<u>आयकर अपीलीय अधिकरण, कोलकाता पीठ "ए'', कोलकाता</u>

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA

श्री राजेश कुमार, लेखा सटस्य एवं श्री संजय शर्मा न्यायिक सदस्य के समक्ष

[Before Shri Rajesh Kumar, Accountant Member & Shri Sonjoy Sarma, Judicial Member]

I.T.A. No. 1068 & 1166/Kol/2017
Assessment Year: 2010-11 & 2011-12

M/s ITC Limited (PAN: AAACI 5950 L)	Vs.	ACIT, Range-8, Kolkata
Appellant / (अपीलार्थी)		Respondent / प्रत्यर्थी

I.T.A. No. 1222 & 1223/Kol/2017
Assessment Year: 2010-11 & 2011-12

DCIT, Circle-8(1), Kolkata	Vs.	M/s ITC Limited (PAN: AAACI 5950 L)
Appellant / (अपीलार्थी)		Respondent / प्रत्यर्थी

Date of Hearing / सुनवाई की तिथि	14.03.2023
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	10.05.2024
For the Appellant/ निर्धारिती की ओर से	Shri J.P. Khaitan, Sr. Counsel Shri Bikash Chanda, ACA Shri Aakash Agrawal, ACA
For the Respondent/ राजस्व की ओर से	Shri Rakesh Kumar Das, CITDR

ORDER / आदेश

Per Rajesh Kumar, AM:

These are the cross appeals preferred by the assessee and the revenue against the separate orders of the Ld. Commissioner of Income Tax (Appeals)-2, Kolkata (hereinafter referred to as the Ld. CIT(A)"] dated 27.03.2017 for the AY 2010-11 & 2011-12. Since there are common issues involved in these appeals , therefore these are being clubbed and heard together and is disposed off by this common order for the sake of convenience and brevity. First we shall adjudicate assessee's appeal in ITA No. 1068/Kol/2017 and cross appeal of the revenue in ITA NO. 1222/KOl/2017 for AY 2010-11.

ITA No. 1068/Kol/2017 (Assessee) and ITA NO. 1222/KOl/2017(Revenue) for AY 2010-11.

2. Issue raised in ground no. 1 by the assessee is against the part confirmation of disallowance of Rs. 27,095/- by the Ld. CIT(A) in respect of registration of new patents out of total disallowance made by the AO of Rs. 27,38,000/- whereas the revenue has challenged vide ground no. 5 the part deletion of addition of Rs. 27,10,905/- by the Ld. CIT(A).

3. Facts in brief are that the assessee filed return of income on 30.09.2010 showing total income of Rs. 61,09,14,46,480/- under the normal provisions of Act and Rs. 58,83,58,39,895/- as book profit u/s 115JB of the Act. The assessee was also filed revised return of income on 30.03.2012. The return was processed u/s 143(1) of the Act followed by rectification on 08.05.2013. The case of the assessee was selected for scrutiny and statutory notices were duly issued and served upon the assessee during the course of assessment proceedings. The AO observed from the details filed by the assessee that it had incurred expenses of Rs. 27.38 lacs on account of registration of patents. According to AO, registration of patents by the assessee is done to secure clear and better title on the intangible rights paid for purchase of immovable properties. Consequently the AO held that expenses incurred by the

assessee on the registration of patents are capital in nature and are not revenue expenses and added the same to the income of the assessee in the assessment framed.

4. In the appellate proceedings, the Ld. CIT(A) partly allowed the appeal of the assessee by conformingly only that part of the expenses which were incurred in connection with registration of new patents amounting to Rs. 27,095/- and partly allowed the appeal by deleting the addition to the tune of Rs. 27,10,905/-. The Ld. CIT(A) deleted the addition on the ground that the assessee has incurred Rs. 27,10,905/- on the existing patents and held that the legal expenses were incurred to obtain a speedy and less expensive remedy against the infringement of the patent rights. Besides, the Ld. CIT(A) held that these expenses had been incurred in the protection of the business interests of the assessee company. The Ld. CIT(A) also noted that legal expenses on registration of the existing patents wholly and exclusively incurred by the assessee for its business and were allowable u/s 37 of the Act while giving no reasoning as to why disallowance of Rs. 27,095/- incurred on registration of new patents was sustained. The assessee is in appeal against the sustenance of addition of Rs. 27,095/- while the revenue has challenged the appellate order so far as the part deletion of addition to the tune of Rs. 27,10,905/- relating to registration of existing patents is concerned.

5. After hearing the rival contentions and perusing the material on record, we find that the assessee has incurred these expenses as stated above for registration for existing patents as well as the new patents. The existing patents were registered in order to protect the assessee's interest in the said patents so that there is no infringement patents from any quarters. Similarly new patents were registered by the assessee to ensure the same are not used by any third party without any authorization and therefore these expenses has also been incurred by the assessee in order to protect the business interest. In our opinion, both these expenses were wholly and exclusively incurred for the purpose of business and are allowable u/s 37 of the Act. We are unable to understand as to how the expenses were split inot relating to existing and

new patents. The case of the assessee finds support from the decision of Hon'ble Supreme Court in the case of Dalmia Jain & Co. Ltd. vs. CIT [1971] 81 ITR 754 (SC) wherein similar issue has been held in favour of the assessee. Further the case of the assessee is also supported by the decision of Hon'ble Apex Court in the case of CIT vs. Finlay Mills Ltd. [1951] 20 ITR 475 (SC) wherein the Hon'ble Apex Court has held that expenses are incurred on registration of new patents are not capital expenditure. We also note that above decision of Hon'ble Apex Court in the case of Finley Mills Ltd. (supra) has been followed by co-ordinate Bench of Ahemedabad in the case of Cadila Healthcare Ltd. vs. ACIT [2012] 21 taxmann.com 484 (Ahmedabad-Trib.) which has been affirmed by Hon'ble Gujarat High Court in the case of CIT vs. Cadila Healthcare Ltd. [2013] 31 taxmann.com 300 (Guj). Similarly the aforesaid decision was followed by Bangalore Bench in On Mobile Global Ltd. vs. ACIT [2014] 45 taxmann.com 346 (Bangalore-Trib.) which has been affirmed by Hon'ble Karnataka High Court in CIT vs. On Mobile Global Ltd. [2021] 129 taxmann.com 254 (Karnataka). Considering the facts of the case in the light of the aforesaid decisions, we are inclined to hold that the registration expenses incurred on the existing as well as new patents are wholly and exclusively incurred for the purpose of business and are revenue in nature. Consequently ground no. 1 in the assessee's appeal is allowed and ground no. 5 in revenue's appeal is dismissed.

6. Issue raised in ground no. 2 by the assessee is against the confirmation of disallowance of Rs. 7,28,07,989/- by the Ld. CIT(A) as made by the AO for non-deduction of tax at source u/s 40a(i) of the Act.

7. Facts in brief are that the AO upon perusal of the details of payment made to the foreign parties as furnished by the assessee observed that the assessee has made aggregate payments of Rs. 7,28,07,989/- to various parties for procurement and marketing of export orders. The AO noted that the assessee has not deducted TDS at source as mandated u/s 195 of the Act for such payments. Therefore the same were not allowable in terms of the provisions of Section 40a(i) of the Act. Pertinent to state

that the assessee had entered into agreements with non-resident agents for selling its products outside India and the commission agents rendered their services entirely outside India and no part of the services were ever rendered in India and the nature of services performed by the commission agents were confined to sales agent related functions such as marketing and promotion of products of the assessee etc. It is also noteworthy that such type of payments are recurring in nature over the years and have been accepted by the revenue in the earlier years. It is only during the year the disputes arose because of Circular No. 7/2009 dated 22.10.2009 issued by the CBDT. According to the AO, consequent to withdrawal of circular No. 23 dated 23.07.1969, circular no. 163 dated 29.05.1972 and circular no. 786 dated 7.2.2000 vide Circular No. 7/2009 dated 22.10.2009 issued by CBDT, the payments on account of export commission would be taxable and hence the assessee was liable to deduction tax at source on such payments u/s 195 of the Act. The AO also relied on the decision of Authority for Advance Ruling in SKF Boilers & Driers P Ltd. [2012] 343 ITR 383 (AAR-New Delhi). Finally the AO added the entire amount of commission paid to foreign commission agents aggregating to Rs. 7,28,07,989/-.

8. In the appellate proceedings, the Ld. CIT(A) dismissed the appeal of the assessee by observing and holding as under:

> *"I have considered the submissions of the authorized representative of the appellant as well as the assessment order framed in the light of the materials available on record before the assessing officer during the assessment proceedings. The AR of the appellate has submitted that in FY 2009-10 relevant for AY 2010-11, the International Taxation Wing of the Income Tax Department had conducted a detailed scrutiny of the various foreign remittances made by the assessee. Thus, the International Taxation Wing of the Department, after detailed scrutiny of the tax positions and explanations provided by the assessee, had dropped the impugned proceedings relating to the foreign remittances, even in respect of 4 parties for which the Assessing Officer has alleged non-compliance under section 40(a)(i). The AR neither during the assessment proceeding nor appellate proceeding filed any acceptance letter from the International Taxation Wing of the Income Tax Department in the matter. I agree with the*

view as taken by the AO in the matter. Accordingly the order of the AO on this ground is upheld and this ground of appeal is dismissed."

9. The Ld. A.R vehemently argued before us that the provisions of Section 40a(i) of the Act are not attracted in this case as the provisions of TDS deduction at source as contained u/s 195 of the Act are not applicable to the assessee. The Ld. A.R argued that the provisions of Section 40a(i) of the Act are attracted where the assessee fails to deduct tax at source from any payment or from any sum chargeable to tax in India which is payable outside India or payable in India to a non resident not being a company or to a foreign company. The Ld. A.R argued that the provisions of Section 195 of the Act provide that where a person responsible for making payment of any sum chargeable to tax in India to a non-resident not being a company or to a foreign company are required to deduct tax at source at the rates in force. The Ld. A.R submitted that therefore in order to determine the applicability of Section 195 of the Act it has to be determined whether commission on export paid by the assessee to a non-resident agents was chargeable to tax in India but that was not the case at hand. The Ld. A.R contended that the commission was paid entirely outside in India. The Ld. A.R also submitted any sum payable to non-resident is not chargeable to tax in India and the payer is not liable to deduct tax at source as per the provisions of section 195 of the Act. The Ld. A.R in defense of arguments relied on the decision of Hon'ble Supreme Court in the case of GE India Technology Cen. P Ltd. vs. CIT [2010] 327 ITR 456 (SC). The ld AR therefore argued that since there was no liability of the assessee to deduct tax at source and there is no question of disallowance u/s 40(a)(i) of the Act. The Ld. A.R also submitted that the provisions relating to taxability of income accruing or arising through or from any business connection in India shall be deemed to accrue or arise in India are contained section 9(1)(i) of the Act. Explanation 1 to Section 9(1)(i) of the Act provides that income deemed to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operation carried out in India. The Ld. A.R submitted that in the instant case, it is not in dispute that non-resident selling agents did not carry out any activity in India and entire gamut

of services by such non-resident agents were provided outside India. The Ld. A.R in defense of his arguments relied on the decision of Hon'ble Apex Court in the case of CIT vs. Toshoku Ltd. [1980] 125 ITR 525 (SC) . The Ld. A.R submitted that no part of the commission paid by the assessee accrued or arose or was deemed to accrue or arise to non-resident in India and therefore the same was not chargeable to tax in India and as such there was no obligation on the part of the assessee to deduct tax at source u/s 195 of the Act. The Ld. A.R also contended that withdrawal of earlier circular by CBDT did not make the commission chargeable to tax in India as there was no amendment of statutory provisions and law laid down by Hon'ble Supreme Court in CIT vs. Toshoku Ltd. (supra) and ratio laid down therein continue to hold the field. The Ld. A.R referred to the decision of Co-ordinate bench in the case of Gujarat Reclaim & Rubber Products Ltd. vs. CIT TS-153-ITAT-2013 (MUM) wherein it has been held that in the absence of any relevant changes in the provisions of the Act the withdrawal of CBDT circular will not make the payment to non-resident taxable in India and the said decision of tribunal has been upheld by the Hon'ble Bombay High Court in the case of CIT vs. Gujarat Reclaim & Rubber Products Ltd. [2017] 79 taxmann.com 352 (Bom). The Ld. A.R further contended that the Authority for Advance Ruling of SKF Boilers & Driers P Ltd.(supra) is not binding precedents and was considered by the Ahemedabad Bench in DCIT vs. Welspun Corporation Ltd. [2017] 77 taxmann.com 165 (Ahemedabad-Trib.). Finally the Ld. A.R prayed that in view of underlying facts and ratio laid down and various judicial forums, the order passed by the Ld. CIT(A) on this issue is wrong and not sustainable and may be set aside and the AO may be directed to delete the addition.

10. The Ld. D.R relied on the order of authorities below by submitting that the payment were made by the assessee towards export commission without deduction tax at source and therefore are not allowable expenses in terms of provisions of Section 40a(i) of the Act. The ld DR therefore prayed that the ground raised by the assessee may be dismissed.

11. We have heard the rival contentions and perused the material on record. We find that the commission was paid to foreign agents with whom the assessee has entered into agreements to render services abroad and no part of the services was ever rendered in India. We also note that these are the non-resident commission agents who operated in foreign markets and provided their services there only. We have also perused the provisions of Section 195 of the Act and note that the impugned section provides for making payment of any sum chargeable to tax in India to a non-resident not being a company or to a foreign company. In the present case, the Commission in the hands of foreign agents are not liable to tax in India as the same was paid in India in respect of services rendered abroad to non-resident commission agents. The case of the assessee finds support from the decision of Hon'ble Apex Court in the case of GE India Technology Cen. Pvt. Ltd. vs. CIT (supra) wherein the Hon'le Court has held that if the sum payable to the non-resident is not chargeable to tax in India , the payer is not liable to deduct tax at source as per Section 195 of the Act at the time of making the payment and therefore there is no question of invoking the provisions of Section 40a(i) of the Act. We have further perused the provisions of Section 9(1)(i) of the Act which deals with the income accruing or arising through or from any business connection in India which shall be deemed to accrue and arise in India. Further explanation (i) to Section9(1)(i) provides for income deemed to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. But in the present case, it is not in dispute that non-resident commission agents did not carry out any activity in India and the entire services by such agents were provided abroad. The case of the assessee is squarely covered by the decision of Hon'ble Apex court in the case of CIT vs. Toshoku Ltd. wherein the Hon'ble Apex Court has held as under:

> *"In the instant case, the non-resident assessees did not carry on any business operations in the taxable territories. They acted as selling agents outside India. The receipt in India of the sale proceeds of tobacco remitted or caused to be remitted by the purchasers from abroad does not amount to an operation carried out by the assessees in India as contemplated by cl. (a) of the Explanation to section 9(1)(i) of the Act. The commission amounts which were earned by the non-resident assessee s for services rendered outside India cannot, therefore,*

be deemed to be incomes which have either accrued or arisen in India. The High Court was, therefore, right in answering the question against the department."

11.1. We note that authorities below have relied on the withdrawal of circular by CBDT without any corresponding amendment of statutory provisions in the Act and therefore in absence of any such amendment in the provisions of the Act ,the law laid down by the Hon'ble Apex Court in the case of Toshoku Ltd. (supra) continue to hold good. We find that similar issue has come up for consideration by Hon'ble Co-ordinate Bench of Mumbai in Gujarat Reclaim & Rubber Products Ltd. (supra) wherein the Co-ordinate Bench has held that in the absence of any relevant changes in the provisions of the Act, the withdrawal of CBDT circular will not make the payment to non-resident taxable in India and the said decision stood affirmed by the Hon'ble Bombay High Court. We also find merit in the contention of the assessee that the Authority for Advance Ruling in SKF Boilers & Driers Pvt. Ltd. (supra) is not binding precedent and the same has been considered by the Co-ordinate Bench in DCIT vs. Welspun Corporation Ltd. (supra) wherein the Co-ordinate Bench has held as under:

"33. "33- There are a couple of rulings by the Authority for Advance Ruling, which support taxability of commission paid to non-residents under section 9(1)(i), but, neither these rulings are binding precedents for us nor are we persuaded by the line of reasoning adopted in these rulings. As for the AAR ruling in SKFBoilers & Driers (P.) Ltd. In re [2012] 343ITR 385/206 Taxman 19/18 taxmann.com 325 (AAR - New Delhi), we find that this decision merely follows the earlier ruling in Rajiv Malhotra, In re [2006] 284 ITR 564/155 Taxman 101 (AAR - New Delhi) which, in our considered view, does not take into account the impact of Explanation 1 to Section 9(1)(i) properly. That was a case in which the non-resident commission agent worked for procuring participation by other non-resident entities in a food and wine show in India, and the claim of the assessee was that since the agent has not carried out any business operations in India, the commission agent was not chargeable to tax in India, and, accordingly, the assessee had no obligation to deduct tax at source from such commission payments to the non-resident agent. On these facts, the Authority for Advance Ruling, inter alia, opined that "no doubt the agent renders services abroad and pursues and solicits exhibitors there in the territory allotted to him, but the right to receive the commission arises in India only when exhibitor participates in the India International Food & Wine Show (to be held in India), and makes full and final payment to the applicant in India" and that "the commission income would, therefore, be taxable under section 5(2)(b) read with section 9(i)(i) of the Act". The Authority for Advance Ruling also held that "the fact that the agent renders services abroad in the form of pursuing and soliciting participants and that the commission is remitted to him abroad are wholly irrelevant for the purpose of determining situs of his income". We do not consider this approach to be correct. When no operations of the business of commission agent is carried on in India, the Explanation 1 to Section 9(1)(i)

takes the entire commission income from outside the ambit of deeming fiction under section 9(1)(i), and, in effect, outside the ambit of income 'deemed to accrue or arise in India'for the purpose of Section 5(2)(b). The point of time when commission agent's right to receive the commission fructifies is irrelevant to decide the scope of Explanation 1 to Section 9(1)(i), which is what is material in the context of the situation that we are in seisin of. The revenue's case before us hinges on the applicability of Section 9(1)(i) and, it is, therefore, important to ascertain as to what extent would the rigour of Section 9(1)(i) be relaxed by Explanation 1 to Section 9(i)(i). When we examine things from this perspective, the inevitable conclusion is that since no part of the operations of the business of the commission agent is carried out in India, no part of the income of the commission agent can be brought to tax in India. In this view of the matter, views expressed by the Hon'ble AAR, which do not fetter our independent opinion anyeway in view of its limited binding force under Section 245 S of the Act, do not impress us, and we decline to be guided by the same. The stand of the revenue, however, is that these rulings, being from such a high quashi-judicial forum, even if not binding, cannot simply be brushed aside proposition. We have, with utmost care and deepest respect, perused the above rulings rendered by the Hon'ble Authority for Advance Ruling. With greatest respect, but without slightest hesitation, we humbly come to the conclusion that we are not persuaded by these rulings."

11.2. Considering the aforesaid facts in the light of the decisions as discussed above we are inclined to hold that the provisions of section 195 are not applicable to the assessee and therefore there no need for deduction of tax at source from payments made to foreign commission agents. Ground no. 2 accordingly .is allowed.

12. Issue raised in ground no. 3 by the assessee is against the confirmation of addition of Rs. 2,60,15,928/- by Ld. CIT(A) as made by the AO u/s 40a(ia) of the Act on payments made to foreign parties for various services rendered.

13. Facts in brief are that the assessee has made payments to various foreign parties for different kind of services rendered by them. The assessee has duly deducted tax at source from the some payments u/s 195 of the Act wherever applicable. In some cases tax at source was not deducted in view of the double taxation avoidance agreements (DTAA). All the remittances was duly supported by the Chartered Accountant's certificated in Form No. 15CB as per the provisions of Rule 37BB of the Rules, wherein the Chartered Accountant had independently ascertained the nature of remittances and whether tax needed to be deducted at source or not on the payment as per the provisions of Section 195 of the Act read with Section 90 of the Act and the relevant DTAA which India had entered into with the country concerned. The AO noted that remittances were made to 8 foreign parties aggregating to Rs. 2,60,15,388/-

(wrongly mentioned in AO's order as 2,60,15,928/-). According to the AO the assessee should have deducted tax at source u/s 195 of the Act which was not deducted and hence the disallowance u/s 40a(i) of the Act.

14. In the appellant proceedings, the Ld. CIT(A) also dismissed the appeal of the assessee on this issue by rejecting the contentions of the assessee that TDS Wing of IT Department had examined these remittances and had not initiated any proceeding under section 201 of the Act for non-deduction of tax at source when the assessee failed to furnish the letter from International Taxation Wing of Income Tax Department.

15. After hearing the rival contention and perusing the materials as placed before us ,we find that the assessee has not furnished the details/evidences before the authorities below and has harped on the issue that TDS Wing of International Taxation Department has examined these remittances in the light of various evidences furnished by the assessee and also relevant DTAA and having satisfied as to non deduction of TDS has not initiated any action u/s 201 of the Act. Therefore according to the assessee there is no default u/s 195 of the Act and no disallowance u/s 40a(i) could be made. We note that the assessee has made remittances to 8 foreign parties which need to be examined at the level of the AO in the light of DTAAs and ascertain whether the assessee is covered under the Treaties. Needless to mention that if the AO can also find out about the examination by the TDS Wing of International taxation Department to the effect of non applicability of TDS u/s 195 of the Act then all these expenses are to be allowed. Accordingly we restore this issue to the file of AO to examine and decide accordingly. The ground no. 3 is allowed for statistical purpose.

16. Issue raised in ground no. 4 by the assessee is against the confirmation of Rs. 1,49,54,059/- by the Ld. CIT(A) as made by the AO on account of liquidated damages.

17. Facts in brief are that the assessee has credited a sum of Rs. 1,49,54,059/- to the profit and loss account which represented the liquidated damages received from various suppliers. According to assessee these damages were received on account of capital assets upon failure of the suppliers to supply machineries/complete construction of building etc within the stipulated period. According to assessee these liquidate damages received by way of compensation for delay in the delivery and installation of plant and machineries/construction of building and they are to be treated as capital receipts and not liable to tax. According to AO, these liquidated damages were received from suppliers in lieu of their violations/not honoring the terms agreed upon in the contracts which were entered into in the course of business for supply/installation of machinery/construction of building and therefore the liquidated damages are intimately and intrinsically linked to the business of the assessee. The AO held that these damages received has no nexus with the cost of fixed assets and therefore these damages cannot be said to have any relation to capital asset owned by the assessee and thus constitute a regular nature of business income and was added to the income of the assessee.

18. In the appellate proceedings, the Ld. CIT(A) also affirmed the order of AO by observing and holding as under:

> *"I have considered the submissions of the authorized representative of the appellant as well as the assessment order framed in the light of the materials available on record before the assessing officer during the assessment proceedings. I find that the during the FY 2009-10, the Company has credited in the Profit &Loss account Rs. 1,49,54,059/- relating to liquidated damages received from various suppliers and submitted that these liquidated damages were received on account of capital assets due to failure on their part to supply machineries/complete construction of building within the stipulated time. These liquidated damages have been received from suppliers in lieu of their violation of the terms agreed upon in the contracts which were entered into in the course of burins of the assessee. The liquidated damages are directly linked to the business of the assessee. All the contracts either for supply of machinery or for other purposes was entered into in the course of business activities. Some of the damages may have arisen pursuant to default for delay/non-installation of assets but it has not nexus with the cost of assets which the assessee has paid. If the asset was not installed, the damages received were not related to any capital asset which is owned by the assessee. Such damages therefore in the nature of regular business income. The submissions and the actions of the assessee are self-contradictory. In one hand the assessee is contending that the liquidated damages are directly related to capital assets and therefore in the nature of capital receipts, however these receipts have not been adjusted against the block*

of capital assets to which it pertains. This shows that the assessee himself not sure as to the nature of these damages. In view of the above, the order of the AO is upheld and this ground of appeal is dismissed."

19. After hearing the rival contentions and perusing the material on record, we find that the liquidated damages were received by the assessee as compensation from these suppliers for failure to supply machineries/complete construction of building within the stipulated time. The party-wise details of damages is available at page no. 253-256 of PB volumn-1. According to assessee, since the damages were received on account of delay in supply/non-installation of assets which eventually lead to delay in coming into existence the profit making apparatus of the assessee and thus these damage are not a part of receipt in the regular course of business of assessee. The assessee relied on the decision of Hon'ble Apex Court in the case of CIT vs. Saurashtra Cement Ltd. [2010]192 Taxman 300 (SC) wherein the Hon'ble Apex Court has held as under:

"13. We have considered the matter in the light of the afore-noted broad principle. It is clear from clause No. 6 of the agreement dated 1-9-1967, extracted above, that the liquidated damages were to be calculated at 0.5 per cent of the price of the respective machinery and equipment to which the items were delivered late, for each month of delay in delivery completion, without proof of the actual damages the assessee would have suffered on account of the delay. The delay in supply could be of the whole plant or a part thereof but the determination of damages was not based upon the calculation made in respect of loss of profit on account of supply of a particular part of the plant. It is evident that the damages to the assessee was directly and intimately linked with the procurement of a capital asset, i.e., the cement plant, which would obviously lead to delay in coming into existence of the profit-making apparatus, rather than a receipt in the course of profit-earning process. Compensation paid for the delay in procurement of capital asset amounted to sterilization of the capital asset of the assessee as supplier had failed to supply the plant within time as stipulated in the agreement and clause No. 6 thereof came into play. The afore-stated amount received by the assessee towards compensation for sterilization of the profit-earning source, not in the ordinary course of their business, in our opinion, was a capital receipt in the hands of the assessee. We are, therefore, in agreement with the opinion recorded by the High Court on question Nos. (i) and (ii) extracted in Para 1 (supra) and hold that the amount of Rs. 8,50,000 received by the assessee from the suppliers of the plant was in the nature of a capital receipt."

19.1. We note that the assessee has shown these receipts from liquidated damages under the Generally Accepted Accounting Principles in the profit and loss account but while filing the return of income reduced the same from the net profit in the computation of income on the ground of being capital receipt. Thus it is clear from the facts of the assessee and ratio laid down above that liquidated damages are capital

in nature and are not arising out of regular course of business of assessee. Further the issue before us whether the said capital receipt is liable to be deducted from the cost of assets or adjusted against the block of asset from actual cost which has been met by any other person. In our opinion the liquidated damages does not fall within the ambit of cost of assets met by any other person as these were not intended to the subsidize the cost of assets but on account of failure of the suppliers for delay in delivery/installation /completing construction of capital asset within the stipulated time. Besides the written down value is defined u/s 43(6)(c) of the Act as the value to be computed only in the manner provided thereunder i.e. value computed by adding actual cost of assets falling within the block of assets acquired during the previous year or deducting the money payable in respect of any asset within the block which is sold, discarded or demolished or destroyed during the previous year together with the amount of the scrap value. The Act does not contemplate any other adjustment for computing the written down value such as liquidated damages of the block of assets. We are supported in our opinion by the decision of Hon'ble Gujarat High Court in the case of Alpha Lab vs. ITO in [2016-TIOL-1143-HC-Ahm-IT] wherein the Hon'ble court has affirmed the view taken by the tribunal. Considering these facts and circumstances we are inclined to hold that liquidated damages are capital receipts not to be reduced from the cost of fixed assets. Accordingly ground no. 4 by the assessee is allowed.

20. Issue raised in ground no. 5 is against the part confirmation of disallowance by the Ld. CIT(A) as made by the AO u/s 14A read with Rule 8D(2)(iii) of the Act.

21. Facts in brief are that the assessee invested surplus fund generated from business activities in shares and securities and thus derived income by way of dividend and tax free interest. The assessee investments into these securities are looked after by the assessee corporate department who is also looking after the working capital/banking functions. The Corporate Treasury Department is comprised of two verticals one is Foreign Exchange Vertical and second is Treasury Vertical.

The AO during the course of assessment proceedings observed that the disallowance made by the assessee u/s 14A of the Act is not as per the provisions of the Act as contained in Section 14A and worked out the disallowance by invoking the same and computed disallowance at Rs. 21,77,50,529/- and after allowing deduction of suo-moto disallowance of Rs. 61,26,800/-, a net addition of Rs. 21,16,23,729/- was made to the income of the assessee which comprised of interest of Rs. 9,61,43,729/-under Rule 8D(2)(ii) and Rs. 12,16,07,250/- under Rule 8D(2)(iii) of the Rules.

22. In the appellate proceedings, the Ld. CIT(A) partly allowed the appeal of the assessee by directing the deletion of addition made under Rule 8D(2)(ii) in respect of interest on the ground that the assessee has shown net interest income besides giving direction to the AO to delete the disallowance in response of exempt income earned from strategic investments and also those investments did not yield any exempt income during the year after doing necessary verification.

23. After hearing the rival contentions and perusing the material on record, we find that the assessee has made suo-moto made disallowance of Rs. 63,38,000/- relating to to earning of exempt income by taking into consideration all the investments i.e. investment which yielded exempt income as well as the investments not yielding any exempt income during the year. Thereafter the assessee furnished revised computation calculating approximate expenditure incurred u/s 14A of the Act amounting to Rs. 45,14,500/- calculated by the assessee on proportionate basis. The Corporate Treasury Department functional profile is placed at page no. 281 of PB. The ld. Counsel for the assessee submitted before us that disallowance cannot exceed the actual expenditure incurred in relation to earning of exempt income by referring to various decision in the case of Hon'ble Apex Court in the case of Maxopp Investment Ltd. vs. CIT [2018] 91 taxmann.com 154 (SC), CIT vs. Walfort Share & Stock Brokers Pvt. Ltd. [2010] 192 Taxman 211 (SC). Decision of Hon'ble Delhi High Court in the case of Maxopp Investment Ltd. vs. CIT [2011] 15 taxmann.com 390 (Del) which has been affirmed by the Hon'ble Apex Court and various other decisions. The Ld. A.R has submitted

before us that where suo-moto disallowance made by the assessee has been found to be reasonable under 8D(2)(ii) of the Rule, there is no need to invoke the provisions of section 14A. The Counsel for the assessee relied on the decision of Hon'ble Calcutta High Court in the case of PCIT vs. Britannia Industries Ltd. in ITAT No. 45/2017, GA No. 420/2017 wherein it has been held that where the AO rejects the claim of the assessee that no expenses were incurred to earn the exempt income it is not mandatory for him to invoke the method of calculation prescribed by Rule 8D(2) of the Rules and is free to make the disallowance on reasonable basis. Considering the above facts and ratio laid down above , we are of the view that it is not mandatory to apply provisions of section 14A where the assessee has made a reasonable disallowance having regard to actual expenditure incurred which may be part of the entire business of the assessee**.** In the present case the AO has overlooked the explanation amounting to reserves strategic vertical and calculated the disallowance**.**

24. In the present case, the assessee is a domestic company having diverse business activities and having operation world over thereby generating huge surplus from operation. The surplus funds so generated are invested into the securities/shares by the treasury department which performs functions as regards foreign exchange verticals as well as treasury verticals. Therefore we find merit in the contention of the Ld. A.R it is not possible to maintain separate books of account relating to /shares securities/instruments. We find merits in the contentions of the assessee that it is not possible for the assessee to maintain separate books of account keeping in view the nature of business of the assessee. In the present case, the case finds support from the decision of Hon'ble Supreme Court in the case of South Indian Bank Ltd. Vs. CIT [2021] 130 taxmann.com 178 (SC) wherein it has been held that it is not necessary for the assessee to maintain separate books of account for the purposes of Section 14A of the Act. We observe that though the above decision has been rendered in the context of disallowance of interest attributable to funds invested towards tax free income but the same analogy is applicable for considering the disallowance u/s 14A read with Rule 8D(2)(iii). Therefore we are inclined to hold that

non-maintenance of separate books of account evidencing expenditure incurred in relation to non-taxable income cannot be a ground to reject the assessee apportionment of expenditure incurred in relation to exempt income. In the present case before us we are quite convinced with the calculation furnished by the assessee which worked out the expenditure u/s 14A read with Rule 8D(2)(iii) at Rs. 45,14,500/- and is a reasonable disallowance u/s 14A read with Rule 8D(2)(iii). This is line with the decision of the Coordinate bench in the case of M/S Ultratech Cement Ltd Vs ACIT ITA No. 5065/Mum/2014.Accordingly we set aside the order of Ld. CIT(A) and direct the AO to restrict the disallowance of Rs. 45,14,500/-. Needless to say that the above disallowance come down based upon the stocks/securities yielding dividend income and hence the amount calculated of Rs. 45,14,500/- is less than the suo-motto disallowance in which the assessee has considered the securities yielded exempt income as well as those securities not yielding any income during the year. Accordingly ground no. 5 is allowed.

25. Issue raised in additional ground no. 8 is against the order of AO not allowing the adjustment of interest payment on income tax dues against the interest received on income tax refund.

26. Facts in brief are that during the year the assessee has paid interest Rs. 25,39,625/- on income tax dues and claimed the set off of the same against the interest received on income tax refunds amounting to Rs. 52,85,234/- and the balance amount was offered to tax during the course of assessment proceedings by relying on the decision of coordinate bench in the case of Bank of America NT & SA(20ri-TI1-ITAT-Mum-INTL). The AO rejected the claim of the assessee the said decision has been overruled by the coordinate bench and the earlier ruling rendered in the context of A.Y. 1990-91 can not be considered. The issue was not pressed before the Ld. CIT(A) which was stated to be because of its then understanding of the law.

27. After hearing the rival contentions and perusing the material on record, we observe that the issue is squarely covered by the decision of Co-ordinate Bench in the

assessee's own case in ITA Nos. 1267/Kol/2014 dated 27.11.2018 wherein the decision of Hon'ble Bombay High Court in the case of DIT vs. Bank of America NT and SA in ITA No. 177 of 2012 (Bom-HC) dated 03.06.2014 has been followed. We note that in the above decision the Hon'ble Bombay High Court has held that the interest received on income tax refund and the interest paid on delayed payment of income tax both have the same character and as such if the interest received from the tax department exceeds the interest paid, then only net amount could be taxed. Accordingly ground no. 8 raised by the assessee is allowed.

28. Issue raised in ground no. 9 and 9A by the assessee are as regards the entitlement of the assessee to deduction of the employees compensation cost on account of Employee Stock Option Plan (ESOP) amounting to Rs. 314,23,65,720/-.

29. Facts in brief are that the assessee has implemented the Employee Stock Option Plan (ESOP) in accordance with Securities and Exchange Board of India (Employees Stock Option and Employees Stock Purchase Scheme) Guidelines, 1999 (SEBI (ESOP) Guidelines, 1999. The employees of the assessee company were granted stock options under the said scheme and the exercise price of which was the market price as on the date of grant of such stock option. During the year, the assessee has determined Rs. 314,23,65,720/- as employee compensation cost accruing for the year based on the vesting period of the ESOPs which was duly disclosed in the Annual Account for the said year. The assessee claims to be entitled to the deduction of this amount since the issue has raised for the first time before the Tribunal and the issue has not been examined by the authorities below.

30. After hearing the rival contentions and perusing the material on record, we find that the same issue has been decided by the Co-ordinate Bench in assessee's own case in AY 2009-10 in ITA no. 685 & 1267/Kol/2014 dated 27.11.2018. The operative part is extracted below:

> *"11. Next comes assessee's additional / third substantive ground seeking to claim ESOPs of Rs. 261737836/- to be wholly and exclusively incurred for the purpose of its business. This*

tribunal's special bench in the case of Biocon Ltd. vs. DCIT [2013] 144 ITD 21(Del) has accepted such a claim qua disallowance between fair market value of shares of ESOP and exercise of the option at the instance of the concerned employees to be allowable revenue expenditure. The assessee's paper book's pages 104, 105, 107,108, 109, 111 and 117 inter alia comprise of the relevant SEBI guidelines, ICAI note, annual report to this effect; respectively. All this indicates that the assessee had not raised impugned ESOP deduction claim owing to complex legal position on the issue since the tribunal varying opinions leading to special bench (supra). Hon'ble Gujrat high court decision in CIT vs. Mitesh Impex 270 CTR 66 (Guj) has taken into account "NTPC" and Goetz (India) Ltd. vs. CIT (2006) 284 ITR 323 (SC) to hold that if a claim which is available in law is not raised either inadvertently or an account of erroneous plea of complex legal position, such a relief cannot be shut up for all the times to come merely because it is raised for the first time in appellate proceedings in absence of a revised return filed before the Assessing Officer. We therefore accept assessee's instant additional ground in principle and leave it open for the Assessing Officer to verify all the relevant facts as per law after affording adequate opportunity of hearing in consequential proceedings. This third substantive ground is accepted for statistical purposes."

Considering the decision of Co-ordinate Bench we admit the issue which is admittedly and undoubtedly allowable to the assessee and restore the same for adjudication before the AO after doing verification of the facts and decide the same by relying the decision in AY 2009-10 in assessee's own case (supra). Accordingly ground no. 9 and 9A are allowed for statistical purposes.

31. Issue raised in ground no. 10 is not pressed at the time of hearing and accordingly the ground raised by the assessee is dismissed as not pressed.

32. Similarly ground no. 11 is alternative ground to ground no. 9 and therefore not pressed by the Counsel for the assessee. Accordingly the same is dismissed as not pressed.

33. Issue raised in ground no. 1 in the revenue's appeal is against the order of Ld. CIT(A) deleting the addition of Rs. 54,00,000/- as made by AO on account of unexpired discounts on forward contract.

34. Facts in brief are that the assessee entered into forward exchange contract for hedging currency related risk in connection with various foreign currency exposure like import of raw materials, export of finished products etc. The maturity date for

some of the forward exchange contracts fall in the subsequent year and hence those contracts remain open/outstanding as at the end of financial year. The discount on account of these forward contracts is recognized over the period of the contract and the same is disclosed at Note 19(i) of the Schedules to the Accounts for AY 2010-11. The exchange difference in respect of forward exchange contracts to be recognized in the profit and loss account in the subsequent accounting period and during the year it was claimed at Rs. 54,00,000/- in the instant assessment year. The AO rejected the same on the ground that the assessee had entered in to binding contract, the premium/discount on such contract crystallizes at the time of entering into the contract and therefore the said discount should be recognized in the year in which the contract is entered into. Accordingly the AO added the same to the income of the assessee.

35. The Ld. CIT(A) allowed the appeal of the assessee by observing and holding as under:

> *I have considered the submissions of the authorized representative of the appellant as well as the assessment order framed in the light of the materials available on record before the assessing officer during the assessment proceedings. The AR has submitted that as per Accounting Standard 11 (AS-11 the premium/discount on forward exchange contract which relate to the period/life of the contract which falls within the current financial year would be recognized in the books in the current year and the unexpired premium/discount on forward exchange contract which relate to the period/life of the contract which falls in the subsequent financial year should be recognized in the books in the subsequent year. This principle of recognizing the unexpired premium/discount on forward exchange contract in the subsequent year (in respect of the period of contract falling in the subsequent year) is also in line with mercantile basis of accounting regularly employed by the assessee, following the fundamental accounting assumption of "Accrual" as enunciated in Accounting Standard 1, which has been notified by the Central Government u/s 145(2) of the Income Tax Act.*
>
> *Thus, following the principles of "accrual" and mercantile basis of accounting and in line with the requirement of AS -11, the unexpired discount of Rs, 54,00,000 in respect of the period/life of the forward contract which fell in the subsequent year) was not accounted for in the books in the FY 2009-10 but was recognized/credited in the Profit & Loss Account in the subsequent year i.e. FY 2010-11. The Assessing Officer's contention that the premium/discount crystallizes in the year in which the contract is signed and should be accounted for in such year is at variance with the established accounting principles mandatorily required to be followed by the assessee. The impugned amount of discount was credited to the Profit & Loss Account of FY 2010-11, hence it was offered to tax in the subsequent year i.e. financial year 2010-11 (AY 2011-12).*
>
> *The AR further submitted that the appellate has consistently followed the afore-mentioned method of accounting mandated by AS-11. The unexpired discount of Rs.26,00,000 relating to*

the forward exchange contracts which were outstanding as on the earlier year end i.e. 31-3-2009 for which the maturity date fell in the financial year 2009-10, was not accounted for in the books of accounts for the FY 2008-09 but was recognized/credited in the Profit & Loss Account in the financial year 2009-10. As such, since this discount of Rs.26,00,000/- was credited to the Profit & Loss Account of FY 2009-10, hence it was offered to tax in FY 2009-10 (AY 2010-11) and no issue on the said matter was raised in the scrutiny assessment of the earlier year and even in the prior years.

The AR further placed his reliance on the Hon'ble Supreme Court judgement wherein it has held that in the absence of any provisions to the contrary, the accounting standards have to be mandatorily followed for ensuring that the books are prepared according to the established accounting principles. The Apex Court in CIT vs. Woodward Governor India (P) Ltd[(2009) 312 ITR 254/2009-TIOL-50-SC-IT] mentioned that ".... profits for income tax purposes are to be computed in accordance with the ordinary principles of commercial accounting, unless such principles stand superseded or modified by legislative enactments.

I agree with the submission of the AR in the matter. In view of above, the assessing officer is directed to delete the addition. This ground of appeal is allowed."

36. After hearing the rival contentions and perusing the material on record, we find that the assessee has been regularly following these contracts accounting standard 11 (AS-11) qua the premium/discount on forward exchange contracts over the period of contract in line with the principles of accrual and mercantile system of accounting and in line with the requirement of AS-11. The unexpired discount of Rs. 54,00,000/- in respect of the period /of the forward contracts which fell in the subsequent year was not accounted for in the books in FY 2009-10 but was recognized /credited in the profit and loss account in the subsequent year i.e. FY 2010-11 and similar accounting as regards forward contracts was followed in the subsequent assessment years and the amount offered as premium/claimed as discount have been duly considered while assessing the income of the assessee. We note that the Ld. CIT(A) while allowing the appeal of the assessee relied on the decision of Hon'ble Supreme Court in the case of CIT vs. Woodward Governor India (P) Ltd. [2009] 312 ITR 254 (SC) wherein it has been held that in absence of any provision to the contrary, the accounting standard have to be followed for ensuring that books are prepared in accordance with accounting standard/ principles and similar ratio has been laid down in the another decision of Hon'ble Supreme Court in the case of CIT vs. Virtual Soft [2018] 92 taxmann.com 370 (SC). Considering the above facts in the light of the ratio laid down by the Hon'ble Apex Court we are inclined to uphold the order of Ld. CIT(A) and

direct the AO to delete the addition. Accordingly ground no. 1 raised by the revenue is dismissed.

37. Issue raised in ground no. 2 is against the order of Ld. CIT(A) deleting the addition made by AO of Rs. 99,96,000/- on account of marked to market loss on forward contracts.

38. Facts in brief are that the assessee claimed exchange fluctuation loss of Rs. 99,96,000/- in the profit and loss account on account of marked to market loss at the year end which relates to outstanding forward contracts and the foreign currency receivable/payable which were revenue in nature. The AO while relying upon CBDT's Instruction No. 3/2010 dated 28.09.2010 disallowed the loss on account of market to market revaluation on the ground that the said loss is notional and contingent in nature.

39. In the appellate proceedings, the Ld. CIT(A) allowed the said loss by observing and holding as under:

> *"I have considered the submissions of the authorized representative of the appellant as well as the assessment order framed in the light of the materials available on record before the assessing officer during the assessment proceedings. I agree with the submission of the AR of the appellate, wherein he has submitted that in a very recent judgment of the Hon'ble Jurisdictional Tribunal in the case of PricewaterhouseCoopers Pvt. Ltd. Versus JCIT (OSD-CIT-I), Circle-2, P-7, Kolkata [(2017) 3 TMI 966 ITAT Kolkata], has allowed the claim of mark to market loss on account of foreign contracts. The Hon'ble Jurisdictional Tribunal while allowing the expenses held that "The assessee has claimed the losses on the basis of mercantile system of accounting. Thus, in our considered view the assessee is very much eligible for the deduction of the impugned loss. In this connection, we find support and guidance from the judgment of theHon'ble Supreme Court in the case of Woodward Governor India (P) Ltd. In view of above, the AOis directed to delete the addition and this ground of appeal is allowed."*

40. After hearing the rival contention and perusing the material on record, we observe that the claim of marked to market loss is allowable business expenditure and a settled issue the Hon'ble Supreme Court in the case of CIT vs. Woodward Governor India (P) Ltd. (supra) and ONGC Ltd. vs. CIT [2010] 322 ITR 180 (SC). The AO has simply made the disallowance by following CBDT Instruction No. 3/ 2010 dated

28.09.2010 which in our opinion is not binding on appellate authorities particularly in case the deduction is allowable in line with the provisions of the Act and in view of the decisions of judicial forum. These appeals have been allowed by the Hon'ble Apex Court in the case of CIT vs. Hero Cycles Pvt. Ltd. and Others 228 ITR 463 (SC) wherein it has been held that circulars are not binding on appellate authorities, Tribunal. Similarly the Hon'ble Calcutta High Court in the case of CIT vs. Swedish East Asia Co. Ltd. 127 ITR 148 (Cal) has held that the circular which disallows a benefit otherwise admissible under the Act, is not binding. Considering the facts of the case and decisions as discussed above, we are inclined to uphold the order of Ld. CIT(A). Accordingly ground no. 2 is also dismissed.

41. Issue raised in ground no. 3 is against the deletion of addition of Rs. 19,55,000/- as made by the AO on the design charges by treating the same as capital in nature.

42. Facts in brief are that the assessee had incurred expenditure of Rs. 19,55,000/- on low value items of spares and consumables required for rearrangement of packing material . Since the assessee is in the business of fast moving consumer goods (FMCG) and is required to incur such expenditure on a regular and routine basis for continuous upgradation of packaging structure of its existing brands in order to compete in the market. Further the design of packaging structure also needs to be changed in order to comply with the various regulations like those issued by Food & Drug Controller in respect of health warnings. According to AO, the expenditure incurred by the assessee on modification of tools has resulted in better productivity and therefore capital in nature and accordingly the same was added to the income of the assessee.

43. In the appellate proceedings, the Ld. CIT(A) after calling for the remand report from the AO allowed the appeal by observing and holding as under:

> *"I have considered the submissions of the authorized representative of the appellant as well as the assessment order framed in the light of the materials available on record before the*

assessing officer during the assessment proceedings. The A.R during the remand proceedings before the AO and before undersigned has submitted that the expenditure for Rs. 19,55,000/- was made in respect of charges paid towards spares and consumables required for rearrangement of packing materials to meet day –to-day production requirements, and also furnished details furnished detailed break-up thereof. The AO in his remand report did not object the nature of expenses but disallowed by stating that these tools will give enduring benefit to the assessee and therefore cannot be claimed as revenue deduction. It is very much clear from the details filed by the A.R that the nature of expenditure related to paper board for packing, spares, presentation in factory, courier charges, program maintenance, regular maintenance of Auto-CAD inverter, spare for Focke machine, printing and proofing charges. This expenditure has been debited to the profit and loss a/c as per the existing Accounting Standards and since such expenditure is regular and recurring in nature. In view of above, the AO is directed to delete the addition and this ground of appeal is allowed. Since this ground of appeal is allowed so allowing of depreciation become infractuous."

44. After considering the rival contentions and perusing the material on record as placed before us including the appellate order, we find that in the remand report the AO has not objected the nature of expenses but simply stated that the expenses has resulted into in the benefit of capital in nature. We note that the Ld. CIT(A) has allowed the appeal by recognizing the fact that expenses has been charged to profit and loss account based on the existing accounting standard and by recording a finding that similar expenses have been allowed in preceding assessment years. Accordingly we do not find any infirmity in the order of Ld. CIT(A) and the same is upheld by dismissing ground no. 3.

45. Issue raised in ground no. 4 is against the deletion of addition of Rs. 3,01,73,072/- by the Ld. CIT(A) as made by the AO on account of information technology expenses which according to AO were capital in nature.

46. Facts in brief are that during the year the assessee has incurred Rs. 2,81,07,382/- which was wrongly stated as Rs. 3,01,73,072/- in respect of payment made to various parties annual maintenance of information technology assets and related consumables. According to AO the said expenses were incurred for routine maintenance and support service and was therefore claimed as revenue expenditure. According to AO the claim of the expenses pointed out that the quantum involved clearly indicated that the expenditure on major overhaul or purchase of consumables which gave rise to a new asset and accordingly the same was disallowed.

47. The Ld. CIT(A) allowed the appeal of the assessee after calling for the remand report from the AO by observing and holding as under:

> *"I have considered the submissions of the authorized representative of the appellant as well as the assessment order framed in the light of the materials available on record before the assessing officer during the assessment proceedings. The AR of the appellate during the appellate and remand proceeding has submitted detailed break-up and copies of invoices in support of its contention that such expenditure was on account of annual maintenance of IT assets and support services. However, in spite of such details being furnished and without assigning any specific reasons therefore, the AO was of the view that the amount was in the nature of capital expenditure. The AO has not disallowed such expenses in subsequent year.*
>
> *The AO has disallowed only stating that "the quantum involved clearly indicates that the expenditure was incurred on major overhaul or purchase of consumables which gave rise to any asset". I find that the expenses as debited to the profit and loss account and details as submitted before the AO in the remand proceeding and before undersigned during the appellate proceeding clearly indicated that these expenses are of revenue nature. The AO in his assessment order also made a chart at page no 5 and in the column of nature of expenses, he has written IT consumables and IT spares. In view of the above, The AO is directed to delete the addition and this ground of appeal is allowed."*

48. After hearing the rival contentions and perusing the material on record, we note that from the perusal of the appellate order the Ld. CIT(A) has allowed the appeal on the ground that the AO has failed to appreciate the facts correctly and simply made disallowance on the basis of agreements and coming to conclusion that the said expenditure may have resulted into new asset whereas as a matter of fact the expenses were incurred on routine basis. The said expenses have been allowed in the preceding and succeeding years to the assessee by the revenue. In our opinion, the claim of expenditure incurred cannot be a ground for determining the nature of expenses either of capital or revenue in nature. In our opinion, these expenses were incurred to maintain the information technology assets and related consumables and were paid to various parties the details whereof are available at page no. 344 and 345 Volumn-1 of PB. The case of the assessee finds support from the decision of Hon'ble Apex Court in the case of Empire Jute Co. Ltd. vs. CIT [1980] 124 ITR 1(SC) wherein the Hon'ble Supreme Court has held that if the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably, while leaving the fixed capital untouched, the expenditure would be of revenue account, even

though the advantage may endure for an indefinite future. In view of the above, we are inclined to uphold the order of Ld. CIT(A) by dismissing the ground no. 4 raised by the revenue.

49. Issue raised in ground no. 5 has already been adjudicated by us while deciding the assessee's appeal in ground no. 1 and revenue's appeal in ground no. 5 therefore our finding whereof decided that the expenses incurred on registration of new patents is also revenue in nature expenses and is allowable. Consequently this ground no. 5 is dismissed.

50. Issue raised in ground no. 6 is against the deletion of addition of Rs.1,49,00,000/- as made by the AO on account of advances written off.

51. Facts in brief are that the assessee has written off advances amounting to Rs. 1,49,00,000/- given to 6,256 farmers in earlier years for the purpose of business of the assessee. The AO required the assessee to file the complete details of bad debts which was furnished by the assessee with reconciliation. The AO disallowed the said amount on the ground that the names addresses, PANs of these farmers were not verifiable from the details furnished by the assessee and also that these advances were never credited to the profit and loss account.

52. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee after calling for a remand report and held that the advances given to the farmers were in the nature of trade advances given for purchase of seedlings, fertilizers etc. which could not be profitable. In the remand report the AO reiterated that these advances were never credited to the profit and loss account and were not allowable. The ld CIT(A) noted that these advances given to the farmers could not be recovered or adjusted due to crop failure and quality issues and deleted the addition holding recording a finding that these advances given in the ordinary course of business were in the nature of trade advances which are fully allowable u/s 37(1) of the Act.

53. After hearing the rival contentions and perusing the material on record, we note undisputedly these advances were given to the farmers against supply of materials/crops which could not be adjusted due to failure of crop or quality issues. In our opinion these advances were undoubtedly given in the ordinary course of business and has rightly been allowed by the CIT(A). Accordingly we dismiss ground no. 6 raised by the revenue by upholding the order of Ld. CIT(A).

54. Issue raised in ground no. 7 is against the deletion of addition of Rs. 5,95,61,000/- by the Ld. CIT(A) as made by the AO on account of double deduction claimed in respect of excise duty on closing stock.

55. Facts in brief are that assessee claimed deduction of Rs. 5,95,61,000/- towards excise duty paid u/s 43B of the Act in the computation of income. According to AO, in terms of accounting standard-2 and its guidance note, the excise duty included in the closing stock is tax neutral as the opening stock , purchases, sales & closing stock are accounted in such manner that the excise duty does not affect the profitability of the assessee. However, the assessee has made an additional claim of Rs. 5,95,61,000/- towards excise duty on closing stock paid u/s 43B as a separate item in the computation of income. According to AO, when the excise duty included in closing stock is already profit neutral then the additional claim of deduction in respect of excise duty on closing stock amounts to double deduction . Accordingly the same was added to the income of the assessee.

56. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee on the ground that the co-ordinate bench has already decided the issue in favour of the assessee.

57. After hearing the rival contentions and perusing the material on record, we find that the issue has been decided by the Hon'ble Calcutta High Court in the assessee's own case in AY 2005-06 in ITAT 186/2018 and for AY 2006-07 in ITA 63 of 2019. Similarly the Co-ordinate Bench decision in AY 2007-08 in ITA No. 301/Kol/2015, in

AY 2009-10 in ITA No. 1027/Kol/2013 by a consolidated order has decided the issue in favour of the assessee. Accordingly we are inclined to dismiss the ground raised by the revenue by upholding the order of Ld. CIT(A).

58. Issue raised in ground no. 8 is against the deletion of addition of Rs. 10,80,562/- by the Ld. CIT(A) as made by the AO on account bogus purchases.

59. Facts in brief are that the assessee made purchases of miscellaneous items from Heta Sales Pvt. Ltd. and Sambhav Traders for Rs. 10,79,831/- and Rs. 731/- respectively. The AO received information from DIT(Inv), Mumbai in respect of bogus purchases made by the assessee from the aforesaid parties during the year under consideration. The AO added the said amount to the income of the assessee on the ground that the assessee has failed to prove the genuineness of the purchases and added the same to the income of the assessee .

60. In the appellate proceedings, the Ld. CIT(A) deleted the addition by observing and holding as under:

> *"I have considered the submissions of the authorized representative of the appellant as well as the assessment order framed in the light of the materials available on record before the assessing officer during the assessment proceedings. The additions have been made merely on the report of the Investigation wing, Mumbai but at the same time it cannot be said that purchases are bogus because the purchases are supported by proper invoices duly reflected in the books of account. The payment reflected in the bank statement of the assessee. There is no evidence to show that the assessee has received cash back from the suppliers. I find that the assessee had discharged the initial onus of proving the genuineness of the transactions by providing necessary documents in the form of invoice copy, confirmations, payment details, while the AO had not brought any material to contradict the records of the assessee by making independent enquiry in the matter. Keeping in view of above, the AO is directed the delete the addition and this ground of appeal is allowed.:*

61. We find that the assessee has purchased petty gift items such as key chain-cum-torch from Heta Sales Pvt. Ltd. and duly furnished the details comprising number of goods received, copies of invoices and delivery challans, photograph of the products purchased which were given as free along with Food products, copies of bank statements reflecting the payment made. Similarly the assessee has purchased

Rangoli powder for internal use from M/s Sambhav Traders of Rs. 731/- qua which the receipt was produced before the AO. In our opinion, considering the volume of operation and the documents placed on record, the addition with reference to Investigation Wing report without carrying on any further investigation by the AO is unreasonable and was rightly deleted by the Ld. CIT(A). Accordingly we are inclined to uphold the order of Ld. CIT(A) by dismissing the ground no. 8 raised by the revenue.

62. Issue raised in ground no. 9, the revenue has challenged the appellate order with regard to 14A/Rule 8Dwhich has already been adjudicated by us while deciding the assessee's appeal in Para 6 to 11 above wherein we have directed the AO to accept assessee's computation of disallowance which was calculated on pro-rata basis. Accordingly ground no. 9 is dismissed.

63. Issue raised in ground no. 10 by the revenue is against the order of Ld. CIT(A) allowing deduction u/s 80IA of the Act in respect of captive power plant.

64. Facts in brief are that the assessee has claimed deduction of Rs. 59,15,70,000/- u/s 80IC in respect of capital undertakings in its original return of income which was revised during the assessment proceedings to Rs. 53,50,95,000/-. The AO disallowed the claim u/s 80IC of the Act by observing that the units in respect of which deduction had been claimed by the assessee were not separate undertakings and that the notional profit from such undertakings had not been included in the profit and loss account of the assessee.

65. The Ld. CIT(A) allowed the appeal of the assessee by following the Co-ordinate Bench of Kolkata Tribunal in the assessee's own case for AY 2007-08, 2008-09 and 2009-10 has decided the issue in favour of the assessee.

66. After hearing the rival contentions and perusing the material on record, we note that the issue has been settled in assessee's own case for AY 2007-08 by the Hon'ble Calcutta High Court as well as by the Co-ordinate Bench in AY 2007-08, 2008-09 and

2009-10. Now the issue of CCP has been finally settled by the Hon'ble Apex Court in the case of CIT Vs M/SJindal Steel & Power Ltd Civil Appeal No. 13771 of 2015and others vide order dated 06.12.2023.Accordingly the issue is squarely covered in favour of the assessee and the ground raised by the revenue is dismissed by upholding the order of ld. CIT(A).

ITA No. 1166/Kol/2017 (Assessee) and ITA NO. 1223/Kol/2017(Revenue) for AY 2011-12.

67. Issue raised in ground no. 1 in the assessee's appealin A.Y. 2011-12 is similar to one as decided by us in ground no. 2 in ITA No. 1068/Kol/2017 AY 2010-11 wherein we have allowed the appeal of the assessee by setting aside the order of Ld. CIT(A) on this issue by holding that the provision of Section 195 are not applicable in the export issue on the ground that the foreign agent has rendered services abroad and no part of the services were rendered in India. Accordingly our decision would mutatis mutandis apply to ground no. 1 in the assessee's appeal . Consequently ground no. 1 is allowed.

68. Issue raised in ground no. 2 in assessee's appeal in A.Y. 2011-12 is similar to one as decided by us in ground no. 3 in ITA NO. 1068/Kol/2017 AY 2010-11 wherein we have set aside the issue to the file of the AO with the direction to decide the same after taking into account all the evidences/ DTAA. Accordingly our decision would mutatis mutandis apply to ground no. 1 in the assessee's appeal . Consequently ground no. 2 is allowed statistical purposes.

69. Issue raised in ground no. 3 in assessee's appeal in A.Y. 2011-12 is in respect of liquidated damages and has been decided by us in ground no. 4 in assessee's appeal in ITA No. 1068/Kol/2017 AY 2010-11 wherein we have allowed the appeal of the assessee by setting aside the order of Ld. CIT(A) on this issue by holding that the liquidated damages are capital receipt not to be taxed and also not to be reduced for the cost of the assets in the block of assets. Accordingly our decision would mutatis

mutandis apply to ground no. 3 in the assessee's appeal . Consequently ground no. 3 is allowed.

70. Issue raised in ground o. 4 in assessee's appeal in A.Y. 2011-12 is against the order of Ld. CIT(A) confirming the order of AO in treating the amount of Rs. 4,31,82,738/- received as income from sale of carbon credit units as regular business income.

71. Facts in brief are that during the year the assessee has credited to the profit and loss account net receipt amounting to Rs. 4,31,82,738/- on account of transfer of carbon credit units after deducting expenses of Rs. 22,91,050/-. This carbon credit units are entitlements which are earned for achieving reduction of emission of carbon gases. The assessee earned the carbon credit units from project activity of renewal energy generation through wind mills qua which the auditor's report is filed at Page 591 to 592 of PB volumn-1along with agreement and invoices in relation to sale of unit of carbon units at page no. 593 to 625 of PB. The assessee claimed the said amount as not taxable since the same was considered to be capital in nature.

72. At the outset, the Ld. Counsel of the assessee submitted that the issue is covered in favour of assessee in its own case for AY 2009-10 in ITA NO. 685/Kol/2014 order dated 27.11.2018 & Ors. Wherein it has been held that the sale of carbon credit units is capital recipt and is not subject to tax besides, the Hon'ble Andhra Pradesh High Court in the case of CIT vs. My home Power Limited [2014] 46 taxmann.com 314 , Hon'ble Karnataka High Court in the case of Subhash Kabini Power Corporation Ltd. [TS-236-HC-2016(Kar) and Hon'ble Madras High Court in CIT vs. Ambika Cotton Mills Ltd. [TCA No. 986 of 2013 dated 8.3.2021 have alos decided the similar issue in favour of the assessee.

73 Considering the aforesaid decision of the Hon'ble High Courts and Co-ordinate Bench in assessee's own case, we are inclined to hold that the sale of carbon credit units is a capital receipt and is not taxable. The Ground no. 4 is allowed.

74. Issue raised in ground no. 5 in assessee's appeal and 6 is revenue's appeal in A.Y. 2011-12 are similar to ground no. 5 and 9 in the assessee's and revenue's appeal respectively in ITA No. 1068/Kol/2017 AY 2010-11 and ITA No. 1222/Kol/2017 for AY 2010-11 wherein we have allowed the proportionate disallowance computed by the assessee u/s 14A rule 8D(2)(iii). Accordingly our decision would mutatis mutandis apply to ground no. 5 and 6 of assessee and revenue's appeal. Consequently the AO is directed to accept the pro-rata disallowance of Rs. 48,01,500/-. Therefore assessee's ground no. 5 is allowed and revenue's ground no. 6 is dismissed.

75. Issue raised in ground no. 6 in assessee's appeal in A.Y. 2011-12 is similar to one as decided by us in ground no. 10 in revenue's appeal in ITA No. 1222/Kol/2017 AY 2010-11 wherein we have dismissed the appeal of the revenue on this issue by upholding the order of Ld. CITA on this issue by following the decision in assessee's own case for AY 2007-08 by the Hon'ble Calcutta High Court as well as by the Co-ordinate Bench in AY 2007-08, AY 2008-09 and AY 2009-10 and also decision of the Hon'ble Apex Court in the case of CIT Vs M/S Jindal Steel & Power Ltd Civil Appeal No. 13771 of 2015 and others vide order dated 06.12.2023. Accordingly our decision would, mutatis mutandis, apply to ground no. 6 in the assessee's appeal. Consequently ground no. 6 is allowed.

76. Issue raised in ground no. 9 of the assessee's appeal in A.Y. 2011-12 is similar to one as decided by us in ground no. 8 in ITA No. 1068/Kol/2017 AY 2010-11 wherein we have allowed the appeal of the assessee by setting aside the order of Ld. CIT(A) on this issue by holding that the interest on income tax dues are to be adjusted against the interest received on income tax refund. Accordingly our decision would mutatis mutandis apply to ground no. 9 in the assessee's appeal . Consequently ground no. 9 is allowed.

77. Issue raised in ground no. 10 & 10A in assessee's appeal in A.Y. 2011-12 is similar to one as decided by us in ground no. 9 & 9A in ITA No. 1068/Kol/2017 AY 2010-11 wherein we have restored the issue to the file of the AO thereby allowing the

ground for statistical purposes. Accordingly our decision would mutatis mutandis apply to ground no. 10 & 10A in the assessee's appeal. Consequently ground no. 10 & 10A are allowed for statistical purposes.

78. Issue raised in ground no. 11 & 12 in assessee's appeal in A.Y. 2011-12 are not pressed and accordingly the same are dismissed as not pressed.

79. Ground no. 1, 2, 3 & 4 in revenue's appeal in A.Y. 2011-12 are similar to ones as decided by us in ground no. 1,2,3 &4 in revenue's appeal in ITA NO. 1222/Kol/2017for AY 2010-11.Accordingly our decision would, mutatis mutandis, apply to ground no. 1,2,3&4 in the revenue's appeal . Consequently ground no. 1,2,3&4 are dismissed.

80. Issue raised in ground no. 5 in revenue's appeal in A.Y. 2011-12 is similar to ground no. 7 in revenue's appeal in ITA No. 1222/Kol/2017 for AY 2010-11 which has been dismissed by us. Accordingly our decision would mutatis mutandis apply to ground no. 5 in the revenue's appeal . Consequently ground no. 5 is dismissed.

81. The issue raised in ground no. 7 in the revenue appeal in A.Y. 2011-12 is similar to ground no. 11 in revenue's appeal in ITA No. 1222/Kol/2017 for AY 2010-11which has been dismissed by us. Accordingly our decision would mutatis mutandis apply to ground no. 7 in the revenue's appeal as well. Consequently ground no. 7 is dismissed.

82. In the result appeals of the assessee are partly allowed for statistical purposes and the appeals of the revenue are dismissed.

Order is pronounced in the open court on 10th May, 2024

Sd/- Sd/-

(Sonjoy Sarma /संजय शर्मा) (Rajesh Kumar/राजेश कुमार)
Judicial Member/न्यायिक सदस्य Accountant Member/लेखा सदस्य

Dated: 10th May, 2024

SM, Sr. PS

Copy of the order forwarded to:

1. Appellant- ITC Limited, Corporate Taxation Department, 37, J. L. Nehru Road, Kolkata-700071
2. Respondent – i) ACIT, Range-8, Kolkata
   ii) DCIT, Circle-8(1), Kolkata
3. Ld. CIT(A)-2, Kolkata
4. Ld. Pr. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata