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

BEFORE SHRI SAKTIJIT DEY, VICE-PRESIDENT
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

ITA No. 1524/Del/2022
Assessment Year: 2018-19

Honda Motorcycle & Scooter India Pvt. Ltd., Plot No. 1, Sector-3, IMT Manesar, Gurgaon. **PAN: AAACH7467D**	Versus	ACIT, Circle 1(1), Gurugram.
(Appellant)		(Respondent)

Assessee by : Sh. Harpreet Singh Ajmani, Adv.
Ms. Mansavini Bajpai, Advocate
Revenue by : Sh. Rajesh Kumar, CIT-DR

Date of hearing : 06.11.2023
Date of pronouncement: 05.02.2024

ORDER

PER SAKTIJIT DEY, VP,

Captioned appeal has been filed by the assessee challenging the final assessment order passed under section 143(3) of the Income-tax Act, 1961 pertaining to assessment year 2018-19, in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. Ground Nos. 1 & 2, being general grounds, do not require specific adjudication.

3. Grounds Nos. 3 to 8 relate to addition made on account of transfer pricing adjustment to the arm's length price (ALP) of export commission paid to Honda Motor Co. Ltd., Japan.

4. Briefly, the facts are, the assessee is a resident corporate entity and a subsidiary of Honda Motor Co. Ltd., Japan. As stated, the assessee is engaged in the business of manufacture and sale of motorcycles and scooters. In the year under consideration, the assessee had entered into various international transactions with its associate enterprises (AEs). One amongst them being payment of export commission of Rs.16,10,03,387/- to Honda Motor Co. Ltd., Japan. As could be seen from the facts on record, the assessee had entered into an export agreement with Honda Motor Co. Ltd., Japan on 13.07.2000, in terms of which, the assessee was granted consent to export specific models of two wheelers to certain countries on payment of export commission @ 5% of the freight on board (FOB) value of such export. In the transfer pricing study report, the assessee benchmarked the transaction by using transactional net margin method (TNMM). The approach adopted by the assessee was not to the liking of the Transfer Pricing Officer (TPO). After rejecting the benchmarking of the assessee *qua* the payment of export commission, the TPO proceeded to benchmark the transaction independently using

Comparable Uncontrolled Price (CUP) method. While doing so, the TPO determined the ALP at nil on the reasoning that no services were provided to the assessee to deserve any commission and secondly, the assessee was a contract manufacturer and only exports as per orders received from AEs. Accordingly, he suggested adjustment of the entire export commission paid to the AE. In the draft assessment order, the Assessing Officer added back the amount of Rs.16,10,03,387/- to the income of the assessee. Against draft assessment order, the assessee raised objections before learned DRP.

5. Before the DRP, assessee's submission was to the effect that the transaction relating to payment of export commission was intrinsically linked with manufacture and sale of products, hence, could not be segregated to be benchmarked separately. It was further submitted that assessee pays export commission to its parent entity to keep access to various markets globally, which is possible only due to the existence of AEs network in those countries. However, the submissions made by the assessee did not find favour with learned DRP. They followed their earlier directions in assessee's own cases in earlier assessment years and upheld the adjustment.

6. Before us, it is a common point between the parties that the issue is covered by the decision of coordinate Bench in assessee's own cases in past assessment years.

7. We have considered rival submissions, we find that this is a legacy issue between the parties since past assessment years. While deciding identical issue in assessee's own case in the latest order passed in assessment year 2017-18 in ITA No. 1523/Del/2022 dated 22.08.2023, the Tribunal following its earlier decision has held as under :

> "5. We have heard both the parties and perused the records. We find that this issue is squarely covered in favour of the assessee by the decisions of ITAT in its own case for AYs. 2015-16 & 2016-17 (supra). The relevant portion of ITAT order for AY 2016-17 is reproduced hereunder :-
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> > "8. Ground number 2 is with respect to the transfer pricing adjustment on account of payment of export commission of ₹ 495,348,444/– and ₹ 91,598,320/– on payment of royalty on export to associated enterprises. The learned transfer pricing officer has rejected the transfer pricing methodology adopted by the assessee for benchmarking its international transaction. The learned TPO also rejected principles of commercial expediency argued by the assessee stating that it is not mandated as per the provisions of Section 92CA of the act. The determined ALP of these transactions at Rs Nil. The coordinate bench in assessee's own case for assessment year 2015 – 16 has considered this issue as under:-
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> > > "7. Ground No. 2 is with respect to adjustment on account of export commission and royalty paid to associated enterprises. This is challenged by the assessee from Ground No. 2 to Ground No. 7 of the above appeal.
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> > > 8. The ld. AR submitted this issue is squarely covered in favour of the assessee by the decision of the coordinate bench in assessee's own case in ITA No.

7463 and 7464/Del/2019 for Assessment Year 2013-14 and 2014-15 dated 30.09.2020. He submitted that there is no change in the facts and circumstances of the case with respect to TPO adjustment of export of commission. With respect to the transfer, pricing adjustment related to royalty paid on sales he also submitted that the coordinate bench in assessee's own case for Assessment Year 2008-09 to 2014-15 allowed this ground in favour of the assessee holding that the assessee has sold the good on principle-to-principle basis and has received the sale consideration. He further relied upon the decision of the coordinate bench in assessee's own case in ITA No. 7963 and 7964/Del/2019 for Assessment Year 2013-14 and 2014-15. Thus, he submitted that this issue is fully covered in favour of the assessee by the order of the coordinate bench in assessee's own case and therefore this ground should be allowed.

9. The ld. DR vehemently supported the orders of the lower authorities. He submitted that the coordinate bench while deciding the case of the assessee has not considered the decision of the Hon'ble Supreme Court in case of Honda Seil Cars Ltd. 319 ITR 713 but coordinate bench has mainly relied upon the Article 2, 13 and 11 of the technology know how agreement. He extensively relied on paragraph 23 to 25 of the orders of the Hon'ble Supreme Court. He further relied on Article 15 and Article 17 of the above agreement. Therefore, he submitted that the above argument might be considered where the royalty is considered as capital expenditure.

10. We have carefully considered the rival contentions and perused the orders of the lower authorities. Ground number 2 - 5 and challenging the rejection of the transfer pricing methodology adopted by the assessee for benchmarking international transaction as well as the application of the principles of commercial expediency and need test applied by the learned transfer pricing officer and confirmed by the learned dispute resolution panel. The ground number 6 along with its sub- grounds (14 in number) is in substance challenging the determination of the arm's-length price of international transaction of export commission of ₹ 484,862,986 at Rs. nil. The ground number seven is with respect to the payment of royalty to its associated enterprise of ₹ 120,022,040/- to Honda Motors Japan for export, which is also determined by the learned

transfer pricing officer at Rs. nil holding that there is a failure of benefit test. The claim of the assessee before us that both these issues are covered in favour of the assessee by the decision of the coordinate benches in assessee's own case in earlier years. We have also considered the decision of the coordinate bench in assessee's own case for AY 2013-14 and 2014-15 where, it is claimed that the issue is squarely covered in favour of the assessee.

11. With respect to the TP adjustment to the export commission, which is claimed by the assessee that it is intrinsically, looked that the main activity of manufacturing and sale of products and as such could not be identified separately for benchmarking. It is also claimed by the assessee export commission is paid to its parent entity to get access to various global markets where the AE exists as network. The identical issue arose in the case of the for Assessment Year 2013-14 and 2014-15 wherein, coordinate bench deleted adjustment relying on the decision of ITAT in assessee's own case for Assessment Year 2008-09 in ITA No. 132/Del/2013. The ITAT quoted in para no. 12 and 13 of that order has followed the same. With respect to the issue of adjustment on account of payment of export commission, the coordinate bench has dealt with the same at para No. 7. The coordinate bench has given its reasons to delete the above adjustment in para No. 7.6 to 7.17 as under:-

"7. Now, we will address to the grievance relating to addition on account of payment of export commission - Under technical know-how agreement dated 13.07.2000 the assessee was entitled to use technical know-how provided by Honda Motor Company Limited Japan for manufacture and sale of two wheelers and parts in India and was not authorized to sell its products or part in any other territory than in India without prior written consent of HMJ. The assessee entered into a separate export agreement dated 13.07.2000 under which HMJ accorded consent to the assessee to export specific models of two wheelers to certain countries on payment of export commission @ 5% of the FOB value of such exports.

7.1 Under TNMM analysis the operating profit ratio of the assessee @ 4.60% was higher than average of operating margin of -2.24% earned by the comparables companies. Considering that the operating profit margin

of the selected comparable companies was lower than the OPM of the assessee, such international transactions were considered as being at arms length TNMM.

7.2 The TPO held that the assessee has not received any services that an independent entrepreneur would be willing to pay for and accordingly considered the arms length price of the said transaction of payment of export commission of nil.

7.3 While treating the ALP as nil the TPO held that the assessee is a contract manufacturer and further held that by its export activities the assessee is developing the brand of the AE and actually has carried out service to the AE.

7.4 It was also pointed out that the assessee has made export to AE's related parties in Chile, Peru and Mexico and such exports are apparently for the benefit of the AE's of parent company.

7.5 The TPO/DRP/DR were of the strong belief that the services rendered by the AE for facilitating exports were unclear.

7.6 At the very outset we have to state that the observations of the TPO/DRP that the assessee was only a contract manufacturer has been out rightly rejected by the Tribunal in assessee's own case in earlier assessment years.

7.7 The primary issue which needs to be examined is whether the assessee was benefited by making such export sales. The following chart would throw light on this issue:-

7.8 From the above chart it can be seen that the average price in respect of exports to AE's was higher than the price of the same product sold in the domestic market to non AE.

7.9 Further we find from the comparative profitability statement, the profitability derived by the assessee from export of goods at 8.91 % is significantly higher than the profitability derived by the assessee from sale of goods in the domestic market @ 5.50%. The comparative profitability statement is as under:-

7.10 For the sake of repetition, the entire edifice of the TPO/DRP's finding is based upon the assumption that the assessee is operating as a contract manufacturer with respect to export of good.

7.11 In our understanding of the facts of the case in hand, we are of the considered view that the TPO/DRP have grossly failed in distinguishing between the function of the license manufacturers and contract manufacturers.

7.12 A perusal of the business profile of the assessee viz-a-viz agreement with the parent, we find that the assessee is a licensed manufacturer such as the assessee, the seller is entitled to compensation which includes returns attributable to exploitation of intangibles such technical know-how etc i.e. market determined prices. On the other hand, in the case of a contact manufacturer, the manufacturer acts in accordance with the instructions of the buyer and is only entitled to routine cost plus returns. It would be pertinent to refer to the decision of the Tribunal in assessee's own case in ITA No. 132/Del/2013 held as under:-

7.13 A similar decision was taken by the Tribunal in the case of Hero Motocorp Limited in ITA No. 5130/Del/2010 wherein the Tribunal has held as under:-

7.14. In the light of the above the first limb of finding of the TPO/DRP is removed.

7.15. We find that while making the disallowance the TPO has held that assessee failed to demonstrate the benefits derive by it. This proposition of the TPO/DRP also do not hold any water in the light of the principle laid down by the Hon'ble jurisdiction High Court of Delhi in the case of Cushman and Wakefield (367 ITR 730). It would not be out of place to mention here that in earlier assessment years, this quarrel was restored to the files of the TPO to decide the issue afresh in the light principle laid down by the Hon'ble High Court in the case of Cushman and Wakefield (supra).

7.16. We have been told that in the set aside assessment proceedings the TPO has once again made the addition following the earlier findings that the assessee had failed to provide evidence.

> 7.17 Considering the facts of the case as mentioned elsewhere we are of the considered view that the assessee has successfully demonstrated not only the benefits but has also shown that the profitability is higher (as per the charts exhibited elsewhere). Considering the totality of the facts we have no hesitation in directing the AO/TPO to delete the impugned addition on account of export commission.
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> 7.18 This ground is accordingly allowed."
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> 12. Thus, we find that the both the issues of transfer pricing adjustment with respect to determination of ALP of Rs. Nil on export commission and payment of royalty are decided in favour of the assessee. The ld. DR could not show as well as the ld. AR vehemently submitted that there is no change in the facts and circumstances of the case. In view of this Ground Nos.2 to seven of the appeal are allowed."
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> 9. Therefore, respectfully following the decision of the coordinate bench in assessee's own case for assessment year 2015–16, we allow ground number 5 of the appeal and thereby direct the learned transfer pricing officer/learned assessing officer to delete the adjustment on account of the arm's-length price of the export commission payment of ₹ 495,348, 444/–."

6. Following the aforesaid precedent, we allow this ground and thereby direct the TPO/AO to delete the adjustment on account of ALP of the export commission payment."

8. Due to parity of facts, we respectfully follow earlier decision of the coordinate Bench and decide the issue in favour of the assessee. The addition is deleted.

9. In ground No. 9, the assessee has challenged the addition made on account of transfer pricing adjustment of payment of royalty.

10. Briefly, the facts are, the assessee has entered into a technical know-how agreement with the AE on 13.07.2000. In terms of which, the assessee pays royalty based on percentage of sales including

exports to AE. The assessee benchmarked the transaction by adopting aggregate approach under TNMM. However, the TPO did not accept the benchmarking of the assessee and proceeded to benchmark the payment of royalty separately by applying CUP method. While doing so, he held that sale made to AE is equivalent to sale made to self. Hence, there was no requirement to pay royalty. Thus, he determined ALP of royalty payment at nil, thereby proposing the entire amount of Rs.13,84,61,947/- as transfer pricing adjustment. While deciding assessee's objections on the issue, learned DRP relied upon their earlier directions and upheld the adjustment.

11. Before us, it is a common point between the parties that the issue is squarely covered by various decisions of the Tribunal in assessee's own cases in past assessment years.

12. Having considered rival submissions, we find, while deciding assessee's appeal for assessment year 2016-17 in ITA No. 477/Del/2021 dated 15.03.2023, the coordinate Bench followed its earlier decision in assessment year 2015-16 and decided as under :

> "12. We have considered rival submissions and perused the material available on record.
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> 13. On going through the material available on record, we find, the issue, whether, technical know-how fee paid is in the nature of capital or revenue expenditure is a legacy issue and is continuing from preceding assessment years. While, deciding the issue in the immediately preceding assessment year i.e. assessment year 2015-16, the Tribunal, in the order referred to above, followed its earlier

decision and allowed assessee's claim. The relevant observations of the Tribunal in this regard are as under:

"25. We have carefully considered the rival contention and perused the orders of the lower authorities. The identical claim with respect to the deduction of expenses in respect of technical knowhow arose before the coordinate bench in case of the assessee in ITA number 7463 and 7464/del/2018 for assessment years 2013 – 14 and 2014 – 15 wherein at para number six the coordinate bench dealt with this issue. The coordinate bench considered the decision of the coordinate bench in assessee's own case for assessment year 1213 as under :

"6. Additional claim of deduction of expenses in respect of technical know- how- A similar issue has been decided in A.Y. 2012-13. The relevant findings read as under :-

47. Now coming to the next issue raised which is by way of additional ground of appeal. Since it is legal issue, it is admitted for adjudication. The assessee fairly pointed out that the lump sum Royalty was capitalized in its books of accounts and also not claimed as an expenditure in the return of income. However, because of the settled position by way of the decision of the Jurisdictional High Court in CIT v. Hero Honda Motors Ltd. (supra), the same is being claimed as business expenditure. The relevant findings are as under:-

"The Hon'ble ITAT in the appellant's own case for assessment Year 2011- 12 reiterated that the facts in the case of the appellant differ from, the facts of Honda Siel Cars Ltd. (supra) because the amount expended is in relation to the running royalty and not for the purpose of setting up of plant.

Further, reference is also made to the decision of the Delhi Tribunal in the case of Honda Cards India Ltd vs DCIT : ITA No.4491/Del/2014 dated 18.08.2017 (pages 414- 457 of the CLPB) and also confirmed by Hon'ble Delhi High Court in ITA No.45/2019 vide order dated 13.05.2019 (refer pages 457A-457F of the CLPB), wherein the Tribunal after referring to the decision of the Supreme Court in the case of Honda Siel Cars (supra) observed that the Supreme Court has carved out the distinction between the payments at the time of setting up of the manufacturing facility and the payments made once the manufacturing process has already began. In the former case, royalty expenditure for setting up the manufacturing facility is capital in nature while in the latter case, the royalty expense is revenue in nature. "

48. The SLP filed against the said decision has been dismissed by the Hon'ble Supreme Court. Applying the said ratio, we are of the

view that the assessee was entitled to claim the aforesaid expenditure as revenue expenditure in the hands of the assessee.

49. Coming to the stand of the Revenue that where the assessee itself had not claimed as deductible in its hands, then the same cannot be allowed by the additional ground of appeal. We find no merit in the stand of the Ld. DR for the Revenue as there is no estoppel in law; especially where the issue has been decided by the Jurisdictional High Court on similar facts. Accordingly, we allow the additional ground of appeal raised by the assessee.

6.1 Respectfully following the findings of the coordinate bench we decide accordingly.

In view of this issue being squarely covered in favour of the assessee by the order of the coordinate bench in assessee's own case for the earlier years, we respectfully following the same allow ground number 11 of the appeal of the assessee."

14. Factual position being identical in the impugned assessment year, respectfully following the consistent view of the Tribunal in assessee's own case, as discussed above, we direct the Assessing Officer to allow assessee's claim of deduction in respect of technical know-how payment. Ground is allowed."

13. There being no difference in factual position in the impugned assessment year, respectfully following the decision of the coordinate Bench, we allow assessee's claim, thereby deleting the addition.

14. In ground No. 10, the assessee has challenged disallowance of signage expenses amounting to Rs.51,87,028/-.

15. Briefly, the facts are, the assessee has incurred expenditure in purchasing glow signboards/signage, which were displayed at location of the dealers. So basically, these are in the nature of business promotion expenses. Accordingly, the assessee, treating them as

revenue expenditure, claimed as deduction. The Assessing Officer, however, disallowed the claim stating that they provide enduring benefit, hence, are capital in nature. When the issue came before learned DRP, following their earlier directions, they directed the Assessing Officer to verify whether Tribunal's decision in favour of the assessee has been accepted by the department or else to follow the earlier directions of DRP.

16. Before us, learned counsel for the assessee submitted that the issue has been consistently decided in favour of the assessee by the Tribunal in assessment years 2012-13 to 2017-18. Thus, he submitted, the issue stands covered in favour of the assessee.

17. Learned Departmental Representative submitted that in assessment year 2012-13, the Tribunal has allowed the expenditure to the extent claimed by the assessee. He further submitted that specific terms of the agreement need to be examined.

18. We have considered rival submissions and perused materials on record. From the observations of learned DRP in paragraph No. 5.4.1 and 5.4.2, it is very much clear that this particular issue is a recurring issue between the assessee and the Revenue from past assessment years. In fact, the specific direction of learned DRP is to the effect that in case Tribunal's decision on identical issue has not been accepted by

the department, the initial directions in earlier assessment years should be followed. It is observed, while deciding the issue in the latest order passed for the assessment year 2017-18 (supra), the Tribunal has followed its earlier decision and has held as under :

> "10. Apropos disallowance of Rs.54,57,713 of signage expenses as capital in nature : On this issue, ld. Counsel of the assessee submitted that the assessee had purchased glow sign board/ signals, which were displayed at the location of the dealers of the assessee. The sole purpose of incurring these expenses is to increase the sales at the stores etc. and thus is solely for the purpose of business and allowable as revenue in nature. At the same time, these are not giving any enduring benefit to the assessee, given the dynamic and competitive nature of the business. The Assessing Officer disallowed the claim of the assessee in a cryptic manner. He observed that the explanation given by the assessee is not satisfactory and following the DRP directions held the expense to be capital in nature and allowed depreciation @15%. The expenditure on Sign boards is revenue in nature and ld. Counsel of the assessee placed reliance on the following decisions :-
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> (i) CIT v. Pepsico India Holdings Pvt. Ltd. [(2007) 207 Taxman 5 (Del)],
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> (ii) CIT v. Orient Ceramics & Inds Ltd. [(2013) 358 ITR 49(Del),
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> (iii) CIT vs Rakhra Technologies P. Ltd. [(2012) 347 ITR 484 (P&H)]
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> Ld. Counsel further submitted that this issue is covered in favour of the assessee in assessee's own case for AY 2012-13 to 2016- 17. In this regard, he referred to the decision of ITAT in assessee's own case for AY 2016-17 & 2015-16.
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> 11. Upon careful consideration and hearing both the parties, we find that this issue is squarely covered in favour of the assessee in assessee's own case for AY 2015-16 & 2016-17. For the sake of reference, relevant portion of the order of AY 2016-17 is given below :-
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> > "12. Coming to ground number 7 of the appeal with respect to the disallowance of expenditure of signage is of Rs.7,545,398/– we find that this issue is also been dealt with by the coordinate bench in assessee's own case for assessment year 2015 – 16 as under:-

“13. Ground No. 8 of the appeal is with respect to the expenses of signage, which was considered by the ld. AO as capital expenditure whereas the assessee claimed it to be revenue expenditure. On carefully consideration of rival contentions, we find that this issue is squarely considered the coordinate bench in ITA No. 7463 and 7064/Del/2018 at para No. 3 of the order. In that para the coordinate bench held that the order of ITAT in assessee's own case for Assessment Year 2012-13 in ITA No. 7714/Del/2017 wherein, as per para No. 26 the coordinate bench held that the expenditure on the signage is allowable to the assessee as revenue expenditure signage are fixed at dealers premises and it dies bit satisfy the test of ownership with the assessee. Thus it was held that same is revenue expenditure as under:-

"3. Disallowance of expenditure on signages - A similar issue was considered and decided by the Tribunal in A.Y. 2012-13 in ITA No. 7714/Del/2017. The relevant findings read as under:-

"26. We have heard the rival contentions and perused the record. The expenditure was incurred on signage for display of the name of the assessee at the dealer's premises. However, once the same is fixed at dealers site then the Courts have held that it does not satisfy the test of ownership with the assessee and the expenditure is to be allowed as revenue expenditure, We find support from the ratio laid down by the Hon'ble Delhi High Court in CIT vs Honda Siel Power Products Ltd.(supra). Thus, we are of the view that the expenditure to the extent claimed by the assessee is to be allowed in the hands of the assessee and not/the entire expenditure. Ground of appeal No. 6 is thus partly allowed."

3.1 Respectfully following the decision of the coordinate bench, we hold accordingly."

14. Therefore, respectfully following the decision of the coordinate bench in assessee's own case ground No. 8 of the appeal of the assessee is allowed holding that signage expenditure of Rs.1,65,62,386/- is revenue in nature.”

13. Therefore respectfully following the decision of the coordinate bench in assessee’s own case, we also hold that signage expenditure is revenue in nature. Accordingly the disallowance of Rs.7,545,398/– is

> deleted and ground number 7 of the appeal of the assessee is allowed."
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> Following the aforesaid order of the coordinate Bench, we delete the disallowance and allow this ground of the assessee."

19. Facts, being identical, respectfully following the decision of the coordinate Bench in assessee's own case in assessment year 2017-18 and past assessment years, we direct the Assessing Officer to delete the addition.

20. In ground No. 11, the assessee has challenged disallowance of sales tools expenses of Rs.1,34,66,723/-.

21. Briefly, the facts are, certain sales tools/fixtures manufactured by third parties in accordance with the specifications provided by the assessee were placed at dealers' outlets. In terms with the agreement with the manufacturer of such tools, the assessee bears 50% of the cost of such sales tools/fixtures placed at dealers' outlets. The expenses so incurred were claimed as deduction by the assessee. Relying upon the past assessment history, the Assessing Officer disallowed assessee's claim by treating the expenses to be capital in nature. Further, he also observed that such expenses are not supported by agreement. While deciding the issue, learned DRP directed the Assessing Officer to verify whether the decision of the Tribunal in favour of the assessee on identical issue has been

accepted by the department and in case it is not so, then to follow the directions of the Penal in assessment year 2015-16 and disallow it.

22. Before us, learned counsel appearing for the assessee submitted that the issue is squarely covered by the decision of the Tribunal in assessee's own case in past assessment years. In this context, he drew our attention to the orders passed by the Tribunal in assessment years 2015-16, 2016-17 and 2017-18.

23. Learned Departmental Representative submitted that in Assessment Years 2003-04 to 2007-08, the Tribunal has decided the issue against the assessee, against which, assessee is in further appeal before the Hon'ble High Court. He submitted that without taking notice of its earlier decision, the Tribunal has granted relief to the assessee in Assessment Year 2012-13 and subsequent assessment years. Thus, he submitted that subsequent decisions rendered by the Tribunal ignoring the earlier decision, should not be relied upon. He submitted, earlier and subsequent dealership agreements are more or less identical except an inconsequential amendment in the subsequent agreement. Thus, he submitted, following the decisions of the Tribunal for Assessment Year 2003-04 to 2007-08, the issue has to be decided in favour of the Revenue.

24. In rejoinder, learned counsel for the assessee submitted that the agreement prevailing in Assessment Year 2003-04 to 2007-08 did not contain any specific clause in terms of which there was any contractual obligation on the assessee to incur such expenses. However, he submitted, subsequently, the agreement was amended on 24.12.2012, in terms of which, the assessee was under a contractual obligation to incur a part of sales tool expenses. Thus, he submitted, taking note of the subsequent agreement, the Tribunal has allowed assessee's claim.

25. Having considered rival submissions, we find that both the Assessing Officer and learned DRP have disallowed assessee's claim relying upon their respective decisions in past assessment years. It is further evident, though, learned DRP was conscious of the fact that the issue has been decided in favour of the assessee by the Tribunal, however, for keeping the issue alive, it has directed the Assessing Officer to follow the directions of the DRP in case department has not accepted the orders of the Tribunal. Thus, the aforesaid facts clearly reveal that the departmental authorities have not found any factual difference between the impugned assessment year and past assessment years *qua* the disputed issue. However, learned Departmental Representative has made an attempt to provide a different dimension to the issue by making certain factual submissions,

which were neither dealt with by the Assessing Officer nor ld. DRP. Nor they are the reasons for disallowance of assessee's claim. It is observed, while deciding identical issue in assessee's own case in assessment year 2017-18 (supra), the coordinate Bench followed its earlier decision in assessment year 2016-17 and deleted the disallowance. The relevant observations of the coordinate Bench in this regard are as under :

> 14. We have heard both the parties and perused the material on record and also the decisions of the coordinate Bench of the Tribunal in assessee's own case. The coordinate Bench of the Tribunal in AY 2016-17 on this issue has held in favour of the assessee and the relevant portion of the said order is reproduced as under :-
> " Respectfully following the decision of the coordinate bench in assessee's own case for assessment year 2015 – 16, we also hold that sales tool expenditure are revenue expenditure in nature and therefore the disallowance made by the learned assessing officer of Rs.1,92,90,061/- is directed to be deleted. Accordingly, ground number 8 of the appeal is allowed."
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> Hence, following the precedent, we delete the disallowance made by the AO and allow this ground.

There being parity of facts in the impugned assessment year, respectfully following the decisions of coordinate Bench, we direct the Assessing Officer to allow assessee's claim. Ground is allowed.

26. In ground No. 12, the assessee has challenged the decision of the departmental authorities in capitalizing a part of the royalty expenses.

27. Briefly, the facts are, in terms with the royalty and technical know-how agreement with the parent company, the assessee has paid royalty of Rs.11,98,29,81,954/-, which was claimed as revenue expenditure. The Assessing Officer, however, was not convinced with the claim of the assessee. Ultimately, he held that 25% of the royalty expense, which works out to Rs.296,11,30,002/- is to be treated as capital expenditure having been spent towards acquisition of assets, which provides enduring benefit. Accordingly, he disallowed aforesaid amount. However, he allowed depreciation @ 25% on such amount. The assessee contested the aforesaid disallowance before learned DRP. While disposing of the objections of the assessee, learned DRP directed the Assessing Officer to verify whether orders passed by the Tribunal in favour of the assessee on identical issue has been accepted by the Revenue and if not so, then to follow the directions of the panel in assessment year 2015-16.

28. Before us, learned counsel appearing for the assessee submitted that this issue is squarely covered by the decisions of the Tribunal in earlier assessment years.

29. Having considered rival submissions, we find that this is a recurring dispute between the assessee and the Revenue from past assessment years. While dealing with the identical issue in

assessment year 2017-18 (supra), the coordinate Bench following its earlier decisions, allowed assessee's claim with following observations:

> 16. Upon careful consideration and hearing both the sides, we find that this issue is squarely covered by the decisions of ITAT in assessee's own case and the same was decided vide paras 16 to 18. For the sake of reference, we reproduced para 18 as under :-
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> "18. The fact also shows that assessee was already engaged in the manufacturing of motorcycle and Scooter and payment of royalty expenses was not with respect to setting up of manufacturing facility. Therefore respectfully following the decision of the coordinate bench, we also allow ground number 9 of the appeal of the assessee and direct the learned AO to delete the addition of Rs.1,591,781,250/– on account of capitalisation of royalty expenses holding it to be revenue in nature.
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> Accordingly, following the aforesaid decision of the coordinate Bench of the Tribunal, we delete the addition made by the AO.

30. In our considered opinion, there is no factual difference obtaining in the impugned assessment year compared to earlier assessment years. In fact, learned DRP has very categorically observed that the factual position on the issue remains identical to past assessment years. However, we must observe, before us, learned Departmental Representative attempted to make out a new case for Department by submitting that in the year 2016, the assessee has set-up a new plant in Gujarat for production of two wheelers. Thus, he submitted that the royalty payment made during the year must have included payment for obtaining technical knowhow for setting up a new start up of the plant, which is certainly in the nature of capital outlay resulting in enduring

benefit to the assessee. Therefore, the disallowance of 25% out of the royalty expenses is justified.

31. Having due regard to the aforesaid submissions of learned Departmental Representative, we must observe that neither the Assessing Officer nor learned Dispute Resolution Panel have found any substantial difference in factual position relating to past assessment years and the impugned assessment year. As discussed earlier, the issue has been consistently decided in favour of the assessee in its own case in assessment years 2012-13 to 2017-18. Having gone through the facts and material available on record, we do not find any good reason to deviate from the consistent view taken by the Tribunal on the issue in earlier assessment years. Hence, respectfully following the decision of the Co-ordinate Bench in Assessment Years 2012-13 to 2017-18 (Supra), we direct the Assessing Officer to allow assessee's claim.

32. In ground No. 13, assessee challenged disallowance of deduction claimed towards education cess amounting to Rs.29,01,52,420/-. As could be seen from the facts on record, this claim was neither made by the assessee in the return of income nor before the Assessing Officer. The claim was made for the first time

before learned DRP. However, learned DRP did not entertain assessee's claim.

33. Learned Departmental Representative submitted that as per the information contained in the annual report of the company, it has set up a new plant and the expenditure relates to that plant. Thus, he submitted that it has to be treated as capital expenditure. He further submitted, there is nothing in the agreement to suggest that the assessee has to bear 50% of the manufacturing cost.

34. Before us, learned counsel appearing for the assessee has furnished a written submission in support of the claim. Learned Departmental Representative submitted that the issue is squarely covered against the assessee by decision of the Tribunal in assessment year 2017-18.

35. Having considered the submissions of the parties, we find, while deciding the identical issue in assessee's own case in assessment year 2017-18 (supra), the coordinate Bench has followed the decision of Hon'ble Supreme Court in case of JCIT vs. Chambal Fertilizers & Chemicals Ltd., 450 ITR 164. The observations of the coordinate Bench in this regard are as under :

> 25. Apropos issue of education cess : On this issue, assessee is aggrieved by the levy of education cess. We have heard both the

> parties and perused the records. We find that the issue is squarely covered by the decision of Hon'ble Supreme Court in the case of JCIT vs. Chambal Fertilizers & Chemicals Ltd. 450 ITR 164. Hon'ble Apex Court expounded that term 'tax' under section 40a(ii) of the Income Tax Act should include cess. Ld. Counsel of the assessee in his elaborate submission tried to distinguish this case law. But we are not convinced. Hence, we decide this issue in favour of Revenue.

36. Therefore, in our view, the issue is no more *res integra.* Moreover, an amendment has been brought to section 40(a)(ii) by Finance Act, 2022 with retrospective effect from 01.04.2005 by inserting Explanation-3, which explains 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. Thus, in view of said amendment in the Act, assessee's claim is unsustainable. Accordingly we uphold the decision of the departmental authorities on this issue. Ground raised is dismissed.

37. In ground No. 14, the assessee has raised the issue of refund of excess dividend distribution tax (DDT) paid amounting to Rs.44,95,21,880/-.

38. Before the Departmental authorities, the assessee made an additional claim that dividend income under section 115-O is income of the shareholders. Therefore, dividends paid to the shareholders in Japan and Thailand would be subject to the beneficial rate provided

under India-Japan and India-Thailand Double Taxation Avoidance Agreement. The departmental authorities, however, rejected assessee's claim by stating that such claim cannot be entertained as it was not made either in the original return of income or through revised return of income. While doing so, they relied upon the decision of Hon'ble Supreme Court in case of Goetze (India) Ltd. vs. CIT (2006) 284 ITR 323 (SC).

39. Before us, the assessee has furnished written submission in support of its claim.

40. Learned Departmental Representative submitted, the issue is squarely covered against the assessee by the decision of the ITAT, Special Bench, in case of DCIT vs. Total Oil India Pvt. Ltd and others (ITA No. 6997/Mum/2019 & Ors.) dated 20.04.2023.

41. We have considered rival submissions and perused materials on record. Though, on a reading of ITAT, Special Bench decision in case of DCIT vs. Total Oil India Pvt. Ltd. (supra), it is clear that the issue raised by the assessee is covered against it, however, before us, learned counsel appearing for the assessee submitted that there are certain facets relating to the issue, which needs to be examined, as on those aspects, the decision of Special Bench is either silent or can be distinguished. Be that as it may, considering the fact that the issue was

never examined on merits by the departmental authorities, we are inclined to restore the issue to the file of the Assessing Officer for de novo adjudication after considering the submissions of the assessee and keeping in view the decision of ITAT, Special Bench, in case of DCIT vs. Total Oil India Pvt. Ltd. (supra). Ground is allowed for statistical purposes.

42. In ground No. 15, the assessee has challenged the disallowance of deduction of technical know-how expenses of Rs.292,48,33,472/- paid to parent company. The Assessing Officer disallowed assessee's claim summarily, as it was neither raised in the original return of income nor through revised return of income. Learned DRP also rejected assessee's claim on the very same ground.

43. Before us, it is the specific case of the assessee that similar claim made in earlier assessment years in course of proceedings before the departmental authorities have been allowed by the Tribunal. Since the issue has not been factually examined by the departmental authorities, as they rejected assessee's claim summarily, we are inclined to restore the issue to the Assessing Officer for de novo adjudication after giving due and reasonable opportunity of being heard to the assessee. Ground is allowed for statistical purposes.

44. Ground Nos. 16 & 17, being consequential in nature, do not require adjudication.

45. In the result, appeal is partly allowed.

Order pronounced in the open court on 05/02/2024.

Sd/-	**Sd/-**
(PRADIP KUMAR KEDIA)	**(SAKTIJIT DEY)**
ACCOUNTANT MEMBER	**VICE-PRESIDENT**

Dated:05.02.2024
*aks/- & Shekhar

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

Assistant Registrar
ITAT New Delhi