transaction has been entered into	Description of the transaction	Amount (INR In Lakhs)
1	Aktiebolaget SKF (Sweden) Se-415 50 Gothenburg, Sweden	Training Charges	50.02
2	SKF Sverige AB (Sweden)	Training Charges	41.96
3	SKF BV (the Netherlands)	Training Charges	17.10
4	SKF France	Business Support & Consultancy	8.74
		Testing Charges	6.73
		Training Charges	0.65
5	Societe Vendeene De Roulements(France)	Business Support & Consultancy	61.42
6	SKF Gmbh (Germany)	Business Support & Consultancy	27.25
		Testing Charges	110.56
		Training Charges	16.44
		Service Charges	5.21
7	SKF Industries SPA (Italy)	Testing Charges	8.97
8	SKF USA INC. Conditioning Monitoring Center (USA)	Business Support & Consultancy	14.88
		Testing Charges	5.50
9	Baker Instrument Company(USA)	Testing Charges	1.07
10	PT Skefindo Primatama (Indonesia)	Business Support & Consultancy	7.40
11	RFT S.P.A. (Italy)	Testing Charges	8.65
12	SKF Asia Pacific Pte Ltd.	Training charges	1.74
13	SKF Osterreich AG (Austria)	Training Charges	8.15
		Testing Charges	39.40
14	SKF Bearing Industries Malaysia)	Testing Charges	2.63
15	Transrol/Vis A Roulement France)	Service Charges	0.58
		Sub-Total (B)	**456.58**
		Grand Total (A+B)	**6435.35**

4.3. Accordingly, the claim of the Appellant regarding the transfer pricing adjustment of INR 59,78,77,000/- relating to payment of intra-group services is dismissed as being not pressed in view of the MAP Resolution. Therefore, the challenge by the Appellant to transfer pricing adjustment stands restricted to aggregate transfer pricing adjustment of INR 4,56,58,000/-. Accordingly, the Ground No. 1 raised by the Appellant stands revised as per Letter, dated 22.05.2023, filed by the Appellant before the Tribunal whereby the transfer pricing adjustment to the extent of INR 4,56,58,000/- has been challenged by the Appellant.

4.4. Having briefly heard both the sides on this issue, we find that both the sides agree that the issue relating to transfer pricing adjustment raised in the present appeal pertaining to payment for availing intra-group services of INR 4,56,58,000/- is covered by the decision of the Tribunal in the case of the Appellant for the Assessment Year 2011-12 as Identical issue had come up before the Tribunal in appeal for the Assessment Year 2011-12 (ITA No. 1420/Mum/2016), and the Tribunal vide order, dated 16/09/2016, decided the issue holding as under:

> *"9. We have considered the rival submissions, perused the relevant finding given in the impugned orders, as well as material referred and relied upon before us. The main issue involved is Transfer Pricing Adjustment of Rs.54.41 crores on the transaction of intra-group services. The entire amount of payment made to the AE has been added to the income of the assessee by the departmental authorities holding that, the assessee could not provide any evidences to show that these services were actually availed by the assessee from the AE and no separate benchmarking has been done by the assessee qua this transaction. The assessee company which is part of SKF Group Worldwide is mainly engaged in Manufacturing & Sales of Ball Bearings, Roller Bearings, Hub Bearings & Textile Machinery components service and lubricants systems etc. As part of its manufacturing activity, assessee has shown availing of various services from its AE. The overall profit margin of the manufacturing and related activities worked out at 19.77% (on the base of operating*

profit/total costs). This PLI was benchmarked with the independent comparables whose average profit margin was worked out at 10.85% and hence it was reported that assessee's entire transaction of manufacturing segment which included these services also are at Arm's Length Price. Even if aggregations of all the transactions including relating to these services are to be taken into account, then also the assessee's margin is at Arm's Length Price. The revenue's case is that, firstly, assessee has not separately benchmarked these services; however, they themselves have failed to carry out proper transfer pricing analysis to benchmark and arrive at appropriate ALP by following any of the prescribed method. Secondly, assessee could not substantiate that any actual rendering of services was done by AE. From the perusal of the material placed before us, which was also there before the authorities below, prima facie it is seen that various evidences were filed to corroborate the rendering of services by the AE and also the nature of services along with the allocation of costs. The details of documents/evidences filed before the TPO and DRP are as under:-

A. *Written submissions dated 09 October 2014 filed before the Transfer Pricing Officer along with the relevant annexures thereto;*

   i. *Service agreement dated 21 April 2008 entered into between Associated Enterprise (Aktiebolaget SKF, Sweden) and the Appellant,*

   ii. *Addendum to the Service agreement for prolongation of services for the period 2010 and 2011 dated 16 March 2010 and 28 March 2011;*

   iii. *IT Services delivery agreement dated 07 January 2011 entered into between Associated Enterprise (Aktiebolaget SKF, Sweden) and the Appellant;*

   iv. *Updated margin of comparable companies FYE March 2011 in Manufacturing and Trading Segment*

B. *Written submissions dated 09 December 2014 filed before the Transfer Pricing Officer along with relevant annexures thereto*

   i. *Sample email correspondences to show Associated Enterprise has provided assistance and clarification with respect to accounting related issues to the Appellant*

   ii. *Sample email correspondences to show Associated Enterprise has provided review and inputs on Term sheet/ agreements, assistance in training for legal risk management to the Appellant,*

iii. Sample email correspondences to show Associated Enterprise has provided group insurance support service to the appellant;

iv. A statement giving summary of sample documentary evidence for availing services and benefits received by the Appellant"

Apart from that, before the DRP, the assessee had filed summary of intra-group services availed from the AE, which was filed before the DRP; memorandum of allocation of service fees amongst the intra-group as well as the allocation of service fees. In the light of these evidences/documents, we are unable to apprehend as to what other kind of documents were required by the assessee to show that these services has not been rendered. First of all the order of the TPO itself is very cryptic and passed in a very callous manner, without any proper analysis and understanding of the Transfer Pricing principles. The DRP too has failed to take note of these evidences. If the documents/evidences were deficient then DRP should have specified the same and asked the assessee to corroborate further. Various observations made by the DRP to arrive at their conclusion like, there is no added commercial value provided by providing such kind of services; business support consultancy and training charges are a typical shareholder activity of the AE; the management and consultancy services provided by the AE fall in the category of "Services that provide incidental benefits", etc. as discussed above is again too generic and how can value of such services can be treated as 'nil' under transfer pricing principle. If any transaction has been recognized as international transaction by the department, then it is incumbent to arrive at the ALP of such transaction. The Department cannot disregard the actual transaction between the parties unless the economic substance of the transaction differ from its form; or the arrangement made by the parties in relation to the transaction differ from those which is or should have been adopted by an independent enterprises behaving in a commercial rational manner. It is otherwise a trite law that revenue authorities cannot dictate the assessee as to how he should conduct his business and what expenditure he can incur. The test of "commercial expediency" for determining, whether the expenditure was wholly and exclusively for the purpose of the business or not has been time and again explained by our Courts. The reasonableness of the expenditure has to be judged from the point of view of the businessman and not of the revenue. Even Rule 10B(1)(a) does not envisages the disallowance of any expenditure on the ground that it was not necessary for the assessee to incur or avail the same. Here in this case, the revenue authorities, first of all, have disregarded the voluminous documents and evidences filed before them and secondly, have opined that these expenditures are not separately required to be incurred because of various reasons as given above. Such an approach of the revenue cannot be upheld and the ALP of the

transaction cannot be taken at "Nil" because what is required to be analysed is whether the payment made for the services to the AE meets the requirement of Arm's Length Price or not. The Arm's Length Price can only be determined under the prescribed provisions of law that is, by carrying out comparability analysis by comparing the controlled transactions with uncontrolled transactions under prescribed methods

Accordingly, we reject the finding of the DRP that, no services has been rendered by the assessee and, therefore, the Arm's Length Price of the service availed by the assessee from its AE should be taken at "Nil".

10. Now, whether the payment and the margin on these services are to be subsumed with other transactions, that is, whether all the transactions are to be aggregated for determination of ALP and would be covered under the overall profit margin worked out under the TNMM. As discussed in earlier part of our order, the intra-group services were stated to be inextricably linked with the manufacturing segment and hence it has been contended that the margin earned on the overall assets as well as the operations have to be aggregated. Since, the assessee's operating profit margin over total cost is much higher, that is 19.77% as compared to the average profit margin of comparables arrived at 10.25% and, therefore, it has been contended that, such a high margin will take care of the payment made for intra-group services. In theory this contention of the assessee appears to be tenable, however the onus is on the assessee to demonstrate, whether the two AEs have treated the international transactions as a single transaction or is attributed to the aggregate package or not. If the assessee is able to demonstrate that the transaction of intra-group services are inextricably linked with the overall business activities undertaken by the assessed which herein this case is 'manufacturing and has a overall effect on net income or loss in the final result then, such a transaction can be aggregated for the purpose of determining the Arm's Length Price of the transactions between the AEs. Under the facts and circumstances of the case, we are of the opinion that, this matter needs to be restored back to the file of the AO/TPO to examine whether the transaction of intra-group services are inextricably linked with the manufacturing and overall business activities carried out by the assessee. The primary onus would be on the assessee to provide necessary details and explain as to how these services provided by the AE can be subsumed or can be aggregated with the overall business activities. If it is found that all the transactions are to be aggregated then definitely under the TNMM and given the high profit margin of

the assessee, no separate benchmarking would be required qua the intra-group services. In case, if it is found that these transactions needs to be separately benchmarked, then needless to say that, proper comparability analysis has to be carried out by following prescribed method under the Transfer Pricing provisions. With these directions, the issue of Transfer Pricing is set aside to the file of the TPO / AO for fresh and proper analysis after giving due and effective opportunity to the assessee to present its case properly."

4.5. On perusal of above, we find that the issue relating to transfer pricing adjustment has been set aside to the file of TPO/Assessing Officer for fresh determination after giving due and effective opportunity to the Appellant to present its case. The Tribunal rejected the findings of the DRP that no services rendered by the Appellant and therefore the arm's length price of services availed by the Appellant from AE should be taken as Nil. Further, the Tribunal was of the view that the matter needs to be remanded back to the file of Assessing Officer/TPO to examine whether the transactions of intra-group services were intractably linked with the manufacturing and overall business activities carried out by the Appellant. The primary onus was case upon the Appellant to provide necessary details and explain as to how these services provided by the associated enterprises could be subsumed or aggregated with the overall business activities. Since, both the sides agreed that there is no change in the facts and circumstances of the case, we remand the issue of transfer pricing adjustment relating to intra-group services made by the Appellant to its AEs for fresh determination to the file of Assessing Officer/TPO and direct the Assessing Officer/TPO to decide the issue afresh as per the directions given by the Tribunal in appeal for the Assessment Year 2011-12 reproduced in paragraph 4.4 above. In terms of the aforesaid Ground No. 1 raised by the Appellant is allowed for statistical purposes.

5. Ground No. 2.1

5.1. Ground No. 2.1 is directed against the addition of INR 3,58,20,147/- on account of adjustment in the value of the closing stock under Section 145A of the Act. In the Draft Assessment Order, the Assessing Officer proposed an addition of INR 3,58,02,1417/- being the difference between CENVAT element of INR 12,73,89,600/- pertaining to the closing stock goods on 31/03/2012 reduced by the CENVAT element of INR 9,15,87,453/- in the opening stock of goods as on 01/04/2011. Before DRP, the Appellant made the following submissions:

"i. The assessee regularly follows the 'exclusive method of accounting as prescribed by the ICAI for the purposes of accounting its purchases, sales and inventories. The assessee accounts for purchase of raw materials, stores and spares net of cenvat credit resulting in reduction in the cost of purchases charged to profit and loss account. Correspondingly, the sales are also booked net of excise duty paid on such goods.

ii. Prior to 1 April 1999, as per Accounting Standard 2 read with Guidance Note on tax audit issued by ICAI, there were two alternative methods of accounting for cenvat credit viz. Inclusive method or Exclusive method. However, with effect from 1 April 1999, the Inclusive method of accounting has been withdrawn by the ICAI and only the Exclusive method of valuation has been prescribed.

iii Under the Inclusive method, opening stock of goods, purchases and sales are accounted inclusive of duties of excise arising on account of the same which is finally adjusted from raw material consumption. Whereas, under the Exclusive method, the opening stock of both raw materials and finished goods is stated at value which exclusive of tax, similarly the sales are also stated net of taxes. Under both the methods of accounting viz. Inclusive method as well as exclusive method there would be no impact on the Profit and loss statement of the assessee. Accordingly, as there is no impact on Profit/Loss for the year, the closing stock should also be valued at net of cenvat credit.

iv. The assessee submits that since purchases which are charged to the profit and loss account during the year are being accounted net of

cenvat credit, then corresponding closing valuation of inventory should also be valued at net of cenvat credit. Further, the accounting of purchases net of cenvat credit has resulted in lesser charge to the profit and loss account similarly the sales are also reflected net of excise duty, thereby creating equilibrium on both the sides of the profit and loss account. Therefore, any disturbance to the valuation of closing stock would lead to distorted results.

v. *As per the provisions of section 145A, adjustment made for any tax, cess or duty on goods should be made on the sales, purchases and closing stock of goods. If at all any addition is to be made to the closing stock on account of cenvat element, then similar adjustment should also be made to purchases as the same are accounted net of modvat credit availed on them. The adjustment on account of cenvat credit ought to be made by the learned AO in entirety i.e. purchases, sales and stock of goods and not restricted only to stock of goods. In either of the methods used for accounting of modvat / cenvat, there would be no impact on profit for the year. This view is supported by the Guidance Note on tax audit issued by the ICAI.*

vi. *The assessee also places reliance on the following judicial precedents in support of its contentions:*

Cyanamid Agro v. ACIT (31 SOT 286) [(page 1029 of Volume 2 (part IV)];

DCIT v. Beck India (26 SOT 141) [(page 1045 of Volume 2 (part IV)];

L&T Demag Plastics Machinery P. Ltd. v. ITO (123 ITD 391) [(page 1053 of Volume 2 (part IV)]

vii. *Based on the foregoing, the assessee submits that no addition ofRs.3,58,02,147 on account of CENVAT ought to have been made to the total income of the assessee.*

viii. *The assesse further submitted that for the AY 2006-07, the issue was not pressed before the Hon'ble Tribunal and hence the case was not decided on merits. Accordingly the principle of res-judicata does not apply. The assesse further requested that the issue for the current year be decided on merits."*

5.2. However, the DRP dismissed the objections filed by the Appellant against the proposed addition of INR 3,58,02,147/- under Section 145A of the Act on the ground that the identical issue stood decided against the Appellant in Appellant's own case for the Assessment Year 2006-07 [ITA No. 7723/Mum/2010, dated 22.05.2015].

5.3. Before us, the Ld. Authorised Representative for the Appellant pointed out that in appeal for the Assessment Year 2006-07, the Appellant had not pressed this ground before the Tribunal. Further, she reiterated the contention raised before the DRP and submitted that any disturbance in violation of closing stock would lead to distortion of the results. She submitted that the Appellant has been following exclusive method of accounting as prescribed by the Institute of Chartered Accountant of India (ICAI) in Accounting Standard 2 read with Guidance Note of tax audit issued by the ICAI consistently and therefore, no adjustment on account of CENVAT was warranted. In alternative, and without prejudice of the aforesaid, the Ld. Authorised Representative for the Appellant submitted that the issue be remanded back to the file of Assessing Officer so that the Appellant could establish that even by following exclusive method there would be no change of the profits as declared by the Appellant.

5.4. Per contra, the Ld. Departmental Representative relied upon the decision of the Tribunal in the case of the Appellant for the Assessment Year 2011-12 (ITA No. 1420/Mum/2016, dated 16/09/2016).

5.5. We have considered the rival submissions and perused the material on record. We note that the Tribunal has while disposing of appeal for the Assessment Year 2011-12 (ITA No. 1420/Mum/2016, dated 16/09/2016) decided the issue as under:

"11 So far as second issue relating to adjustment to closing stock on account of CENVAT under section 145A, the only contention raised by the Ld. Counsel before us is that, the same treatment should be given to the opening stock also in line with the decision of Hon'ble Bombay High Court in the case of CIT vs Mahalakshmi Glass Works Private Limited. reported in [2009] 318 ITR 116. Ld. DR admitted that, this issue may be set aside to the file of the AO to follow the principle laid down by the Hon'ble Bombay High Court.

12. On the perusal of the impugned orders, we find that, ITA 1420/Mum/2016 DRP has referred to the fact that in AY 2006-07, the assessee has not pressed this issue. However, there cannot be an estoppel to the assessee to contend the issue if a proper adjustment is required to be made in accordance with the provision of section 145A. If the difference in the valuation of closing stock is on account of CENVAT amount and has been added to the closing stock, then same treatment has to be given in the opening stock. This principle has been upheld by the Hon'ble jurisdictional High Court. Accordingly, we set aside this issue to the file of the AO apply the principle laid down by the Hon'ble Bombay High Court in the case of CIT vs. Mahalakshmi Glass Works Private Limited (supra) and grant consequential relief to the assessee."

5.6. In view of the above we are not inclined to accept the decision taken by the DRP that the issue stands decided against the Appellant in terms of decision of the Tribunal in appeal for the Assessment Year 2006-07 (ITA No. 7723/Mum/2010, dated 22/05/2016). Since the DRP has not examined the submissions raised by the Appellant, we deem it appropriate to remand this issue back to the file of the Assessing Officer for fresh adjudication by applying the principle laid down by the Hon'ble Bombay High Court in the case of CIT Vs. Mahalaxmi Glass Work Pvt. Ltd.: [2009] 318 ITR 116 and by following the decision of the Tribunal in the case of the Appellant for the Assessment Year 2011-12. The Appellant would be at liberty to establish before the Assessing Officer that even by following exclusive method of accounting, there would be no change in the profits

requiring no additions in terms of Section 145A of the Act. In terms of the aforesaid Ground No. 2.1 raised by the Appellant is allowed for statistical purposes.

6. Ground No. 2.2

6.1. Ground No. 2.2 is directed against the addition of INR 21,98,678/- made by the Assessing Officer in respect of bad debt written off during the relevant previous year.

6.2. Advancing arguments on this issue, the Ld. Authorised Representative for the Appellant, at the outset, submitted that the Assessing Officer/DRP has failed to appreciate the submissions as well as additional evidence filed by the Appellant vide letter, dated 14/09/2016, furnishing details in respect of bad debt written off, during the relevant previous year and therefore, Assessee submitted that this issue could be remitted back for fresh adjudication.

6.3. On perusal of the order dated 28/12/2016, passed by the DRP, we find that in paragraph 12, the DRP has recorded the submissions of the Appellant are as under:

> *"vi. The bad debts written off aggregating to Rs. 56,38,368 pertain to trade debtors. The assessee now furnishes debtors' ledgers extracts at page no 61 to 85 of the application dated 14 September 2016 in respect of bad debts disallowed by the AO on a sample basis. These ledgers depict the bad debts written off during the year pertain to the assesse's regular trade debtors."*

6.4. The Appellant has, in its submissions, referred to the application, dated 14/09/2016. However, the DRP has rejected the objections raised by the Appellant without taking into consideration, the documents/details furnished by the Appellant in the following manner:

> *"3.1 We have considered the objection raised before us. The assessee has not been able to provide reconciliation with respect to Rs.*

21,98,678- of bad debts claimed. This is a necessary requirement for the claim to be allowed since how else would it be possible to co-relate it with income earlier credited? Since the assessee has failed to demonstrate the same the objection raised is rejected and the action of the AO upheld."

6.5. In view of the above, we find merit in the contention advanced by the Appellant that the DRP has not taken into consideration the documents and details furnished by the Appellant to support its claim in respect of bad debts of INR 21,98,678/- written off during the relevant previous year. Accordingly, we remit this issue back to the file of Assessing Officer for fresh adjudication.

7. Ground No. 2.3

7.1. Ground No. 2.3 is directed against the addition of INR 5,08,58,004/- made by the Assessing Officer in respect of transactions reported in the Annual Information Report (AIR).

7.2. We have heard both the sides on this issue and perused the material on record. The grievance of the Appellant is that the Assessing Officer has made the addition with providing the relevant material to the Appellant. While the stand of the Revenue is that the Appellant has failed to provide reconciliation despite sufficient opportunities having been granted.

7.3. On perusal of paragraph 9 of the Assessment Order we find that transactions of INR 3,24,14,337/- and INR 2,88,27,297/- were identified by the Assessing Officer as totally un-reconciled and partially un-reconciled, respectively. After receiving directions of DRP, the Appellant was able to provide further reconciliation for an amount of INR 1,03,83,630/-. Therefore, the Assessing Officer made addition of balance amount of INR 5,08,58,004/-.

7.4. Before us it was contended by the Ld. Authorised Representative for the Appellant that the Appellant would be able to provide reconciliation in case relevant information/details are shared by the Assessing Officer. Per Contra, Ld. Departmental Representative submitted that the soft copy of the AIR information has already been furnished by the Assessing Officer. We note that the Appellant had contended before DRP that the AIR information furnished did not contain the complete details and requested the DRP for directions to Assessing Officer to carry necessary inquiry. It is in this context the following directions were given by the DRP

7.5. Keeping in view the above factual background, we deed it appropriate to set aside the addition of INR 5,08,58,004/- and remit the issue back to the file of Assessing Officer with the directions to the Assessing Officer to examine the issue of non-reconciliation and partial-reconciliation of the AIR information afresh. The Assessing Officer is directed to provide relevant AIR information to the Appellant who shall provide reconciliation statement to the Assessing Officer. In case the Appellant denies the transactions reflected in the AIR statement the Assessing Officer shall carry out such inquiry as the Assessing Officer may deem appropriate as per law which may include issuing notices to the transacting parties under Section 133(6) of the Act. The Appellant would be free to raise all rights and contentions before the Assessing Officer. In terms of the aforesaid, Ground No. 2.3 raised by the Appellant is allowed for statistical purposes.

8. <u>Ground No. 2.4</u>

8.1. Ground No. 2.4 pertaining to the short credit of tax deducted at source of INR 5,02,73,196/- as against INR 5,00,64,081/- claimed

by the Appellant. The Assessing Officer is directed to grant credit of tax deducted at source as per law after due verification. Accordingly, Ground No. 2.4 raised by the Appellant is allowed for statistical purposes.

9. Ground No. 2.5

9.1. Ground No. 2.5 pertaining to levy of interest under Section 234B and 234C of the Act is disposed off as being consequential.

10. Ground No. 2.6

10.1. Ground No. 2.6 pertaining to levy of penalty under Section 271(1)(c) of the Act is disposed off as being premature.

11. Ground No. 3

11.1. Ground No. 3 is disposed off as being general in nature.

12. First Additional Ground [Ground Nos. 5 & 6]

12.1. First Additional Ground [Ground No. 5 & 6] raised by the Appellant vide Letter dated 03/12/2018 pertains to the rate of dividend distribution tax applicable to the dividend distributor by the Appellant to its shareholders. The Appellant had claimed that the benefit of tax treaty rates as applicable to the shareholders should have been adopted to tax the dividend distributed by the Appellant. However, this issue has been raised for the first time before the Tribunal. We are of the view that this issue does not arise from the order impugned and therefore, cannot be admitted. Even on merits, the Special Bench of the Tribunal has, in the case of Deputy Commissioner of Income-tax v. TotalOil India (P.) Ltd.: [2023] 149 taxmann.com 332 (Mumbai - Trib.) (SB)/[2023] 104 ITR(T) 1 (Mumbai - Trib.) (SB)[20-04-2023] held that tax treaty provisions do not get attracted when a domestic company pays dividend

distribution tax under Section 115O of the Act. In view of the aforesaid, First Additional Ground [Ground No.5 & 6] raised by the Appellant is dismissed.

13. Second Additional Ground [Ground No. 7 to 7.8]

13.1. The Second Additional Ground [Ground No. 7 to 7.8] raised by the Appellant vide Letter dated 24/09/2020 pertains to claim of deduction of INR 2,90,04,338/- pertaining to Education Cess and Secondary & Higher Education Cess paid by the Appellant during the relevant previous year raised for the first time before the Tribunal. In view of the statement made by the Ld. Authorised Representative for the Appellant under instruction that the Appellant does not wish to pursue this ground, the Second Additional Ground [Ground No. 7 to 7.8] are dismissed as not pressed.

14. In result, the present appeal is partly allowed.

Order pronounced on 21.08.2023.

Sd/-	***Sd/-***
(S. Rifaur Rahman)	**(Rahul Chaudhary)**
Accountant Member	**Judicial Member**

मुंबई Mumbai; दिनांक Dated : 21.08.2023
Alindra, PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai