

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I': NEW DELHI**

**BEFORE SHRIS.RIFAUR RAHMAN, ACCOUNTANT MEMBER
and
SHRI VIMAL KUMAR, JUDICIAL MEMBER**

**ITA No.287/DEL/2016
(Assessment Year: 2011-12)**

**ITA No.901/DEL/2017
(Assessment Year: 2012-13)**

**ITA No.6949/DEL/2017
(Assessment Year: 2013-14)**

Maruti Suzuki India Limited,
Plot No.1, Nelson Mandela Road,
Vasant Kunj,
New Delhi – 110 070.

vs,

DCIT, Circle 16 (1),
New Delhi.

(PAN : AAACM0829Q)

**ITA No.1024/DEL/2016
(Assessment Year: 2011-12)**

DCIT, Circle 16 (1),
New Delhi.

vs.

Maruti Suzuki India Limited,
Plot No.1, Nelson Mandela Road,
Vasant Kunj,
New Delhi – 110 070.

(PAN : AAACM0829Q)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Ajay Vohra, Sr. Advocate
Shri Neeraj Jain, Advocate
Shri Rohit Jain, Advocate
Ms. Somya Jain, CA

REVENUE BY : Shri G.C. Srivastava, Spl. Counsel for the Department
Shri Kalrav Melhotra, Advocate
Ms. Kannu Priya, Advocate

Date of Hearing : 31.07.2025
Date of Order : 08.10.2025

ORDER

PER S.RIFAUR RAHMAN, ACCOUNTANT MEMBER :

1. The assessee and Revenue have filed cross appeals against assessment order dated 31.12.2015 passed by the DCIT, Circle 16(1), New Delhi under section 143(3) read with section 144C(1) of the Income-tax Act, 1961 (for short 'the Act') for Assessment Year 2011-12 pursuant to the directions of the Dispute Resolution Panel u/s 144C(5) of the Act. The assessee has also filed appeals against assessment order passed by the DCIT, Circle 16(1), New Delhi under section 143(3) read with section 144C(1) of the Act for Assessment Years 2012-13 and 2013-14 pursuant to the directions of the Dispute Resolution Panel u/s 144C(5) of the Act.
2. Since the issues are common and the appeals are connected, hence the same are heard together and being disposed off by this common order. We take up the assessee's appeal being ITA No.287/Del/2016 for AY 2011-12 as lead case to adjudicate the issues under consideration wherein the assessee has raised the following grounds of appeal :-

"1. That on the facts and circumstances of the case the impugned assessment completed vide order dated 31.12.2015 passed under section 143(3) read with section 144C of the Income-tax Act, 1961 (the Act'), is illegal and bad in law.1

1.1 That on the facts and circumstances of the case, the impugned assessment having been completed on the basis of directions issued by the Dispute Resolution Panel ("DRP") under section 144C(S) of the Act without judiciously and independently considering e factual and legal objections to the draft assessment order, is illegal and bad in law.

1.2 That the DRP erred on facts and in law in not directing the assessing officer to delete certain additions/ disallowance which were squarely covered in favour of the appellant by the appellate orders for the earlier years.

2. That the assessing officer erred on facts of the case and in law in completing the impugned assessment at an income of Rs.37,01,18,87,075/- as against income of Rs.2294,80,71,262/- declared by the appellant.

3. That the assessing officer erred on facts and in law in not reducing Rs.117,11,24,049/-, being amount offered to tax by the appellant in the return

of income under section 43B of the Act consistent with the said amount being claimed as deduction on payment basis in the preceding assessment years.

3.1 That the assessing officer erred on facts and in law in not reducing the aforesaid amount, even though the assessing officer, as per the directions given by the DRP, had verified that the said amount had not been allowed as deduction on payment basis in the preceding assessment years.

4. That the assessing officer erred on facts and in law in making further disallowance of expenses amounting to Rs.19,20,34,841/- under section 14A of the Act, over and above suo-motu disallowance of Rs.2,09,65,159/- by the appellant.

4.1 That the assessing officer erred on facts and in law in proceeding to make disallowance under section 14A simply on the basis of method/ formula prescribed in Rule 8D of the I.T. Rules, without appreciating that pre-conditions for applying the said rule as prescribed in sub-sections (2) (3) of section 14A of the Act were not satisfied.

4.2 That the assessing officer erred on facts and in law in holding that suo-motu disallowance of Ra.2,09,65,159/- by the appellant in the return of income under section 14A of the Act was incorrect and not backed by the documentary evidence.

4.3 Without prejudice, the assessing officer erred on facts and in law in computing disallowance under section 14A of the Act read with Rule 8D of the Income Tax Rules.

5. That the assessing officer/DRP erred on facts and in law in disallowing weighted deduction of Rs.249,57,70,000/- claimed by the appellant under section 35(2AB) of the Act in respect of R&D expenditure of Rohtak Unit.

5.1 That the assessing officer/DRP failed to appreciate that since Rohtak Unit was duly approved, R&D deduction of Rs.249,57,70,000/- claimed for that unit is allowable deduction under section 35(2AB) of the Act.

5.2 Without prejudice, the assessing officer erred on facts and in law in not allowing depreciation under section 32 or deduction under section 35(1)(iv) of the Act on capital expenditure incurred by the appellant.

6. That the assessing officer/ DRP has erred on facts and in law in making disallowance of Rs.36,27,43,195/-, being the expenditure on account of foreseen price increase (in short "FPI). disregarding the consistent and accepted method of accounting followed by the appellant for last many years since inception.

6.1 That the assessing officer/DRP completely failed to appreciate that there was a clear contractual agreement/ understanding between appellant and suppliers under which the appellant was liable to pay additional amount of

price for the supplies of various inputs received during the year and accordingly, the said liability accrued during or before the end of that year and was accordingly allowable as deduction from assessable income.

6.2 That the assessing officer/DRP failed to appreciate that the mere fact that the exact amount of additional price payable to suppliers was not quantified until the end of relevant accounting year, did not mean that there was no accrual of liability in that year.

6.3 That the assessing officer/DRP erred on facts and in law in not taking cognizance of the fact that the entire amount of liability has either been paid or written back and offered to tax as its income in the succeeding assessment year(s).

6.4 That the DRP erred on facts and in law in alleging that calculation/ method/ basis of computing and claiming the liability on account of foreseen price increase was not furnished/ explained by the appellant holding that the appellant has failed to furnish evidence in support of its contention that price differential is worked out at end of the year after taking into account actual market price of raw material at the time of purchase.

6.5 Without prejudice, the Assessing Officer erred on facts and in law in not allowing deduction of the amount disallowed in the preceding assessment year (s) but actually paid/written back during the year under consideration.

7. That the assessing officer/DRP erred on facts and in law in making ad-hoc disallowance of Rs.6,86,58,370/- for alleged sharing of resources by the appellant with other group subsidiary companies.

7.1 That the assessing officer/DRP erred in observing that the expenses incurred in respect of the common facilities shared by the appellant with other group/ subsidiary companies were not incurred wholly and exclusively for the purpose of the business of the appellant.

7.2 That the assessing officer/DRP further failed to appreciate that the disallowance of any part of the expenses incurred was ultimately tax neutral inasmuch as the expenses disallowed in the hands of the appellant would have to be allowed in the hands of the group/subsidiary companies.

7.3 Without prejudice, the quantum of disallowance computed by the assessing officer was very high as compared to expenses of Rs.1.30 crores that could, if at all, reasonably be attributed towards sharing of expenses

8. That the assessing officer/ DRP erred on facts and in law in disallowing Rs15,20,00,000 being the expenditure incurred on account of discharging corporate social responsibility (CSR) without appreciating that such expenditure was incurred wholly and exclusively for the purposes of business.

8.1 That the assessing officer/ DRP erred on facts and in law in holding that expenditure incurred on CSR is, even otherwise, capital in nature, on the ground that the same resulted in enduring benefit to the appellant.

8.2 Without prejudice, the assessing officer erred on facts and in law in not allowing depreciation under section 32 of the Act, consistent with his finding that the aforesaid expenditure is capital in nature.

9. That the assessing officer /DRP erred on facts and in law in treating gains from sale and purchase of mutual funds as "business income" as against the same being declared under the head capital gains" by the appellant.

9.1 That the assessing officer erred on facts and in law in assessing gain of Rs.51,12,36,410/- on transfer of units of mutual fund as business income as against long-term capital loss of Rs.219,70,90,370/- declared by the assessee after claiming benefit of indexation.

9.2 That the assessing officer erred on facts and in law in assessing short-term capital gain of Rs.6,90,68,982/- as business income.

9.3 That the assessing officer erred on facts and in law in holding that investment in units of mutual funds and shares were made as a systematic business activity, without appreciating that such investments were made on capital account and not as "stock-in-trade".

9.4 That the assessing officer erred on facts and in law in holding that that the assessee had shown/categorized the purchases of mutual funds as "investment" in the books of account in order to hoodwink the Department and conceal the real nature of the transactions.

10. That the assessing officer/DRP erred on facts and in law in disallowing purchases to the tune of Rs,218,20,87,484/- made by the assessee from Suzuki Motor Corporation. Japan (in short "SMC), on the ground that appellant failed to deduct tax at source, by invoking the provisions of section 40(a)) of the Act.

10.1 That on the facts and circumstances of the case and in law, the aforesaid disallowance is bad in law and not sustainable having being made in violation of principles of natural justice.

10.2 That the assessing officer/DRP erred on facts and in law in holding that SMC had a Permanent Establishment ["PE"] in India in terms of Article 5 of the India-Japan Tax Treaty ["Treaty"] and income arising to SMC from sale of goods to the assessee was attributable to the activities of such alleged PE, and was liable to tax in India.

10.3 That the assessing officer/DRP erred on facts and in law in alleging that SMC had a place of management in India and hence, a fixed place PE in India in terms of Article 5(1) and 5(2) of the Treaty, on the ground that the executive directors on the board of the assessee who were Japanese nationals

nominated (nominee directors) by SMC and held significant influence over the affairs of the assessee were employees of SMC and were deriving salary from SMC.

10.4 That the assessing officer erred on facts and in law in alleging that the nominee directors were looking after the interests of and carrying on business of SMC in India.

10.5 That the assessing officer erred on facts and in law in alleging that SMC also had dependent agent PE in India since the nominee directors were taking commercial decisions in the interest of SMC.

10.6 That the assessing officer erred on facts and in law in alleging that the assessee also had service PE in India alleging that the nominee directors were rendering managerial services on behalf of SMC to the appellant.

10.7 Without prejudice, the assessing officer erred on facts and in law in not appreciating that there is no concept of service PE under the Treaty

10.8 Without prejudice, the assessing officer erred on facts and in law in computing the profits attributable to the alleged PE of SMC in India at Rs.238,20,87,484/-, and disallowing the same under section 40(a) of the Act.

10.9 That the assessing officer erred on facts and in law by arbitrarily assuming 20% net profit margin on purchases made from SMC, out of which 50% profits alleged to be attributable to the alleged PE of SMC in India.

10.10 That the assessing officer erred on facts and in law in not appreciating that no disallowance under section 40(a)(i) of the Act was warranted as the said provisions were not applicable in view of the provisions of Article 24 of the Treaty.

11. That the AO has erred in law, on facts and in the circumstances of the case in allowing TDS credit of Rs.19,65,40,178/- only against Rs.20,40,80,150/- claimed by the appellant in the revised return of Income and/or before DRP/AO, thereby allowing a short-credit of Rs.75,39,972/-,

Transfer Adjustment on account of payment of royalty

12. That the assessing officer erred on facts and in law in making transfer pricing adjustment amounting to Rs.789,92,95,000 on account of the alleged difference in the arm's length price of international transactions of payment of royalty entered into by the appellant on the basis of the order under section 92CA(3) of the Act.

12.1 That the TPO / DRP erred on facts and in law in holding that the international transaction of payment of royalty does not satisfy the arm's length principles as envisaged under the Act.

12.2 That the TPO / DRP erred on facts and in law in holding that out of the total royalty paid by the assessee, 41.74% was attributable to royalty towards payment for use of SMC's trademark and the appellant was not required to pay royalty to SMC towards use of SMC's trademark.

12.3 That the TPO/DRP erred on facts and in law in adopting a completely contradictory position of accepting Transactional Net Margin Method (TNMM') as the most appropriate method on the one hand, and yet seeking to question appropriateness of individual elements of operating cost on the other. thereby failing to appreciate fundamental TP principles

12.4 That the assessing officers/TPO erred on facts and in law in separately examining the international transactions entered into by the appellant, not appreciating that such transactions being closely linked have been appropriately benchmarked considering entity wide profitability

12.5 That the TPO / DRP erred on facts and in law in rejecting Transactional Net Margin Method (TNMM) as the most appropriate method for benchmarking the international transaction of payment of royalty.

12.6 That the TPO / DRP erred on facts and in law in not following any of the prescribed method for determination of the arm's length price of international transaction of payment of royalty.

12.7 That the TPO/ DRP erred on facts and in law in failing to appreciate that at the time of entering into the license agreement, the appellant and SMC were unrelated parties.

12.8 That the TPO / DRP erred on facts and in law in not appreciating that brand 'Maruti- Suzuki was used by the appellant from its inception.

12.9 That the TPO / DRP erred on facts and in law in not appreciating that the use of brand 'Suzuki was in the commercial interest of the appellant.

12.10 That the TPO / DRP erred on facts and in law in holding that Suzuki brand has piggybacked the brand Maruti owned by the appellant.

12.11 That the TPO / DRP erred on facts and in law in artificially splitting the single and inseverable license agreement entered into by the appellant with Suzuki Motor Corporation, Japan (SMC).

12.12 That the TPO / DRP erred on facts and in law in not appreciating that all rights vested in the license agreement are inseverable and linked to the core right to manufacture and sell licensed products.

12.13 That the TPO / DRP erred on facts and in law in holding that co-branding of "Maruti- Suzuki" has resulted in the reinforcement of value of Suzuki" brand and simultaneous impairment of "Maruti" trademark.

12.14 That the TPO / DRP erred on facts and in law in holding that "Suzuki brand in India is relatively weak"

12.15 That the TPO /DRP erred on facts and in law in not following the appellate order passed by the Hon'ble Tribunal for assessment year 2005-06 and 2006-07 wherein similar Transfer Pricing adjustment on account of international transaction of payment of royalty was deleted.

12.16 That the TPO7 DRP erred on facts and in law in holding, on the basis of conjectures and surmises that, the associated enterprise has charged separate royalty for the use of technology and for use of brand name in the proportion in which it incurs expenditure on R&D and brand promotion.

12.17 That the TPO/ DRP erred on facts and in law in not appreciating that the royalty was the consolidated charge made by the appellant for obtaining right and license to manufacture motor vehicles in India using the technology and brand name of the SMC, Japan.

12.18 Without prejudice, the TPO/ DRP erred in considering the consolidated financials of the associated enterprise for the purpose of segregating the payment of royalty for the use of technology and for the use of brand name.

12.19 That the assessing officer / the TPO erred on facts and in law in ignoring the search for third party independent technology agreements conducted by the appellant.

13. That the assessing officer erred on facts and in law in charging/ computing interest under sections 234B and 234D of the Act.”

3. Ground Nos.1 &2 are general in nature, hence do not require adjudication.
4. With regard to Ground Nos.3 & 3.1 which are with regard to not allowing withdrawal of add back made under section 43B of the Income-tax Act, 1961 (for short ‘the Act’), ld. AR of the assessee submitted that these grounds are not pressed in view of relief allowed by the AO vide order dated 11.07.2017 passed u/s 154 r.w.s. 143(3) of the Act. Accordingly, these grounds are dismissed as not pressed.
5. With regard to Ground Nos.4 to 4.3 regarding disallowance u/s 14A of the Act, ld. AR submitted that the assessee had, during the year under consideration, earned dividend income amounting to Rs.211,07,39,103, which was claimed as exempt u/s 10(34) & 10(35) of Act. Though no expenditure was incurred for earning exempt income, the assessee, on a conservative basis, made a suo-motu disallowance of Rs.2,09,65,159, was computed by proportionately disallowing salary and administrative expenditure related to the Finance / Treasury department. The

assessing officer however, computed net disallowance at Rs.19,20,34,841 by applying the formula prescribed under Rule 8D of the Income-tax Rules, 1962 (for short 'the Rules'). He submitted that Hon'ble Delhi High Court in assessee's own case for AYs 2008-09 & 2009-10 has set aside the order passed by the Tribunal to the extent of remanding the matter to the AO and deleted the disallowance made u/s 14A of the Act for no objective satisfaction having been recorded by the AO before applying provisions of Rule 8D.

6. With regard to no disallowance out of interest expenditure, Ld. AR further submitted that so long as it is established that the borrowed funds have been utilized for the purposes of business, interest thereon is to be allowed as deduction and Revenue cannot justifiably put itself into the armchair of the businessman and decide how and in what manner the business to be conducted and/or how much expenditure is to be incurred or how much expenditure is reasonable. In this regard he relied on the decision of Hero Cycle Ltd. v. CIT: 379 ITR 347 (SC). Further he submitted that this issue is covered in favour of the assessee by order of the Hon'ble Delhi High Court in assessee's own case for assessment year(s) 1999-00 (ITA No. 250/2005) and 2000-01 (ITA No. 976/2005), wherein the High Court has held that onus is on the Revenue to establish proximate nexus of expenses with earning of exempt income. The Court further held that the assessee had surplus funds and that no disallowance of interest was called for under section 14A of the Act. Further he submitted that the above order passed by the High Court for AY 1999-00 has now been confirmed by the Hon'ble Supreme Court vide order dated 27.03.2025. Further, Department's appeal on the aforesaid issue has not been admitted by the Delhi High Court for assessment year 2006-07.
7. Further he submitted that in case of surplus funds, presumption to be drawn in favour of the assessee with respect to utilization of interest free and borrowed funds and relied on the following cases :-
 - East India Pharmaceutical Works Ltd. v. CIT: 224 ITR 627 (SC)
 - CIT v. UTI Bank Ltd: 215 Taxman 8 (Mag.) - Revenue's SLP dismissed in Civil Appeal No. 468/2014
 - Indian Explosives Ltd. V. CIT: 147 ITR 392 (Cal.)
 - Woolcombers of India Ltd. v. CIT: 134 ITR 219 (Cal.) - approved by Supreme Court in the case of East India Pharmaceutical Works Ltd. v. CIT: 224 ITR 627
 - Alkali & Chemical Corp. of India v. CIT: (1986) 161 ITR 820 (Cal.)

- CIT v. Reliance Utilities and Power Ltd.: 313 ITR 340 (Bom.)
 - CIT vs. M/s. Ashok Commercial Enterprises: ITA No. No.2985 of 2009 (Bom)
 - Gujarat State Fertilizers and Chemicals Ltd.: 358 ITR 323 (Guj)
 - Hero Honda Finance Ltd vs. ACIT: ITA No. 3726 & 6102/Del/2012 (Del)
8. Further he submitted that interest expenditure cannot be disallowed under section 14A where the assessee had surplus funds and there was no finding by the assessing officer of any direct nexus of borrowed funds with investments:
- CIT v. Reliance Industries Ltd.: 410 ITR 466 (SC)
 - Godrej & Boyce Mfg. Co. Ltd. v. DCIT: 394 ITR 449 (SC)
 - HT Media v. PCIT: 399 ITR 576 (Del.)
 - CIT vs. Taikisha Engineering India Ltd: 370 ITR 338 (Del)
9. He submitted that no disallowance out of administrative expenditure can be made and relied on the following decisions :-
- SIL Investment Ltd. v. ACIT: 148 TTJ 213 (Del. Trib.)
 - DCIT v. Jammu and Kashmir Bank Ltd: 152 TTJ 522 (Asr. Trib.)
10. With regard to investments not resulting in exempt income to be excluded, ld. AR relied on the following decisions :-
- PCIT v. Caraf Builders & Constructions (P.) Ltd.: 414 ITR 122 (Del) – SLP filed by the Department dismissed in SLP(C) No. 25130/2019 reported in 268 Taxman 317
 - ACB India Ltd. v. ACIT: 374 ITR 108 (Del.)
 - REI Agro Ltd v. DCIT: 144 ITD 141 (Kol. Trib.) – Revenue appeal dismissed by Calcutta HC in appeal No.GA No.3581 of 2013
 - ACIT v. Vireet Investments Pvt. Ltd.: 165 ITD 27 / 188 TTJ 1 (Del Trib.) (SB)
 - Religare Enterprises Ltd. v. DCIT: 1549/Del/2014 (Del Trib.)
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11. It is submitted that if only the dividend yielding investments are considered for the purpose of section 14A of the Act, then the disallowance would not exceed Rs.2,09,65,159, being the suo-motu disallowance made by the assessee.
12. He further submitted that these issues are covered by orders of the Tribunal in assessee's own case as under :-
- AY 1999-00 (Para 62)
 - AY 2000-01 (Para 9)
 - AY 2005-06 (Para12)
 - AY 2006-07 (Para 15.1-15.2)

- AY 2007-08 (Para 17-17.19)
- AY 2008-09 (Para 6-6.16)
- AY 2009-10 (Para 46-50)
- AY 2010-11 (Para 41-45)

Further, the assessing officer has, in the appeal effect order for the AY 2006-07, deleted the entire disallowance made under section 14A of the Act.

8. On the other hand, ld. DR of the Revenue submitted as under :-

“1. At the outset, it is submitted that the Hon'ble Tribunal has set-aside the matter to the file of the A.O. to verify the claim of the Assessee regarding the administrative expenses incurred for maintaining such huge investment.

2. In the year under consideration, the Appellant has claimed exempt dividend income of Rs. 4,52,99,266.00 from Indian Companies under Section 10(34) of the Act and exempt dividend income of Rs. 206,54,39,838.00 from Mutual Fund under Section 10(35) of the Act. The total investment in these assets is Rs. 5,630 crores in the A.Y. 2010-11 and Rs. 1,274 crores in the A.Y. 2011-12.

3. It is seen from the facts that the Appellant has itself disallowed the amount of salary and administrative expenditure of Rs. 2,09,65,159.00 incurred indirectly relatable for earning of the exempt income by way of dividends

4. That, the AD rejected the computation of expenditure as the Appellant had incurred huge expenditure than disclosed by it. Furthermore, the reliance on judgements pertaining to earlier A.Y.s prior to A.Y. 2008-09 was also rejected as Rule 8D was not introduced in the statute till then. Therefore, the amount of Rs.19,20,34,841.00 was added by the Assessing Officer to the total income of the Appellant.

5. The Appellant claims to have proportionately disallowed the salary and administrative cost by attributing them as cost incurred for earning of exempt income. However, it did not lead any evidence before the AO to justify the arbitrary disallowance. The claim of the expense attributable to "investment" activity did not emanate from accounts and no separate accounts were maintained. Thus, the claim represented an arbitrary figure without any rational basis or supporting material. Therefore, it is submitted that the AO was left with no option but to apply the method provided in Rule BD.

6. The Appellant's suo-motu disallowance of Rs.2,09,65,159 is a self-serving and inadequate measure, significantly understating the actual expenditure attributable to exempt income. The very purpose of Section 14A is to curb the claim of expenses relatable to exempt income, and this is to be determined objectively. The AO is not bound by the Appellant's own calculation, particularly when it appears to be an arbitrary figure. The application of Rule BD of the Rules is a statutory mechanism to compute the disallowable expenditure where the AO is not satisfied with the correctness of

the assessee's claim. The AO's action in applying Rule 8D, resulting in a disallowance of Rs.19,20,34,841, demonstrates such objective dissatisfaction and should not be interfered with.

7. The Appellant's reliance on Walfort Share & Stock Brokers and Godrej & Boyce Manufacturing Company Ltd. regarding proximate nexus and objective satisfaction is misplaced in the context of Rule 8D. These judgments laid down the general principles for Section 14A prior to or on the cusp of Rule 8D's clear statutory framework. Rule 8D provides a presumptive method for calculation where a direct nexus is difficult to establish, precisely because the AO is not satisfied with the assessee's accounts or methods. The AO's disallowance implicitly records this satisfaction by proceeding to apply the rule.

8. That, the disallowance under Section 14A is holistic and covers both direct and indirect expenses, including a portion of administrative expenditure as per Rule 8D(2)(iii) and a notional interest component as per Rule 8D(2)(ii) if borrowed funds are utilized for investments. Even if an assessee has surplus funds, the overall administrative machinery of the company contributes to managing all investments, including those yielding exempt income. It is highly improbable that no expenditure, direct or indirect, is incurred for managing an investment portfolio yielding substantial exempt income.

9. It is accordingly, prayed that in light of the directions given for verification of administrative expenses in AY. 2010-11, the years under consideration be similarly set-aside to the file of the AO, with necessary directions.

9. In rejoinder, the Id. AR of the assessee submitted as under :-

Re B: Ground No. 4-4.3: Disallowance under section 14A of the Act

Vide Chart of Issues dated 31.07.2025, it was respectfully submitted that the disallowance made by the assessing officer is not sustainable for the following reasons:

- (a) Before invoking the methodology prescribed under Rule 8D, the assessing officer has not recorded any dissatisfaction, let alone objective, with the suo-motu disallowance made by the appellant, having regard to the accounts of the appellant company. Mere assumptions, that, too, in vacuum, that huge expenditure must have been incurred for earning exempt income, without identifying any expenditure having regard to the accounts of the appellant, cannot qualify as satisfaction being recorded.

Arguments of the Revenue

The Id. Special Counsel for the Revenue has contended that the assessing officer had recorded the necessary satisfaction in as much as the assessing officer has examined the computation of suo-motu disallowance surrendered by the appellant company and then rejected the same for want of documentary

evidence and explanation in respect of the arbitrary disallowance made by the appellant.

Rebuttal

The appellant had on the basis of the actual number of employees involved in the management of treasury, disallowed expenditure relating to four employees (out of 68 employees in the finance department). The estimate of 5.48% was further rounded off to 10%. The assessing officer, on mere conjectures and surmises rejected the estimate made by the appellant on the basis that the same was not backed by documentary evidence/ explanation. The appellant fails to understand what kind of documentary evidence had to be led in order to sustain the aforesaid estimates. The appellant does not maintain any log sheet for the time spent by its employees on various jobs and if the assessing officer was to take a different view, the onus was on the assessing officer to demonstrate with reference to the accounts of the appellant that the estimate made by the appellant was not justified. In the facts of the present case, the onus on the assessing officer has clearly not been discharged. Further, the submission of the Ld Special Counsel for the Revenue that “*claim represents an arbitrary figure without any rational basis nor any supporting material*” is again based on conjectures and surmises; the assessing officer has not been able to demonstrate with reference to the accounts of the appellant that the estimate made by the appellant was not justified.

At the cost of duplicity, it is reiterated that in identical facts, the Delhi High Court for AY 2008-09 and 2009-10 has set-aside the order passed by the Tribunal to the extent of remanding the matter to the assessing officer and deleted the disallowance made under section 14A of the Act for no objective satisfaction having been recorded by the assessing officer before applying provisions of Rule 8D.

- (b) As for the disallowance made out of interest expenditure, it is reiterated that interest expenditure cannot be disallowed under section 14A of the Act where the assessee had sufficient surplus funds and there was no finding by the assessing officer of direct nexus of borrowed funds with investments yielding exempt income.

Argument of Revenue:

The Ld. Special Counsel for Revenue has contended that disallowance under section 14A covered both direct and indirect expenses; including a portion of administrative expenditure as per Rule 8D(2)(iii) and interest component as per Rule 8d(2)(ii) if borrowed funds are utilized for investments. Even if an assessee has surplus funds, the overall administrative machinery of the company contributes to managing all investments, including those yielding exempt income.

Rebuttal:

During the year under consideration, the appellant has incurred nominal interest expenditure aggregating to Rs.20.22 crore on foreign currency loans, export credit, overdraft, etc. It will kindly be appreciated that the aforesaid

negligible interest expenditure, having regard to the magnitude and size of the appellant's business and the large cash reserves, by its very nature, is normal business expenditure, having no connection, whatsoever, to the making of investments in shares/ mutual funds. No such nexus between interest bearing funds and the making of investments in shares and securities which have yielded exempt income during the relevant previous year, has been pointed out by the assessing officer.

Pertinently, the Hon'ble Delhi High Court in appellant's own case for **assessment year(s) 1999-00 (ITA No. 250/2005) and 2000-01 (ITA No. 976/2005)**, held that **onus is on the Revenue to establish proximate nexus of expenses with earning of exempt income. The Court further held that the assessee had surplus funds and that no disallowance of interest was called for under section 14A of the Act.**

The above order passed by the High Court for AY 1999-00 has now been confirmed by the Hon'ble Supreme Court vide order dated 27.03.2025.

Most importantly, the Tribunal has, in appellant's own case for AY 2006-07 to AY 2010-11, deleted the disallowance made out of interest expenditure observing that the appellant had sufficient own funds to make investments.

In view of the aforesaid and considering the settled law, no disallowance can be made out of interest expenditure.

- (c) Accordingly, the formula in Rule 8D(2)(iii) has to be calculated by taking only investments yielding exempt income during the year, as reduced by the suo-motu disallowance [*as held in PCIT v. Caraf Builders & Constructions (P.) Ltd.: 414 ITR 122 (Del) – SLP filed by the Department dismissed in SLP(C) No. 268 Taxman 317; ACB India Ltd. v. ACIT: 374 ITR 108 (Del.)*].”

10. Considered the rival submissions and material placed on record. After going through the submissions of the ld. AR of the assessee, we observe that this issue is covered in favour of the assessee in its own cases in different assessment years as mentioned above. For the sake of brevity, we reproduce relevant findings of the coordinate Bench in ITA No.961/Del/2015 order dated 09.02.2023 for AY 2010-11 on this issue as under :-

“45. We have heard the rival submissions and perused the material available on records and gone through the orders of the authorities below. The question be decided as to whether the AO was justified in rejecting the claim of the assessee regarding suo-motu disallowance of Rs.1,69,36,938/- in terms of section 14A of the Act and computing the disallowance to the tune of Rs.32,57,05,335/- after giving the set off of suo-motu disallowance made by the AO. The grievance of the assessee is that the AO has applied the provision of section 14A of the Act r.w. Rule 8D of the Rules in a arbitrary manner

without taking into consideration mandate of law. The contention of the assessee is that the AO ought to have recorded his satisfaction having regard to the accounts of the assessee company. It is the submission of the assessee that invocation of provision of section 14A of the Act and computing disallowance as prescribed under Rule 8D of the Rules, is not merely a formality and cannot be invoked in a mechanical fashion. The AO has to bring on record as to why the disallowance is required to be made under Rule 8D of the Rules. If the AO fails to record such satisfaction in that event, disallowance made by the AO would be contrary to the statutory provisions and also the judicial pronouncements. The AO has noticed that the assessee claimed exempt dividend income amounting to Rs.156,03,20,325/- u/s 10(34) and 10(35) of the Act and incurred interest expenses of Rs.21.7 crores, interest of 10.20 crores on foreign currency loans and interest of Rs.1.6 crores on export credits. The assessee itself has disallowed Rs.1,69,36,938/- u/s 14A of the Act r.w. Rule 8D of the Rules in computation of income. Before AO, it was stated that investments were made out of the internal resources therefore, no expenditure was incurred in relation to the investments. Similar disallowance was made by the AO in AYs 1999-2000, 2000-2001 have been deleted by the Tribunal. However, alternatively as a matter of abundant precaution and to avoid further litigation, the assessee had disallowed an amount of salary and administrative expenses of Rs.1,69,36,938/- incurred indirectly relatable for exempt income by way of dividend income following the objective method of computation. The AO has recorded that the assessee made investments in equity shares of Indian companies, the dividend income from whom is exempt under section 10(34) and investment in Mutual Fund, the dividend income from which was exempted u/s 10(35) of the Act. The assessee claimed exempt dividend income of Rs.2,89,90,987/- from Indian companies and exempt dividend income of Rs. 153,13,29,138/- from Mutual Fund. Total investment in these assets was Rs.3173.3 crores in AY 2009-10 and Rs.7176.6 crores in AY 2010-11. However, the Assessing Authority did not accept the contention of the assessee on the basis that the assessee could have repaid the particular amount of loan on which the assessee is making huge interest repayment by not making the aforesaid investment. Further, the assessee was incurring huge principle cost as the assessee would have substantial return from the above investment if they have been invested elsewhere. Further, the AO in para 5.9 of the assessment order observed that the computation of disallowance made by the assessee was examined and was not accepted on the basis that same was on estimate basis and was not backed up by any documentary evidence. The AO was of the view that the assessee has incurring huge interest expenses. It could have lowered its interest liability by not investing in these assets. Therefore, he was of the view that part of the interest expenses claimed u/s 36 clause (1)(iii) of the Act was liable to be disallowed. We have given our thoughtful consideration to the material placed on record, as per section 14A, the AO would be justified to make disallowance in the manner prescribed under Rule 8D of the Rules if he is satisfied having regard to the accounts of the assessee. It is well settled law that provision of section 14A of the Act are enacted to make disallowance of the expenditure if it is claimed in P&L Account which was in fact incurred for earning of the exempt income. Rules, 8D of the Rules, prescribed the method

of disallowance related to the interest expenditure and administrative expenses. If the assessee has claimed interest expenses as a deduction in terms of section 36(1)(iii) of the Act in its P&L Account. The AO is required to examine and after considering the accounts of the assessee whether any interest income related to earning of exempt income has been claimed by the assessee in the P&L Account for the purpose of disallowance u/s 14A of the Act. In the present case, it is brought on record that the assessee is having sufficient own fund to make investments. Merely because the assessee could have deployed such funds for the repayment of loans in our considered view, should not be the basis for making disallowance by the AO. It is the assessee who has to take a call for making investments out of its own funds. The AO is not empowered to regulate business behavior of the assessee. Therefore, in our considered view, the AO was not justified in making the disallowance of interest expenses under Rule 8D of the Rules.”

11. Respectfully following the aforesaid decision, we observed that in the above decision, the Hon’ble court had given relief to the assessee on the basis of not recording proper satisfaction, however, in the year under consideration, AO had recorded satisfaction, there is no standard format to record satisfaction. We observe that the assessee itself had disallowed the expenses by accepting the fact that the expenditure incurred on earning the exempt income is not allowable. Therefore, we are satisfied that the observation of the AO leads to recording of satisfaction. Coming to the disallowances made by the AO, the issue relating to disallowance of Interest, it is already settled issue, when the assessee submits the relevant information and utilizes the funds borrowed for the purpose of business and whatever investment made on the scripts which earns exempt income are out of surplus funds, the AO cannot make any disallowance u/r 8D(2)(ii). Therefore, we are inclined to allow the grounds relating to this aspect.
12. With regard to disallowance on the administrative cost, we direct the AO to consider the disallowance only by considering those investments which had actually earned dividend income and we direct accordingly. We respectfully follow the decision of Hon’ble Delhi HC in the case of Caraf Builders & Constructions P Ltd (supra) and Vireet Investments P Ltd (SB) to direct the AO in this regard. Accordingly, the ground raised by the assessee in this regard is allowed.
13. We allow the ground raised by the assessee on the issue of Section 14A.
14. With regard to Ground Nos.5 to 5.2 regarding disallowance of deduction claimed on account of expenditure on scientific research under section 35(2AB) for Rohtak Unit,

ld. AR of the assessee brought to our notice that the assessee had, during the year under consideration, claimed deduction in respect of scientific research expenditure incurred at its in-house facility in Gurgaon and Rohtak and the R&D facility at Rohtak was granted recognition / approval by DSIR in Form 3CM w.e.f 01.04.2013. He submitted that accordingly, since the Rohtak facility was not registered/ approved by DSIR in the year under consideration, the assessing officer disallowed the deduction being claimed by the appellant in respect of expenditure incurred at Rohtak facility. He submitted that subsequently, the assessee filed a writ petition before the Hon'ble Delhi High Court against the action of the assessing officer in denying approval for expenses incurred for Rohtak facility and the Hon'ble High Court, vide order dated 04.08.2017 issued in Maruti Suzuki India Ltd vs. Union of India: 397 ITR 728 (Del.) categorically held that for availing the benefit under Section 35(2AB) of the Act, date of recognition or the cut-off date mentioned in the certificate of the DSIR or the date of approval is not relevant and what is relevant is the existence of the recognition. Accordingly, the High Court held that the assessee was entitled to deduction under Section 35(2AB) of the Act for the expenditure in respect of its Rohtak R&D Centre as per the provisions of Section 35(2AB) for AYs 2011-12, 2012-13 and 2013-14. Giving effect to the above order of the Hon'ble Delhi High Court, the assessing officer has, vide order dated 11.01.2019 passed under section 260 r.w.s 143(3) of the Act, allowed the deduction of the extent of Rs.249,52,70,000 claimed by the assessee in respect of scientific research expenditure incurred at Rohtak facility and accordingly, the impugned addition made in the final assessment order now stands reduced to Rs.5,00,000. The aforesaid amount of Rs.5,00,000 represents short-approval granted by DSIR in Form 3CL. He submitted that the approval / non-approval of expenses by DSIR in Form 3CL has no relevance for the purposes of claiming weighted deduction under section 35(2AB) of the Act. In this regard, he placed on the following decisions wherein it has been held that Form 3CL issued by DSIR is of no consequence for the purpose of claiming weighted deduction under section 35(2AB) of the Act:-

- ACIT v. Torrent Pharmaceuticals: IT Appeal No. 3569/Ahd/2004 (Ahd Trib.)
- Coromandel International Ltd vs. ADIT: ITA No. 101/Hyd/2012 (Hyd Trib.)

- Sun Pharmaceutical Industries Ltd. vs. PCIT: 162 ITD 484 (Ahd. Trib.)
 - ACIT vs. Mahindra & Mahindra Ltd.: ITA No. 3599 & 3806/Mum/2015 (Mum. Trib.)
 - Minilec India (P.) Ltd. vs. ACIT: ITA No. 690/Pun/2015 (Pune Trib.)
 - Texmaco Rail & Engineering Ltd. vs. Pr. CIT: 191 TTJ 9 (Kol. Trib.) (URO)
15. Ld. AR further submitted that a useful reference can also be made to the following decisions wherein the Courts have consistently held that the main document for the purpose of claiming weighted deduction is Form 3CM regarding approval of the in-house R&D Centre for the purposes of claiming deduction under section 35(2AB), which is admittedly in place in the facts of the present case:
- Claris Lifesciences Ltd. vs. Asst. CIT: 111 TTJ 902 (Ahd)
 - CIT v. Claris Lifesciences Ltd.: 326 ITR 251 (Guj.) – SLP dismissed by the HC
 - CIT v. SandanVikas India Ltd.: 335 ITR 117 (Del) – SLP dismissed by the HC
 - Nagravision India (P) Ltd vs. Secretary, DSIR: 159 taxmann.com 558 (Del.)
 - CIT v. Wheels India Ltd.: 336 ITR 513 (Guj.)
 - Banco Products (India) Ltd. vs. DCIT (ITA No. 1057/2017)(Guj.)
 - DCIT vs. International Tractors Ltd.: ITA No. 5817/ 6071 of 2010 (Del);
 - ACIT vs Meco Instruments (P) Ltd.: ITA No. 4246/Mum/2009 (Mum.)
 - DCIT vs. Famy Care Ltd: 67 SOT 85 (Mum)
 - ACIT vs. Wockhardt Limited: ITA No.71/Mum/2007 dated 27.08.2010
16. In view of the aforesaid, he pleaded that the disallowance to the extent of Rs.5,00,000 sustained by the assessing officer may be deleted.
17. On the other hand, ld. DR of the Revenue relied on the findings of lower authorities.
18. Considered the rival submissions and material placed on record. We observed that the facility at the Rohtak was not approved in the year under consideration. However, the same was approved w.e.f 01.04.2013. We observed that the Hon'ble Delhi High Court had approved the claim of the assessee on the basis that date of recognition or the cut off date mentioned in the certificate of the DSIR or the date of approval is not relevant and what is relevant is the existence of the recognition, it allowed the claims for AYs 2011-12,2012-13 and 2013-14. Now the assessee is claiming on the same extended claim before us on the basis that DSIR had short approved the claim under Form 3CL, it has no relevance for the purpose of claiming weighted deductions. After careful

consideration, we are of the opinion that the Hon'ble High court had already considered the claim of the assessee and allowed their original claim, this being the extended claim, that too a small amount, which is part of the same claim, we do not see any reason to disturb the same, accordingly, we allow the claim of the assessee in the above terms. In the result, grounds raised by the assessee are allowed.

19. With regard to Ground Nos.6 to 6.5 regarding disallowance on account of Provisional Liability- Expenditure on account of FPI-OE Components, ld. AR of the assessee submitted that this issue is covered in favour of assessee by ITAT orders for AY 2006-07 to 2010-11 and also covered in favour of assessee by the following orders :-

- CIT vs. Woodward Governor India (P) Ltd. 312 ITR 254 (SC)
- Rotork Controls India (P) Ltd. vs CIT: 314 ITR 62 (SC)
- Calcutta Discount Co. Ltd.: 37 ITR 1 (SC)
- Metal Box (P) Limited (1969): 73 ITR 53 (SC)
- United Commercial Bank vs. CIT 240 ITR 355 (SC)
- Bharat Earth Movers: 245 ITR 428 (SC)
- Kelvinator of India Ltd. reported in 256 ITR 1 confirmed by SC in 320 ITR 561
- CIT vs Vinitec Corpn. (P) Ltd.: 278 ITR 337 (Delhi)

He further submitted that the appeals filed by the department, inter-alia, on this issue before the Delhi High Court for AYs 2007-08, 2008-09 and 2009-10 have not been admitted. Accordingly, he pleaded to allow these grounds.

20. On the other hand, ld. DR of the Revenue relied on the orders of lower authorities.

21. Considered the rival submissions and material placed on record. After going through the submissions of the ld. AR of the assessee, we observe that this issue is covered in favour of the assessee in its own cases in different assessment years as mentioned above. For the sake of brevity, we reproduce relevant findings of the coordinate Bench in ITA No.961/Del/2015 order dated 09.02.2023 for AY 2010-11 on this issue as under :-

“64. We have heard the rival submissions and perused the material available on records and gone through the orders of the authorities below. We find that identical ground was raised by the assessee in the earlier AY in ITA No.467/Del/2014 for AY 2009-10. The Co-ordinate Bench decided the issue in favour of the assessee by observing as under:-

7. “We have heard both the parties and perused the material available on record. Considering the corrigendum dated 12.17.2018 for Assessment Year 2008-09 passed by the Tribunal in assessee’s own case, we are hereby substituting earlier directions which should be read as under:-

Page 145 of the order dated 17.10.2018

“Thus, the issue is identical in assessee’s own case for A.Y. 200809. Therefore, we are remanding back this issue to the file of the Assessing Officer with direction to decide the issue afresh after giving opportunity of hearing to the assessee. Hence, Ground No.9 to 9.5 are partly allowed for statistical purposes.

And issuing the fresh direction as under:-

“Following the reasoning adopted by the Co-ordinate Bench of this Tribunal Bench for the Assessment Year 2007-08 & 2008-09 vide corrigendum dated 12.07.2018, we direct the Assessing Officer to delete the disallowance of Rs.36.38 crores on account of provisional liability relating to expenditure on account of FPI-OE components. Ground Nos. 9 to 9.5 are disposed of accordingly.”

65. We do not see any reason to deviate from the reasoning of Co-ordinate Bench the AO is hereby directed to delete the disallowance. Thus, Ground Nos. 9 to 9.6 raised by the assessee are allowed.”

22. Respectfully following the aforesaid decision, we allow ground nos.6 to 6.5 raised by the assessee.
23. With regard to Ground Nos.7 to 7.3 regarding sharing of resources with other Group Companies/ Subsidiary Companies, Id. AR of the assessee submitted that this issue is covered in favour by ITAT order for earlier years and pointed out that the ITAT has, while adjudicating the said issue for preceding AY 2010-11, inadvertently followed the original ITAT order for AY 2009-10 wherein the issue was set-aside to the file of the assessing officer, as against ITAT order read with MA Order wherein the disallowance was deleted. Against the aforesaid order of the Tribunal, the assessee filed a miscellaneous application and the ITAT, vide its order dated 31.05.2023 in MA No. 221/Del/2023 directed the assessing officer to delete the said disallowance. He further submitted that the appeal filed by the department, inter-alia, on this issue before Hon’ble Delhi High Court for AYs 2008-09 and 2009-10 have not been admitted. Accordingly, he pleaded to allow this appeal.

24. On the other hand, Id. DR of the Revenue relied on the orders of lower authorities.
25. Considered the rival submissions and material placed on record. We observe that this issue is covered in favour of the assessee in its own cases in different assessment years as mentioned above. For the sake of brevity, we reproduce relevant findings of the coordinate Bench in ITA No.961/Del/2015 order dated 09.02.2023 for AY 2010-11 on this issue as under :-

“69. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. The identical ground was raised by the assessee in the AY 2009-10 and the Tribunal after following the order of earlier AY, remanded back to the AO for decision afresh. On a careful reading of the 61 | Page decisions of the Tribunal in earlier years, it is evident that the relief was granted to the assessee. The Revenue has not brought any contrary decision to support its contention. Therefore, we hereby, set aside the impugned disallowance and restore the issue to the file of AO to make correct disallowance if any, after giving due opportunities to the assessee. Thus, Ground Nos.10 to 10.3 raised by the assessee are allowed for statistical purposes.”

26. Respectfully following the decision of the coordinate Bench (supra) and also considering the MA filed by the assessee on the same issue and the coordinate bench has allowed the claim of the assessee in the MA no 221/Del/203, since the facts are exactly similar, we allow ground nos.7 to 7.3 raised by the assessee.
27. With regard to Ground Nos.8 to 8.2 regarding disallowance of expenditure incurred on Corporate Social Responsibility, Id. AR of the assessee submitted that this issue is covered in favour of the assessee by ITAT orders for assessment year(s) 2009-10 and 2010-11 and the appeal filed by the department, inter-alia, on this issue before the Delhi High Court for AY 2009-10 has not been admitted.
28. On the other hand, Id. DR of the Revenue relied on the orders of lower authorities.
29. Considered the rival submissions and material placed on record. We observe that this issue is covered in favour of the assessee in its own cases in different assessment years as mentioned above. For the sake of brevity, we reproduce relevant findings of the coordinate Bench in ITA No.961/Del/2015 order dated 09.02.2023 for AY 2010-11 on this issue as under :-

“73. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. We find that Co-ordinate Bench of the Tribunal under the identical facts has decided the issue by observing as under:-

78. “We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the Ld. AR submitted before us that the CSR expenditure is allowable as a business deduction under the provisions of the Income Tax Act (“the Act”). In this regard, the Ld. AR pointed out to provisions of section 37(1) of the Act, and submitted that under section 37(1) of the Act the fundamental condition for allowability is that the expenditure must be incurred “for the purpose of business”. The said expression is, much wider than “for the purpose of earning income”. For any expenditure to be eligible for deduction, such expenditure must be incurred for the purposes of business, irrespective of fact whether incurring of such expenditure is voluntarily and without any compelling necessity or mandatory. It is, in this regard, also relevant to refer to the legislative history of section 37(1) of the Act, wherein the Income Tax Bill of 1961 initially proposed to lay down that “necessity” of the expenditure would be a condition for claiming deduction under that section. The implication of the aforesaid is that the fact that somebody other than the assessee is also benefitted by the incurring of the expenditure does not come in the way of the expenditure being allowed by way of deduction under section 37(1) of the Act. What is important for the purpose of allowability of deduction under section 37(1) of the Act is that the expenditure must be incurred for the purpose of business. Again, the words, “for the purpose of business” should not be limited to the meaning of “earning profit alone”. It is also important to note that the purpose has to be seen from the point of view of the businessman and should not be seen with reference to narrow objective of earning profits immediately. Certain expenditure may not reap profits immediately, but may be advantageous in the long run, by creating goodwill and brand image. These submissions of the Ld. AR are supported by the Income Tax statute. But at the same time, it can be seen that Explanation 2 has been inserted in section 37 of the Act by the Finance (No.2) Act, 2014 w.e.f. 1.04.2015 to provide that CSR expenses referred in section 135 of the Companies Act, 2013 shall not be deemed to be incurred for the purpose of business. The aforesaid Explanation inserted w.e.f. 1.04.2015. Therefore, in the present assessment year the said explanation will not be applicable. Hence, the expenditure has to be allowed because ultimately the assessee was publicizing its product at the prominent places by maintaining them such as parks and this has direct impact on the sales promotions of the assessee company. Therefore, Ground No. 11 to 11.12 are allowed.”

74. The facts are identical and there is no change into facts and circumstances of the present case. We therefore, respectfully following the binding precedent, direct the AO to delete the disallowance.”

30. Respectfully following the decision of the coordinate Bench (supra), we allow ground nos.8 to 8.2.

31. With regard to Ground Nos.9 to 9.4 regarding income from trading in mutual funds/shares treated as business income and not as long term/short term capital gain, Id. AR of the assessee submitted as under :-

“The appellant, as a consistent practice, has been investing the surplus funds in mutual funds as a prudent cash management strategy. Such investments, as a matter of facts, have always been reflected under the head investments in the balance sheet and the gains arising on sale / redemption of such securities has always been recorded under the head ‘Capital Gains’.

In accordance with the aforesaid practice, during the relevant previous year, the appellant made investments in mutual funds, gains arising wherefrom were assessable under the head “capital gains”, either as “long term” or “short term” on the basis of period of holding. In the return of income, the appellant claimed long-term capital loss of Rs.220 crores and net short term capital gain of Rs.6.91 crores.

The assessing officer however, simply following the assessment order for AY 2010-11 treated the aforesaid “capital gains” as “business income” and determined taxable business income of Rs.51,12,36,410/- in respect of units of mutual fund held for more than 12 months as against long-term capital loss of Rs.219,70,90,370 declared by the assessee after claiming benefit of indexation. Similarly, short term capital gain of Rs. 6,90,68,982 has also assessed as business income by the assessing officer.

The aforesaid re-characterization of income made by the assessing officer is erroneous and cannot be sustained for the following reasons:

Re: Predominant purpose of making investment was to enjoy returns

It is respectfully submitted that the nature of income arising from shares depends upon the nature of asset, viz., whether the shares were held as “capital asset” or as “stock-in-trade”.

The term 'capital asset' has been defined in section 2(14) of the Act as under:

“Capital asset' means property of any kind held by an assessee, whether or not connected with his business or profession, but does not include— any stock-in-trade, consumable stores or raw materials held for the purposes of his business or profession;”

The term ‘stock in trade’ has not been defined under the Act. In general parlance ‘stock-in trade’ is understood as an asset, which is held with an objective to deal therein.

‘Stock-in-trade’ is something “in which” a business deals, whereas a ‘capital asset’ is something “with which” he deals. The essential characteristic of stock-in-trade is that it must be a commodity in which there is dealing as distinguished from a commodity with which the business is carried on, viz., from the exploitation of which income is derived [refer *H. Mohammed & Co.*

vs. *CIT 107 ITR 637 (Guj.)*].

In this regard, it is pertinent to note that for the purposes of assessability of profit derived from the sale of shares/ mutual funds, it is predominantly the intention of the assessee which is relevant. The issue whether shares/ securities/ units are held by an assessee as 'investment' or as 'stock in trade' and whether profit derived from the sale of shares/ securities is assessable as 'capital gains' or 'business income', depends upon the intention of the assessee, which, inter alia, is to be ascertained predominantly from the following:

- a) Objective of acquiring the shares - whether objective was to acquire shares/securities as an investment and enjoy income therefrom or to trade in shares?
- b) Method of classification in the books of accounts - whether shares are classified as "investments" or held as 'stock in trade'?
- c) Method of valuation – whether shares are valued at cost or at cost or market price, whichever is lower?
- d) Period for which shares/ securities are held – whether shares/ securities are held for very short period or is held for reasonable period;
- e) Source of acquisition/ investment – whether investment is made out of own fund or out of borrowed funds?
- f) Nature of business of the assessee – whether trading in shares/ securities is normal business activity or not?
- g) Nature of transactions – whether transactions are delivery based or not?

The **Central Board of Direct Taxes, vide Circular No. 4 of 2007, dated 15.6.2007: 291 ITR (St.) 384**, laid down various guidelines for determination of investment in shares as 'capital asset' or 'stock in trade', which reads as under:

“Distinction between shares held as stock-in-trade and shares held as investment tests for such a distinction

CIRCULAR NO. 4/2007, DATED 1562007

.....

4. *The Central Board of Direct Taxes (CBDT) through Instruction No. 1827 dated August 31, 1989 had brought to the notice of the assessing officers that there is a distinction between shares held as investment (capital asset) and shares held as stock-in-trade (trading asset). In the light of a number of judicial decisions pronounced after the issue of the above instructions, it is proposed to update the above instructions for the information of assessees as well as for guidance of the assessing officers.*

5. *In the case of Commissioner of Income Tax (Central), Calcutta Vs Associated Industrial Development Company (P) Ltd (82 ITR 586), the Supreme Court observed that:*

Whether a particular holding of shares is by way of investment or forms part of the stock-in-trade is a matter which is within the knowledge of the assessee who holds the shares and it should, in normal circumstances, be in a position to produce evidence from its records as to whether it has maintained any distinction between those shares which are its stock-in-trade and those which are held by way of investment.

6. *In the case of Commissioner of Income Tax, Bombay Vs H. Holck Larsen (160 ITR 67), the Supreme Court observed:*

The High Court, in our opinion, made a mistake in observing whether transactions of sale and purchase of shares were trading transactions or whether these were in the nature of investment was a question of law. This was a mixed question of law and fact.

7. The principles laid down by the Supreme Court in the above two cases afford adequate guidance to the assessing officers

8. *The Authority for Advance Rulings (AAR) (288 ITR 641), referring to the decisions of the Supreme Court in several cases, has culled out the following principles:-*

*(i) **Where a company purchases and sells shares, it must be shown that they were held as stock-in-trade** and that existence of the power to purchase and sell shares in the memorandum of association is not decisive of the nature of transaction;*

*(ii) the substantial nature of transactions, **the manner of maintaining books of accounts, the magnitude of purchases and sales and the ratio between purchases and sales** and the holding would furnish a good guide to determine the nature of transactions;*

*(iii) **ordinarily the purchase and sale of shares with the motive of earning a profit, would result in the transaction being in the nature of trade/adventure in the nature of trade; but where the object of the investment in shares of a company is to derive income by way of dividend etc. then the profits accruing by change in such investment (by sale of shares) will yield capital gain and not revenue receipt.***

9. *Dealing with the above three principles, the AAR has observed in the case of Fidelity group as under:-*

*“We shall revert to the aforementioned principles. The first principle requires us to ascertain whether the purchase of shares by a FII in exercise of the power in the memorandum of association/trust deed was as stock-in-trade as the mere existence of the power to purchase and sell shares will not by itself be decisive of the nature of transaction. **We have to verify as to how the shares were valued/held in the books of account i.e. whether they were valued as stock-in-trade at the end of the financial year for the purpose of arriving at business income or held as investment in capital assets.** The second principle furnishes a guide for determining the nature of transaction by verifying whether there are substantial transactions, their magnitude, etc.,*

maintenance of books of account and finding the ratio between purchases and sales. It will not be out of place to mention that regulation 18 of the SEBI Regulations enjoins upon every FII to keep and maintain books of account containing true and fair accounts relating to remittance of initial corpus of buying and selling and realizing capital gains on investments and accounts of remittance to India for investment in India and realizing capital gains on investment from such remittances. The third principle suggests that ordinarily purchases and sales of shares with the motive of realizing profit would lead to inference of trade/adventure in the nature of trade; where the object of the investment in shares of companies is to derive income by way of dividends etc., the transactions of purchases and sales of shares would yield capital gains and not business profits.

10. CBDT also wishes to emphasis that it is possible for a tax payer to have two portfolios, i.e., an investment portfolio comprising of securities which are to be treated as capital assets and a trading portfolio comprising of stock-in-trade which are to be treated as trading assets. Where an assessee has two portfolios, the assessee may have income under both heads i.e., capital gains as well as business income.

11. Assessing officers are advised that the above principles should guide them in determining whether, in a given case, the shares are held by the assessee as investment (and therefore giving rise to capital gains) or as stock-in-trade (and therefore giving rise to business profits). The assessing officers are further advised that no single principle would be decisive and the total effect of all the principles should be considered to determine whether, in a given case, the shares are held by the assessee as investment or stock-in-trade..... (emphasis supplied)

The controversy whether surplus on sale of shares, securities, etc., is of the nature of business income or capital gains has now been put to rest by CBDT vide **Circular No.6 of 2016 dated 29.02.2016** to the following effect:

“SECTION 45, READ WITH SECTION 28(i), OF THE INCOME-TAX ACT, 1961 - CAPITAL GAINS, CHARGEABLE AS - ISSUE OF TAXABILITY OF SURPLUS ON SALE OF SHARES AND SECURITIES - CAPITAL GAINS OR BUSINESS INCOME - INSTRUCTIONS IN ORDER TO REDUCE LITIGATION

CIRCULAR NO.6/2016 [F.NO.225/12/2016-ITA-II], DATED 29-2-2016

1. Sub-section (14) of section 2 of the Income-tax Act, 1961 ('Act') defines the term "capital asset" to include property of any kind held by an assessee, whether or not connected with his business or profession, but does not include any stock-in-trade or personal assets subject to certain exceptions. As regards shares and other securities, the same can be held either as capital assets or stock-in-trade/trading assets or both. Determination of the character of a particular investment in shares or other securities, whether the same is in the

nature of a capital asset or stock-in-trade, is essentially a fact-specific determination and has led to a lot of uncertainty and litigation in the past.

2. Over the years, the courts have laid down different parameters to distinguish the shares held as investments from the shares held as stock-in-trade. The Central Board of Direct Taxes ('CBDT') has also, through Instruction No. 1827, dated August 31, 1989 and Circular No. 4 of 2007 dated June 15, 2007, summarized the said principles for guidance of the field formations.

3. Disputes, however, continue to exist on the application of these principles to the facts of an individual case since the taxpayers find it difficult to prove the intention in acquiring such shares/securities. In this background, while recognizing that no universal principal in absolute terms can be laid down to decide the character of income from sale of shares and securities (i.e. whether the same is in the nature of capital gain or business income), CBDT realizing that major part of shares/securities transactions takes place in respect of the listed ones and **with a view to reduce litigation and uncertainty in the matter, in partial modification to the aforesaid Circulars, further instructs** that the Assessing Officers in holding whether the surplus generated from sale of listed shares or other securities would be treated as Capital Gain or Business Income, shall take into account the following—

(a) Where the assessee itself, irrespective of the period of holding the listed shares and securities, opts to treat them as stock-in-trade, the income arising from transfer of such shares/securities would be treated as its business income,

(b) **In respect of listed shares and securities held for a period of more than 12 months immediately preceding the date of its transfer, if the assessee desires to treat the income arising from the transfer thereof as Capital Gain, the same shall not be put to dispute by the Assessing Officer. However, this stand, once taken by the assessee in a particular Assessment Year, shall remain applicable in subsequent Assessment Years also and the taxpayers shall not be allowed to adopt a different/contrary stand in this regard in subsequent years;**

(c) In all other cases, the nature of transaction (i.e. whether the same is in the nature of capital gain or business income) shall continue to be decided keeping in view the aforesaid Circulars issued by the CBDT.

4. It is, however, clarified that the above shall not apply in respect of such transactions in shares/securities where the genuineness of the transaction itself is questionable, such as bogus claims of Long Term Capital Gain/Short Term Capital Loss or any other sham transactions.

5. It is reiterated that the above principles have been formulated with the **sole objective of reducing litigation and maintaining consistency in approach on the issue of treatment of income derived from transfer of shares and**

securities. *All the relevant provisions of the Act shall continue to apply on the transactions involving transfer of shares and securities.*” (emphasis supplied)

The same position was reiterated in respect of surplus on sale of unlisted securities vide **letter dated 02.05.2016 issued by the CBDT** reproduced as under:

“Consistency in taxability of income/ loss arising from transfer of unlisted shares under Income Tax Act, 1961

Regarding characterisation of income from transaction in listed shares and securities, Central Board of Direct Taxes (‘CBDT’) has issued a clarificatory Circular No.6/2016 dated 29th February, 2016, wherein with a view to reduce litigation and maintain consistency in approach in assessments, it was instructed that income arising from transfer of listed shares and securities, which are held for more than twelve months would be taxed under the head ‘Capital Gain’ unless the tax-payer itself treats these as its stock-in-trade and transfer thereof as its business income. It was further stated that in other situations, the issue was to be decided on the basis of existing Circulars issued by the CBDT on this subject.

*2. Similarly, for determining the tax-treatment of income arising from transfer of unlisted shares for which no formal market exists for trading, a need has been felt to have a consistent view in assessments pertaining to such income. **It has, accordingly, been decided that the income arising from transfer of unlisted shares would be considered under the head ‘Capital Gain’, irrespective of period of holding, with a view to avoid disputes/litigation and to maintain uniform approach.***

3. It is, however, clarified that the above would not be necessarily applied in the situation where:

- (i) the genuineness of the transaction in unlisted shares itself is questionable; or*
- (ii) the transfer of unlisted shares is related to an issue pertaining to lifting of corporate veil; or*
- (iii) the transfer of unlisted shares is made along with the control and management of underlying business.*

and the Assessing Officer would take appropriate view in such situations.(emphasis supplied)

The underlying principle that emerges from the aforesaid Board Circulars is that the relevant/ crucial factor in determining the nature of the gain arising on transfer of an asset is **the intention at the time of purchase**. If the intention at the time of purchase was to merely resell at profit, the asset would be in the nature of stock-in-trade. On the other hand, if the intention at the time of acquisition is to hold the asset for use and/ or earn income therefrom, then the character of such asset would be ‘capital asset’/ ‘investment’ and income from its sale would be ‘capital gains’ and not business income.

The **Gujarat High Court** in the case of **CIT v. Rewashankar A. Kothari: 283 ITR 338**, after analyzing various decisions of the Apex Court, formulated following tests for determining the nature of the asset:

“(a) The first test is whether the initial acquisition of the subject-matter of transaction was with the intention of dealing in the item, or with a view to finding an investment. If the transaction, since the inception, appears to be impressed with the character of a commercial transaction entered into with a view to earn profit, it would furnish a valuable guideline.

(b) The second test that is often applied is as to why and how and for what purpose the sale was effected subsequently.

(c) The third test, which is frequently applied, is as to how the assessee dealt with the subject-matter of transaction during the time the asset was with the assessee. Has it been treated as stock-in-trade, or has it been shown in the books of account and balance sheet as an investment. This inquiry, though relevant, is not conclusive.

(d) The fourth test is as to how the assessee himself has returned the income from such activities and how the Department has dealt with the same in the course of preceding and succeeding assessments. This factor, though not conclusive, can afford good and cogent evidence to judge the nature of the transaction and would be a relevant circumstance to be considered in the absence of any satisfactory explanation.

(e) The fifth test, normally applied in cases of partnership firms and companies, is whether the deed of partnership or the memorandum of association, as the case may be, authorises such an activity.

(f) The last but not the least, rather the most important test, is as to the volume, frequency, continuity and regularity of transactions of purchase and sale of the goods concerned. In a case where there is repetition and continuity, coupled with the magnitude of the transaction, bearing reasonable proportion to the strength of holding, then an inference can readily be drawn that the activity is in the nature of business.”

The **Gujarat High Court** in the case of **PCIT v. Ramniwas Ramjivan Kasat : 248 Taxman 484** dismissed the appeal filed by the Revenue recording that if in respect of listed shares and securities held for a period of more than 12 months immediately preceding date of its transfer, the assessee desires to treat income arising from transfer thereof as capital gains, the same shall not be put to dispute by the assessing officer subject to the condition that the stand taken by the assessee in a particular year would be followed in subsequent years.

To the same effect are the following decisions rendered by the various benches of the Hon'ble Tribunal:

- CIT v. Gopal Purohit: 336 ITR 287 (Bom.) (Supreme Court has dismissed the departmental appeal vide CC 16802/2010: 334 ITR 308 (St.))
- Jindal Photo Investment Ltd.: 334 ITR 307 (St.) (SC)
- CIT v. Rohit Anand: 327 ITR 445 (Del)
- CIT v. Vinay Mittal: 208 Taxman 106 (Del) [SLP dismissed by SC]
- CIT v. Devasan Investment Pvt. Ltd. : 365 ITR 452 (Del) (Supreme Court has dismissed the Department's SLP vide CC 17946/2014 : 229 Taxman 496)
- CIT v. Consolidated Finvest and Holding Ltd: 337 ITR 264 (Del.)
- CIT v. Avinash Jain : 362 ITR 441 (Del)
- CIT v. PNB Finance & Industries Ltd: 236 CTR 1 (Del)
- CIT v. Ess Jay Enterprises (P) Limited: 173 Taxman 1 (Del.)
- Pace Industries Ltd. for A.Y. 2000-01 in ITA No.1106/Del/2004 (Del)
- CIT vs. S. Ramaamirtham: 306 ITR 239 (Mad.)
- CIT v. Trish Investments Ltd.: 305 ITR 434 (Mad).
- CIT v. N.S.S. Investment Pvt. Ltd.: 277 ITR 149 (Mad)
- Arjun Kapur vs. DCIT: 70 ITD 161 (Del.)
- Slocum Investment (P) Ltd. v. DCIT: 106 ITD 1 (Del.)
- Gomti Credits (P) Limited v. DCIT: 100 TTJ 1132 (Del).
- Ashish Chaudhary v. ITO : ITA No. 5227/Del./2014 (Del. ITAT)

In the light of the aforesaid legal position, it is clear that the nature of gain arising on transfer of shares/ securities depends upon the intention of the assessee at the time of acquisition of the share/ securities.

In the present case, the appellant is, **undisputedly**, engaged in business of manufacture of automobiles and is not a dealer in various instruments of investments. **Purchase of shares/ securities is not at all the business of the appellant.**

It is also a matter of record, that the appellant made various investments as part of its prudent cash/ fund management with a view to optimally utilize its spare funds. The intent of making such investment was to reap benefits on account of capital appreciation and also to optimally utilize short term/ long term surplus funds available with the company. **It is not at all the intention of the appellant to engage in the business of sale-purchase of various investments. The entire investment activity was undertaken only for the purpose of cash/ fund management and to ensure higher returns therefrom.**

In this regard, it is important to take note of the following pertinent facts:

- (a) Since the assessee is a pure investor, the assessee is not registered with any authority or body, such as Stock Exchange, SEBI, etc., as being engaged in the business of dealing in shares/ securities.

This fact goes to show that the appellant is an investor and not trader.

(b) **Classification in the books of accounts** –Investment in shares/ mutual fund is always reflected under the head ‘investment’/ ‘capital asset’ in the books of account as opposed to ‘stock in trade’.

This clearly goes to show that the activity of purchase/ sale of units of mutual fund were part of investment activity and not a trading activity. Kind attention, in this regard, is particularly invited to Circular No. 4 (supra) issued by the CBDT which clearly states that, “..... *a trading portfolio comprising of stock-in-trade which are to be treated as trading assets. Where an assessee has two portfolios, the assessee may have income under both heads i.e., capital gains as well as business income.*”

Kind attention is also invited to the decision of the **Supreme Court in the case of Karam Chand Thapar (supra)** wherein their Lordships observed that the manner of disclosure in the balance-sheet, though not conclusive, is a relevant circumstance.

(c) **Accounting Standard-13 on ‘Accounting for Investments’ being followed:**

As per Accounting Standard-13 on ‘Accounting for Investments’ issued by the Institute of Chartered Accountants of India (ICAI), the term ‘investments’ has been defined as under:

“Investments are assets held by an enterprise for earning income by way of dividends, interest, and rentals, for capital appreciation, or for other benefits to the investing enterprise. Assets held as stock-in-trade are not ‘investments’.”

The aforesaid definition clearly states that shares/stocks held for earning dividend/ interest income, capital appreciation over a period of time come under the purview of ‘investments’ as against ‘stock in trade’. Accounting Standard 13 mandates investments to be valued at cost.

On the other hand, in the case of shares held as stock-in-trade, valuation is required to be done as per Accounting Standard-2 on “Valuation of Inventories”, which requires inventory to be valued at lower of cost or net realizable value.

In terms of section 211 of the Companies Act, 1956, it is mandatory for every corporate-assessee to strictly follow the aforesaid accounting standards.

The appellant has consistently followed the Accounting Standard 13 and valued the investments at cost and not at lower of cost or net realizable value. The accounting treatment followed by the assessee has always been accepted by the Revenue in the earlier year(s).

Further, the Statutory Auditors in their Audit Report dated 26.04.2010 have also certified that the aforesaid accounting treatment to be correct.

- (d) In the audited profit and loss account, only net gain/ loss on transfer of securities is shown, which is strictly in line with the method of recognition of profits on transfer of capital investments. **Had the shares/ securities been held as “stock in trade” and not as “investments”, cost of purchases and sales would have separately been shown in the profit and loss account;**
- (e) Purchase and sale of shares/ securities is not recognized/ shown as a separate business segment in the audited annual accounts of the assessee;
- (f) The entire investment has been made by the appellant out of own funds, and not out of borrowed funds, as is generally/normally the case with a trader in shares;
- (g) The assessee received substantial amount of income as dividend. During the year under consideration, the assessee received dividend income of Rs. Rs.211 cr.
- (h) The entire transactions entered into by the assessee were delivery based and the assessee did not enter into any derivative/ speculative trade.

The aforesaid facts, in our respectful submission, clearly establish that the investments held by the appellant in shares/ mutual funds were investments on capital account, for capital appreciation and earning return/ dividend therefrom, and not for dealing/ trading in such units.

It is further important to point out that the surplus has arisen on redemption of mutual funds which are surrendered (for redemption) to the funds itself. The same are not traded and it cannot, therefore, be said that the assessee has carried out any business in trading of mutual funds. Accordingly, surplus on redemption of mutual funds cannot, even otherwise, be considered as the nature of business income.

Keeping in view the aforesaid aspects and the Circulars issued by the Board from time to time, the **Delhi Bench of the Tribunal** in the case of **ACIT vs. Wig Investments: 174 ITD 30** held surplus earned on redemption of mutual funds liable to tax under the head “Capital gains” and not business income. The relevant observations of the Hon’ble Tribunal are extracted as under:

“10. One very important fact here is that the entire transaction is on account of redemption of mutual fund which is neither freely tradable nor exchangeable in the market. It is a transaction between two persons, that is, person buying the MF and the other is Mutual Fund Manager who facilitates the fund and it can only be redeemed from the same mutual fund manager from whom it has been purchased. Therefore, it would be very difficult to hold that one would carry out business of mutual funds and will not make any investment. If any item is purchased from one person which can be sold or redeemed to that person alone, then it cannot fall into the category of freely traded commodity.....The concept of 'business'

*alludes to the concept of systematic activity carried out with an object to earn profit.....Here it is not a case where the mutual funds have been rotated again and again to purchase and sell the same which is a typical feature in a business, albeit here in this case as pointed out earlier, only 15 transactions have been undertaken for redemption of mutual funds and investment in the same mutual funds have not been made and redeemed again and again. **The purchase of mutual funds has been classified as 'investment' in the books of account and in the balance sheets and such a treatment is continuing in the subsequent periods also and at no point of time, they have been treated as 'stock in trade' in the books of accounts. Thus, the intention of the assessee right from the day one was to make investment in the form of mutual fund and not for the trading. This is also fortified by the fact that no borrowed funds have been utilised in such an investment.....Hon'ble Gujarat Court in the case of Pr. CIT v. Bhanuprasad D Trivedi (HUF) [2017] 87 taxmann.com 137, held that, if the assessee had an intention of being an investor and held shares by way of investment in the books of accounts then it has to be treated as investor and any gain arising out of transfer of shares should be treated as capital gains and not business income.** Hon'ble High Court has also referred to the CBDT circular dated 29.2.2016 in which guidelines have been provided and one such guidelines is that, if the assessee in respect of the listed shares and securities held for a period of more than twelve months before transfer and treats the same as transfer of shares, then it has to be treated as "capital gain". This circular was later on modified to include unquoted shares also. Though here in this case redemption of mutual funds are for a period less than 12 months, but it is quite clear from the CBDT circular that intention of the assessee and the treatment given by the assessee in the books has been given paramount importance. SLP against the said decision of the Hon'ble Gujarat High Court has been dismissed. The same principle has been earlier reiterated by Hon'ble Bombay High Court in Gopal Purohit (supra) and Delhi High Court in PNB Finance & Industries Ltd. (supra) Accordingly, on facts and circumstances of the case we hold that Ld. CIT (A) has rightly held that redemption of units of mutual funds is to be taxed as capital gains and not as business. In the result ground No. 1 raised by the revenue is dismissed.” (emphasis supplied)*

The aforesaid decision of the Delhi Tribunal has recently been affirmed by the **Hon’ble Delhi High Court in PCIT vs. Wig Investments: 461 ITR 117.**

The said decision is on all fours with the facts in the case of the appellant and squarely covers the present dispute.

Having regard to the aforesaid submissions, the action of the assessing officer in treating the gains from sale and purchase of mutual funds as in the nature of “business income” is erroneous and cannot be sustained.

Re: Principle of Consistency

Additionally, it is pertinent to mention here that the assessee has been consistently disclosing gains arising on sale of shares as “capital gains” in preceding years as well, which has been accepted by the assessing officer. There is no change in facts of the present year.

It is a well settled position of law that while the principle of res judicata does not apply to the income-tax proceedings, the Courts have emphasized there must be consistency in the position that the Revenue takes on an issue in different assessment years. Reliance in this regard is placed on the following decisions:

- CIT vs. Excel Industries (P) Limited: 358 ITR 295 (SC)
- Radhasoami Satsang v. CIT 193 ITR 321(SC)
- DIT (E) v. Apparel Export Promotion Council: 244 ITR 734 (Del)
- CIT v. Neo Polypack (P) Ltd: 245 ITR 492 (Del.)
- CIT v. Dalmia Promoters Developers (P) Ltd: 200 CTR 426 (Del.)
- Escorts Cardiac Diseases Hospital: 300 ITR 75 (Del)

Reliance in this regard is also placed on following decisions where the change in treatment of nature of profits arising from sale of shares, accepted by the Department to be on account of capital gains in the earlier years, was held to be not permissible in view of the principals of consistency:

- CIT v. S. Ramaamirtham: 306 ITR 239 (Mad.)
- CIT v. GopalPurohit: 336 ITR 287 (Bom.)
- CIT V. SMAA Enterprises (P) Ltd: 382 ITR 175 (J&K)
- Janak S. Rangwalla v. CIT: 11 SOT 627 (Mum)
- Bombay Gymkhana Ltd. v. ITO: 115 TTJ 639 (Mum.)

In view of the above, on ground of consistency, as well, the transaction of sale of shares/ mutual funds must be accepted to be taxable under the head ‘capital gains’ and the treatment of the same as business income is not sustainable.

Re: Remand proceedings for AY 2010-11

The aforesaid re-characterization of income arising from sale of securities was, for the first time, treated as income under the head ‘business income’ by the assessing officer. Against the aforesaid action of the assessing officer, the appellant filed an appeal before this Hon’ble Tribunal in ITA 961/Del2015 which was decided vide order dated 09.02.2023. The relevant findings of the Tribunal, on the aforesaid issue, are reproduced as under:

*“84. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. **It is not in dispute that the AO in earlier years has allowed the claim of the assessee regarding***

treatment of transactions related to sale and purchase of mutual funds/securities etc. as the investment. In the year under consideration, the AO has taken a different stand and treated the surplus arising out of the sale of mutual funds/securities as income from business. **It is also not in dispute that the investment made by the assessee is out of non-interest bearing fund.** The AO did not accept the contention of assessee made during the course of assessment proceedings on the basis that most of the investments were held for a period of 13 months in respect of long term capital gain and in respect of short term capital gain also there was frequent sale and purchases. He was also view of the fact that looking to the volume of transaction, the total purchase price of mutual fund is Rs.1004,58,57,202/- in respect of long term capital gain and Rs.1587,10,65,228/- in respect of short term capital gain which is substantial by any standard. Hence, he treated the transaction as the business activity of the assessee. **Law is well settled now that intent is required to be examined whether it is for investment or otherwise for business of course to arrive at any conclusion certain factors need to be kept in mind. If such factors point towards business activity certainly then any surplus arising would partake character of business profit however, if it for parking surplus fund or is mandatorily made under government policy or otherwise then it will fall in category of investment.** Therefore, Considering the totality of the facts, to verify the claim of the assessee that the transaction in question are pure investments by the assessee, the impugned disallowance is hereby set aside and the issue is restored back to the file of AO for decision afresh. The AO would consider all the objections of the assessee in the light of binding precedents. The Ground Numbers 13 to 13.5 are allowed for statistical purpose only.” (emphasis supplied)

The assessing officer, while giving effect to the aforesaid order of the Tribunal has, vide order dated 31.03.2024, once again treated the capital gains arising on sale of mutual funds as business income, inter-alia, holding that the Circular No. 6/2016 dated 29.02.2016 issued by the CBDT in this regard is prospective in nature and hence cannot be applied to the assessment year under consideration, being AY 2010-11.

In this regard, it is respectfully submitted that the Circular No.6 of 2016 was issued in partial modification of the earlier board circular issued in 2007, as an addition direction to the officers, and was accordingly applicable retrospectively. **It is further respectfully submitted that circular No.6/2016 (supra) was issued to clarify the position to be adopted by the Revenue on all the aforesaid highly litigative issue to reduce litigation and therefore, clearly applied to all pending cases.**

Empathetic reliance in this regard is placed on the decision of the **Calcutta High Court** in a recent decision in the case of **CIT vs. Century Plyboards (I) Ltd: [2023] 148 taxmann.com 301 (Cal.)** wherein it has been held that

CBDT's Circular 6/2016, dated 29-2-2016, clarifying that in respect of listed shares and securities held for a period of more than 12 months immediately preceding the date of its transfer if the assessee desires to treat the income arising from transfer thereof as capital gains, the same shall not be put to dispute by the assessing officer, is to be understood that the circular would be retrospective in operation and would apply to assessment years prior to issue of the Circular also.

Most importantly, the High Court / Tribunal have, in the following cases, relied on the CBDT Circular No. 6/2016 for deciding issue pertaining to assessment years **prior to 2016-17**:

- ACIT vs. Wig Investments: 461 ITR 117 (Del HC) – AY 2006-07
- PCIT vs. Hardik Bharat Patel: 260 Taxman 294 (Bom HC) [SLP dismissed] – AY 2008-09
- PCIT vs. Ramniwas Ramjivan Kasat: 248 Taxman 484 (Guj HC) – AY 2006-07
- Deepaben Amitbhai Shah vs. DCIT: 397 ITR 687 (Guj HC) – AY 2004-05
- DCIT vs. Hero Investment (P.) Ltd.: 204 ITD 29 (Del ITAT) – AY 2012-13
- ACIT vs. Vireet Investments (P.) Ltd: 169 taxmann.com 379 (Del ITAT) – AY 2004-05
- Arunima Adcon Services (P.) Ltd. vs. ACIT: 204 ITD 146 (Del ITAT) – AY 2015-16
- ACIT vs. Sachin R. Tendulkar: 163 ITD 65 (Mum ITAT) – AY 2010-11 and 2011-12
- Smt. Yamini Khandelwal vs. ACIT: 197 ITD 520 (Kol ITAT) – AY 2010-11
- Chandan Infratech Ltd. vs. ITO: 145 taxmann.com 136 (Ahd ITAT) – AY 2011-12

On a perusal of the aforesaid cases, it will be appreciated that the CBDT Circular No. 6/2016, as a matter of fact, was issued only in clarification and modification of the earlier board circulars and was accordingly applicable retrospectively.

In that view of the matter, the transaction of sale of shares/ mutual funds must be accepted to be taxable under the head 'capital gains' and the treatment of the same as business income is not sustainable and calls for being deleted.”

32. On the other hand, Id. DR of the Revenue submitted as under :-

“1. The Appellant entered into frequent and large transactions for the purchase and sale of quoted and unquoted mutual funds during the assessment year and claimed Long Term Capital Loss of Rs. 219,70,90,370.0 and Short-Term Capital Gain of Rs. 6,90,68,982.00 on the purchase and sale of the mutual funds. The AO vide order dated 31.12.2015, after examining the submission made by the Appellant, rejected the claim of the Appellant by relying on the assessment order of AY. 2010-11.

2. In AY. 2010-11, the AO held that the such transactions are business activity and the Hon'ble ITAT vide order its dated 09.02.2023 observed that the intent is required to be examined whether it is for investment or otherwise for business and restored the issue back to the file of the Assessing Officer for deciding the issue afresh.

3. During the course of hearing, the Appellant placed reliance on Circular 6/2016 which states that listed shares/securities held for more than 12 months are opted to be treated as Capital Gain, the AO shall not dispute it, provided the stand is consistent in subsequent years. As per the Appellant this Circular was clarificatory and retrospective, thereby meaning that it also applied to pending cases.

4. The Revenue submits with utmost respect that the Appellant's reliance on CBDT Circular No. 6/2016 and its subsequent clarifications is misplaced for the AYs 2011-12, 2012-13, and 2014-15. While the Appellant contends that Circular No. 6/2016 is clarificatory and thus retrospectively applicable, it is a 'well-established principle that CBDT Circulars are generally prospective in nature, unless explicitly stated otherwise or they merely clarify an existing legal position without altering it. Circular No. 6/2016 was issued on February 29, 2016 , specifically providing a "partial modification" to earlier circulars, with a view to reduce litigation and uncertainty going forward.

5. It is an undisputed fact that the assessment orders for the relevant AYs (2011-12, 2012-13, 2014-15) was passed prior to the issuance of this Circular. The AO's determination of income, based on the facts and the law prevailing at the time of assessment, cannot be faulted or retrospectively altered merely by a later circular that provides a new "option" to taxpayers for listed shares held for over 12 months or a "decision" for unlisted shares.

6. Even assuming, arguendo, that the Circular could have some retrospective flavour for "clarification," it comes with crucial exceptions that mandate further examination by the AO. Paragraph 4 of Circular No. 6/2016 explicitly states:

'It is, however, clarified that the above shall not apply in respect of such transactions in shares/securities where the genuineness of the transaction itself is questionable, such as bogus claims of Long Term Capital Gain/Short Term Capital Loss or any other sham transactions. "

Similarly, the clarification for unlisted shares states:

"It is, however, clarified that the above would not be necessarily applied in the situation where: (i) the genuineness of the transaction in unlisted shares itself is questionable; or (ii) the transfer of unlisted shares is related to an issue pertaining to lifting of corporate veil: or (iii) the transfer of unlisted shares is made along with the control and management of underlying business."

7. The AO, in the present case, did not merely rely on the classification in books or duration of holding. Instead, the AO undertook a thorough analysis, taking into account the volume, frequency, and magnitude of the transactions (e.g., total purchase price for long-term and short-term capital gain segments amounting to Rs. 1004.58 crores and Rs. 1587.10 crores respectively for AY 2010-11, which are substantial), which are key indicators of "trading activity" rather than passive investment.

8. It is submitted that the AO determined that the nature of these transactions pointed towards business activity. When the underlying intent, based on factual analysis (volume, frequency etc.), suggests a business activity, the AO is justified in treating the income as business income, and the Circular does not restrict this power, especially when the conditions for "investment" treatment (like holding for more than 12 months and opting for capital gains treatment) are not conclusively met or if the factual indicators lean towards trading.

9. That, the AO's findings, indicating a departure from a pure "investor" profile based on transactional patterns, would fall within the scope where the Circular's "non-dispute" clause would not automatically apply.

10. That, the AO's re-characterization was not arbitrary but based on an analysis of the "intent" and "conduct" of the assessee's activities, considering factors like volume of transactions and frequency, which are established judicial tests for distinguishing between "investment" and "stock-in-trade".

11. Accordingly, it is submitted that the AO's view was consistent with the prevailing understanding that the "intention" behind holding the shares/mutual funds is paramount, and that this intention is discerned from various factors, not merely the Appellant's self-declaration. The remand order for AY 2010-11 specifically directed the AO to examine the intent of the assessee to verify if the transactions were "pure investments".

12. Therefore, the Revenue submits that Circular No. 6/2016, being issued post- assessment for these AYs and containing specific exceptions that justify the AO's detailed factual examination, cannot override the AO's finding that the income in question is taxable as business income based on the true nature of the transactions. Without prejudice to the same, in case, the Hon'ble Tribunal thinks it fit to remand the matter back to the file of the AO [as was done in A Y 2010-11], it is submitted that the AO, at the outset, be given the opportunity to examine the applicability of Circular No. 6/2016 [in view of the exceptions contained therein].”

33. In rejoinder, Id. AR of the assessee submitted as under :-

“The appellant, as a consistent practice, has been investing the surplus funds in mutual funds as a prudent cash management strategy. Such investments, as a matter of fact, have always been reflected under the head ‘investments’ in the

balance sheet and the gains arising on sale / redemption of such securities has always been recorded under the head 'Capital Gains'.

The assessing officer however, simply following the assessment order for AY 2010-11 treated the aforesaid "capital gains" as "business income".

The action of the assessing officer in taxing the surplus on redemption of mutual funds as business income is contrary to the factual matrix of the case and position in law, as elaborated hereunder:

Considering that the appellant is a cash rich company, the appellant has over the years been making investment in mutual funds for the purposes of prudent cash management. Having regard to the test laid down in successive decisions of the Supreme Court, viz., the nature of asset, whether "stock in trade" or "capital asset", depends upon the intention with which the same was acquired, the appellant offered the surplus on redemption of mutual funds under the head "Capital gains", in view of the following facts:

- (i) The appellant is a pure investor, not being registered with any authority or body, such as Stock Exchange, SEBI, etc., engaged in the business of dealing in shares/ securities.
- (ii) Further, the fact that the appellant is not a dealer or trader in shares, securities, debentures and other investments has also been reported by the auditor in the report issued under the Companies (Auditors Report) (Amendment) Order, 2004.
- (iii) Investment in shares/ mutual fund is always reflected under the head 'investment'/ 'capital asset' in the books of account as opposed to 'stock in trade';
- (iv) The appellant has been consistently following Accounting Standard 13 on 'Accounting for Investments' for valuing and recording investments, which has been accepted by the department in earlier years;
- (v) In the audited profit and loss account, only net gain/ loss on transfer of securities is shown, which is strictly in line with the method of recognition of profits on transfer of capital investments.
- (vi) The investments are made out of internal accruals and no borrowed funds have been utilized.

The controversy whether surplus on sale of shares, securities, etc., is of the nature of business income or capital gains has been put to rest by CBDT vide **Circular No.6 of 2016 dated 29.02.2016** to the following effect:

"SECTION 45, READ WITH SECTION 28(i), OF THE INCOME-TAX ACT, 1961 - CAPITAL GAINS, CHARGEABLE AS - ISSUE OF TAXABILITY OF SURPLUS ON SALE OF SHARES AND SECURITIES -

**CAPITAL GAINS OR BUSINESS INCOME - INSTRUCTIONS IN
ORDER TO REDUCE LITIGATION**

CIRCULAR NO.6/2016 [F.NO.225/12/2016-ITA-III], DATED 29-2-2016

1. Sub-section (14) of section 2 of the Income-tax Act, 1961 ('Act') defines the term "capital asset" to include property of any kind held by an assessee, whether or not connected with his business or profession, but does not include any stock-in-trade or personal assets subject to certain exceptions. As regards shares and other securities, the same can be held either as capital assets or stock-in-trade/trading assets or both. Determination of the character of a particular investment in shares or other securities, whether the same is in the nature of a capital asset or stock-in-trade, is essentially a fact-specific determination and has led to a lot of uncertainty and litigation in the past.

2. Over the years, the courts have laid down different parameters to distinguish the shares held as investments from the shares held as stock-in-trade. The Central Board of Direct Taxes ('CBDT') has also, through Instruction No. 1827, dated August 31, 1989 and Circular No. 4 of 2007 dated June 15, 2007, summarized the said principles for guidance of the field formations.

3. Disputes, however, continue to exist on the application of these principles to the facts of an individual case since the taxpayers find it difficult to prove the intention in acquiring such shares/securities. In this background, while recognizing that no universal principal in absolute terms can be laid down to decide the character of income from sale of shares and securities (i.e. whether the same is in the nature of capital gain or business income), CBDT realizing that major part of shares/securities transactions takes place in respect of the listed ones and with a view to reduce litigation and uncertainty in the matter, in partial modification to the aforesaid Circulars, further instructs that the Assessing Officers in holding whether the surplus generated from sale of listed shares or other securities would be treated as Capital Gain or Business Income, shall take into account the following—

(a) Where the assessee itself, irrespective of the period of holding the listed shares and securities, opts to treat them as stock-in-trade, the income arising from transfer of such shares/securities would be treated as its business income,

(b) **In respect of listed shares and securities held for a period of more than 12 months immediately preceding the date of its transfer, if the assessee desires to treat the income arising from the transfer thereof as Capital Gain, the same shall not be put to dispute by the Assessing Officer. However, this stand, once taken by the assessee in a particular Assessment Year, shall remain applicable in subsequent Assessment Years also and the taxpayers shall not be allowed to adopt a different/contrary stand in this regard in subsequent years;**

(c) In all other cases, the nature of transaction (i.e. whether the same is in the nature of capital gain or business income) shall continue to be decided keeping in view the aforesaid Circulars issued by the CBDT.

4. It is, however, clarified that the above shall not apply in respect of such transactions in shares/securities where the genuineness of the transaction itself is questionable, such as bogus claims of Long Term Capital Gain/Short Term Capital Loss or any other sham transactions.

5. It is reiterated that the above principles have been formulated with the **sole objective of reducing litigation and maintaining consistency in approach on the issue of treatment of income derived from transfer of shares and securities**. All the relevant provisions of the Act shall continue to apply on the transactions involving transfer of shares and securities.” (emphasis supplied)

The same position was reiterated in respect of surplus on sale of unlisted securities vide **letter dated 02.05.2016 issued by the CBDT** reproduced as under:

“Consistency in taxability of income/ loss arising from transfer of unlisted shares under Income Tax Act, 1961

Regarding characterisation of income from transaction in listed shares and securities, Central Board of Direct Taxes (‘CBDT’) has issued a clarificatory Circular No.6/2016 dated 29th February, 2016, wherein with a view to reduce litigation and maintain consistency in approach in assessments, it was instructed that income arising from transfer of listed shares and securities, which are held for more than twelve months would be taxed under the head ‘Capital Gain’ unless the tax-payer itself treats these as its stock-in-trade and transfer thereof as its business income. It was further stated that in other situations, the issue was to be decided on the basis of existing Circulars issued by the CBDT on this subject.

2. Similarly, for determining the tax-treatment of income arising from transfer of unlisted shares for which no formal market exists for trading, a need has been felt to have a consistent view in assessments pertaining to such income. **It has, accordingly, been decided that the income arising from transfer of unlisted shares would be considered under the head ‘Capital Gain’, irrespective of period of holding, with a view to avoid disputes/litigation and to maintain uniform approach.**

3. It is, however, clarified that the above would not be necessarily applied in the situation where:

- (iv) the genuineness of the transaction in unlisted shares itself is questionable; or
 - (v) the transfer of unlisted shares is related to an issue pertaining to lifting of corporate veil; or
 - (vi) the transfer of unlisted shares is made along with the control and management of underlying business.
- and the Assessing Officer would take appropriate view in such situations.(emphasis supplied)

Having regard to the aforesaid cited Circulars issued by the CBDT, the **Gujarat High Court** in the case of **PCIT v. Ramniwas Ramjivan Kasat : 248 Taxman** dismissed the appeal filed by the Revenue recording that if in respect of listed shares and securities held for a period of more than 12 months immediately preceding date of its transfer, the assessee desires to treat income arising from transfer thereof as capital gains, the same shall not be put to dispute by the assessing officer subject to the condition that the stand taken by the assessee in a particular year would be followed in subsequent years.

To the same effect are the following decisions rendered by the various benches of the Hon'ble Tribunal:

- Anil Kumar Goel v. ACIT : ITA No.3142/Mds/2016
- CIT vs. Sahara India Housing Corporation Ltd: ITA No. 740/2009 (Del)
- Sarnath Infrastructure (P) Ltd. v. ACIT: 120 TTJ 216 (Lucknow)

In view of the binding Circulars issued by the CBDT, the action of the assessing officer, without anything more, cannot be countenanced.

It is further important to point out that the surplus has arisen on redemption of mutual funds which are surrendered (for redemption) to the funds itself. The same are not traded and it cannot, therefore, be said that the appellant has carried out any business in trading of mutual funds. Accordingly, surplus on redemption of mutual funds cannot, even otherwise, be considered as the nature of business income.

Keeping in view the aforesaid aspects and the latest Circulars issued by the Board, the **Delhi Bench of the Tribunal** in the case of **ACIT vs. Wig Investments: 174 ITD 30** held surplus earned on redemption of mutual funds liable to tax under the head "Capital gains" and not business income. The relevant observations of the Hon'ble Tribunal are extracted as under:

"10. One very important fact here is that the entire transaction is on account of redemption of mutual fund which is neither freely tradable nor exchangeable in the market. It is a transaction between two persons, that is, person buying the MF and the other is Mutual Fund Manager who facilitates the fund and it can only be redeemed from the same mutual fund manager from whom it has been purchased. Therefore, it would be very difficult to hold that one would carry out business of mutual funds and will not make any investment. If any item is purchased from one person which can be sold or redeemed to that person alone, then it cannot fall into the category of freely traded commodity.....The concept of 'business' alludes to the concept of systematic activity carried out with an object to earn profit.....Here it is not a case where the mutual funds have been rotated again and again to purchase and sell the same which is a typical feature in a business, albeit here in this case as pointed out earlier, only 15 transactions have been undertaken for redemption of mutual funds and investment in the same mutual funds have not been made and redeemed again and again. The purchase of mutual funds has been classified as 'investment'

in the books of account and in the balance sheets and such a treatment is continuing in the subsequent periods also and at no point of time, they have been treated as 'stock in trade' in the books of accounts. Thus, the intention of the assessee right from the day one was to make investment in the form of mutual fund and not for the trading. This is also fortified by the fact that no borrowed funds have been utilised in such an investment.....Hon'ble Gujarat Court in the case of Pr. CIT v. Bhanuprasad D Trivedi (HUF) [2017] 87 taxmann.com 137, held that, if the assessee had an intention of being an investor and held shares by way of investment in the books of accounts then it has to be treated as investor and any gain arising out of transfer of shares should be treated as capital gains and not business income. Hon'ble High Court has also referred to the CBDT circular dated 29.2.2016 in which guidelines have been provided and one such guidelines is that, if the assessee in respect of the listed shares and securities held for a period of more than twelve months before transfer and treats the same as transfer of shares, then it has to be treated as "capital gain". This circular was later on modified to include unquoted shares also. Though here in this case redemption of mutual funds are for a period less than 12 months, but it is quite clear from the CBDT circular that intention of the assessee and the treatment given by the assessee in the books has been given paramount importance. SLP against the said decision of the Hon'ble Gujarat High Court has been dismissed. The same principle has been earlier reiterated by Hon'ble Bombay High Court in Gopal Purohit (supra) and Delhi High Court in PNB Finance & Industries Ltd. (supra) Accordingly, on facts and circumstances of the case we hold that Ld. CIT (A) has rightly held that redemption of units of mutual funds is to be taxed as capital gains and not as business. In the result ground No. 1 raised by the revenue is dismissed." (emphasis supplied)

The aforesaid decision of the Delhi Tribunal has been affirmed by the **Hon'ble Delhi High Court in PCIT vs. Wig Investments: 461 ITR 117.**

The said decision is on all fours with the facts in the case of the appellant and squarely covers the present dispute.

Arguments of Revenue

The Ld. Special Counsel for the Revenue has contended that since the subsequent Circulars issue by the CBDT were not before the assessment officer, the claim of the appellant has not been considered by the assessing officer in that light. According to the Ld. Special Counsel for the Revenue, the benefit of the Circular can be given to the appellant only if the conditions laid down in the said Circulars are fulfilled.

The Ld. Special Counsel for the Revenue has further submitted that the assessing officer has conducted thorough analysis of the transactions undertaken and came to the conclusion that it cannot be said that the appellant was holding such mutual funds as investment and that the same did not amount to carrying on of the business activities.

Rebuttal

The assessing officer, it may be pertinent to point out, had referred to the earlier Circular issued by the CBDT, viz, **Circular No.4 of 2007 dated 15.06.2007** and **Instruction No. F.No.149/287/2005-TPL** laying down the tests for determining the nature of income on sale of securities. It is important to point out that the Circulars of 2016, as referred to supra, are in modification of the earlier Circulars and, therefore, tests that were required to be considered by the earlier Circulars are no longer relevant.

For the applicability of **Circular No. 6 of 2016 dated 29.02.2016**, it is stated that surplus arising on sale of listed shares and securities held for more than 12 months from the date of transfer would be considered as taxable under the head “capital gains” if the assessee so desires, so long as the assessee does not change the stand in subsequent years. The appellant has followed consistent treatment of reflecting the investment in shares and mutual funds under the head “investments” in the balance sheet for the preceding and succeeding years. There is no change in the stand of the appellant and, therefore, the benefit of the Circular No.6 of 2016 dated 29.02.2016 cannot be denied to the appellant.

Emphatic reliance in this regard is placed on the decision of the **Calcutta High Court** in a recent decision in the case of **CIT vs. Century Plyboards (I) Ltd: [2023] 148 taxmann.com 301 (Cal.)** wherein it has been held that CBDT's Circular 6/2016, dated 29-2-2016, would be retrospective in operation and would apply to assessment years prior to issue of the Circular also.

Similarly, the High Court / Tribunal have, in the following cases, relied on the CBDT Circular No. 6/2016 for deciding issue pertaining to assessment years **prior to 2016-17:**

- ACIT vs. Wig Investments: 461 ITR 117 (Del HC) – AY 2006-07
- PCIT vs. Hardik Bharat Patel: 260 Taxman 294 (Bom HC) [SLP dismissed] – AY 2008-09
- PCIT vs. Ramniwas Ramjivan Kasat: 248 Taxman 484 (Guj HC) – AY 2006-07
- Deepaben Amitbhai Shah vs. DCIT: 397 ITR 687 (Guj HC) – AY 2004-05
- DCIT vs. Hero Investment (P.) Ltd.: 204 ITD 29 (Del ITAT) – AY 2012-13
- ACIT vs. Vireet Investments (P.) Ltd: 169 taxmann.com 379 (Del ITAT) – AY 2004-05
- Arunima Adcon Services (P.) Ltd. vs. ACIT: 204 ITD 146 (Del ITAT) – AY 2015-16
- ACIT vs. Sachin R. Tendulkar: 163 ITD 65 (Mum ITAT) – AY 2010-11 and 2011-12
- Smt. Yamini Khandelwal vs. ACIT: 197 ITD 520 (Kol ITAT) – AY 2010-11
- Chandan Infratech Ltd. vs. ITO: 145 taxmann.com 136 (Ahd ITAT) – AY 2011-12

Further, para 3 of the letter dated 02.05.2016 carves out the situation in which the said Circular would not be applicable. None of the situations mentioned in

para 3 of the aforesaid Circular are applicable in the present facts in as much as –

- (i) the assessing officer has not raised any doubt on the genuineness of transactions in unlisted mutual funds; and
- (ii) the redemption of unlisted mutual funds is not related to an issue pertaining to lifting of corporate veil; and
- (iii) redemption of mutual funds is not made along with control and management of the underlying business.

It is respectfully submitted that the investment in mutual funds is for prudent cash management. The aggregate investment in mutual funds has to be seen vis-a-vis the profit earned by the appellant year after year and the balance sheet size. The fact that the appellant is prudently managing its cash reserves by investing the same in mutual funds to ensure optimum returns, cannot be a ground to hold that the appellant is carrying on business in trading of mutual funds. In any case, the volume, frequency, regularity and consistency (tests laid down by the Courts and reiterated in Circular No.4 of 2007 followed by the assessing officer) are no longer relevant. In terms of the binding Circulars No.6 of 2016 dated 29.02.2016 and dated 02.05.2016, **the consistent treatment given by the appellant to the surplus on sale of listed / unlisted mutual funds is paramount** and the Revenue is bound by the same, subject to the only caveat that the appellant must follow the same treatment in succeeding years, which the appellant has undisputedly done.

Reliance in this regards is also placed on the decision of **Hon'ble Calcutta High Court in case of CIT vs. Merlin Holding (P.) Ltd. [2016] 65 taxmann.com 37 (Calcutta)/ [2015] 375 ITR 118 (Calcutta) [12-05-2015]** wherein it was held that where share transaction was entered into with intention of investment, income derived from share transaction would constituted short-term capital gain; frequency of transactions alone could not be a factor to show that intention was not to make investment.

Most importantly, even in the remand proceedings for AY 2010-11, the assessing officer, after analysing the facts of the case of the appellant vis-à-vis the conditions specified in the Circular has not drawn any adverse inference on the nature of the investments made; the assessing officer only confirmed the re-characterization of gains holding that Circular No. 6 having been issued in 2016 is not applicable retrospectively.

Having regard to the aforesaid submissions, the assessing officer erred in treating the long term capital loss and short term capital gains on redemption of mutual funds as in the nature of “business income”.

34. Considered the rival submissions and material placed on record. We observe that this issue is covered in favour of the assessee in its own cases in different assessment years as mentioned above. For the sake of brevity, we reproduce relevant findings of

the coordinate Bench in ITA No.961/Del/2015 order dated 09.02.2023 for AY 2010-11 on this issue as under :-

“84. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. It is not in dispute that the AO in earlier years has allowed the claim of the assessee regarding treatment of transactions related to sale and purchase of mutual funds/securities etc. as the investment. In the year under consideration, the AO has taken a different stand and treated the surplus arising out of the sale of mutual funds/securities as income from business. It is also not in dispute that the investment made by the assessee is out of non-interest bearing fund. The AO did not accept the contention of assessee made during the course of assessment proceedings on the basis that most of the investments were held for a period of 13 months in respect of long term capital gain and in respect of short term capital gain also there was frequent sale and purchases. He was also view of the fact that looking to the volume of transaction, the total purchase price of mutual fund is Rs.1004,58,57,202/- in respect of long term capital gain and Rs.1587,10,65,228/- in respect of short term capital gain which is substantial by any standard. Hence, he treated the transaction as the business activity of the assessee. Law is well settled now that intent is required to be examined whether it is for investment or otherwise for business of course to arrive at any conclusion certain factors need to be kept in mind. If such factors point towards business activity certainly then any surplus arising would partake character of business profit however, if it for parking surplus fund or is mandatorily made under government policy or otherwise then it will fall in category of investment. Therefore, Considering the totality of the facts, to verify the claim of the assessee that the transaction in question are pure investments by the assessee, the impugned disallowance is hereby set aside and the issue is restored back to the file of AO for decision afresh. The AO would consider all the objections of the assessee in the light of binding precedents. The Ground Numbers 13 to 13.5 are allowed for statistical purpose only”

35. Considered the above findings of the coordinate bench and material placed on record. We observe from the above decision of the coordinate bench that the AO in the earlier years had agreed with the fact that the investments made by the assessee in the Mutual funds were for the purpose of investment. Only recently the AO had taken a view on the basis of volume of transactions of purchase and sale of mutual funds made him to believe that these transactions are trading and to be treated as part of business transactions. In order to verify the nature and purpose of transactions, coordinate bench had remitted back to the file of AO to verify in AY 2010-11. However, after considering the materials placed before us, we observe that the assessee is consistently making investments in the mutual funds out of surplus funds available in the business with the only intention to maximize the return on its investments in the

mutual funds or short term investments. They always reinvest the same only after maturity of the investments and do not make any short selling or traded the same. As per the information available on the record, they always buy the mutual funds with the term 13months, it clearly demonstrates that the intention is only to make the investment and not for trading. It is normal in the companies to park their additional funds for a return, the notion return clearly indicate that this is for investment only, not for trading. Therefore, we are in agreement with the assessee these investments are made with the only intention of making investments, it can only be allowed to classify the same under the head capital gains not under the head income from Business.

36. The next issue is whether the CBDT circular be applied prospectively or retrospectively, we observed that this issue was already addressed by the Hon'ble Calcutta High Court in the case of Century Plyboards I Ltd (supra), wherein it was held that CBDT Circular 6/2016 dated 29/2/2016 would be applicable retrospective in operation and would apply to the assessments years prior to the issue of the Circular also. Similar view was also expressed by the Jurisdictional High Court in the case of WIG Investments (supra). Therefore, we are inclined to allow the grounds raised by the assessee in this regards instead of remitting the issue back to the AO for verification. In the result, ground nos. 9 to 9.4 raised by the assessee are allowed with the above observations.
37. With regard to Ground Nos.10 to 10.10 regarding disallowance of purchases of Rs.238,20,87,484/- on account of non-deduction of tax from payments made to M/s Suzuki Motor Corporation (SMC), Id. AR of the assessee submitted as under :-

“The assessee, had during the year under consideration, relevant to AY 2011-12, made payment aggregating to Rs. 2382.08 crores to SMC on account of purchase of goods outside India on FOB basis.

The AO during the course of the hearing on 09.12.2014, required the appellant to provide detail of tax withheld on payments made for purchase of goods from SMC.

The appellant vide reply dated 19.02.2015, submitted that all purchases made by the assessee from SMC are on FOB basis; the goods were manufactured outside India and the property therein transfers to the assessee outside India. Further, such purchases are at arm's length. In absence of any PE of SMC in India, income arising to SMC in relation to sale of goods to the appellant is not liable to tax in India and, therefore, the question of deducting tax at source from payment thereof does not arise. Further, without prejudice, the TDS

provisions are not applicable in respect of payments of purchase price in view of the non-discrimination provisions contained in Article 24 of the Indo-Japan Tax Treaty.

The assessing officer in the final assessment order has, however, disallowed Rs. 238,20,87,484 under section 40(a)(i) of the Act for failure to withhold tax on purchase price paid by assessee to SMC. The aforesaid amount has been arrived at by the assessing officer by arbitrarily assuming that the Japanese directors nominated by SMC, who are Japanese nationals, constituted place of management of SMC in India, dependent agent PE and service PE of SMC under Article 5 of the Treaty and the income arising to SMC from sale of goods to assessee was attributable to such PE and was liable to tax in India.

Re: ITAT's order in the appellant's own case for assessment year 2010-11 is not applicable:

At the outset it is submitted that the Tribunal, in the impugned order, duly considered the documentary evidences/material and written submissions filed by both the parties and on that basis recorded detailed arguments of the parties, on the issue at hand. Instead of conclusively deciding the issue on merits, the Tribunal remanded the issue to the Assessing Officer for fresh consideration without ascribing any specific reason to do so. The relevant finding of the Tribunal is set out as under:

*“96. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. The contention of the assessee against the disallowance are **multifolds; firstly, the transaction took place outside India and there was no transfer of title of goods within territory of India; secondly, there was no service PE as claimed by the AO; thirdly, there was no dependent agency; and fourthly, the issue is squarely covered by the decision of the Coordinate Bench and also the judgement of the Hon'ble Supreme Court and finally even it is assumed there was PE and the transaction took place within the territory of India.** Even in that event, the attribution of profit is erroneous and contrary to the settled position of law. In this regard, it was submitted that the AO had disallowed a sum of Rs.1956,78,37,510/- made by the assessee to SMC out of which 50% profits have been alleged to be attributable to the alleged PE in India. **However, had the AO correctly attributed the profit, it would have come at Rs.1.82 crores only and without prejudice to the submissions, the amount of disallowance could be restricted to this extent.***

*97. The issue needs to be examined whether the AO was correct in holding that the assessee was required to deduct tax on the payments made to SMC. **The broad submissions of the assessee are that in the light of the principle of consistency, the disallowance is unjustified. Moreover, there is no dependent or service PE and the entire transaction took place off shore.** The assessee also placed upon the judgement of Hon'ble Delhi High Court in the case of DIT vs Ericson*

*AB 204 taxman 192 [2011] wherein Hon'ble Delhi High Court answered the question in favour of the assessee, holding **that having regard to the fact that goods manufactured outside India as passing of property from seller to buyer. Hence, the assessee had not earned income through or from any business connection.***

*98. After considering the **totality of facts and in the light of the judicial pronouncements we find merit in the contention of the assessee even if it is assumed that there was PE even then correct attribution of profit is required to be made. To meet the ends of justice we hereby set aside the issue to the file of AO.** The impugned disallowance is hereby set aside. The AO is hereby directed to decide the issue afresh after adjudicating all the objections of the assessee. The Ground Numbers 15 to 15.10 are allowed for statistical purpose only.”*

The present appeal assails the order of the Tribunal in the setting aside the aforesaid issues to the file of the assessing officer for de-novo adjudication in excess of the jurisdiction when all facts in addition thereto were already on record, detailed oral and written arguments were made and above all, it was not the stand of either the Appellant or the Respondent that the issues ought to be remanded for fresh consideration.

Re.: Tribunal has erred in remanding the matter:

Scope of Remand

The Tribunal can only remand back the order to the file of lower authorities when:

- (i) the documents/evidences were not placed before the lower authorities [Assessing officer/DRP] and the same is necessary to be examined to adjudicate the issues;
- (ii) there is new evidence/material put on record before the Tribunal and the same requires verification at the level of the lower authorities;
- (iii) there was a submission made by either of the parties requesting for remand of the issue under consideration;

It is pertinent to note that the power to remand back is exceptional and can be exercised if there is a lack of finding or investigation by the lower authorities. It is important to note that the Supreme Court and several High Courts have repeatedly held that if all the material necessary to examine the disallowance is already on record and when the Assessing Officer as well as DRP/CIT(Appeals) have already considered the issue and given detailed findings, it would be appropriate for the Tribunal to give its final conclusive opinion on the issue.

Kind attention, in this regard, is invited to the recent decision of **Hon'ble Supreme Court** in the case of **Arvind Kumar Jaiswal (D) Thr. LR. vs. Devendra Prasad Jaiswal Varun: SLP (C) No. 9172/2020**, wherein the Hon'ble Supreme Court while deprecating the practice of remand by the High Court to the trial court held as under:

*“An order of remand prolongs and delays the litigation and hence, should not be passed unless the appellate court finds that a re-trial is required, or the evidence on record is not sufficient to dispose of the matter for reasons like lack of adequate opportunity of leading evidence to a party, where there had been no real trial of the dispute or there is no complete or effectual adjudication of the proceedings, and the party complaining has suffered material prejudice on that account. **Where evidence has already been adduced and a decision can be rendered on appreciation of such evidence, an order of remand should not be passed remitting the matter to the lower court, even if the lower court has omitted to frame issue(s) and/or has failed to determine any question of fact, which, in the opinion of the appellate court, is essential.** The first appellate court, if required, can also direct the trial court to record evidence and finding on a particular aspect/issue in terms of Rule 25 to Order XXI, which then can be taken on record for deciding the case by the appellate court.*

In the present case, the High Court, as the first appellate court, which is also a court of fact and law, has passed an order of remand observing that the judgment of the trial court was, in its opinion, not written as per the mandate of Section 33 and Rule 4(2) and 5 of Order XX of the Code, as the discussion and reasoning on certain aspects was not detailed and elaborate.”

This Hon'ble Court vide order dated 14.02.2022 in the case of LG Electronics, Korea: ITA No. 960/2019 set aside the order of the Tribunal remanding the matter to the DRP and directed the Tribunal to hear and dispose the appeal on merits, when all facts were on record, with the following observations:

“We find that the Tribunal in its very detailed order recorded the rival submissions of the parties. In this background, in our view, there was no purpose of remanding the matter back to the DRP on a small aspect, namely whether the appellant had made any concession with regard to the existence of its PE in the India. The same was a matter of record, if at all. The Tribunal could have decided the said issue and all other issues arising from answer to the said issue, or in consequences thereof. We, therefore, answer the question framed in favour of the appellant. We set aside the impugned order in so far as the operative direction contained in paragraph 88 is concerned.”

Reliance is further placed on the decision of the **Hon'ble Delhi Court** in the case of **CIT vs. Zuari Leasing and Finance Corporation: ITA No. 317/2009** wherein it was held as under:

“The third member also rightly observed that when all the facts were before the Tribunal to take a view on this aspect, the accountant member was not correct in remanding the case to the A.O. for this purpose.” The power to remand is an exception and should be used sparingly and cannot be exercised if there is a lack of finding or investigation by Assessing officer. Remand in a casual manner as a shortcut is totally prohibited under the law.”

It has been held similarly in the following decisions of the Hon’ble Delhi High Court:

- Microsoft India (R&D) Pvt. Ltd. vs DCIT: [2021] 431 ITR 483 (Del)
- Vedanta Limited vs ACIT, order dated 19.09.2022 in ITA 63/2021 (Del.)
- Sony Ericsson Mobile Communications vs CIT: 276 CTR 97 (Del.)

In similar circumstances, other Hon’ble High Courts have in the following decisions disapproved the approach of the Tribunal in remanding the matter to the lower authorities when all evidences and documents were available on records:

- CIT vs. UTI Bank Ltd.: 223 Taxman 157 (Guj.)
- Shivsagar Veg. Restaurant vs. ACIT: 317 ITR 433 (Bom.)
- Coca-Cola India (P.) Ltd vs. ITAT: 368 ITR 487 (Bom.)
- Cholamandalam MS General Insurance Co. vs. ACIT: 357 ITR 597 (Mad)
- CIT vs. GEC Alsthom India Ltd: 361 ITR 304 (Mad.)

It is submitted that considering all the relevant documentary evidence related to the issue are on record, the Hon’ble Tribunal may be pleased to decide the aforesaid issue on merit; instead in remanding the same for afresh consideration to the Assessing Officer.

The legal submission on the ground that no tax was required to be deducted at source on payments to be made to SMC since the said payments were not liable to tax in India is as under:

Re: No Permanent Establishment of SMC in India

In terms of paragraph 1 of Article 7 of the Treaty, business profits arising to a Japanese enterprise shall be taxable in India, only if the Japanese enterprise has a PE in India. In other words, in absence of PE in India, no part of the business profits arising to the Japanese enterprise would be taxable in India.

Article 7 of the Treaty dealing with taxation of “business profits”, reads as under:

“ARTICLE 7

1. *The profits of an enterprise of a Contracting State shall be taxable only in that Contracting State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in that other Contracting State but only so much of them as is directly or indirectly attributable to that permanent establishment.*
2. *Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.”*

Article 5 of the Treaty defines PE as under:

“ARTICLE 5

1. For the purposes of this Convention, the term 'permanent establishment' means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term 'permanent establishment' includes especially :

- (a) a place of management;*
- (b) a branch ;*
- (c) an office ;*
- (d) a factory ;*
- (e) a workshop ;*
- (f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources ;*
- (g) a warehouse in relation to a person providing storage facilities for others;*
- (h) a farm, plantation or other place where agriculture, forestry, plantation or related activities are carried on ;*
- (i) a store or other sales outlet ; and*
- (j) an installation or structure used for the exploration of natural resources, but only if so used for a period of more than six months.*

3 to 6.....

7. Notwithstanding the provisions of paragraphs 1 and 2, where a person other than an agent of an independent status to whom paragraph 8 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State, that enterprise shall be deemed to have a permanent establishment in the first-mentioned Contracting State, if

- (a) *he has and habitually exercises in that Contracting State an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to those mentioned in paragraph 6 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph ;*
- (b) *he has no such authority, but habitually maintains in the first-mentioned Contracting State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise ; or*
- (c) *he habitually secures orders in the first-mentioned Contracting State, wholly or almost wholly for the enterprise itself or for the enterprise and other enterprises controlling, controlled by, or subject to the same common control as that enterprise.*

8. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that Contracting State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

9. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other Contracting State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.”

Re: No fixed place PE

The principles regarding the conditions for existence of a Fixed Place of Business PE have been laid down very clearly and exhaustively by the Supreme Court in its Judgments in the case of **Assistant Director of Income – Tax Vs. E-Funds I.T Solution Inc (399 ITR 34)** and **Formula One World Championship Ltd. Vs. CIT- (394 ITR 80)**, wherein it has been explained that, firstly, the foreign enterprise should have a clearly demarcated and defined space in India which is placed at the disposal of the foreign enterprise to use as it pleases to carry on its own business activities. Secondly, the core income earning activity of the foreign enterprise should be carried out through such PE.

The **Supreme Court** in the case of **Formula One World Championship Ltd. vs. CIT: 394 ITR 80 (SC)** after referring to the OECD Model Tax Convention, Commentaries by Professor Philip Baker and Professor Klaus Vogel, international tax jurisprudence observed that in terms of Article 5(1) of the India-UK Tax Treaty, a fixed place PE is constituted in India, if the following twin conditions are satisfied viz, (i) existence of a fixed place of

business at the disposal of the foreign enterprise in India; (ii) through which the business of the foreign enterprise is wholly or partly carried on.

The **Delhi High Court** in the case of **CIT v. eFunds IT Solution and Ors. : 364 ITR 256 / 266 CTR 1**, while deciding the issue as to whether outsourcing of services to an Indian affiliate results in a PE in India for the foreign company under the provisions of the India-US Tax Treaty held that the subsidiary constitutes an independent legal entity for taxation purposes, and hence the relationship of holding-subsidiary or control exercised by the parent on its subsidiary by itself does not result in PE of the foreign company in India. The aforesaid decision has been affirmed by the **Supreme Court** in the case of **ADIT vs. eFunds IT Solution Inc. : 399 ITR 34**.

Reference is also made to the decision of the **Delhi High Court** in the case of **Adobe Systems Incorporated vs. ADIT: 292 CTR 407** wherein the Court relying upon the decision in the case of eFunds (supra) observed as under:

"Para (1) of Article 5 defines a PE to mean a fixed place of business through which the business of an enterprise is wholly or partly carried on. The term 'fixed place of business' includes premises, facilities, offices which are used by an enterprise for carrying on its business. The fixed place must be at the disposal of an enterprise through which it carries on its business wholly or partly. Although, the word 'through' has been interpreted liberally but the very least, it indicates that the particular location should be at the disposal of an Assessee for it to carry on its business through it. These attributes of a PE under Article 5(1) of the Indo-US DTAA were elucidated by the Supreme Court in Morgan Stanley & Co. Ltd. (supra). In a recent decision, a Division Bench of this Court in DIT v. E-Funds IT Solution [2014] 364 ITR 256/226 Taxman 44/42 taxmann.com 50 (Delhi) reiterated the above-stated attributes; after quoting from various authors, this Court held that "The term 'through' postulates that the taxpayer should have the power or liberty to control the place and, hence, the right to determine the conditions according to its needs".

Additionally, reliance is placed upon the decision of the **Delhi High Court** in the case of **National Petroleum Construction Company vs. DIT: 383 ITR 648** wherein the Court observed as under:

"Paragraph 1 of Article 5 provides an overarching general definition of the expression 'Permanent Establishment' (PE). It defines a PE to mean a fixed place of business through which the business of an enterprise is wholly or partially carried on. It is clear from the aforesaid definition that the expression 'Permanent Establishment' entails (a) a fixed place of business; and (b) business of the enterprise being carried on wholly or partially through the said fixed place of business. These two conditions must necessarily be satisfied for the existence of a PE. In addition, the word permanent in the term 'Permanent Establishment' indicates that there should be some degree of permanency attached to the fixed place of business before the same can be construed as a PE of an enterprise. The word permanent does

not imply for all times to come but merely indicates a place which is not temporary, interim, short-lived or transitory”

Reliance is also placed on the decision of the **Delhi Bench of the Tribunal** in the case of **Samsung Electronics Co. Ltd. vs. DCIT: 193 TTJ 769** wherein the assessee, a Korean company was engaged in the business of manufacturing of various electronic items. Pursuant to survey operations undertaken on the Indian subsidiary of the assessee, the department alleged that the Indian subsidiary's office was used as place of management by the assessee and would constitute a PE of the assessee in India **since the Korean company had deputed/ seconded employees to the Indian subsidiary who, according to the Revenue, looked after the interests of the Korean company.** The ITAT after perusal of the statements of the employees of the Indian company recorded during the course of the survey and other relevant documents observed that the assessee does not exercise absolute control over posting of employees to Indian subsidiary but has been posting the employees only pursuant to the tripartite agreements between the assessee, Indian subsidiary and the concerned employee. The ITAT further observed that by way of the seamless communication between the Indian subsidiary and the assessee, the expatriate employees were only discharging the duties of the subsidiary company towards the holding company and such activities do not constitute PE of the assessee in India. Relevant extracts of the decision are as under:

“..... 32. We have considered the observations of ld. DRP in the light of the above statements. There is no doubt that there is seamless information exchange between the employees of the assessee and the expat employees. However, on a careful consideration of the entire matter including the statements of the expatriate employees, extracted supra, we are of the considered opinion that the statements show that such information exchange relates to the models/designs to the liking of the Indian consumers, plans and strategies relating to the sale of the products, detailed stock/logistical status, the market strategies both the mid and long terms etc.

33. As rightly argued by the Ld. AR that none of the statement would go to show that the any activity of the global business management (GBM) has ever been conducted in India or that the market survey that is conducted in India, as spoken by the expatriate employees has nothing to do with the business of the Indian subsidiary and it is solely for the benefit of the assessee. All the activities that are spoken by the expatriate employees related to the specificity of the products, stock verification, they designs according to the preferences of the Indian consumers, the market strategies to be adopted etc are clearly within the ambit of the business of the Indian subsidiary. Such a communication would primarily benefit the Indian subsidiary, and would help the assessee in its GBM to sustain its supply chain management and to place optimized purchase orders at a right timing or to acquire the most promising manufacturing technologies, as is submitted on behalf of the assessee.

34. At the best, the statements and other material relied upon by the revenue show that by way of the seamless communication between the Indian subsidiary and the assessee, the expatriate employees were only discharging the duties of the subsidiary company towards the holding company. Whatever the benefits that are derived by the Indian subsidiary by such communication are offer to tax in India. We therefore find that the activities spoken by the expatriate employees in their statements are in the nature of reporting required in the course of discharge of the functions of the subsidiary company towards the holding company, and such activities do not constitute a PE under Article 5(4)(d), (e) and (f) of the DTAA....”

From the aforesaid discussions, it would emerge that in order to constitute a fixed place of business, there has to be right to use the premises for carrying out its own business by the enterprise and not for the purpose of business of the owner of the premises. Further, the premises or part thereof should be available at the constant disposal of the enterprise notwithstanding that the same is situated in the business facilities of another enterprise.

It is the indisputable factual position that no part of the business premises of MSIL has been made available to SMC for use by SMC, leave alone for its own business activities. There is not even an iota of material on record to show that SMC had a right to use any part of the business premises of MSIL to carry on its own business activities in such manner as SMC considered appropriate.

Further, the second essential and indispensable ingredient of a fixed place PE is equally totally missing in the present case, viz, that SMC should carry on its core revenue yielding business through the so-called PE. The revenue yielding business in question in the present case is the supply of goods, materials and inputs by SMC from Japan to appellant in India. For purchasing these materials, the management of appellant, which is under the control of appellant's Board of Directors, places purchase orders on SMC and SMC then executes the purchase orders by shipping the goods from Japan to appellant in India. As per the settled legal principles relating to the sale of goods, the property in the said goods supplied by SMC stood transferred to appellant the moment the goods were delivered to the shipping line for transport to India.

Accordingly, no fixed place of SMC in terms of Article 5(1) of the Treaty is constituted in India.

Re: No place of management of SMC in India

At the outset, it is to be appreciated that it needs to be demonstrated that nominee directors on the assessee's board, who are Japanese nationals are acting for and behalf of SMC and looking after the interest of SMC and not of the appellant, in their dealings with the appellant to hold that SMC has a place

of management and hence PE in India and business of SMC is being carried on through such PE.

SMC by virtue of its 54.21% shareholding in the appellant is entitled to nominate directors on the board of the appellant, as also financial institutions who have significant shareholding in the appellant. The appellant's board of directors as on 31.03.2011, comprised of the following: (Refer page 25 of Audit Report)

S.no	Name of Director	Designation	Nominated by
1.	Mr R C Bhargawa	Chairman	
2.	Mr S Nakanishi	MD and CEO	M/s Suzuki Motor Corporation, Japan
3.	Mr T Ohashi	Director and MEO (Production)	M/s Suzuki Motor Corporation, Japan
4.	Mr S Oishi	Director and MEO (Marketing and Sales)	M/s Suzuki Motor Corporation, Japan
5.	Mr K Asai	Director and MEO (Engineering)	M/s Suzuki Motor Corporation, Japan
6.	Mr Osamu Suzuki	Director	M/s Suzuki Motor Corporation, Japan
7.	Mr Kenichi Ayukawa	Director	M/s Suzuki Motor Corporation, Japan
8.	Mr Amal Ganguli	Director	
9.	Ms Pallavi Shroff	Director	
10.	Mr Manvinder Singh Banga	Director	
11.	Mr Davinder Singh Brar	Director	

The constitution of Board of Directors continue to remain same as on 31.03.2011. The aforesaid personnel, it is respectfully submitted, contractually are not acting in interest of SMC but were working towards the growth of the appellant company. The directors were appointed to watch over the affairs of the appellant to ensure that the affairs of the assessee were being carried out as per law and in its best interest. For instance, employment of Mr. Shinzo Nakanishi with the appellant company and related terms and conditions including remuneration, etc. has specifically been approved by the Government of India, Ministry of Corporate affairs.

Therefore, in view of approval for the employment of Mr. Shinzo Nakanishi with assessee company by the Government role and responsibilities assumed by him as MD and CEO of the assessee company cannot be called in question.

The Japanese Nationals seconded to the appellant were on the pay roll of the Indian company; were occupying positions in the organizational hierarchy in

the Indian company; were paid salaries by the Indian company on which necessary tax at source was deducted under section 192(1) of the Act; were appointed after complying with the applicable provisions of the Companies Act, 1956, wherever required.

In the case of the appellant, the deputation of these Japanese-employees and their nomination, remuneration and conduct as the Directors on the Board is not only in conformity of the provisions of the Companies Act, but also overseen by the Audit Committee and is in compliance with the Corporate Governance requirements, as follows:

- **Constitution of Audit Committee** - All the related party transactions, including the purchases from SMC is finally approved by the audit committee of the assessee which consists of four independent professional directors out of total five members in the committee. Composition of the audit committee has been reported under Page 25 of the Company's Annual Report enclosed as **Annexure A**. The decision of the Board for any transaction with SMC, including purchases from SMC, thus merges with the approval granted by the audit committee. Had the nominated personnel been acting in the interest of SMC, the audit committee would have objected to the related party transactions undertaken. In other words, only the independent directors have the power to approve the transactions with the related parties.
- **Disclosure made by the Management to the Board:** In the Corporate Governance Report it is stated that there are no transactions of material nature with the promoters, the directors, or the management, their subsidiaries or relatives etc. that had potential conflict with the interest of the company. All disclosures related to financial and commercial transactions where directors may have a potential interest are provided to the board and the interested directors do not participate in the discussion nor do they vote on such matters (Specimen copy of the Corporate Governance Report is enclosed at Page 44 of the Annexure A.)
- **Related Party Transactions:** In the Corporate Governance Report it has been stated that none of the transactions with any of the related parties was in conflict with the interest of the company. Details of transactions between the company and its subsidiaries, fellow subsidiaries, joint ventures, associates are given in the Schedule to the annual accounts. All related party transactions are negotiated on arm's length basis and are in the interest of the company (Specimen copy of the Corporate Governance Report is enclosed at Page 44 of Annexure A.)
- In the **Corporate Governance Report** it has been stated that the company has a transparent framework for evaluating the internal controls over financial reporting which reinforces the commitment to adopt the best governance practices.

- In terms of **Clause 49 of the Listing Agreement** and section 292A of the Companies Act, 1956, all purchases of components, capital goods etc. from related parties has to be reviewed and approved by Audit Committee. Independent Directors constitute majority of Audit Committee and Chairman of Audit Committee is also an independent director. Relevant details of audit committee has already been filed. Hence, no director nominated / seconded by SMC has any final say in the decisions taken by the Audit committee with regard to transactions with SMC.
- The **Code of Business Conduct and Ethics** requires the Senior Management Personnel to act in accordance with the highest standards of integrity, honesty, fairness and ethical conduct while working for the Company as well when representing the Company.
- The approval granted by the Government of India specifies that the salary to be paid should not exceed the ceiling limit of 11 percent. The approval also states that headquarter of the personnel shall be fixed at the place where he regularly stays for attending to his duties. Since the Japanese directors are stationed in India, their headquarters are in India. Accordingly, such directors are functioning under the direction, supervision and control of appellant.

It would thus be appreciated that the nominee directors on the board of the assessee, as per position of law explained above, are required to act in the best interest of the appellant and not SMC. It is for Revenue to prove with evidence that such directors and management personnel are merely puppets of SMC and not acting in the best interest of the appellant. Merely because the nominee directors are also paid salary by SMC does not ipso facto mean that such persons are acting for and on behalf of SMC and looking after the interest of SMC and not the appellant.

At this juncture it is pertinent to mention that director of a company holds a fiduciary position towards the company and its stakeholders. The primary duty of a director is to keep the interest of the company of which he is a director intact. In **Palmer's Company Law** (18th Edn., p. 183), it is stated that directors in exercising their power, whether general or special, must always bear in mind that they are in a fiduciary position and must exercise their powers for the benefit of the company and for that alone.

Attention is drawn to the following observation made in an Australian judgment in the case of **Bennets V. Board of Fire Commissioners of New South Wales (1967) 87 NSWVN 307**, while dealing with conflict of interest of nominee director representing nominator and the company:

“It is entirely foreign to the purpose for which this or any other board exists to contemplate a member of the board being representative of a particular group or a particular body. Once a group has elected a member he assumes office as a member of the board and becomes subject to the overriding and predominant duty to serve the interests of

the board in preference, on every occasion upon which any such conflict might arise, to serving the interests of the group which appointment him. With this basic position, there can be no room for compromise.”

Further, reference is made to the following pertinent observation made by the Supreme Court in the case of **Vodafone International Holdings B.V. vs UOI and Anr. : 341 ITR 1 :**

“66. The approach of both the corporate and tax laws, particularly in the matter of corporate taxation, generally is founded on the abovementioned separate entity principle, i.e., treat a company as a separate person. The Indian Income Tax Act, 1961, in the matter of corporate taxation, is founded on the principle of the independence of companies and other entities subject to income-tax. Companies and other entities are viewed as economic entities with legal independence vis-à-vis their shareholders and participants. It is fairly well accepted that a subsidiary and its parent are totally distinct tax payers. Consequently, the entities subject to income-tax are taxed on profits derived by them on standalone basis, irrespective of their actual degree of economic independence and regardless of whether profits are reserved or distributed to the shareholders/participants. Furthermore, shareholders/participants, that are subject to (personal or corporate) income-tax, are generally taxed on profits derived in consideration of their shareholding/participations, such as capital gains. Now a days, it is fairly well settled that for tax treaty purposes a subsidiary and its parent are also totally separate and distinct tax payers.

“67. It is generally accepted that the group parent company is involved in giving principal guidance to group companies by providing general policy guidelines to group subsidiaries. However, the fact that a parent company exercises shareholder’s influence on its subsidiaries does not generally imply that the subsidiaries are to be deemed residents of the State in which the parent company resides. Further, if a company is a parent company, that company’s executive director(s) should lead the group and the company’s shareholder’s influence will generally be employed to that end. This obviously implies a restriction on the autonomy of the subsidiary’s executive directors. Such a restriction, which is the inevitable consequences of any group structure, is generally accepted, both in corporate and tax laws. However, where the subsidiary’s executive directors’ competences are transferred to other persons/bodies or where the subsidiary’s executive directors’ decision making has become fully subordinate to the Holding Company with the consequence that the subsidiary’s executive directors are no more than puppets then the turning point in respect of the subsidiary’s place of residence comes about.”

74.....*The directors of the subsidiary under their Articles are the managers of the companies. If new directors are appointed even at the request of the parent company and even if such directors were removable by the parent company, such directors of the subsidiary will owe their duty to their companies (subsidiaries). They are not to be dictated by the parent company if it is not in the interests of those companies (subsidiaries). The fact that the parent company exercises shareholder's influence on its subsidiaries cannot obliterate the decision-making power or authority of its (subsidiary's) directors. They cannot be reduced to be puppets. The decisive criteria is whether the parent company's management has such steering interference with the subsidiary's core activities that subsidiary can no longer be regarded to perform those activities on the authority of its own executive directors*"
(Emphasis supplied)

The mere fact that the majority of the Directors on the Board of MSIL are nominees of SMC does not at all lead to the consequence that SMC has a "place of Management" in India otherwise Article 5(9) of the DTAA would be rendered completely meaningless and otiose.

It is well known that multinationals while deputing its employees to subsidiaries/ associates in the foreign jurisdiction, retain lien on employment, so that the employee reverts to the parent jurisdiction after the deputation term. Reference is made in this regard to the decision of the **Supreme Court** in the case of **CIT vs Eli Lilly and Co. India (P) Ltd. : 312 ITR 225**, wherein the Court held as follows:

"It cannot be stated as a broad proposition that the TDS provisions which are in the nature of machinery provisions to enable collection and recovery of tax are independent of the charging provisions which determines the assessability in the hands of the employee-assessee. Secondly, whether the Home Salary payment made by the Foreign Company in foreign currency abroad can be held to be "deemed to accrue or arise in India" would depend upon the in- depth examination of the facts in each case. If the home salary/special allowance payment made by the foreign company abroad is for rendition of services in India and if as in the present case of M/s Eli Lilly and Company (India) Pvt. Ltd. no work was found to have been performed for M/s Eli Lilly Inc Netherlands then such payment would certainly come under Section 192 (1) read with Section 9(1)(ii). As stated above, the post-survey operations revealed that no work stood performed for the foreign company by the four expatriates to the joint venture company in India and that the total remuneration paid was only for services rendered in India. In such a case the tax-deductor-assessee was statutorily obliged to deduct tax under Section 192 (1) of the 1961 Act"

In the view of the aforesaid, the nominee directors cannot be said to be acting on behalf of SMC while on the board of the assessee and are to be considered

as looking after the interest of the assessee only. Therefore, **their presence in India cannot be considered as ‘place of management’ of SMC in India and the nominee directors and ‘senior management personnel’ cannot be said to be acting for or on behalf of SMC.**

It is reiterated that though the “senior management personnel” were nominated by SMC, they were acting on behalf of and in interest of the appellant company, the appellant places on record Government approvals and Board Resolutions for appointment of the “senior management personnel” to show that the personnel were appointed by the assessee, their remuneration was paid by the appellant and they were acting for and in interest of the assessee.

Further, it has been consistently held that employees of foreign parent company seconded to the Indian subsidiary and working under the direction, control and supervision of the Indian company do not constitute a PE of the foreign company in India. Reliance in this regard is placed on the following judicial precedents:

- Carborandum Co. vs. CIT : 108 ITR 335 (SC)
- HCL Infosys Systems Ltd vs. DCIT : 76 TTJ 505 (Del. ITAT) further affirmed by Hon'ble Delhi High Court in the case of Director of Income-tax vs. HCL Info Systems Ltd : 274 ITR 261.
- IDS Software Solutions (India) (P.) Ltd. vs. Income-tax Officer: 32 SOT 25 (Bang.)

In view of the aforesaid discussions regarding the role and duties of directors, concept and scope of fixed place PE, it is beyond doubt that SMC does not have a fixed place PE/ place of management in India due to the following reasons:

- a) It is the indisputable factual position that no part of the business premises of MSIL has been made available to SMC for use by SMC, leave alone for its own business activities. There is not even an iota of material on record to show that SMC had a right to use any part of the business premises of MSIL to carry on its own business activities in such manner as SMC considered appropriate.
- b) The assessee is a publicly listed company and its Board of Directors comprise of 11 number of directors out of which 6 directors of the assessee are Japanese nationals who are employed with the assessee. Further, 5 are independent directors. All the directors (including the directors who are Japanese nationals) watch over the affairs of the assessee to ensure that the affairs of the appellant are being carried out as per law and in its best interest. The said directors have a fiduciary duty to ensure that the affairs of the assessee are properly administered.
- c) It is an accepted fact that the directors have been nominated in the Board of Directors of the appellant by SMC to ensure that the commercial interest of the assessee are looked after.

- d) The nominee directors and ‘senior management personnel’ are paid salary by the appellant in India and a portion of salary has also been paid by SMC in Japan for meeting the personal expenses of the family members of the Japanese-employees from which tax is duly deducted under section 192 of the Act. Such nominee directors and ‘senior management personnel’ are not working under the direction, supervision and control of SMC, while discharging their functions as directors of the assessee.
- e) The directors who are Japanese nationals do not render any services in India for and on behalf of SMC in the appellant’s dealing with SMC and do not carry on SMC’s business in India.
- f) If that were not the case, then, every subsidiary in India of the foreign company would automatically result in fixed place PE of the foreign company.
- g) **SMC had vide application dated 13.02.2001, invoked Article 25 – Mutual Agreement Procedure of the India Japan Tax Treaty requesting the National Tax Administration of Japan to enter into a Mutual Agreement with the Indian Competent Authorities and determine whether SMC has a Permanent Establishment in India. Accordingly, upon Mutual Agreement with the Indian Competent Authorities, the National Tax Administration of Japan vide order dated 06.04.2001 held that SMC does not have a Permanent Establishment in India.**

In view of the aforesaid, fixed place PE of SMC cannot be said to be constituted in India and presence of aforesaid nominee directors in India cannot be considered as ‘place of management’ of SMC in India and the nominee directors and ‘senior management personnel’ cannot be said to be acting for or on behalf of SMC merely because the nominee directors are also paid salary by SMC.

Re.: No Dependent Agent PE

It is submitted that Article 5(7) of the Indo Japan Tax Treaty states that where a person (other than an agent of an independent status) is acting on behalf of a Japanese enterprise in India, such person shall be deemed to constitute a PE of the Japanese enterprise if:

- the person has and habitually exercises in India an authority to conclude contracts on behalf of the Japanese enterprise, or
- he has no such authority but habitually maintains in India stock of goods or merchandise from where he regularly delivers stock of goods or merchandise on behalf of that enterprise and some additional activities conducted in that State on behalf of the enterprise have contributed to the sale of goods or merchandise, or

- he habitually secures orders in India, wholly or almost wholly for the Japanese enterprise.

A dependent agent can be deemed to be PE of the Japanese enterprise in India only if such individual has or habitually exercises an authority to conclude contracts in India on behalf of the Japanese enterprise.

No such contention has at all been made by the Revenue and in any event, there is not an iota of material which would even indicate, leave alone establish, the fulfilment of any of the abovementioned conditions. It is, therefore, absolutely clear SMC cannot possibly be said to have a Dependent Agent PE in India.

Further, it would be pertinent to understand the meaning of the word 'conclude' in its natural or general sense. The word 'conclude' means as per the Black's Law Dictionary (Seventh Edition), 'to ratify or formalize' or 'to bind; estop'.

Further, 'conclusion of contracts' means carrying out of contract negotiations, decision making relating to acceptance of the contract and not merely signing of the contracts. If the agent is authorized to negotiate all elements and details of a contract in a way binding on the principal, it can be construed that the agent has an authority to conclude contracts, even if the contract is signed by another person.

The mere existence of an authority to conclude contracts is not sufficient to constitute a dependent agent. There must be a habitual exercise of this authority. The word 'habitual' implies that the activities of the agent be on a long-term basis covering a series of contracts.

The OECD Commentary while elaborating on the expression "authority to conclude contracts" states as follows:

"32.1 Also, the phrase "authority to conclude contracts in the name of the enterprise" does not confine the application of the paragraph to an agent who enters into contracts literally in the name of the enterprise; the paragraph applies equally to an agent who concludes contracts which are binding on the enterprise even if those contracts are not actually in the name of the enterprise."

In the context of authority to 'negotiate and conclude contracts', it is specified that, a general authority cannot be taken to exist if the authority to negotiate and conclude contracts is so restricted that it allows the agent or employee to settle for only such prices and terms and conditions as were fixed in advance by his principal, the agent or employee having no scope for decisions of his own in this respect. However, in the context of authority to 'conclude contracts', an agent who has the power to engage and commit the principal in

business in another country constitutes an agency PE even if the principal has pre-determined the conditions in the contracts signed by the agent.

Without prejudice, it is further submitted that in order to determine the status of the Indian enterprise (i.e., independent or dependent), the following tests need to be applied having regard to the provisions of the treaty and various international commentaries on interpretation of this article:

- Whether or not the Indian entity is legally and economically independent of foreign company?
- Whether Indian entity is acting in the ordinary course of business, when acting on behalf of foreign company? and
- Whether Indian company's activities are devoted wholly or almost wholly on behalf of the foreign company and the transactions are at arm's length or not?

In this regard, it is submitted that:

- The appellant is **legally and economically independent** of SMC; and
- **It is acting in the ordinary course of business** in respect of transaction with SMC; and
- Its activities are not devoted wholly or almost wholly on behalf of SMC

On the basis of the aforesaid position in law and facts of the instant case, the appellant or its employees cannot be said to constitute dependent agency PE in India due to following reasons:

- a) The appellant is legally and economically independent of SMC and is acting in the ordinary course of business in respect of transaction with SMC. Further, the appellant's activities are not devoted wholly or almost wholly on behalf of SMC
- b) The appellant and its employees are not acting for or on behalf of SMC. The nominee directors of the appellant as submitted hereinabove have a fiduciary duty to ensure that the affairs of the appellant are properly administered and to act in the best interest of the appellant. In fact, in law the presumption is that the nominee directors act for and on behalf of the appellant and not SMC in the assessee's dealings with SMC.
- c) No evidence has been brought on record to demonstrate that the employees of the appellant were given powers to act on behalf of SMC in its dealings with the appellant and to conclude contracts relating to sale of products by SMC to the appellant on behalf of SMC.
- d) It is pertinent to point out that the assessee has a separate department for procurement of kits, parts, etc. required for manufacturing of vehicles. The assessee procures kits, parts, etc. from SMC on negotiated prices that are settled at the time of introduction of each model.

- e) It would be observed that the nominee directors and ‘senior management personnel’ of the appellant are not acting on behalf of SMC and are not involved in negotiating and concluding sales contracts on behalf of SMC

Accordingly, in view of the above, the appellant cannot, by any stretch of imagination, be held to be dependent agency PE of SMC in India, in terms of Article 5(7) of the Treaty.

Re: No Service PE clause in the India Japan DTAA

It has been alleged that the managerial services rendered by the SMC nominated Directors the Board of MSIL constituted a “Service PE” of SMC in India. It needs to be noted that, unlike certain other DTAAAs which contain provisions regarding a “service PE”, the India-Japan DTAA does not contain any provision in respect of a Service PE it is obvious that in the absence of a specific provision in the DTAA, the AO cannot put forward any contention regarding the existence of an alleged Service PE. The aforesaid view has also been affirmed by the Delhi ITAT in the case of **Samsung Electronics Co. Ltd. (supra)**.

Re: No income arose in India as sale of goods was made outside India

In terms of section 5(2) of the Act, a non-resident is liable to tax in India in respect of, inter alia, income which accrues or arises or which is deemed to accrue or arise in India.

Section 9 of the Act defines the concept of income deemed to accrue or arise in India. Section 9(1)(i) of the Act contemplates that any income accruing or arising to a non-resident whether directly or indirectly, through or from any ‘Business Connection’ in India, would be regarded as income deemed to accrue or arise in India.

The concept of ‘Business Connection’ basically envisages a relationship between the business carried on by a non-resident yielding profits or gains, on the one hand and some activity in India which contributes to earning of such profit and gains on the other.

The word ‘Business Connection’ has been judiciously examined in detail by various Courts in the following cases:

- CIT v R D Aggarwal & Co (SC) [56 ITR 20]
- CIT v Hindustan Shipyard Ltd (AP) [109 ITR 158]
- CIT v Atlas Steel Company Ltd (Cal) [164 ITR 401]
- Commissioner of Income-tax v Gulf Oil (Great Britain) Ltd

The ratio decidendi emanating from the aforesaid decisions is that the following conditions should exist to constitute ‘Business Connection’ in India:

- A real and intimate relation must exist between the trading activities carried on outside India by a non-resident and the activities in India;
- The relation contributes directly and indirectly to the earnings of income by the non-resident in his business;
- There should be an element of continuity between the business of the non-resident and the activity in India. To put it apparently, stray or isolated transaction is not normally regarded as a business connection.

Accordingly, if no operations of business are carried out in the taxable territory of India, it follows that no part of the income accruing or arising abroad can be deemed to accrue or arise in India through or from any 'Business Connection' in India.

In the instant case, all the aforesaid conditions are conspicuous by their absence and therefore, no 'Business Connection' of SMC could be deemed to exist in India. In support of the same attention is invited to the following:

- **The sales were independently made by SMC on principal to principal basis;**
- **The sales were concluded outside India;**
- **In connection with the contract in question, no business operations were carried out by SMC in India.**

In view of the aforesaid, it is respectfully submitted that income flowing from the Contract in question is not liable to tax in India since the SMC does not have any Business Connection in India. Accordingly, no part of the income can be said to be deemed to accrue or arise in India.

All the raw materials, components and inputs supplied by SMC to MSIL were sold on F.O.B basis, as is expressly stated in each sale invoice issued by SMC to MSIL. The legal effect and consequence of such sales is that the property in the goods sold stood transferred to MSIL when the goods were placed on a shipping vessel and were booked for transport to MSIL in India.

It is the settled legal position laid down by the Supreme Court in the case of **Ishikawajima- Harima Heavy Industries Ltd vs D.I.T – [2007] (288) ITR 408 (S.C)** that where profit arises from supply of goods by a foreign enterprises to an Indian enterprise, then, if the transfer of property in the goods has taken place outside India, the profit on the sale of the goods would not be taxable in India. The Court further held that signing of contract in India was of no material consequence while determining taxability of offshore supply of equipments since all activities in connection with such supply were undertaken outside India and could not, therefore, be deemed to accrue or arise in India

Consequently, the payment of the purchase price for such goods by MSIL to SMC would not include any element of income taxable in India. The Judgment in **Ishikawajima** (supra) has been followed in a number of subsequent Supreme Court and High Court Judgments.

Reference in this regard is made to the decision of the **Delhi High Court** in the case of **DIT v. Ericsson AB: 204 Taxman 192** wherein the assessee was a Swedish Company, which had entered into an agreement with an Indian company for supply of hardware and software and installation, commissioning of telecom network in India on turnkey basis. While the contract for supply of software and hardware was entered into by the assessee, the consideration for installation and commissioning services were later on, assigned by the assessee to another group company. The main issue before the Court was in regard to the taxability of income arising from offshore supply of equipment and software. The Court held that the fact that the supply contract was signed in India or that the equipment was subject to acceptance test by Indian customers was not relevant. **As per the terms of the supply, the title to the equipment passed to the assessee outside India** and the fact that the equipment was subject to acceptance test in India did not alter the aforesaid legal position. **It was further held that the equipment was manufactured outside India and even the sale took place outside India.** The Court observed that once this was established, even if the contract was considered to be composite contract consisting of supply of hardware and software and provision of installation and commissioning services, it had to be held that the income from supply of equipment was not taxable in India as no “business connection” existed within the meaning of section 9(1)(i) of the Act.

Reliance is also placed on the decision of the Special bench in the case of **Nokia Networks OY vs. JCIT: 194 TTJ 137 (Del Trib.)(SB)** wherein, *inter alia*, it was held that mere provision of marketing activities does not lead to creation of a business connection.

Accordingly, since no operations of business are carried out in the taxable territory of India, it follows that no part of the income accruing or arising abroad can be deemed to accrue or arise in India through or from any ‘Business Connection’ in India. Hence, the payments made to SMC are not taxable in India, therefore, question of tax deduction at source does not arise.

Even otherwise, it is a settled position that income from transaction of sale of goods accrues at the place where the title in goods passes to the buyer. In the instant case, as stated above, **the goods were supplied by SMC to assessee outside India and the title in goods passed to the assessee outside India.** Accordingly, no income from such sale of goods, accrued or arose to the SMC in India, and, therefore, no part of such payment is liable to tax in India.

Further, in terms of the provisions of Indo-Japan Tax Treaty, business income arising to the non-resident can be taxed in India only if it has a permanent establishment in India and the income is attributable to such permanent establishment.

As stated supra, since SMC does not have a PE in India, payments received by SMC towards sale of goods were not chargeable to tax in India and

consequently, the assessee was not required to withhold any tax on the payment made for such purchases.

Re: No disallowance permissible under section 40(a)(i) of the Act in view of the Article 24 – Non Discrimination Clause of the India Japan Tax Treaty

Without prejudice to the above, it is respectfully submitted that in terms of Article 24(1) of the Treaty, residents of Japan shall not be subjected to any taxation in India or any requirement connected therewith which is more burdensome than the taxation and connected requirements to which nationals of India in the same circumstances are or may be subjected. Further, in terms of Article 24(4) of the Treaty, the assessee which is a resident of India and whose capital is wholly or partly controlled by SMC, cannot be subjected in India to any taxation or requirement connected therewith, which is more burdensome than the taxation and connected requirements to which other similar enterprises in India are or may be subjected.

In connection with the above, reference is made to the following cases wherein it has been held that deduction neutrality clause in non-discrimination Article in a Tax Treaty is designed to primarily seek parity in eligibility for deduction between payments made to residents and non-residents and any preconditions for deductibility qua payments made to non-residents which are harsher than payments made to the residents, are ineffective in law by the virtue of such non-discrimination clause:

The **Delhi High Court** in the case of **CIT vs. Herbal Life International P. Ltd.: 384 ITR 276 (Del.)** held that disallowance under section 40(a)(i) of the Act was not called for having regard to the provisions of Article 26 of the India-US Tax Treaty, relating to non-discrimination, which, inter alia, provides that interest, royalties, and other disbursements paid by a resident of India to a resident of USA shall, for the purposes of determining taxable profits US resident, be deductible under the ‘same conditions’ as if they had been paid to an Indian resident. In coming to the said conclusion, the Court observed that the object of Article 26 of the Tax Treaty was to ensure non-discrimination in the condition of deductibility of the payment in the hands of the payer where the payee is either a resident or a non-resident.

Reference is further made to the decision of the Delhi ITAT in the case of **Mitsubishi Corporation India Private Limited vs. ACIT, [5147/Del/2010 (Del.)]** wherein the assessee, a wholly owned subsidiary of Mitsubishi Corporation Japan (MCJ), was a general trading company acting as trade intermediary. The assessee had purchased goods from Japanese, USA, Singapore companies and had not withheld any tax under section 195 of the Act on payments made to such companies since no income was chargeable to tax in India as these companies did not have any PE in India. The assessee contended that even if the above foreign companies are alleged to have PE in India, even then such payments for purchase of goods would not be liable to TDS in view of Article 24 – Non Discrimination clause of the India Japan Tax

Treaty, and no disallowance of purchase price under section 40(a)(i) of the Act could be made.

The ITAT held that the decision of the Delhi ITAT ruling in the case of Herbalife International P.Ltd. [101 ITD 450] rendered in the context of India-US Tax Treaty was squarely applicable to assessee's transactions with MCJ and group companies which were resident of USA and Japan. The ITAT observed that the Non-discrimination clause under India-Japan Tax Treaty was in pari-materia with Non-discrimination clause under Indo-US Tax Treaty and thus, the propositions laid down in the case of Herbalife were also applicable to India-Japan Tax Treaty.

On an appeal by the department before the High Court in **CIT vs. Mitsubishi Corporation India (P.) Ltd: 436 ITR 335 dated 16.02.2024**, the Court dismissed the appeal filed by the department and held that non-discrimination clause under India-Japan Tax Treaty was in pari-materia with non-discrimination clause under Indo-US Tax Treaty and thus, the propositions laid down in the case of Herbalife were also applicable to India-Japan Tax Treaty.

Reliance in this regard is also placed on the following decisions:

- The **Special Bench of Ahmedabad** in the case of **Rajeev Sureshbhai Gajwani vs. ACIT: 137 TTJ 1** held that a different treatment per se to a foreign enterprise is enough to invoke the non-discrimination clause.
- Reference is made to the recent decision of the Agra ITAT in the case of **DCIT vs. Gupta Overseas : 160 TTJ 257**. During the course of scrutiny assessment proceedings for AY 2008-09, the assessing officer noticed that the assessee, an exporter of leather footwear and footwear uppers had, inter alia, made payments of Rs 1.05 crores under the head "design and development expenses" to certain non-residents based in Spain, Italy, Ireland, UK, Denmark, Austria and Belgium without deducting tax at source. The officer disallowed these payments in respect of foreign remittances u/s 40(a)(i) on the ground that the assessee was under obligation to withhold tax on the subject payments under section 195 read with Sec 9(1)(vii) of the Act. In view of the non-discrimination clause under the respective Tax Treaties, the assessee contended that the scope of section 40(a)(i) relating to payments made to non-residents could not be any broader than the scope of section 40(a)(ia) of the Act relating to payments made to residents.

The ITAT relied on the decision in the case of **Rajeev Sureshbhai Gajwani Vs ACIT (supra)** and international tax commentaries and held that any pre conditions for deductibility, which are harsher than payments made to the residents are ineffective in law by the virtue of non-discrimination clauses in the respective tax treaties.

- The **Delhi Bench of the Tribunal** in the case of **Honda Cars India Ltd. vs. DCIT : 181 TTJ 36**, rendered in the context of Indo-Japanese Tax Treaty, wherein it has been held that payments made during AY 2009-10 for purchases are covered by the term ‘other disbursements’ used in Article 24(3) of the Non Discrimination clause of the India Japan Tax Treaty, and section 40(a)(i) being discriminatory qua payments made to non-residents vis-à-vis payments to residents, no disallowance could be made under section 40(a)(i) of the Act.

It has been held similarly in the following cases:

- ITO (Intl Taxation) vs. Santur Developers (P) Ltd.: 70 SOT 475 (Del. ITAT)
- Rolls Royce Industrial Power Ltd. vs. ACIT: 73 taxmann.com 37 (Del. ITAT)

It is respectfully submitted that the decision of the **Delhi High Court** in the case of **Herbalife International India (P) Ltd** and that of ITAT Delhi in the case of **Honda Cars India Ltd.** (supra) are squarely applicable on the facts of the instant case and, therefore, even if it is held that SMC has a PE in India and the transaction of sale of goods was attributable to such PE, the assessee was not required to withhold tax from such payments since no TDS is required to be made on payments to be made for purchase of goods from an Indian resident, and applying the Non Discrimination clause under Article 24(1) and (4) of the India Japan Tax Treaty, tax was not required to be withheld on payments made to SMC.

Thus, applying the ratio of the aforesaid decisions to the facts of the present case, since payments made to residents in India for purchase of goods is not subject to tax withholding, disallowance of purchases made from the non-resident on the ground that deduction has not been made from payment of purchase price, would amount to discrimination in accordance with the provisions of the Treaty.

It is submitted that non-discrimination clause can be invoked at the time of deduction of TDS by a resident payer in relation to payments to be made to a non-resident payee. In this regard, reference is made to the OECD Model Tax Convention, 2017 wherein it has been held that non-discrimination clause can be invoked if withholding tax is applied exclusively to the income (such as dividend, royalty etc.) paid to non-residents. Relevant extracts of the OECD Commentary are produced below:

“62. When permanent establishments receive dividends, interest, or royalties such income, by virtue of paragraph 4 of Articles 10 and 11 and paragraph 3 of Article 12, respectively, comes under the provisions of Article 7 and consequently — subject to the observations made in paragraph 53 above as regards dividends received on holdings of permanent establishment — falls to be included in the taxable profits of

such permanent establishments (see paragraph 74 of the Commentary on Article 7).

63. According to the respective Commentaries on the above-mentioned provisions of Articles 10, 11 and 12 (see respectively paragraphs 31, 24 and 20), these provisions dispense the State of source of the dividends, interest or royalties received by the permanent establishment from applying any limitation provided for in those Articles, which means — and this is the generally accepted interpretation — that they leave completely unaffected the right of the State of source, where the permanent establishment is situated, to apply its withholding tax at the full rate.

64. While this approach does not create any problems with regard to the provisions of paragraph 3 of Article 24 in the case of countries where a withholding tax is levied on all such income, whether the latter be paid to residents (permanent establishments, like resident enterprises, being allowed to set such withholding tax off against the tax on profits due by virtue of Article 7) or to nonresidents (subject to the limitations provided for in Articles 10, 11 and 12), the position is different when withholding tax is applied exclusively to income paid to non-residents.

65. In this latter case, in fact, it seems difficult to reconcile the levy of withholding tax with the principle set out in paragraph 3 that for the purpose of taxing the income which is derived from their activity, or which is normally connected with it — as is recognised to be the case with dividends, interest and royalties referred to in paragraph 4 of Articles 10 and 11 and in paragraph 3 of Article 12 — permanent establishments must be treated as resident enterprises and hence in respect of such income be subjected to tax on profits solely”

The aforesaid principle has also been upheld by the Tribunal in following cases wherein non-discrimination clause has been applied while determining withholding tax requirements in relation to the payments to be made to a non-resident:

- DCIT vs. Gupta Overseas (supra)
- Rajeev Sureshbhai Gajwani Vs ACIT (supra)

In view of the above, since payments made to residents in India for purchase of goods is not subject to tax withholding, disallowance of purchases made from the non-resident (SMC) on the ground that deduction has not been made from payment of purchase price, would amount to discrimination in accordance with the provisions of the Treaty.

Re: No disallowance permissible under section 40(a)(i) of the Act in the absence of assessment of income from sale of goods in the hands of SMC

Without prejudice, it is respectfully submitted that if the income does not suffer tax in India in the hands of the non-resident, including for the reason

that no assessment has been framed on the non-resident, then, the payer cannot be saddled with the attendant consequences of non-deduction of tax at source.

Under the scheme of the Act, the recipient of income is liable to tax on the income of any previous year, determined in accordance with section 5 of the Act. Deduction of tax at source out of the income of the recipient is mandated in section 4 of the Act. Such deduction of tax at source by the payer of the income is only a means to an end and does not absolve the recipient of income from the ultimate responsibility of paying tax on such income. The obligation of the recipient of income to pay tax thereon is not mitigated even in a situation where the payer has failed to deduct tax therefrom. [Refer sections 190 and 191 of the Act]

Reference in this regard is made to the decision of the **Delhi High Court** in the case of **Van Oord ACZ India (P.) Ltd. vs. CIT (2010) 323 ITR 130**, wherein the High Court held that if in the hands of the recipient it is held that the sum was not chargeable to tax, there cannot be cast any obligation on the payer to deduct tax at source.

To the same effect is the decision of the **Bombay High Court** in the case of **DIT vs. Mahindra & Mahindra Ltd: 365 ITR 560**.

In view of the aforesaid, no disallowance under section 40(a)(i) of the Act is called for.

Re: Attribution of income/ amount disallowable under section 40(a)(i)

Without prejudice to the aforesaid it is further submitted, as under:

Disallowance of 'other sum chargeable under the Act' in terms of section 40(a)(i) of the Act is applicable only when the payer fails to deduct tax under section 195 of the Act, which casts an obligation on a person making payment to a non-resident of any sum, which is chargeable under the provisions of the Act, to deduct tax at the rates in force at the time of payment of such sum or at the time of credit thereof to the account of the payee, whichever is earlier. As per the said section 195, tax is required to be withheld in respect of payments made to a non-resident only if such payment is chargeable to tax in India. **In the event that the payment so made to a non-resident is not chargeable to tax, there is no obligation on the payer to deduct tax at source.**

In the present case, the appellant, in view of the aforesaid decisions of the Supreme Court, did not withhold tax at source under section 195 of the Act on the payments made to SMC as the appellant was certain that the said payments made to SMC for goods supplied from outside India are not chargeable to tax in India in absence of PE of SMC in India.

Reference in this regard is made to **Instruction No. 02/2014 dated 26.02.2014, issued by the Central Board of Direct Taxes ('CBDT')** wherein the CBDT after referring to the decision of the Supreme Court in the case of

Transmission Corporation of A.P. Ltd. vs. CIT and GE India Technology (P.) Ltd. v. CIT (supra) clarified that tax is to be deducted under section 195(1) of the Act only the portion of the sum chargeable to tax in a case where no application has been made under section 195(2) of the Act.

Subsequently, the CBDT vide **Circular No. 3/2015 dated 12.02.2015**, further clarified that for the purpose of making disallowance of 'other sum chargeable' under section 40(a)(i) of the Act, the appropriate portion of the sum which is chargeable to tax under the Act shall form the basis of such disallowance and shall be the same as determined by the assessing officer as per Instruction No. 2/2014 dated 26.02.2014. Relevant extracts of the Circular No. 3/2015 dated 12.02.2015 are reproduced below:

“.....2. Disallowance regarding ‘other sum chargeable’ under section 40(a)(i) is triggered when the deductor fails to withhold tax as per provisions of section 195 of the Act. Doubts have been raised about the interpretation of the term ‘other sum chargeable’ i.e. whether this term refers to the whole sum being remitted or only the portion representing the sum chargeable to income-tax under relevant provisions of the Act.

3. Central Board of Direct Taxes has already issued Instruction No. 02/2014 dated 26.02.2014 (F. No. 500/33/2013-FTD-I) regarding deduction of tax at source under sub-section (1) of section 195 read with section 201 of the Act relating to payments made to non-residents in cases where no application is filed by the deductor for determining the sum so chargeable under sub-section (2) of section 195 of the Act. Vide this Instruction, Board has clarified that in cases where tax is not deducted at source under section 195 of the Act, the Assessing Officer shall determine the appropriate portion of the sum chargeable to tax, as mentioned in sub-section (1) of section 195 to ascertain the tax-liability on which the deductor shall be deemed to be an assessee in default under section 201 of the Act. It has been further clarified that such appropriate portion of the said sum will depend on the facts and circumstances of each case taking into account the nature of remittances, income component therein or any other fact relevant to determine such appropriate proportion.

4. As disallowance of amount under section 40(a)(i) of the Act in case of a deductor is interlinked with the sum chargeable under the Act as mentioned in section 195 of the Act for the purposes of tax deduction at source, the Central Board of Direct Taxes, in exercise of powers conferred under section 119 of the Act, hereby clarifies that for the purpose of making disallowance of ‘other sum chargeable’ under section 40(a)(i) of the Act, the appropriate portion of the sum which is chargeable to tax under the Act shall form the basis of such disallowance and shall be the same as determined by the Assessing Officer having jurisdiction for the purpose of sub-section (1) section 195 of the Act as per Instruct on No. 2/2014 dated 26.02.2014 of CBDT. Further, where determination of ‘other sum chargeable’ has

been made under sub-section (2), (3) or (7) of section 195 of the Act, such a determination will form the basis for disallowance, if any under section 40(a)(i) of the Act.”(emphasis supplied)

From a perusal of the aforesaid Circular No. 3/2015 dated 12.02.2015 it is clear that the disallowance of 'other sum chargeable' in terms of section 40(a)(i) of the Act, can be made only in respect of the appropriate portion of the sum which is chargeable to tax under the Act and that the said exercise is to be carried out by the assessing officer under section 195(1), where no application has been made under section 195(2) by the payer.

The **Hon'ble Delhi High Court** in the case of **Honda Siel Cars India Ltd vs DCIT: WP(C) 4262/2015** after referring to Circular No.3/2015 dated 12.02.2015, held that disallowance under section 40(a)(i) should be made in respect of the sum chargeable to tax as per section 195(1) of the Act.

Reference is also invited to the **Instruction No. F.No.500/39/2015 (US FT & TR-V) dated 26.10.2016 issued by the CBDT**, requiring the assessing officers to follow the Circular No.3/2015 (supra) for calculating sum chargeable to tax under section 195(1) of the Act while making disallowance in terms of section 40(a)(i) of the Act.

The situation envisaged in the aforesaid CBDT circulars is precisely the one obtained in the present case. It is to be appreciated that the aforesaid Circulars have been issued by the CBDT after considering the decision of the Supreme Court in the case of *Transmission Corporation of A.P. Ltd. vs. CIT and GE India Technology Centre (P) Ltd. vs CIT* (supra) and intended to remove the hardship caused on account of disallowance of the whole of the payment even though only a part of such payment was liable to tax in India.

In view of the aforesaid binding circulars and the position as clarified by the Supreme Court, the assessee, in absence of any income determined as chargeable to tax in the hands of SMC, it is respectfully submitted, was not required to deduct tax at source on payments made to SMC and the disallowance proposed to be made in the impugned draft assessment order calls for being deleted in toto.

Re.: Alternate contentions:

Strictly without prejudice to the above, it is respectfully submitted, to arrive at the profits attributable to the alleged PE of SMC, the global operating profit margin of SMC to the revenues relatable to alleged PE ought to be applied, the same being a rational and accepted method of computing income of PE. In fact, such method is referred to in Rule 10 of the Income-tax Rules, 1962.

Reference is made to the decision of the **Delhi Bench of the Tribunal** in the case of **Convergys Customer Management Group Inc. vs. ADIT: 159 TTJ 42** and the Special Bench of the Tribunal in the case of **Motorola Inc vs.**

DCIT[95 ITD 269] for the aforesaid proposition. In the latter case, it was held as under:

“287. We have carefully considered the argument raised by the Department as well as the assessee. In the present case it cannot be disputed that the research and development activities and the manufacture of the GSM equipment took place wholly outside India. We have also found, for reasons stated earlier, that the title and risk in the equipment also passed wholly outside India. The only activities which the assessee carried on in India through its PE were :

- a) Net work planning,*
- b) Negotiations in connection with the sale of equipment, and*
- c) The signing of the supply and installation contracts.*

In the case of Ahmadbhai Umarbhar 18 ITR 472, the Supreme Court held that the income attributable to the manufacturing activity should be more than the income attributable to the activity of sale. In the case of Annamalia Timber Trust and Co. vs. CIT 41 ITR 781, the Madras High Court approved the tribunal's decision that 10% of the income can be attributed to the signing of the contracts in India. The Calcutta High Court also approved the same percentage as income attributable to the signing of the contracts in India in the case of CIT vs. Bertram Scott Ltd. 31 Taxman 444. We have kept the principles laid down in these judgments in mind. In the present case, as already noted, in addition to the signing of the contracts in India, the preliminary negotiations for the contracts and the network planning were carried out through the PE. We may clarify here that the network planning activity is different from the activities which are of the preparatory or auxiliary character. In respect of signing of contracts, alone, the income attributed is 10% in the decisions cited above. Two more activities have been carried out by the PE in India and, therefore, we have to attribute a higher income than what was attributed in the decided case. The negotiations which ultimately lead to the signing of the contracts may involve more effort on the part of the PE and the signing of the contracts is only the fructification of those efforts. Obviously, therefore, the income attributable to the negotiations part should be more and in addition to the income attributable to the signing of the contracts. Some income has to be attributed to the net work planning also. Taking all these into consideration, we consider it fair and reasonable to attribute 20% of the net profit in respect of the Indian sales as the income attributable to the PE. The following steps are involved in computing the income attributable to the PE.

First the global sales and the global net profit have to be ascertained. From the accounts presented before us as well as before the Income-tax authorities, the global net profit rate has been ascertained at 10.8% and 6.1% by the CIT (Appeals) to which no objection has been taken either side. This percentage has to be applied to the Indian sales and by Indian sales, we means the total

contract price for the equipment as a whole and not the bifurcated price which the Assessing officer has referred to in the assessment order. This will also be consistent without view that the software and the hardware constitute one integrated equipment. The resultant figure would be the net profit arising in respect of the Indian sales. Out of this figure of net profit 20% shall be attributed to the PE to cover the three activities mentioned above. The A.O. is directed to compute the income of the PE as directed above.”

On a rough and ready basis, in the present case, since the alleged PE is hardly involved in any activity in India, hence only a conservative bases, 10% of global profit percentage as applied to India sales could at best be attributed as profit attributable to the alleged PE, as held in the following cases:

- Anglo French Textile Company Ltd. vs CIT : 23 ITR 101 (SC)
- CIT Vs Bertrams Scotts Ltd.: 31 Taxman 444 (Cal. HC)

On the above basis, the profit of the PE comes out to Rs. 471,37,848 Cr [Rs. 2382,08,74,842 Cr * (Profit attribution @ 10% * Profit margin @ 1.98 %)] and at the most the aforesaid amount can be disallowed under section 40(a)(i) of the Act.”

38. On the other hand, Id. DR of the Revenue submitted as under :-

“I. BACKGROUND

1. The present appeal concerns the disallowance made under Section 40(a)(i) of the Act for AY.s 2011-12 to 2014-15. The core facts remain consistent with the submissions made for AY 2010-11. The present submissions advert to the facts of AY. 2011-12, which was argued before the Hon'ble Bench.

2. The Appellant, M/s. Maruti Suzuki India Pvt. Ltd., made significant payments amounting to Rs. 2382.08 crores to its Associated Enterprise, M/s Suzuki Motor Company, Japan [SMC], during the relevant financial year, without deduction of tax at source. Though the AE was alleged to have a PE in India, the payments included the profit element on their sales which was chargeable to tax in India and hence fell within the ambit of Section 195 of the Act.

3. The Appellant's contention for non-deduction of tax is twofold: (i) the goods were sold outside India; and (ii) SMC has no Permanent Establishment (PE) in India as per Article 5 of the India-Japan DTAA. It was argued before the lower authorities that in the absence of a PE, the sum paid to SMC was not chargeable to tax, and thus, no tax was deductible and the disallowance under Section 40(a)(i) is inapplicable.

4. The Appellant [during arguments before the Hon'ble Tribunal] conceded that the findings rendered by the Co-ordinate Bench in AY. 2010-11 were binding [wherein the Hon'ble Tribunal had set-aside the matter to the A.O to decide the issue of PE afresh]. It was, however, urged by the Appellant that the Hon'ble Tribunal had ignored to take into account a vital submission regarding non-discrimination clause contained in Article 24 of the Indo- Japan DTAA owing to which no disallowance under Section 40(a)(i) could be made. Reliance was placed by the Appellant on the decisions of the Hon'ble High Court in the cases of CIT v. Herbal Life International P. Ltd. (384 ITR 276) affirmed by Mitsubishi Corporation India Private Limited case (4361TR 335) to bolster its arguments.

II. SUBMISSION OF THE REVENUE

5. There are two issues in this case before the Hon'ble Bench: -

- a) Whether income is chargeable to tax on the ground that SMC, Japan [which is NOT the Appellant] has a PE in India or not; and
- b) Whether Section 40(a)(i) of the Act would be inapplicable because of the non-discrimination clause contained in Article 24 of the Indo-Japan DTAA.

6. While the first issue relates to SMC [the foreign parent- Suzuki Motor Corporation] viz. whether they have a PE in India or not, the second question relates to Maruti Suzuki India ltd. i.e., Appellant, which is an Indian Company and a resident of India.

7. As far as the first issue is concerned, the matter has been restored to the AO and the Revenue's only contention is that while writing the order for AY 2010-11, the Hon'ble Bench has not incorporated the vital arguments of the Revenue which were also given by way of written submissions. A copy of the same written submissions has also been filed for the year under consideration [enclosed again for ready reference]. Those submissions may be taken on record and thereafter the decision may be taken in tune with the decisions-of the Hon'ble ITAT for earlier years.

8. Coming to the second question i.e., "Whether Section 40(a)(i) would be inapplicable because of the non-discrimination clause contained in Article 24 of the Indo-Japan DTAA?" The Revenue seeks to submit as under: -

- a) Article 24 of the India-Japan DTAA reads as under: -
 - "Article 24- Non-Discrimination
 - (1) ...
 - (2) ...
 - (3) Except where the provisions of article 9, paragraph 8 of article 11/ or paragraph 7 of article 12 apply, interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident

of the other Contracting State shall, FOR THE PURPOSE of determining the TAXABLE PROFITS of SUCH ENTERPRISE, be DEDUCTIBLE UNDER THE SAME CONDITIONS as if they had been paid to a resident of the first mentioned Contracting State.

(4) Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled directly or indirectly; by one or more residents of the other Contracting State, shall not be subjected in the first- mentioned Contracting State to any TAXATION OR ANY REQUIREMENT CONNECTED THEREWITH WHICH IS OTHER OR MORE BURDENSOME THAN THE TAXATION AND CONNECTED REQUIREMENTS TO WHICH OTHER SIMILAR ENTERPRISES OF THE FIRST-MENTIONED CONTRACTING STATE are or may be subjected

(5) ... "

- b) It is apparent that the case of the Appellant which is an Indian Company and a resident of India, would fall under Para (4) and not under Para (3) of Article 24.
- c) The Revenue submits that ARTICLE 24(3) is applicable for the purposes of determining the taxable profits of SMC, Japan i.e., the foreign parent. It is submitted that the fundamental intent underpinning Article 24(3), is to safeguard the position of foreign enterprises from the other Contracting State from discriminatory treatment. That is to say, the overarching purpose of non- discrimination provisions a DTAA is to ensure that a foreign enterprise is not subjected to taxation or connected requirements that are more burdensome than those faced by domestic enterprises. When Article 24(3) speaks of "for the purposes of determining the taxable profits of such enterprise" , it must be construed in light of this core objective i.e., the deduction of interest and other disbursements for the purposes of determining the taxable profits of such enterprise.
- d) In the case at hand, the Appellant-Assessee today is not SMC, Japan, but MSIL which is a domestic company and further, the taxable income of the Indian company is being determined in the present proceedings. Therefore, the non-discrimination clause contained in Article 24(3), therefore should not be invoked for determining the taxable profits of the Indian Company. It is submitted that it would be a complete misreading of DTAA if the benefit of the non-discrimination clause is extended to Indian residents or the company which is a pure domestic company.
- e) Without prejudice to what has been stated above, even if it is assumed that "such enterprise" refers to the payer viz. the Appellant which is a domestic entity, the rigours of Article 24(3) would still not be attracted to the case at hand. Assuming that "such enterprise" meant the Appellant payer, the intent of this specific clause would then be to

ensure that the Appellant's ability to claim a deduction for expenses in its own profit computation is not made more burdensome simply because the recipient of the payment is a non-resident, as opposed to a resident. In this context, the disallowance under Section 40(a)(i) does not constitute discrimination prohibited by Article 24(3) for the following compelling reasons: -

- I. That, Section 40(a)(i) is a consequence of the failure to comply with a statutory obligation to deduct tax at source (TDS) under Chapter XVII-B of the Act, which includes Section 195. It penalizes non-compliance with a procedural requirement for collecting tax on income chargeable in India. It does not make the underlying expense inherently non-deductible based on the recipient's residency. The "conditions" for deductibility under Article 24(3) pertain to the substantive nature of the expense itself (e.g., wholly and exclusively for business purposes), not to consequential non-deduction of certain payment for procedural defaults.
 - II. That, the very scheme of Section 40(a)(i) demonstrates a legislative intent to enforce TDS compliance across the board. Section 40(a)(i) uses the term "ANY ASSESSEE" and therefore it includes both non-resident and resident payers. The obligation to deduct tax on payments of sums which are chargeable to tax in India is cast on both residents and non-residents alike. Hence, where disbursements are made to a resident of India of any sum chargeable to tax, the tax would be deductible, wherever deductible, under different provisions contained in Chapter XVII of the Act. The allowability of deduction is governed by the provisions of Section 37, where the test is to see if the expenditure is incurred wholly and exclusively for business purposes.
 - III. That, the disallowance in the present case is for payments made to SMC Japan where the Revenue asserts the existence of a PE in India for SMC. This means the income derived by SMC from these payments is chargeable to tax in India under Article 7 of the DTAA. Section 195 mandates TDS only on sums "chargeable to tax". Therefore, the disallowance under Section 40(a)(i) is a direct consequence of the Appellant's failure to comply with a statutory TDS obligation on genuinely chargeable income. Even a resident assessee has to deduct tax at source on payments made to non-residents which are chargeable to tax. This is not discrimination, but the enforcement of domestic law designed to collect tax on income that has a clear nexus with India
- f) PARA (4) OF ARTICLE 24 is specifically included for resident-companies, where the capital is wholly or partly contributed /

controlled by non-residents. Some of the shares of the Appellant being owned by SMC, Japan, the case of Appellant would fall, if at all, under Para (4) of Article 24. This Para being specific to resident companies, this shall prevail and for that reason also, Para 24(3) would become inapplicable.

- g) Article 24(4) does not refer to deductibility of any expenditure. It refers to "TAXATION OR ANY REQUIREMENT CONNECTED THEREWITH" As far as taxation is concerned, there is no discrimination in Indian law with regard to taxation of one resident company with the other resident company. The Appellant being an Indian resident, is subjected to the same taxation (rate of tax and scope of taxation) as any other resident company. Next aspect to be considered is 'any requirement connected therewith'. The only requirement under consideration is the requirement of deduction of tax on payments made to Non-Resident Company which has allegedly a PE in India and therefore the payment represents 'sum chargeable to tax in India', as stipulated under Section 195 of the Act. There is a requirement of tax at source if the sum is chargeable to tax within the meaning of the Act and the DTAA. When a Non-Resident holds a PE in India, its income derived from sales made to India becomes chargeable to tax and such payments would be subject to deduction of tax under Section 195. Failure to deduct tax invites consequences under Section 40(a)(i) of the Act. As stated above, the provisions of Section 40(a)(i) apply to "any assessee" i.e., resident or non-resident, who make payment to non-resident which represents any sum chargeable to tax. The provisions of Section 195 and the consequential provisions under Section 40(a)(i) do not make any distinction between a Resident and Non-Resident, once the payment is being made to a Non-Resident of any sum chargeable to tax. Hence, there is no discrimination either on account of taxation or any other requirement connected therewith.
- h) The distinction which is sought to be made is by drawing analogy of a situation where the payment is made by a resident to another resident. This is not the case here.

9. Having submitted thus, it is prayed that the Hon'ble Bench has already remitted the issue of PE back to the file of the AD [in consonance with its order passed in AY 2010-11J and therefore, the applicability of non-discrimination clause under Article 24 of the Act [if at all any] be also set-aside to the file of the AO to be examined afresh, in the interest of justice. Needless to say case laws on the subject, if applicable would be taken into consideration by any statutory authority."

39. In rejoinder, ld. AR of the assessee submitted as under :-

“The appellant had submitted that the disallowance under section 40(a)(i) of the Act made by the assessing officer is not sustainable under the Non-Discrimination Clause contained in Article 24 of the India-Japan DTAA, replying upon the decisions of the Delhi High Court in the case of **CIT vs. Herbal Life International P. Ltd.: 384 ITR 276 (Del.)** and **CIT vs. Mitsubishi Corporation India (P.) Ltd: 463 ITR 335 (Del.)**.

Contention of the Revenue:

The Ld. Special Counsel has raised the following contentions with respect to application of non-discrimination clause in para 3 of Article 24 of Indo-Japan DTAA:

The Ld. Special Counsel has contended that when Article 24(3) speaks of “*for the purposes of determining the taxable profits of such enterprise*”, it must be construed in light of this core objective i.e., the deduction of interest and other disbursements for the purposes of determining the taxable profits of such enterprise. It is contended, therefore, that the non-discrimination clause contained in Article 24(3), therefore should not be invoked for determining the taxable profits of the Indian Company.

It is alternatively contended by the Ld. Special Counsel that even assuming that “*such enterprise*” refers to the payer viz. the appellant which is a domestic entity, the rigours of Article 24(3) would still not be attracted to the case at hand. Assuming that “such enterprise” meant the appellant payer, the intent of this specific clause would then be **to ensure that the appellant’s ability to claim a deduction for expenses in its own profit computation is not made more burdensome simply because the recipient of the payment is a non-resident, as opposed to a resident.** In this context, the disallowance under Section 40(a)(i) does not constitute discrimination prohibited by Article 24(3) for the following compelling reasons:

- I. That, Section 40(a)(i) **is a consequence of the failure to comply with a statutory obligation to deduct tax at source (TDS) under Chapter XVII-B of the Act, which includes Section 195.** It penalizes non-compliance with a procedural requirement for collecting tax on income chargeable in India. **It does not make the underlying expense inherently non-deductible based on the recipient's residency. The “conditions” for deductibility under Article 24(3) pertain to the substantive nature of the expense itself (e.g., wholly and exclusively for business purposes), not to consequential non-deduction of certain payment for procedural defaults.**
- II. That, the very scheme of Section 40(a)(i) demonstrates a legislative intent to enforce TDS compliance across the board. **Section 40(a)(i) uses the term “ANY ASSESSEE” and therefore it includes both non-resident and resident payers.** The obligation to deduct tax on payments of sums which are chargeable to tax in India is cast on both residents and non-residents alike. Hence, where disbursements are made to a resident of India of any sum chargeable to tax, the tax would be deductible, wherever deductible, under different provisions contained in Chapter XVII of the Act. The allowability of

deduction is governed by the provisions of Section 37, where the test is to see if the expenditure is incurred wholly and exclusively for business purposes.

- III. That, the disallowance in the present case is for payments made to SMC Japan where the Revenue asserts the existence of a PE in India for SMC. This means the income derived by SMC from these payments is chargeable to tax in India under Article 7 of the DTAA. **Section 195 mandates TDS only on sums “chargeable to tax”.** Therefore, the disallowance under Section 40(a)(i) **is a direct consequence of the Appellant’s failure to comply with a statutory TDS obligation on genuinely chargeable income.** Even a resident assessee has to deduct tax at source on payments made to non-residents which are chargeable to tax. **This is not discrimination, but the enforcement of domestic law designed to collect tax on income that has a clear nexus with India.”**

With reference to Article 24(4) of the Tax Treaty, the Revenue further submitted as under:

“PARA (4) OF ARTICLE 24 is specifically included for resident-companies, where the capital is wholly or partly contributed / controlled by non-residents. Some of the shares of the Appellant being owned by SMC, Japan, the case of Appellant would fall, if at all, under Para (4) of Article 24. This Para being specific to resident companies, this shall prevail and for that reason also, Para 24(3) would become inapplicable.”

“Article 24(4) does not refer to deductibility of any expenditure. It refers to **“TAXATION OR ANY REQUIREMENT CONNECTED THEREWITH”** As far as **taxation** is concerned, there is no discrimination in Indian law with regard to taxation of one resident company with the other resident company. The Appellant being an Indian resident, is subjected to the same taxation (rate of tax and scope of taxation) as any other resident company. Next aspect to be considered is ‘**any requirement connected therewith**’. The only requirement under consideration is the requirement of deduction of tax on payments made to Non-Resident Company which has allegedly a PE in India and therefore the payment represents ‘sum chargeable to tax in India’, as stipulated under Section 195 of the Act. There is a requirement of tax at source if the sum is chargeable to tax within the meaning of the Act and the DTAA. When a Non-Resident holds a PE in India, its income derived from sales made to India becomes chargeable to tax and such payments would be subject to deduction of tax under Section 195. Failure to deduct tax invites consequences under Section 40(a)(i) of the Act. As stated above, **the provisions of Section 40(a)(i) apply to “any assessee” i.e., resident or nonresident, who make payment to non-resident which represents any sum chargeable to tax. The provisions of Section 195 and the consequential provisions under Section 40(a)(i) do not make any distinction between a Resident and Non-Resident, once the payment is being made to a Non-Resident of any sum chargeable to tax. Hence, there is no discrimination either on account of taxation or any other requirement connected therewith.”**

Rebuttal:
Tax Treaty applicable to resident:

Section 90(2) of the Act reads as under:

“90. Agreement with foreign countries or specified territories.

.....
 2) *Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.”*

The said section provides that where the Central Government has entered into an agreement with the Government of any country outside India for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of the Act shall apply to the extent the same are more beneficial to that assessee. The term “the assessee to whom such agreement applies”, implies that provisions of the applicable tax treaty would equally be applicable to resident of either of the Contracting States (and not only to a non-resident) in respect of a transaction undertaken with a person resident of the other Contracting State (with whom India has entered into the Treaty). The Treaty accordingly, applies to residents of either of the contracting States (and not only to a non-resident).

The provisions of the applicable Double Tax Avoidance Treaty would thus equally be applicable to the domestic company with respect to payments of tax to non-resident to whom that particular Treaty applies, as is evident from the plain reading of the said section.

The aforesaid interpretation is also consistent with Article 1 of the Treaty which provides in categorical terms that the same would be applicable to persons who are residents of either of the contracting States. Article 1 of the India – Japan Treaty (the Treaty) is set out herein below:

“ARTICLE 1

This Convention shall apply to persons who are residents of one or both the Contracting States.”

That the Tax Treaty is applicable while determining the tax liability in India of the resident tax payer is borne out, inter alia, from Article 19 dealing with “Remuneration and pension in respect of government services”, Article 23 dealing with “Elimination of double taxation” and Article 24 dealing with “Non-discrimination”.

In support of the aforesaid, reference may be made to the following decisions wherein income arising to a resident outside India was held not liable to tax in India in the hands of the resident taxpayer, having regard to the provisions of the applicable Treaty with the country in which the income arose to the resident.

In the case of **DCIT v Turquoise Investment & Finance Ltd: 300 ITR 1 (SC)**, before the Supreme Court, the assessee, an Indian resident company, had received dividend income from a Malaysian company. The Supreme Court upheld the decision of the lower authorities that though the assessee was a resident of India (and its global income was taxable in India), the dividend income received from the Malaysian company was not liable to tax in India since as per Article XI of India-Malaysia Tax Treaty, such dividend was taxable only in Malaysia. Thus, the Supreme Court accepted the principle that even a resident of India could avail the benefits under a distributive rule of a Tax Treaty vis-à-vis taxation of income in India.

Attention of the querist is further invited to the decision of the Madras High Court in the case of **CIT vs. M. R. M. Plantations (P) Ltd (2016) 72 taxmann.com 246 (Madras)** wherein the Revenue alleged that the assessee an Indian company had concealed income of Malaysian plantation from Indian taxation laws. The High Court deleted the addition made by the Revenue by relying on the Indian Malaysia DTAA and held that it was an admitted fact that the plantation in Malaysia, would constitute permanent establishment in Malaysia in terms of the India Malaysia DTAA through which business is carried on by the assessee in Malaysia. The Court accordingly held that income from such plantation, would be taxable only in Malaysia and not in India.

In that view of the matter, an Indian company is entitled to invoke the beneficial provisions of the applicable tax treaty qua transaction entered into with a person resident in the Treaty partner country. Taking any other view would render section 90(2) of the Act and Article 1 of the Treaty otiose.

Article 24 of the India-Japan DTAA reads as under:

“Article 24- Non-Discrimination

(1) ...

(2) ...

...

(3) Except where the provisions of article 9, paragraph 8 of article 11, or paragraph 7 of article 12 apply, interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first mentioned Contracting State.

(4) Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the

other Contracting State, shall not be subjected in the first mentioned Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned contracting state are or may be subjected.

(5) ...”

The Hon'ble **Delhi High Court** in the case of **CIT vs. Herbal Life International P. Ltd.: 384 ITR 276 (Del.)** affirming the decision of the Tribunal held that disallowance under section 40(a)(i) of the Act was not called for having regard to the provisions of Article 26 of the India-US Tax Treaty, relating to non-discrimination, which, inter alia, provides that interest, royalties, and other disbursements paid by a resident of India to a resident of USA shall, for the purposes of determining taxable profits US resident, be deductible under the 'same conditions' as if they had been paid to an Indian resident. In coming to the said conclusion, the Court observed that the object of Article 26 of the India-US Tax Treaty was to ensure non-discrimination in the condition of deductibility of the payment in the hands of the payer where the payee is either a resident or a non-resident.

In terms of Article 24(3) of the Tax Treaty, except in cases where provisions of Article 9 or paragraph 8 of Article 11 or paragraph 7 of Article 12 apply, interest, royalties, **and other disbursements** paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining taxable profits of the payer, be deductible under the same conditions as if such payments have been made to a resident of the Contracting State. Paragraph 3 to Article 24 does not apply in situations where provisions of Article 9 or paragraph 8 of Article 11, paragraph 7 of Article 12 apply, i.e., in situations where owing to the special relationship between the parties, business profits / interest income / royalty, respectively, are not at arms-length.

As per paragraph 3 of Article 24, the payment of interest, royal **and other disbursement** would be subject to deduction in the hands of the payer-entity **“under the same conditions”** as if such payments are made to the resident of the Contracting State where the payer-entity resides, i.e., in India. In other words, deduction would be available to the payer-resident entity in respect of such amounts paid to the AE “under the same conditions” as applicable to the payments made to residents of that country. The term **“under the same conditions”** as appearing in Article 24(3) of the Tax Treaty refers to conditions for deductibility, in relation to similar payments made under the domestic laws of that State. This essentially means that conditions for allowance or disallowance of expenses in case of payments made to residents and non-residents have to be alike. It follows therefrom that deduction for such amounts paid to non-residents cannot be disallowed in the hands of the resident payer unless there is similar provision in the Act for disallowing such payments made to residents as well.

The Ld. DR has further failed to appreciate that Article 24(3) relates to deduction in the hands of the resident payer making payments to a non-resident. The purpose of Article 24(4) is to safeguard an equal treatment to an enterprise in the Source State which is discriminated solely on account of foreign ownership. Article 24(4) is not a non-obstante clause and it nowhere prohibits that Article 24(3) cannot be invoked by a resident in respect of payments to be made to a non-resident. If the argument of the Revenue is to be accepted then an Indian company which is a subsidiary of a foreign company is permitted to be subjected to discrimination in respect of deduction claimed while computing its taxable income (vis a vis an Indian company which is a subsidiary of another Indian company) which is clearly not the intent of the Tax Treaty.

In the present case, since payments made to residents in India for purchase of goods is not subject to tax withholding, disallowance of purchases made from the non-resident on the ground that deduction has not been made from payment of purchase price, would amount to discrimination in accordance with the provisions of Article 24(3) of the Tax Treaty.

The term “under the same conditions”, in the context of India-US DTAA, came up for consideration before the Delhi High Court in the case of **CIT vs Herbalife International Pvt Ltd: 384 ITR 276 (Del.)**. It was held by the Delhi High Court that that disallowance under section 40(a)(i) of the Act was not called for in respect of payments made to the non-resident for availing certain services viz data processing, accounting etc., having regard to the provisions of Article 26 of the India-US DTAA, relating to non-discrimination, which, inter-alia, provides that interest, royalties and other disbursements paid by a resident of India to a resident of USA shall, for the purpose of determining taxable profits of the Indian resident, be deductible under the same conditions as if such payments had been made to an Indian resident, in the absence of corresponding provision relating to disallowance of payments to be made to residents for non-deduction of tax at source therefrom. In coming to the said conclusion, the Court observed that the object of Article 26 of the India-US DTAA was to ensure non-discrimination qua conditions of deductibility of payment in the hands of the payer irrespective of whether the payee is a resident or non-resident. The relevant extracts from the said judgment are reproduced hereunder for the sake of ready facility:

“51. The arguments of counsel on both sides focussed on the expression 'same conditions' in Article 26(3) of the DTAA. To recapitulate, a comparison was drawn by learned counsel for the Revenue with Article 26(1) which speaks of preventing discrimination on the basis of nationality and which provision employs the phrase 'same circumstances'. Article 26 (2) which talks of prevention of discrimination vis-a-vis computing tax liability of PEs and employs the expression 'same activities'. The expression used in Article 26 (3) is 'same conditions'. Learned counsel for the Revenue sought to justify the difference in the treatment of payments made to non-residents by referring to Article 14 of the Constitution of India and contended that the line of enquiry

envisaged examining whether (a) the classification was based on an intelligible differentia and (b) whether the classification had a rational nexus with the object of the statute.

.....

56. *The argument of the Revenue also overlooks the fact that the condition under which deductibility is disallowed in respect of payments to non-residents, is plainly different from that when made to a resident. Under Section 40 (a) (i), as it then stood, the allowability of the deduction of the payment to a non-resident mandatorily required deduction of TDS at the time of payment. On the other hand, payments to residents were neither subject to the condition of deduction of TDS nor, naturally, to the further consequence of disallowance of the payment as deduction. The expression 'under the same conditions' in Article 26 (3) of the DTAA clarifies the nature of the receipt and conditions of its deductibility. It is relatable not merely to the compliance requirement of deduction of TDS. The lack of parity in the allowing of the payment as deduction is what brings about the discrimination. The tested party is another resident Indian who transacts with a resident making payment and does not deduct TDS and therefore in whose case there would be no disallowance of the payment as deduction because TDS was not deducted. Therefore, the consequence of non-deduction of TDS when the payment is to a non-resident has an adverse consequence to the payer. Since it is mandatory in terms of Section 40(a)(i) for the payer to deduct TDS from the payment to the non-resident, the latter receives the payment net of TDS. The object of Article 26 (3) DTAA was to ensure non-discrimination in the condition of deductibility of the payment in the hands of the payer where the payee is either a resident or a non-resident. That object would get defeated as a result of the discrimination brought about qua non-resident by requiring the TDS to be deducted while making payment of FTS in terms of Section 40 (a) (i) of the Act.*

.....

59. *Consequently, the Court negatives the plea of the Revenue that unless there are provisions similar to Section 40 (a) (i) of the Act in the DTAA, a comparison cannot be made as to which is more beneficial provision."*

In this regard, specific reliance is made to the decision of **Honda Cars India Ltd. vs. DCIT : 181 TTJ 36**. The Tribunal replying upon the decision in Herbalife International (supra) held that conditions for deductibility of tax on payment made for purchases to non-residents being discriminatory qua payments made to residents, no disallowance could be made under section 40(a)(i) of the Act, in view of Article 24(3) of the Tax treaty. Relevant extracts of the decision are reproduced below:

“13. We have heard the rival contentions. On a careful consideration of the facts and circumstances of the case and perusal of the papers on record and the orders of the authorities below, as well as the case law cited, we hold as follows. The sole issue for our consideration is whether the disallowance made u/s 40(a)(i) of the Act read with section 195 of the Act, of payments made to non-resident companies is correct in law.

13.1 There is no dispute of the fact that out of 18 non-resident associate companies to whom payments have been made, it was held that 16 associated enterprises do not have a P.E. in India. The D.R.P. in the case of Asia Honda Thailand for the A.Y. 2009-10 has held that the Non-resident company had no P.E. in India. Revenue has not filed an appeal on this finding of the D.R.P. Hence we have to reverse the finding of the Ld.CIT(A) that Asia Honda Thailand has a P.E. in India in this A.Y. Thus we have to hold that, except in the case of Honda Motors Japan, payments made to all other 17 non-resident associate companies do not attract the provisions of S.195 and consequently 40(a)(i) of the Act, as no portion of the income of these companies arising from the supply of parts etc. was liable for tax in India.

14. This leaves us with the issue of applicability of the provisions of S.195 r.w.s. 40(a)(i) to Honda Motor Company Ltd.

15. The issue whether Honda Motor Company Ltd. has a PE in India or not should be preferably adjudicated by the AO in the assessment of that company. It is not advisable to determine this issue in collateral proceedings, as is in the case of the assessee. Thus, we adjudicate the issue by considering the arguments of the assessee without prejudice, invoking the non-discrimination clause in terms of Article 24(3) of the DTAA, between India and Japan. The AO in this case has denied the benefit of the non-discrimination clause to the assessee by holding that the provisions of the Income-tax Act are different from the provisions of the DTAA and hence no benefit could be given to the assessee. When the matter came up before the Ld.CIT(A), he held that the term used in Article 24(3) related only to royalties, fee for technical services, interest and the term 'other disbursements' necessarily related to payments in the same generic and thus the payments for purchases are not covered by Article 24(3) and hence the benefit of DTAA cannot be given.

16. We find that this issue is no more res integra. The jurisdictional High Court in the case of Herbalife International India (P.) Ltd. (supra) judgment dated 13th May, 2016, has, after considering the argument of the intervener, Mitsubishi Corporation, and the provisions of the Indo-Japanese DTAA has on the issue of 'other disbursements' in paras 38 to 42, held as follows:—

“38. The question that next arises is whether the payment by the Assessee to HIAI qualifies as 'other disbursements' for the purpose of Article 26(3) DTAA?

39. To recapitulate, the case of the Revenue is that the expression 'other disbursements' should take colour from the context and would apply only to income which is of passive character just like interest and royalties. The Revenue invokes the doctrines of 'noscitur-a-sociis' and 'ejusdem generis'. It is

submitted that FTS does not qualify as 'other disbursements' since it is not a passive character like royalties and interest.

40. The Court is unable to agree with the above submissions of the Revenue. In the context of which the expression 'other disbursement' occurs in Article 26 (3), it connotes something other than 'interest and royalties'. If the intention was that 'other disbursements' should also be in the nature of interest and royalties then the word 'other' should have been followed by 'such' or 'such like'. There is no warrant, therefore, to proceed on the basis that the expression 'other disbursements' should take the colour of 'interest and royalties'.

41. The expression 'other disbursements' occurring in Article 26(3) of the DTAA is wide enough to encompass the administrative fee paid by the Assessee to HIAI which the Revenue has chosen to characterize as FTS within the meaning of Explanation 2 to Section 9(1)(vii) of the Act.

42. At one stage of the proceedings, the Assessee sought to contend that the payment was FIS covered under Article 12(4) of the DTAA. The ITAT did not address this issue. It addressed the question whether, even assuming it was FIS, Section 40(a)(i) of the Act cannot be applied and consequently, no disallowance can be made. Before this Court no question has been framed at the instance of the Assessee that the payment is covered by Article 12 (4) of the DTAA. Consequently, this question is not examined by the Court.”

17. Thus, the findings of the Id.CIT(A) on this issue have to be necessarily reversed. Coming to the findings of the AO, we find that the Hon'ble High Court vide paras 46 to 62 of the order in the case of Herbalife International India (P.) Ltd. (supra) has dealt with the issue as under, and when the proposition laid down in this judgment is applied to the facts of this case, the finding of the A.O. has to be reversed.

The aforesaid proposition of law has also been reiterated by the Delhi High Court vide majority judgement in the case of **CIT vs. Mitsubishi Corporation India (P.) Ltd.: [2024] 463 ITR 335 (Del)**. While construing the provisions of Non-Discrimination Article (Article 24(3)) of the DTAA between India and Japan, the majority held that there could be no disallowance under section 40(a)(i) on account of non-deduction of tax at source out of payments made to the overseas enterprise for purchase of goods by the India payer entity, inter alia, for the reason that there was no provision similar to section 195 of the Act warranting deduction of tax at source out of payment of consideration for purchase of goods to a resident supplier. In the view of the majority, the non-discrimination clause in Article 24(3) of the India – Japan DTAAA, would equally apply with regard to payment for purchases made by the Indian payer assessee to the Japanese supplier.

The Delhi High Court dismissed the appeal filed by the department and held that non-discrimination clause under India-Japan Tax Treaty was in pari-materia with non-discrimination clause under Indo-US Tax Treaty and thus, the propositions laid down in the case of Herbalife were also applicable to India-Japan Tax Treaty. The Hon'ble Delhi High Court considering similar contentions raised by the Revenue held as under:

“15. As indicated above, before 1-4-2005, payments specified in clause (i) of Section 40(a) made outside India or to a non-resident could not be deducted while computing the income chargeable to tax under the head "profits and gains from business and profession" unless TAS was deducted or after the deduction the amount was made over, i.e., paid. Inter alia, the payments specified in clause (i) of Section 40(a) concern interest [not being interest on a loan issued for public subscription before the 1st day of April, 1938], royalty, fees for technical services or other sums chargeable under the Act.

15.1 The rigour of the said provision, as it obtained prior to 1-4-2005, did not apply to the aforementioned specified payments made to residents. FA 2004 brought about an amendment in Section 40(a), whereby the resident was also brought within its sway, albeit with respect to payments specified in clause (ia). The payments adverted to in clause (ia) were the following: "any interest, commission or brokerage, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work)"

15.2 Thus, although parity had been brought about with regard to the power of the AO to deny deduction where TAS was not deducted against payments made outside India or to non-residents and residents, it was limited to certain payments. As is evident upon perusal of clause (ia) of Section 40(a), it did not bring payments made towards purchases to resident-vendors within its net. Therefore, the respondent/assessee argued that even after the amendment in Section 40(a) w.e.f. 1-4-2005, unequal treatment, i.e., discrimination, obtained with regard to payments made against purchases to resident-vendors. The expenditure incurred on payments made to resident-vendors against purchases could thus, be taken into account while computing income chargeable under the head "profits and gains of business or profession". This disparity was removed by FA 2014, albeit w.e.f. from 1-4-2015, when the ambit of disallowance was enlarged by bringing any sum payable to a resident within the four corners of clause (ia) of Section 40(a).

15.3 Since the period in issue is AY 2006-07, the amendment brought about in Section 40(a) by virtue of FA 2014 would have no relevance. Therefore, in my opinion, the equal treatment or the non-discrimination clause obtaining in Articles 24(3) and 26(3) of the India-Japan/India-USA DTAA's would apply with regard to the payment for purchases made by the respondent/assessee concerning the following five companies: MC (Japan); Metal One Corporation (Japan); Tubular (USA); Petro (Japan) and Miteni (Japan)

16. There can be no cavil with the proposition advanced on behalf of the respondent/assessee that since the provision of Article 24(3)/26(3) of the India-Japan and India-USA DTAA's respectively are more beneficial, it is entitled to rely upon the same, in support of its stand that the disallowance had been rightly deleted by the Tribunal. Section 90(2) of the Act makes it abundantly clear that, "Where the Central Government has entered into an

agreement with the Government of any country outside India or specified territory outside India...for granting relief of tax, or....avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee." [See Azadi Bachao Andolan (Supra)

17. The argument advanced on behalf of the appellant/revenue that since provisions of Article 9 of the respective DTAA's apply, the equal treatment/non-discrimination clause incorporated in Article 24(3)/26(3) would have no application to my mind, is untenable for the following reason:

17.1 Article 9 captures transactions that an assessee may enter with an AE, which may result in a transfer pricing adjustment. In the instant case, the transfer pricing adjustment impacted the payments received by the respondent/assessee against services rendered by it to its group companies. This aspect was concededly not the subject matter of the disallowance ordered under Section 40(a) of the Act. The disallowance under the said provision was confined to payments made by the respondent/assessee against purchases required to conform to the equal treatment clause or the non-discrimination Clause contained in Article 24(3)/26(3). Perhaps for this reason, the AO did not take recourse to the provisions of Article 9 of the respective DTAA's"

It is pertinent to point out that in the case of **Herbal Life** (supra), the Delhi High Court construed identically worded Article 26(3) of the India – US Treaty; further the Full Bench of the Delhi High Court in the case of **Mitsubishi** (supra) interpreted Article 24(3) of the India– Japan Treaty, itself, being the subject of reference by the appellant.

It may further be noted that facts of Mitsubishi's case are identical to facts in case of the appellant. The same are tabulated hereinunder:

Similarity	Mitsubishi	Appellant
Treaty involved	India-Japan	India-Japan
Section invoked	Disallowance u/s 40(a)(i) for non-deduction of TDS	Disallowance u/s 40(a)(i) for non-deduction of TDS
Nature of payment	Purchase of goods from multiple AEs (7 in total)	Purchase of goods from AE
Whether Tax Department alleged that AE had a PE in India	Yes (Out of 7, in 2 AEs, Tax Department had contended that AEs have PE in India and matter had not attained finality)	Yes

Further, reference is also made to the following cases wherein it has been held that deduction-neutrality clause in non-discrimination Article in the applicable Treaty is designed to primarily seek parity in eligibility for deduction between payments made to residents and non-residents and any pre-conditions for

deductibility of payments which are harsher than payments made to residents are ineffective in law, by virtue of such non-discrimination clause:

- (a) The Special Bench of the Tribunal in the case of **Rajeev Sureshbhai Gajwani vs ACIT: 137 TTJ 1** held that a different treatment per se to a foreign enterprise is enough to invoke the non-discrimination clause. The observations of the Special Bench are as under:

“There is also a dispute regarding the words "same activities" used in article 26. The case of the ld. Counsel is that the assessee is engaged in the business of export of software in the same manner in which a number of Indian enterprises are exporting software. The fact that the assessee has been allowed to export software shows that the business does not fall in the prohibited category. Accordingly, the assessee's case has to be compared with the case of an Indian enterprise engaged in the business of exporting software. If that is done, the assessee would be entitled to deduction under section 80HHE on the same footing and in the same manner as the deduction is admissible to a resident assessee. On the other hand, the case of the ld. DR is that various deductions under section 80HHE, 10A or 10B are area specific or industry specific. However, he was not able to carry this argument any further. The case of the ld. Counsel is that the provision contained in section 80HHE is industry specific and the assessee is not precluded in any manner from conducting this business in India. We agree with this view as no debate seems to be feasible in this regard. Therefore, we are of the view that the assessee is carrying on the activities of export of software. An Indian Company or any other resident person carrying on the business of export out of India of computer software or its transmission from India to a place outside India by any means is entitled to deduction under section 80HHE. Therefore, the deduction admissible to an Indian company or a person resident in India will be allowable to the assessee also.”

- (b) In the case of **DCIT vs Gupta Overseas: 153 ITD 357** decided by the Agra bench of the Tribunal, the facts were that the assessee was an exporter of leather footwear and footwear uppers. During the course of scrutiny assessment proceedings, the assessing officer noticed that the assessee had, inter-alia, made payments of Rs.1.05 crores under the head “design and development expenses” to certain non-residents based in Spain, Italy, Ireland, UK, Denmark, Austria and Belgium without deducting tax at source. The officer disallowed deduction under section 40(a)(i) of the Act on the basis that the assessee was under an obligation to withhold tax on the subject payments under section 195 r.w. section 9(1)(vii) of the Act. On the other hand, the assessee contended that in view of the non-discrimination clause under the respective tax treaties, the scope of section 40(a)(i) relating to payments made to non-residents could not be any broader than the scope of section 40(a)(ia) of the Act relating to payments made to residents. The Tribunal, relied on the decision in the case of Rajeev Sureshbhai Gajwani (supra) and international tax commentaries and held that any pre-conditions for deductibility of payments which were harsher than payments made to residents were

ineffective in law by virtue of non-discrimination clauses in the respective tax treaties.

In the above referred judicial precedents, it would be appreciated that the non-discrimination article was invoked qua admissibility of deduction under the Act to a resident assessee, including deductibility of payment made to a non-resident on which tax had not been withheld at source attracting disallowance under section 40(a)(i) of the Act.

Thus, applying the ratio of the aforesaid decisions to the facts of the present case, since payments made to residents in India for purchase of goods is not subject to tax withholding, disallowance of purchases made from the non-resident on the ground that deduction of tax has not been made from payment of purchase price, would amount to discrimination in accordance with the provisions of the Tax Treaty.

Reference is made to the OECD Model Tax Convention, 2017 wherein it has been held that non-discrimination clause can be invoked if withholding tax is applied exclusively to the income (such as dividend, royalty etc.) paid to non-residents. Relevant extracts of the OECD Commentary are produced below:

“62. When permanent establishments receive dividends, interest, or royalties such income, by virtue of paragraph 4 of Articles 10 and 11 and paragraph 3 of Article 12, respectively, comes under the provisions of Article 7 and consequently — subject to the observations made in paragraph 53 above as regards dividends received on holdings of permanent establishment — falls to be included in the taxable profits of such permanent establishments (see paragraph 74 of the Commentary on Article 7).

63. According to the respective Commentaries on the above-mentioned provisions of Articles 10, 11 and 12 (see respectively paragraphs 31, 24 and 20), these provisions dispense the State of source of the dividends, interest or royalties received by the permanent establishment from applying any limitation provided for in those Articles, which means — and this is the generally accepted interpretation — that they leave completely unaffected the right of the State of source, where the permanent establishment is situated, to apply its withholding tax at the full rate.

64. While this approach does not create any problems with regard to the provisions of paragraph 3 of Article 24 in the case of countries where a withholding tax is levied on all such income, whether the latter be paid to residents (permanent establishments, like resident enterprises, being allowed to set such withholding tax off against the tax on profits due by virtue of Article 7) or to nonresidents (subject to the limitations provided for in Articles 10, 11 and 12), the position is different when withholding tax is applied exclusively to income paid to non-residents.

65. In this latter case, in fact, it seems difficult to reconcile the levy of withholding tax with the principle set out in paragraph 3 that for the purpose of taxing the income which is derived from their activity, or which is normally

connected with it — as is recognised to be the case with dividends, interest and royalties referred to in paragraph 4 of Articles 10 and 11 and in paragraph 3 of Article 12 — permanent establishments must be treated as resident enterprises and hence in respect of such income be subjected to tax on profits solely”

There is, therefore, no merit in the argument raised by the Revenue that section 40(a)(i) of the Act seeks to provide differential treatment in respect of payments to non-resident payees and accordingly, the same does not amount to discrimination so as to trigger the provisions of Article 24 of the India-Japan DTAA.

Accordingly, the disallowance made under section 40(a)(i) of the Act on account of non-deduction of tax at source on the payment made to SMC for purchases cannot be sustained. In view of the above, since payments made to residents in India for purchase of goods is not subject to tax withholding, disallowance of purchases made from the non-resident (SMC) on the ground that deduction has not been made from payment of purchase price, would amount to discrimination in accordance with the provisions of the Treaty.

Further, inference made to Article 24(4) is completely misplaced. Reliance in this regard is placed on relevant extract of **OECD Commentary cases explaining the applicability of Article 24(5) is parimateria to Article 24(4) of India-Japan DTAA** as under:

“76. This paragraph forbids a Contracting State to give less favourable treatment to an enterprise, the capital of which is owned or controlled, wholly or partly, directly or indirectly, by one or more residents of the other Contracting State. This provision, and the discrimination which it puts an end to, relates to the taxation only of enterprises and not of the persons owning or controlling their capital. Its object therefore is to ensure equal treatment for taxpayers residing in the same State, and not to subject foreign capital, in the hands of the partners or shareholders, to identical treatment to that applied to domestic capital...”

Thus, the Commentary states that Article 24(5) [parimateria to Article 24(4) of India-Japan DTAA] avoids discrimination between Indian company owned by Indian promoter vis-à-vis Indian company which is wholly or partly owned subsidiary of foreign parent, which is not applicable in facts of instant case.

Additionally, as regards the Ld. Department Special counsel’s contention on without prejudice basis that the matter may be remanded back to file of AO, it is humbly submitted that the issue of interpretation of applicability of Article 24(3) is a legal issue and cannot be remanded back for interpretation of law.

40. Considered the rival submissions and material placed on record. We observed that the AO had disallowed the payment made by the assessee against the purchases made from the SMC which is the parent company of the assessee. The AO invoked the provisions of section 40(a)(i) r.w.s 195 of the Act. From the facts submitted before us clearly establishes that the payment made by the assessee was only against the purchases and materials supplied by SMC from Japan. It is established fact on record and also both the parties agree with the above facts on record, we noticed that the AO had invoked the above provisions on the basis of non-deduction of tax at the time of payments. First let us discuss the taxability of the above transactions under section 40(a)(i) and section 195 of the Act. In our considered view, it is settled position of law that any payment to a non-resident, tax has to be deducted only upon the transaction or payment which is chargeable to tax under Income Tax Act, as held in the case of **GE India Technology Centre (P) Ltd. vs CIT:327 ITR 456 (SC), Engineering Analysis Centre of Excellence Pvt Ltd vs. CIT: 125 taxmann.com 42 (SC)**]. It is precondition that the AO had to establish that the payments made are chargeable to tax under the provisions of Income Tax. In the given case, the disallowances were made on the significant payments towards purchases to the SMC, Japan Which is the parent company. The issue is whether the provisions of with holding tax applicable to the purchases?. In our view, the provisions are outside the scope of payments towards purchases. It is fact on record that the manufacturing of the goods imported by the assessee are made outside the territory of India. In our view, the above transaction has to be evaluated on the basis of related party transactions involving International Transaction on the basis of transfer pricing. From the facts brought on record, the provisions of section 40(a)(i) r.w.s 195 is not applicable to the present transaction, the additions proposed are not valid.
41. The revenue argued that any payment made to the non-resident has to be subjected to TDS, even if the tax is not payable, the assessee should have made application before AO or obtained a certificate as per the rule prescribed u/s 195 (3) and (6) of the Act. These rules are applicable particularly when the payments are made with concessional rate or payments are made subject to tax. When the persons making the payment aware of the fact that the transaction is not taxable in the territory of India, there is no requirement of deduction of tax.

42. At the same time, we observed that the assessee had declared the above purchases from SMC as international transaction before the TPO, which is reproduced at page 2 of the TPO order. The TPO had accepted the above purchases and not proposed any TP adjustment, it is also fact on record that the above components and consumables were utilized by the assessee in the manufacturing in their plant. It is the domain of the TPO to verify the purchases as part of the transfer pricing and if there is any SMC interest in terms of Permanent Establishment or not had to be analyzed by him considering the same as special domain. Once the Purchases are accepted as proper in the TP study, there is no room for the AO not make any addition at the time of making payments. In our view, the purchases are made from the related concern having impact on the functions and manufacturing carried on by the assessee having direct impact on the Indian Market, therefore, this is the domain of the TPO, the AO instead of applying section 195 on the payment to the SMC, he should have referred this issue back to the TPO, there is not domain of the assessing officer particularly he is aware of the fact that the transaction involving import of material or components from the AE. We observe that for the issue of payments towards purchases, several issues relating to PE and all the relevant issues raised in this appeal relating to Permanent Establishment involving permanent or fixed place of business, service PE, controlling of subsidiary by employing deputed directors, whether in the pay roll of the assessee company or not, whether there can be any place of management issue, issue of dependent agent PE has to be analyzed at the back drop of analyzing the international transaction with the related concern. This is not domain of the assessing officer; it is the domain of technical units like TPO. Therefore, in our considered view, TPO had already considered the issues involving the transfer pricing at the reference of the AO, the same cannot be revisited with the wrong additions proposed by the AO. The additions proposed by the AO have no legs to stand.
43. With regard to article 24 non-discrimination clause of the treaty, we have already held that the payment for purchases are not subjected to the TDS provisions, it falls under the Article 5 and 7 of the treaty, this has to be evaluated under the transfer pricing. The article 24 has direct implication when the tax authorities impose TDS provisions differently for domestic and foreign entities. In the domestic transactions, the TDS provisions are not applicable in the case of purchases, similar treatment has to be extended to the nonresidents involving similar purchases, only difference is it should

be evaluated by applying Transfer Pricing provisions. There are specific provisions applicable with regard to import of goods from AEs. Therefore, we are inclined to delete the additions made u/s 40(a)(i) of the Act.

44. With regard to Ground No.11 regarding short credit of TDS, ld. AR of the assessee submitted that this issue is covered in favour by ITAT Orders for earlier years and accordingly prayed to allow this ground.
45. On the other hand, ld. DR of the Revenue did not controvert this position.
46. Considered the rival submissions and material placed on record. We observe that this issue is covered in favour of the assessee in its own cases in different assessment years as mentioned above. For the sake of brevity, we reproduce relevant findings of the coordinate Bench in ITA No.961/Del/2015 order dated 09.02.2023 for AY 2010-11 on this issue as under :-

“108. We have heard Ld. Authorized Representatives of the parties and perused the material available on record. The AO is hereby directed to verify the claim of the assessee regarding additional TDS certificate and give credit of the same in accordance with law. Thus ground of appeal raised by the assessee is hereby, allowed.”
47. Respectfully following the decision of the coordinate Bench (supra), we allow ground no.11 for statistical purposes.
48. With regard to Ground Nos.12 to 12.19 regarding TP – Royalty issue, ld. AR of the assessee submitted that this issue is covered in favour of the assessee by ITAT Orders for earlier years and the Hon’ble Delhi High Court, vide recent consolidated order dated 03.02.2025 passed for AY 2005-06, 2007-08, 2008-09 and 2009-10, has decided the aforesaid issue in favour of the assessee.
49. On the other hand, ld. DR of the Revenue has not controverted on the above submissions.
50. Considered the rival submissions and material placed on record. We observe that this issue is covered in favour of the assessee in its own cases in different assessment years as mentioned above. For the sake of brevity, we reproduce relevant findings of the coordinate Bench in ITA No.961/Del/2015 order dated 09.02.2023 for AY 2010-11 on this issue as under :-

“104. The facts are identical in this case as well and the Revenue has not brought to our notice any change into facts and circumstances of the case or any other binding precedents. Therefore, respectfully following the decision of the Co-ordinate Bench of the Tribunal in ITA No.467/Del/2014 (AY 2009-

10) in assessee's own case, we hold that the AO was not justified in making transfer pricing adjustment. We hereby, direct the AO to delete the same. Thus, Ground Nos.16 to 16.17 raised by the assessee are allowed.”

51. Respectfully following the decision of the coordinate Bench (supra), we allow ground nos.12 to 12.19.
52. With regard to Ground No.13 regarding interest under section 234B and 234D of the Act, ld. AR of the assessee submitted that this issue is covered in favour by ITAT Orders for earlier years and accordingly pleaded to allow this appeal.
53. Ld. DR of the Revenue relied on the orders of lower authorities and also submitted that this is consequential in nature.
54. Considered the rival submissions and material placed on record. We observe that this issue is covered in favour of the assessee in its own cases in different assessment years as mentioned above. For the sake of brevity, we reproduce relevant findings of the coordinate Bench in ITA No.961/Del/2015 order dated 09.02.2023 for AY 2010-11 on this issue as under :-

“113. We have heard the rival contentions and perused the material available on record. We find merit into the contention of Ld Senior Counsel for the Assessee. We, therefore, direct the AO to re-compute the interest in accordance with law, this ground of Assessee's appeal is allowed for statistical purpose only.”
55. Respectfully following the decision of the coordinate Bench (supra), we allow ground no.13 for statistical purposes.
56. With regard to additional ground relating to refund of excess DDT, ld. AR of the assessee submitted that this issue has been decided by the Special Bench of the Tribunal constituted in Mumbai in the case of DCIT vs. Total Oil India (P.) Ltd: [2024] 149 taxmann.com 332, wherein the appellant-assessee was also one of the aggrieved parties. He submitted that at this stage, he don't want to press the same. Further, another additional ground was also raised relating to CESS and Educational Cess, this additional ground also not pressed. Therefore, both the additional grounds are dismissed as not pressed.
57. The Revenue has filed appeal being ITA No.1024/Del/2016 against the impugned order of the Assessing Officer dated 31.12.2015 pursuant to the directions of TPO/DRP raising following grounds of appeal :-

- “1. Whether the Dispute Resolution Panel (DRP) was right in fact and circumstances of the case and law in holding that unutilized excise duty, custom duty and cess should be allowed as deduction u/s 43B of Income Tax Act 1961 (the Act) even when liability to pay such excise duty, custom duty and cess has not incurred during year under consideration?
2. Whether the DRP was right in fact and circumstances of the case and in law in holding that unutilized MODVAT credit in question should be treated as actual payment of excise duty u/s 43 of the Act?
3. Whether the DRP was right in facts and circumstances of the case and in law in holding that duty paid and allowed as deduction under section 43B cannot be added to the value of closing stock ignoring provisions of section 145A of the Act?
4. Whether on facts and circumstances of the case, the DRP was right in deleting the disallowance made by the Assessing Officer (AO) u/s 43B of the Act amounting to Rs. 16,16,793/- on account of PLA Balance of Excise Duty of Vehicles/Spare Parts and PLA Balance R&D Cess on Vehicles?
5. Whether on facts and circumstances of the case, the DRP was right in deleting the disallowance made by the AO u/s 43B of the Act amounting to Rs.50,53,45,956/- on account of customs duty paid on import of components for Export purposes for which export had been made?
6. Whether on facts and circumstances of the case, the DRP was right in deleting the disallowance made by the AO u/s 43B of the Act amounting to Rs.93,58,25,308/- on account of Excise duty and CVD paid on purchases of components to be adjusted against Excise Duty payable on finished products?
7. Whether on facts and circumstances of the case, the DRP was right in deleting the disallowance made by the AO u/s 43B of the Act amounting to Rs.70,230/- on account of NCCD paid to be adjusted against Excise Duty payable on finished products?
8. Whether on facts and circumstances of the case, the DRP was right in deleting the disallowance made by the AO u/s 43B of the Act amounting to Rs.23,53,42,864/- on account of CVD (Modvat) paid on goods in transit to be adjusted against excise duty payable on finished products components?
9. Whether on facts and circumstances of the case, the DRP was right in deleting the disallowance made by the AO u/s 43B of the Act amounting to Rs. 16.18,98,461/- on account CVD (Modvat) paid on goods in transit to be adjusted against excise duty payable on finished products Sheet Coils?
10. Whether on facts and circumstance of the case, the DRP was right in deleting the disallowance made by the AO us 43B of the Act amounting to Rs.6,66,05,037/- on account of Customs Duty on goods in Transit/under inspection?

11 Whether on facts and circumstances of the case, the DRP was right in deleting the disallowance made by the AO u/s 43B of the Act amounting to Rs.37,96,61.014/- on account of Customs Duty on Inventory in Closing Stock?

12. Whether on facts and circumstances of the case, the DRP was right in deleting the disallowance made by the AO on account of excise duty (MODVAT) on input difference amounting to Rs. 23,07,200/-?

13. Whether on facts and circumstances of the case, the DRP was right in directing the AO to verify whether claim of deduction on account of withdrawal of add back amounting to Rs. 117,11.24,049/- u/s 43B of the Act has been allowed in earlier years and if not, then it shall not be brought to tax during AY under consideration?

14. Whether on facts and circumstances of the case, the DRP was right in deleting the disallowance made by the AO u/s 35(2AB) of the Act amounting to Rs.27032.58 lacs in view of the fact that the assessee had not submitted necessary certificate conveying the approval from the competent authority i.e., Secretary DSIR?

15. Whether on facts and circumstances of the case, the DRP was right in considering the expenses on Royalty payment alongwith R&D Cess payment as revenue in nature and deleting the disallowance of Rs. 696,56,00,412/- made by the AO?

58. Ground Nos.1, 2 & 3 are general in nature, hence do not require adjudication.

59. With regard to Ground No.4 regarding PLA balance on Excise Duty on Vehicles and R&D Cess on vehicles, at the outset, ld. AR of the assessee submitted that this issue is covered by the decision of Hon'ble Supreme Court in the case of CIT v. Modipon Ltd.: 400 ITR 1 and also covered in favour by order of the Delhi High Court in assessee's own case for:

- AY 1994-95, 1995-96, 1996-97 reported in 255 CTR 140 (Para 15-16)
- AY 1999-00 in ITA No. 31/2005 (Para 16-20)
- AY 2000-01 in ITA No. 442/2005 (Para 3)

He further submitted that on the aforesaid issue of PLA balance, the Department has not preferred an appeal before the Hon'ble SC against aforesaid order(s) passed by Hon'ble High Court for AYs 1999-00 and 2000-01 and the aforesaid issue, it is thus submitted, has attained finality. He also submitted that pertinently, the appeal filed by

the department, inter-alia, on this issue before the Delhi High Court for AY 2007-08, 2008-09 and 2009-10 have not been admitted.

60. On the other hand, Id. DR of the did not controvert the aforesaid proposition.
61. Considered the rival submissions and material available on record. We observe that the issue is covered in favour of the assessee by Hon'ble Delhi High Court decisions in its own case in earlier years. Respectfully following the same, we dismiss ground no.4 raised by the Revenue.
62. With regard to Ground No.5 regarding Customs Duty paid on import of components for export purposes for which export has been made, we observe that this issue is covered by the order of the Hon'ble Delhi High Court for:
 - AY 1999-2000 in ITA No. 250/2005 (Para 6)
 - AY 2005-06 in ITA No. 171/2012 (Para 3)
 - AY 2005-06 in ITA No. 172/2012 (Para 3)
 - AY 2006-07 in ITA No. 381/2016 (Para 3)

It is also observed that the aforesaid orders passed by the Hon'ble Delhi High Court have now been confirmed by the Hon'ble Supreme Court vide order dated 27.03.2025. We also observe that pertinently, the appeals filed by the department, inter-alia, on this issue before the Delhi High Court for AY 2007-08, 2008-09 and 2009-10 have not been admitted. Respectfully following the aforesaid orders of Hon'ble Supreme Court and Hon'ble Delhi High Court in assessee's own case in earlier assessment years, we dismiss ground no.5.

63. With regard to Ground Nos.6 & 7 regarding balance in RG 23A Part II, Id. DR of the Revenue submitted that the issue under consideration is against the assessee as the Hon'ble Supreme Court had decided the issue against the assessee. He Relied on the findings of lower authorities.
64. On the other hand, Id. AR of the assessee submitted that this issue is covered against the assessee by order of the Hon'ble Supreme Court in assessee's own case for AY 1999-00 and AY 2000-01 vide order dated 07.02.2020 (CA No.11923&11924 of 2018). He submitted that Hon'ble High Court had decided the alternate claim in favour of the assessee and held that the amount pertaining to goods already consumed and not includable in closing stock of raw materials and inputs is allowable as deduction (refer para 43-45) and this claim has not been disputed by the Department before the Supreme Court. He submitted that accordingly, the assessee may be

allowed deduction of the above. He submitted that Hon'ble High Court has further allowed deduction for amount representing additional or countervailing duty which has been paid directly to the custom authorities and this claim has also not been contested before the Hon'ble Supreme Court. He submitted that AO may therefore be directed to allow deduction for amount forming part of RG23A balance to the extent it has been directly paid to custom authorities and in this regard referred para 43 of Hon'ble Delhi High Court order for AY 1999-00 in ITA No.31/2005. He submitted that pursuant to the above orders of the Hon'ble Delhi High Court, the Tribunal has for the AY 2009-10, restored the said issue to the file of the assessing officer to verify the claim as per the directions of the Hon'ble High Court and held that deduction be allowed for the amount forming part of RG23A to the extent it has been directly paid to custom authorities.

65. Considered the rival submissions and material placed on record, we observe that the issue of balance in the RG 23A Part II was decided against the assessee by the Apex Court, however, the Hon'ble Delhi High Court has allowed the alternative plea of the assessee with regard to amounts pertaining to already consumed goods and not includable in closing stock of raw materials are concerned, we are remitting the alternative plea to the file of AO to evaluate the same as per the directions of High Court and allow the same as per law. In the result, grounds raised by the Revenue are allowed for statistical purpose.
66. With regard to Ground Nos.8 to 10 regarding Customs Duty (CVD) paid to be adjusted against excise duty payable on finished products and customs Duty on Goods in Transit/under inspection, we observe that this issue is covered in favour of the assessee by the order of the Hon'ble Supreme Court in the case of Samtel Color Ltd, wherein the Hon'ble Court while dismissing the SLP Civil Appeal No. 6449/2012 filed by the department against the order of the Hon'ble Delhi High Court reported in CIT vs. Samtel Color Ltd: 184 Taxman 120 has held that Custom duty paid is allowable deduction u/s 43B of the Act. Further we observe that the orders passed by the Hon'ble Delhi High Court on this issue in assessee's own case for AY 1999-00, 2000-01, 2001-02, 2005-06 and 2006-07 have now been confirmed by the Hon'ble Supreme Court vide order dated 27.03.2025, hence the aforesaid issue now stands settled in favour of the assessee. We also observe that the appeal filed by the department, inter-alia, on this issue before the Hon'ble Delhi High Court for AYs

2007-08, 2008-09 and 2009-10 have not been admitted. Accordingly, respectfully following the aforesaid orders of Hon'ble Supreme Court and Hon'ble Delhi High Court, we dismiss ground nos.8 to 10 raised by the Revenue.

67. With regard to Ground No.11 regarding customs duty included in closing inventory, we observe that this issue is covered in favour by order of the Hon'ble Supreme Court, in the case of Berger Paints India Limited v. CIT : 266 ITR 99 and also, covered in favour of the assessee in its own case by order of the Hon'ble Delhi High Court for:

- AY 1999-2000 in ITA No. 250/2005 (Para 12-13)
- AY 2000-01 in ITA No. 976/2005 (Para 3)
- AY 2001-02 in ITA No. 519/2010 (Para 4)
- AY 2005-06 in ITA No. 171/2012 (Para 3)
- AY 2006-07 in ITA No. 381/2016 (Para 3)

We further observe that the aforesaid orders passed by the Hon'ble High Court have now been confirmed by the Hon'ble Supreme Court vide recent order dated 27.03.2025 (received on 09.04.2025) passed in assessee's own case where the aforesaid issue has been decided in favour of the assessee and this issue now stands settled in favour of the assessee. Accordingly, respectfully following the aforesaid orders, we dismiss ground no.11.

68. With regard to Ground No.12 regarding disallowance on account of expenditure on Excise duty paid on input difference, we observe that Also, covered in favour by order of the Delhi High Court for:

- AY 2000-01 in ITA No. 976/2005 (Para 3)
- AY 2001-02 in ITA No. 519/2010 (Ques 4, Para 6)

We further observed that the appeal filed by the Department, inter-alia, on this issue before the Delhi High Court for AY 2007-08, 2008-09 and 2009-10 have not been admitted. We also observe that the orders of the Tribunal have been affirmed by Delhi High Court for assessment years 2000-01 and 2001-02. Further, the aforesaid order passed by the High Court, have now been confirmed by the Hon'ble Supreme Court vide recent order dated 27.03.2025 (received on 09.04.2025) passed in assessee's own case where the aforesaid issue has been decided in favour of the assessee. Respectfully following the same, we dismiss ground no.12 raised by the Revenue.

69. With regard to Ground No.13 regarding not allowing withdrawal of add back u/s 43B, we observed that this issue is covered in favour of the assessee by ITAT Orders for earlier years and the Department Appeal in AY 2004-05 on this issue has not been admitted by Delhi High Court vide order dated 28-01-2010. We also observe that similar claim made in AY 2010-11 was set-aside by the Tribunal to the AO and the AO has, in the appeal effect order, allowed deduction in respect of such deduction claimed. Accordingly, we follow the precedent and dismiss Ground No.13.
70. With regard to Ground No.14 regarding deduction claimed on account of expenditure on scientific research under section 35(2AB) for Gurgaon facility – Approval granted by Scientist G, we observe that this issue is covered in favour of the assessee by following orders:
- CIT vs. SandanVikas (India) Ltd.: 335 ITR 117 (Del.)
 - CIT vs. Claris Lifesciences Ltd.: 326 ITR 251 (Guj.)
 - Ferment Biotech Ltd. v. ACIT: 64 SOT 246 (Mum. Trib.)
 - Vivimed Labs Ltd. v. DCIT: ITA No. 1882 of 2014 (Hyd. Trib.)
 - ACIT v. Mecco Instruments (P.) Ltd.: ITA No.4246/Mum/2012 (Mum. Trib.)
- We further observe that the department had not filed any appeal before the Delhi High Court against the order for AY 2010-11 on this issue till date. Respectfully following the aforesaid decisions, we dismiss Ground No.14 raised by the Revenue.
71. With regard to Ground No.15 regarding disallowance of royalty and R&D Cess paid, we observe that this issue is covered in favour of the assessee by ITAT Orders for earlier years and the Department appeal against the aforesaid order of the Tribunal for AY 2006-07 has not been admitted by the Hon'ble Delhi High Court in ITA No.381/2016 and against the said order of the Hon'ble High Court, the department has not gone into appeal before the Hon'ble Supreme Court on this issue. Respectfully following the aforesaid decisions, we dismiss ground no.15 raised by the Revenue.
72. Now, we take up both assessee's appeals for AYs 2012-13 and 2013-14 together as the grounds in both the assessment years are common and the same are reproduced as under :-

“Assessment Year 2012-13

1. That on the facts and circumstances of the case the impugned assessment completed vide order dated 30.01.2017 passed under section 143(3) read with section 144C of the Income-tax Act, 1961 (the Act'), is illegal and bad in law.

1.1 That on the facts and circumstances of the case, the impugned assessment having been completed on the basis of directions issued by the Dispute Resolution Panel (DRP") under section 144C(5) of the Act, without judiciously and independently considering the factual and legal objections to the draft assessment order, is illegal and bad in law.

1.2 That the DRP erred on facts and in law in not directing the assessing officer to delete certain additions/ disallowance, which were squarely covered in favour of the appellant by the appellate orders for the earlier years.

2. That the assessing officer erred on facts of the case and in law in completing the impugned assessment at an income of Rs.4637,04,20,750/- as against income of Rs.1012,87.80, 183/- declared by the appellant.

3. That the Assessing Officer/ DRP erred on facts and in law in not allowing an aggregate claim of deduction of statutory duties/ taxes of Rs.199,18,33,081/- paid under section 43B of the Act.

3.1 That the Assessing Officer/DRP erred in making disallowance under section 43B of the Act following the assessment orders for the earlier assessment years despite admitting that in the earlier year(s) most of the issues have been decided in favour of the appellant.

3.2 That the Assessing Officer/DRP erred on facts and in law in holding that the deduction of liability to pay taxes/duties under section 43B is admissible only after such liability has been incurred under the Act.

3.3 That the Assessing Officer/DRP failed to appreciate that the assessee having admittedly paid Rs.4,61,131/- as R&D cess on vehicles in the relevant assessment year, the same were allowable deduction u/s 43B of the Act.

3.4 That the Assessing Officer has, without any basis or material, erroneously concluded that the aforesaid payments have been made in advance for the stocks still to be manufactured, without appreciating that as on 31.03.12 the appellant had finished stock of vehicles amounting to Rs.533 crores, which included accrued liability of excise duty and R&D cess amounting to Rs.62.65 crores and consequently, the same were, In any case, allowable deduction u/s 43B of the Act.

3.5 That the Assessing Officer/DRP erred on facts and in law in not allowing deduction under section 43B of the Act for a sum of

Rs.46,52,76,406/- representing the amount of excise duty actually paid on purchased inputs included in RG 23A Part II.

3.6 That the Assessing Officer/DRP failed to appreciate that the aforesaid balances represented the amount of excise duty actually paid by the appellant to the suppliers of raw materials and other inputs for which liability had already been incurred and thus could not be considered as advance payment of excise duty.

3.7. That the Assessing Officer/DRP erred on facts and in law in not allowing deduction under section 43B of the Act for a sum of Rs.86,08,29,267/- representing custom duty (CVD) paid to be adjusted against excise duty payable on finished products.

3.8 That the Assessing Officer/DRP erred on facts and in law in not allowing deduction under section 43B of the Act for a sum of Rs.14,24,41,371/- representing custom duty in respect of the goods in transit/under inspection.

3.9 That the Assessing Officer/DRP erred on facts and in law in not allowing deduction under section 43B of the Act for a sum of Rs.48,68,80,706/- representing the custom duty paid and included in valuation of closing stock.

3.10. That the Assessing Officer/DRP erred on facts and in law in not allowing deduction under section 43B of the Act for a sum of Rs.3,46,44,200/- being Customs Duty paid under protest.

3.11. That the Assessing Officer/DRP erred on facts and in law in not allowing deduction under section 43B of the Act for a sum of Rs. 13,00,000/- being Sales Tax paid under protest.

3.12. That the Assessing Officer/DRP erred in not following the binding decisions of the High Court and the Tribunal in the appellant's own case for the earlier assessment years, in gross violation of principles of judicial propriety.

4. That the Assessing officer/DRP erred on facts and in law in making further disallowance of Rs.4.55,97,813/- under section 14A of the Act, over and above suo-motu disallowance of Rs.2,44,02,187/- by the appellant.

4.1 That the Assessing officer/DRP erred on facts and in law in proceeding to make disallowance under section 14A simply on the basis of method/formula prescribed in Rule 8D of the I.T. Rules, without appreciating that pre-conditions for applying the said rule as prescribed in sub-sections (2)/(3) of section 14A of the Act were not satisfied.

4.2 That the Assessing officer/DRP erred on facts and in law in holding that suo-motu disallowance of Rs.2,44,02,187/- by the appellant in the return

of income under section 14A of the Act was incorrect and not backed by the documentary evidence.

4.4 Without prejudice, the Assessing officer/DRP erred on facts and in law in computing disallowance under section 14A of the Act read with Rule 8D of the Income Tax Rules.

5. That the Assessing officer erred on facts and in law in not allowing weighted deduction of Rs.781.23 crores (exclusive of recovery of Rs.23.33 crores) on gross R&D expenditure incurred by the appellant under section 35(2AB) of the Act.

5.1 That the Assessing officer failed to appreciate that the appellant having approved R&D Centres and having fulfilled the conditions of section 35(2AB) of the Act, is entitled to a weighted deduction in respect of the entire expenditure incurred by the appellant.

5.2 That the Assessing officer erred on facts and in law in denying deduction under section 35(2AB) of the Act on the alleged ground that the assessee failed to furnish requisite certificates issued by DSIR.

5.3. Without prejudice. the assessing officer erred on facts and in law in not allowing deduction of revenue expenditure incurred by the appellant under the provisions of the Act.

5.4 Without prejudice, the assessing officer erred on facts and in law in not allowing depreciation under section 32 or deduction under section 35(1)(iv) of the Act on capital expenditure incurred by the appellant.

6. That the Assessing Officer/DRP erred on facts and in law in holding royalty payments (both lumpsum and running) of Rs.1995,85,06,311 to be in nature of capital expenditure and in making a disallowance of Rs.1202,04,78,621/- (before allowing depreciation) out of the same after adjusting amount disallowed on transfer-pricing grounds.

6.1 That the Assessing Officer/DRP erred, on facts and in law in not appreciating that royalty paid by the appellant to Suzuki Motor Corporation, Japan (hereinafter referred to as "SMC") was merely for the limited right/license to manufacture and sell the licensed product for a specified duration in India and was therefore, revenue in nature.

6.2. That the Assessing officer/DRP erred on facts and in law in not appreciating that payment of royalty was directly linked and correlated with the production/ sales of cars and spares by the appellant and if there is no production/ sale of cars and spares, there will be no royalty payable to SMC.

6.3 That the Assessing officer/DRP erred on facts and in law in not appreciating that royalty payment (including cess) was held to be revenue expenditure in all the preceding assessment years till assessment year 2005-06

and that there being no change in facts during the year under consideration, there was no warrant or justification to take a totally contradictory view in holding the same to be capital expenditure.

6.4 Without prejudice, the assessing officer erred in calculating the amount of depreciation admissible on royalty.

7. That the Assessing officer/DRP erred on facts and in law in disallowing Rs.367,28,89,128/- (before allowing depreciation) on account of R&D cess on royalty, holding that cess also partook the character of royalty, without appreciating that royalty was paid to SMC whereas R&D cess on royalty, being a statutory payment. was paid to the Indian Government.

7.1 That the Assessing Officer erred in failing to appreciate that R&D cess, being a statutory payment, is governed by section 43B, which is a separate code in itself and overrides other provisions of the Act, and hence the payment of R&D cess is an allowable deduction under that section.

7.2 That the Assessing officer erred on facts and in law in not appreciating that R&D cess on royalty was always accepted to be revenue expenditure in all the previous assessments till assessment year 2005-06, and that there being no change in facts during the year under consideration, there was no warrant or justification to take a totally contradictory view and holding the same to be capital expenditure.

7.3 Without prejudice, the Assessing Officer erred on facts and in law in the computing the amount of disallowance.

7.4 Without prejudice, the assessing officer erred in calculating the amount of depreciation admissible on R&D cess.

8. That the Assessing Officer/ DRP has erred on facts and in law in making disallowance of Rs.67,11,08,616/-, being the expenditure on account of foreseen price increase (in short "FPI"), disregarding the consistent and accepted method of accounting followed by the appellant for last many years since inception.

8.1 That the Assessing officer/DRP completely failed to appreciate that there was a clear contractual agreement/ understanding between appellant and suppliers under which the appellant was liable to pay additional amount of price for the supplies of various inputs received during the year and accordingly, the said liability accrued during or before the end of that year and was accordingly allowable as deduction from assessable income.

8.2 That the assessing officer/DRP failed to appreciate that the mere fact that the exact amount of additional price payable to suppliers was not quantified until the end of relevant accounting year, did not mean that there was no accrual of liability in that year.

8.3 That the assessing officer/DRP erred on facts and in law in not taking cognizance of the fact that the entire amount of liability has either been paid or written back and offered to tax as its income in the succeeding assessment year(s).

8.4 That the DRP erred on facts and in law in alleging that calculation/ method/ basis of computing and claiming the liability on account of foreseen price increase was not furnished/ explained by the appellant holding that the appellant has failed to furnish evidence in support of its contention that price differential is worked out at end of the year after taking into account actual market price of raw material at the time of purchase.

8.5 Without prejudice, the Assessing Officer erred on facts and in law in not allowing deduction of the amount disallowed in the preceding assessment year(s) but actually paid written back during the year under consideration.

9. That the Assessing Officer/DRP erred on facts and in law in disallowing Rs.12,03,00,000/-, being the expenditure incurred on account of discharging corporate social responsibility (CSR), without appreciating that such expenditure was incurred wholly and exclusively for the purposes of business.

9.1 That the Assessing officer/ DRP erred on facts and in law in holding that expenditure incurred on CSR is, even otherwise, capital in nature, on the ground that the same resulted in enduring benefit to the appellant.

9.2 Without prejudice, the Assessing officer erred on facts and in law in not allowing depreciation under section 32 of the Act, consistent with his finding that the aforesaid expenditure is capital in nature.

10. That the Assessing officer/ DRP erred on facts and in law in treating gains from sale and purchase of mutual funds as "business income" as against the same being declared under the head "capital gains" by the appellant.

10.1 That the Assessing officer/DRP erred on facts and in law in assessing gain of Rs.242,68,36,912/- on transfer of units of mutual fund as business income as against long-term capital loss of Rs.244,85,70,375/- declared by the appellant after claiming benefit of indexation.

10.2 That the Assessing officer/DRP erred on facts and in law in assessing short-term capital gain of Rs.1.50,66,689/- as business income.

10.3. That the Assessing officer/DRP erred on facts and in law in holding that investment in units of mutual funds and shares were made as a systematic business activity, without appreciating that such investments were made on capital account and not as "stock-in-trade".

11. That the Assessing officer/DRP erred on facts and in law in disallowing purchases to the tune of Rs.211,49,00,000/- made by the assessee

from Suzuki Motor Corporation, Japan (in short SMC). on the ground that appellant failed to deduct tax at source, by invoking the provisions of section 40(a)(i) of the Act.

11.1 That on the facts and circumstances of the case and in law, the aforesaid disallowance is bad in law and not sustainable having being made in violation of principles of natural justice.

11.2. That the Assessing officer/DRP erred on facts and in law in holding that SMC had a Permanent Establishment [PE"] in India in terms of Article 5 of the India-Japan Tax Treaty [*Treaty"] and income arising to SMC from sale of goods to the assessee was attributable to the activities of such alleged PE, and was liable to tax in India.

11.3. That the Assessing officer/DRP erred on facts and in law in alleging that SMC had a place of management in India and hence, a fixed place PE in India in terms of Article 5(1) and 5(2) of the Treaty, on the ground that the executive directors on the board of the assessee who were Japanese nationals nominated (nominee directors) by SMC and held significant influence over the affairs of the assessee were employees of SMC and were deriving salary from SMC.

11.4. That the Assessing officer/DRP erred on facts and in law in alleging that the nominee directors were looking after the interests of and carrying on business of SMC in India.

11.5 That the Assessing officer/DRP erred on facts and in law in alleging that SMC also had dependent agent PE in India since the nominee directors were taking commercial decisions in the interest of SMC.

11.6 That the Assessing officer/DRP erred on facts and in law in alleging that the assessee also had service PE in India alleging that the nominee directors were rendering managerial services on behalf of SMC to the appellant.

11.7 Without prejudice, the Assessing officer/DRP erred on facts and in law in not appreciating that there is no concept of service PE under the Treaty.

11.8 Without prejudice, the Assessing officer/DRP erred on facts and in law in computing the profits attributable to the alleged PE of SMC in India at Rs.211,49,00,000/-, and disallowing the same under section 40(a)(xi) of the Act.

11.9 That the Assessing officer DRP erred on facts and in law by arbitrarily assuming 20% net profit margin on purchases made from SMC, out of which 50% profits alleged to be attributable to the alleged PE of SMC in India.

11.10 That the Assessing officer DRP erred on facts and in law in not appreciating that no disallowance under section 40(a)) of the Act was

warranted as the said provisions were not applicable in view of the provisions of Article 24 of the Treaty.

12. That the Assessing officer has erred in law, on facts and in the circumstances of the case in allowing TDS credit of Rs.36,81,17,016/- only against Rs.38,36,53,767/- claimed by the appellant before DRP/AO, thereby allowing a short-credit of Rs.1,55,36,751/-.

Transfer Pricing Adjustment on account of payment of royalty

13. That the assessing officer erred on facts and in law in making transfer pricing adjustment amounting to Rs.793, 80,27.690/- on account of the alleged difference in the arm's length price of international transaction of payment of royalty entered into by the appellant on the basis of the order under section 92CA(3) of the Act.

13.1 That the TPO / DRP erred on facts and in law in holding that the international transaction of payment of royalty does not satisfy the arm's length principles as envisaged under the Act.

13.2 That the TPO/ DRP erred on facts and in law in holding that out of the total royalty paid by the appellant, 39.60% was attributable to royalty towards payment for use of Suzuki Motor Corporation's ('SMC') trademark and the appellant was not required to pay royalty to SMC towards use of SMC's trademark.

13.3 That the TPO/DRP erred on facts and in law in adopting a completely contradictory position of accepting Transactional Net Margin Method (TNMM) as the most appropriate method on the one hand, and yet seeking to question appropriateness of individual elements of operating cost on the other, thereby failing to appreciate fundamental TP principles.

13.4 That the assessing officer/TPO erred on facts and in law in separately examining the international transactions entered into by the appellant, not appreciating that such transactions being closely linked have been appropriately benchmarked considering entity wide profitability.

13.5 That the TPO / DRP erred on facts and in law in rejecting Transactional Net Margin Method (TNMM) as the most appropriate method for benchmarking the international transaction of payment of royalty.

13.6 That the TPO/ DRP erred on facts and in law in not following any of the prescribed method for determination of the arm's length price of international transaction of payment of royalty.

13.7 That the TPO/ DRP erred on facts and in law in failing to appreciate that at the time of entering into the license agreement, the appellant and SMC were unrelated parties.

13.8 That the TPO / DRP erred on facts and in law in not appreciating that brand Maruti- Suzuki was used by the appellant from its inception.

13.9 That the TPO / DRP erred on facts and in law in not appreciating that the use of brand Suzuki was in the commercial interest of the appellant.

13.10 That the TPO / DRP erred on facts and in law in holding that 'Suzuki brand has piggybacked the brand 'Maruti' owned by the appellant.

13.11 That the TPO / DRP erred on facts and in law in artificially splitting the single and in severable license agreement entered into by the appellant with SMC.

13.12 That the TPO / DRP erred on facts and in law in not appreciating that all rights vested in the license agreement are in severable and linked to the core right to manufacture and sell licensed products.

13.13 That the TPO / DRP erred on facts and in law in holding that co-branding of "Marui- Suzuki" has resulted in the reinforcement of value of "Suzuki" brand and simultaneous impairment of "Maruti" trademark.

13.14 That the TPO / DRP erred on facts and in law in holding that Suzuki brand in India is relatively weak".

13.15 That the TPO /DRP erred on facts and in law in not following the appellate order passed by the Hon'ble Tribunal for assessment year 2005-06 , 2006-07 & 2007-08 wherein similar Transfer Pricing adjustment on account of international transaction of payment of royalty was deleted.

13.16 That the TPO / DRP erred on facts and in law in holding, on the basis of conjectures and surmises that, the associated enterprise has charged separate royalty for the use of technology and for use of brand name in the proportion in which it incurs expenditure on R&D and brand promotion.

13.17 That the TPO / DRP erred on facts and in law in not appreciating that the royalty was the consolidated charge made by the appellant for obtaining right and license to manufacture motor vehicles in India using the technology and brand name of SMC, Japan.

13.18 Without prejudice, the TPO / DRP erred in considering the consolidated financials of the associated enterprise for the purpose of segregating the payment of royalty for the use of technology and for the use of brand name.

13.19 Without That the assessing officer / the TPO erred on facts and in law in ignoring the search for third party independent technology agreements conducted by the appellant

14. That the Assessing officer erred on facts and in law in charging/ computing interest under sections 234B of the Act.

14.1 That the Assessing officer grossly erred in computing the interest under section 234B of the Act by first adjusting the interest computed under that section on the basis of the assessed income against the self assessment tax paid by the appellant.

“Assessment Year 2013-14

1. That on the facts and circumstances of the case the impugned assessment completed vide order dated 30.01.2017 passed under section 143(3) read with section 144C of the Income-tax Act, 1961 (the Act'), is illegal and bad in law.

1.1 That on the facts and circumstances of the case, the impugned assessment having been completed on the basis of directions issued by the Dispute Resolution Panel (DRP") under section 144C(5) of the Act, without judiciously and independently considering the factual and legal objections to the draft assessment order, is illegal and bad in law.

1.2 That the DRP erred on facts and in law in not directing the assessing officer to delete certain additions/ disallowance, which were squarely covered in favour of the appellant by the appellate orders for the earlier years.

2. That the assessing officer erred on facts of the case and in law in completing the impugned assessment at an income of Rs.5142,24,03,360/- as against income of Rs.2023,22,52,860/- declared by the appellant.

3. That the Assessing Officer/ DRP erred on facts and in law in not allowing an aggregate claim of deduction of statutory duties/ taxes of Rs.285,22,64,287/- paid under section 43B of the Act.

3.1 That the Assessing Officer/DRP erred in making disallowance under section 43B of the Act following the assessment orders for the earlier assessment years despite admitting that in the earlier year(s) most of the issues have been decided in favour of the appellant.

3.2 That the Assessing Officer/DRP erred on facts and in law in holding that the deduction of liability to pay taxes/duties under section 43B is admissible only after such liability has been incurred under the Act.

3.3 That the Assessing Officer/DRP failed to appreciate that the assessee having admittedly paid Rs.1,15,02,211/- as R&D cess on vehicles in the relevant assessment year, the same were allowable deduction u/s 43B of the Act.

3.4 That the Assessing Officer/DRP erred on facts and in law in not allowing deduction under section 43B of the Act for a sum of

Rs.90,35,61,048/- representing the amount of excise duty actually paid on purchased inputs included in RG 23A Part II.

3.5 That the Assessing Officer/DRP failed to appreciate that the aforesaid balances represented the amount of excise duty actually paid by the appellant to the suppliers of raw materials and other inputs for which liability had already been incurred and thus could not be considered as advance payment of excise duty.

3.6. That the assessing Officer has, without any basis or material, erroneously concluded that the aforesaid payments have been made in advance for the stocks still to be manufactured, without appreciating that as on 31.03.13 the appellant had finished stock of vehicles amounting to Rs.480.7 crores, which included accrued liability of excise duty and R& D cess amounting to Rs.62.57 crores and consequently, the same were, in any case, allowable deduction u/s 43B of the Act.

3.7 That the Assessing Officer erred on facts and in law in not allowing deduction under section 43B of the Act for a sum of Rs.8,39,65,508/- representing custom duty (CVD) paid to be adjusted against excise duty payable on finished products.

3.8 That the Assessing Officer/DRP erred on facts and in law in not allowing deduction under section 43B of the Act for a sum of Rs.8,39,65,508/- representing custom duty in respect of the goods in transit/under inspection.

3.9 That the Assessing Officer/DRP erred on facts and in law in not allowing deduction under section 43B of the Act for a sum of Rs.41,68,62,444/- representing the custom duty paid and included in valuation of closing stock.

3.10. That the Assessing Officer/DRP erred on facts and in law in not allowing deduction under section 43B of the Act for a sum of Rs.38,40,02,605/- being Customs Duty paid under protest.

3.11. That the Assessing Officer/DRP erred on facts and in law in not allowing deduction under section 43B of the Act for a sum of Rs.38,40,02,605/- being Sales Tax paid under protest.

3.12. That the Assessing Officer/DRP erred in not following the binding decisions of the High Court and the Tribunal in the appellant's own case for the earlier assessment years, in gross violation of principles of judicial propriety.

4. That the Assessing officer/ DRP erred on facts and in law in not allowing the claim of the appellant for withdrawal of add back of Rs.199,37.32,096 (inadvertently mentioned as Rs.199,18,33,081/- earlier) in computation of taxable income, being the amount disallowed in earlier years under section 43B of the Act.

4.1 That the Assessing officer/ DRP erred on facts and in law in holding that said amount of Rs.199,37,32.096 (inadvertently mentioned as Rs.199,18,33.081/-) is the amount claimed under section 43B for AY 2011-12, in which year deduction was allowed by the Assessing officer/ DRP, without appreciating that the said amount pertained to AY 2012- 13, in which year the Assessing officer/ DRP did not grant any relief to the appellant.

5. That the Assessing officer/DRP erred on facts and in law in making further disallowance of Rs.8.33.82.325/- under section 14A of the Act, over and above suo-motu disallowance of Rs.2, 82,12,231/- by the appellant.

5.1 that the Assessing officer/DRP erred on facts and in law in proceeding to make disallowance under section 14A simply on the basis of method/ formula prescribed in Rule 8D of the I.T. Rules, without appreciating that pre-conditions for applying the said rule as prescribed in sub-sections (2) (3) of section 14A of the Act were not satisfied.

5.2 That the Assessing officer/DRP erred on facts and in law in holding that suo-motu disallowance of Rs.2,82,12.231/- by the appellant in the return of income under section 14A of the Act was incorrect and not backed by documentary evidence.

5.3 Without prejudice, the Assessing Officer/DRP erred on facts and in law in computing disallowance under section 14A of the Act read with Rule 8D of the I.T. Rules.

6. That the Assessing officer/ DRP erred on facts and in law in not allowing weighted deduction of Rs.415.42 crores on gross R&D expenditure incurred by the appellant under section 352AB) of the Act, comprising of Rs.383.41 crores pertaining to Rohtak Unit and Rs.32.01 crores pertaining to Gurgaon Unit.

6.1 That the Assessing Officer/ DRP failed to appreciate that the appellant having approved R&D Centres and having fulfilled the conditions of section 35(2AB) of the Act is entitled to weighted deduction in respect of the entire gross expenditure incurred.

6.2 That the Assessing officer/ DRP erred on facts and in law in denying deduction under section 35(2AB) of the Act on the alleged ground that the appellant failed to furnish requisite certificate issued by DSIR pertaining to Rohtak Unit.

6.3 Without prejudice, the assessing officer erred on facts and in law in not allowing deduction of revenue expenditure incurred by the appellant under the provisions of the Act.

6.4 Without prejudice, the assessing officer erred on facts and in law in not allowing deduction under section 35(1)(iv) and/ or under section 32 of the Act.

7. That the Assessing Officer/DRP erred on facts and in law in holding royalty payments (both lumpsum and running) of Rs.2516,73,64,355/- to be in the nature of capital expenditure and in making disallowance of Rs.1457,70,21,594/- (before allowing depreciation) out of the same after adjusting amount disallowed on transfer-pricing grounds.

7.1 That the Assessing Officer/DRP erred, on facts and in law in not appreciating that royalty paid by the appellant to Suzuki Motor Corporation, Japan (hereinafter referred to as "SMC") was merely for the limited right/license to manufacture and sell the licensed product for a specified duration in India and was therefore, revenue in nature.

7.2 Without prejudice, the assessing officer erred on facts and in law in not allowing depreciation on the amount of royalty disallowed in assessment year 2012-13.

8. That the Assessing officer/DRP erred on facts and in law in disallowing Rs.2,83,14,000/- (correct amount of Rs.116,26,02,467 as pointed out in rectification application) (before allowing depreciation) on account of R&D cess on royalty, holding that cess also partook the character of royalty, without appreciating that royalty was paid to SMC whereas R&D cess on royalty, being a statutory payment, was paid to the Indian Government.

8.1 That the Assessing Officer erred in failing to appreciate that R&D cess, being a statutory payment, is governed by section 43B, which is a separate code in itself and overrides other provisions of the Act, and hence the payment of R&D cess is an allowable deduction under that section.

8.2 Without prejudice, the assessing officer erred on facts and in law in not allowing depreciation on the amount of R&D cess disallowed in Assessment Year 2012-13.

9. That the Assessing Officer/ DRP has erred on facts and in law in making disallowance of Rs.57,89.61,017/-, being the expenditure on account of foreseen price increase ("FPT) disregarding the consistent and accepted method of accounting followed by the appellant for last many years since inception.

9.1 That the Assessing officer/DRP completely failed to appreciate that there was a clear contractual agreement/ understanding between appellant and suppliers under which the appellant was liable to pay additional amount of price for the supplies of various inputs received during the year and accordingly, the said liability accrued during or before the end of that year and was accordingly allowable as deduction from assessable income.

9.2 That the DRP erred on facts and in law in alleging that calculation/ method/ basis of computing and claiming the liability on account of foreseen price increase was not furnished explained by the appellant holding that the

appellant has failed to furnish evidence in support of its contention that price differential is worked out at end of the year after taking into account actual market price of raw material at the time of purchase.

9.3 Without prejudice, the Assessing Officer erred on facts and in law in not allowing deduction of the amount disallowed in the preceding assessment year(s) but actually paid/ written back during the year under consideration.

10. That the Assessing Officer/DRP erred on facts and in law in disallowing Rs.18,94,00,000/-, being the expenditure incurred on account of discharging corporate social responsibility (CSR), without appreciating that such expenditure was incurred wholly and exclusively for the purposes of business.

10.1. That the Assessing officer/ DRP erred on facts and in law in holding that expenditure incurred on CSR is, even otherwise, capital in nature, on the ground that the same resulted in enduring benefit to the appellant.

10.2 Without prejudice, the Assessing officer erred on facts and in law in not allowing depreciation under section 32 of the Act, consistent with his finding that the aforesaid expenditure is capital in nature.

11. That the Assessing officer/ DRP erred on facts and in law in not accepting the claim of the appellant that sales tax incentive/subsidy amounting to Rs.15,20,00,000/- represented capital receipt not liable to tax under the provisions of the Act.

11.1 That the Assessing officer/ DRP erred on facts and in law in holding that the sales tax incentive/subsidy was not capital receipt but taxable revenue receipt under section 28(iv) of the Act.

11.2 That the Assessing officer/ DRP erred on facts and in law in not appreciating that since the object of subsidy was to promote industrial growth/ development, to generate employment, etc., the subsidy received was in the nature of capital receipt not liable to tax under the provisions of the Act.

12. That the Assessing officer/ DRP erred on facts and in law in treating gains from sale and purchase of mutual funds as business income" as against the same being declared under the head capital gains" by the appellant.

12.1 That the Assessing officer/DRP erred on facts and in law in assessing gain on transfer of units of mutual fund as business income as against long-term capital gain of Rs.50,30,46,840/- declared by the appellant.

12.2 That the Assessing officer/DRP erred on facts and in law in assessing short-term capital gain of Rs.1,34,79,923/- as business income.

12.3 That the Assessing officer/DRP erred on facts and in law in holding that investment in units of mutual funds were made as a systematic business

activity, without appreciating that such investments were made on capital account and not as stock-in-trade".

13. That the Assessing Officer/DRP erred on facts and in law in disallowing That the Assessing officer/DRP erred on Rs. 226,56,00,000/- under section 40(a)(i) of the Act out of purchases made by the appellant from Suzuki Motor Corporation, Japan (SMC), on the ground that appellant failed to deduct tax at source.

13.1 That the Assessing officer/DRP erred on facts and in law in holding that SMC had a Permanent Establishment (PE') in India in terms of Article 5 of the India-Japan Tax Treaty (Treaty') and income arising to SMC from sale of goods to the assessee was attributable to the activities of such alleged PE, and was liable to tax in India.

13.2 That the Assessing officer/DRP erred on facts and in law in alleging that SMC had a place of management in India and hence, a fixed place PE in India in terms of Article 5(1) and 5(2) of the Treaty, on the ground that the executive directors on the board of the assessee who were Japanese nationals nominated (nominee directors) by SMC and held significant influence over the affairs of the assessee were employees of SMC and were deriving salary from SMC.

13.3 That the Assessing officer/DRP erred on facts and in law in alleging that the nominee directors were looking after the interests of and carrying on business of SMC in India.

13.4 That the Assessing officer/DRP erred on facts and in law in alleging that SMC also had dependent agent PE in India since the nominee directors were taking commercial decisions in the interest of SMC.

13.5 That the Assessing officer/DRP erred on facts and in law in alleging that the assessee also had service PE in India alleging that the nominee directors were rendering managerial services on behalf of SMC to the appellant.

13.6 Without prejudice, the Assessing officer/DRP erred on facts and in law in not appreciating that there is no concept of service PE under the Treaty.

13.7 Without prejudice, the Assessing officer/DRP erred on facts and in law in computing the profits attributable to the alleged PE of SMC in India at Rs.226,56,00,000/-, and disallowing the same under section 40(a)(i) of the Act.

13.8 That the Assessing officer/DRP erred on facts and in law by arbitrarily assuming 20% net profit margin on purchases made from SMC, out of which 50% profits are alleged to be attributable to the alleged PE of SMC in India.

13.9 That the Assessing officer/DRP erred on facts and in law in not appreciating that no disallowance under section 40(a)(i) of the Act was warranted as the said provisions were not applicable in view of the provisions of Article 24 of the Treaty.

14. That the Assessing officer has erred in law, on facts and in the circumstances of the case in allowing TDS credit of Rs.45,15,09,096/- only against Rs.46,38,62,474 as claimed by the appellant in the revised return of income, thereby allowing a short-credit of Rs.1,23,53,378.

15. That the Assessing officer has erred in law, on facts and in the circumstances of the case in not allowing foreign tax credit of Rs.2,44,778 without assigning any specific reason.

16. That the assessing officer erred on facts and in law in making an addition amounting to Rs.10,59,03,42,761 on account of the alleged difference in the arm's length price of international transactions of payment of royalty entered into by the appellant allegedly on the basis of the order under section 92CA(3) of the Act.

16.1 That the TPO / DRP erred on facts and in law in allegedly holding that the arm's length price of the international transaction of payment of royalty attributable to use of brand was Nil.

16.2 That the TPO / DRP erred on facts and in law in holding that out of the total royalty paid. 42.08% was attributable towards use of SMS's trademark and the appellant was not required to pay any royalty to SMC towards use of SMC's trademark.

16.3 That the TPO / DRP erred on facts and in law in holding, on the basis of conjectures and surmises that, the associated enterprise has charged separate royalty for the use of technology and for use of brand name in the proportion in which it incurs expenditure on R&D and brand promotion.

16.4 That the TPO / DRP erred on facts and in law in not appreciating that the royalty was the consolidated charge made by the appellant for obtaining right and license to manufacture motor vehicles in India using the technology and brand name of the SMC, Japan.

16.5 That the TPO /DRP erred on facts and in law in artificially splitting the single and inseverable license agreement entered into by the appellant with SMC.

16.6 That the TPO / DRP erred on facts and in law in not appreciating that all rights in the license agreement are inseverable and linked to the core right to manufacture and sell licensed products, which formed the foundation of the business of the appellant.

16.7 That the TPO / DRP erred on facts and in law in holding that 'Suzuki' brand has piggybacked the brand 'Maruti' owned by the appellant.

16.8 That the TPO / DRP erred on facts and in law in holding that "Suzuki brand in India is relatively weak".

16.9 That the TPO / DRP erred on facts and in law in holding that co-branding of "Maruti- Suzuki has resulted in the reinforcement of value of "Suzuki" brand and simultaneous impairment of "Maruti" trademark.

16.10 That the TPO/ DRP erred on facts and in law in not appreciating that brand 'Maruti- Suzuki was used by the appellant from its inception and at the time of entering into the license agreement the appellant and SMC were unrelated parties.

16.11 That the TPO/ DRP erred on facts and in law in not appreciating that the use of brand 'Suzuki was in the commercial interest of the appellant.

16.12 That the TPO/ DRP erred on facts and in law in not following any of the prescribed method for determination of the arm's length price of international transaction of payment of royalty.

16.13 That the TPO/DRP erred on facts and in law in adopting a completely contradictory position of accepting Transactional Net Margin Method (TNMM) as the most appropriate method on the one hand, and yet seeking to question appropriateness of individual elements of operating cost on the other. thereby failing to appreciate fundamental TP principles.

16.14. That the TPO / DRP erred on facts and in law in rejecting TNMM as the most appropriate method for benchmarking the international transaction of payment of royalty.

16.15. That the assessing officer/TPO erred on facts and in law in separately examining the international transactions entered into by the appellant., not appreciating that such transactions being closely linked, have been appropriately benchmarked considering entity wide profitability.

16.16. That the assessing officer / the TPO erred on facts and in law in ignoring the search for third party independent technology agreements conducted by the appellant, for alternatively establishing the payment of royalty to be at an arm's length.

16.17. That the TPO/ DRP erred on facts and in law in not following the appellate order passed by the Hon'ble Tribunal for assessment year 2005-06, 2006-07 and 2007-08 wherein similar Transfer Pricing adjustment on account of international transaction of payment of royalty was deleted.

16.18. Without prejudice, the TPO/ DRP erred in considering the consolidated financials of the associated enterprise for the purpose of segregating the payment of royalty for the use of technology and for the use of brand name.

16.19. Without prejudice, that the TPO/DRP erred on facts and in law in incorrectly computing the ratio of Brand Promotion and Research and Development (R&D) expenses incurred by SMC at 42.08% instead of 38.43% for the purpose of splitting the amount of royalty paid by the assessee to SMC.

16.20. Without prejudice, that the TPO erred on facts and in law in holding the arm's length price of royalty allegedly attributable to use of trademark as Nil despite himself computing the arm's length royalty rate at 1.50% applying CUP method.

17. That the Assessing officer erred on facts and in law in charging computing interest under section 234B of the Act.

17.1 That the Assessing officer grossly erred in computing the interest under section 234B of the Act by first adjusting the interest computed under that section on the basis of the assessed income against the self assessment tax paid by the appellant.”

73. Ground Nos.1 & 2 in both the AYs 2012-13 & 2013-14 are general in nature, hence not adjudicated.
74. With regard to Ground Nos.3 to 3.2 in both the AYs 2012-13 & 2013-14 regarding disallowing deduction claimed u/s 43B of the Act raised by the assessee are general, does not require any adjudication.
75. With regard to Ground Nos.3.3 & 3.4 and 3.3 in AYs 2012-13 & 2013-14 respectively regarding excise duty paid i.e. balance in PLA - (a) Excise Duty on Vehicles, (b) R&D Cess on vehicles and (c) Excise Duty on spare parts, this issue is covered in favour of the assessee and on this issue, we dismiss the ground no.4 of Revenue's appeal in paras 59 to 61 in this order. Accordingly, these grounds raised by the assessee are allowed.
76. With regard to Ground Nos.3.5 & 3.6 and 3.4 to 3.6 in AYs 2012-13 & 2013-14 respectively regarding balance in RG 23A Part II, this issue is decided against the Revenue by us in Paras 63 to 65 while dealing Ground Nos.6 & 7 of Revenue's appeal, accordingly these appeals filed by the assessee are allowed.
77. With regard to Ground Nos.3.7 & 3.8 in AYs 2012-13 & 2013-14, Customs Duty (CVD) paid to be adjusted against excise duty payable on finished products and Customs Duty on Goods in Transit/under inspection, this issue is decided by us in

Ground Nos.8 to 10 in Revenue's appeal in Para 66 of the instant order against the Revenue, hence these grounds raised by the assessee are allowed.

78. With regard to Ground Nos.3.9 in AYs 2012-13 & 2013-14 regarding Customs duty included in closing inventory, this issue is also decided by us in Revenue's Ground No.11 in para 67 above against the Revenue. Accordingly, we allow this ground of assessee's appeals.
79. With regard to Ground Nos.3.10 & 3.11 in AYs 2012-13 & 2013-14 regarding Customs Duty/ Sales Tax/ Excise Duty paid under protest, we observe that this issue is covered by order of Hon'ble Delhi High Court in the case of CIT v. Dharampal Satyapal Sons (P.) Ltd : 50 DTR 287. We further observe that this issue is covered in favour of the assessee by the order of Hon'ble Delhi High Court in assessee's own case for AY 1999-00 in ITA No.250/2005 since the Hon'ble Court had allowed deduction for the duty amount which has been paid directly to the custom authorities. Further this issue is also decided by the ITAT in favour of the assessee in AYs 2007-08 to 2010-11. Respectfully following the aforesaid decision, we allow these grounds.
80. Ground No.3.12 in both the AYs 2012-13 & 2013-14 are general in nature, hence not adjudicated.
81. With regard to Ground No.4 & 4.1 in AY 2013-14 regarding not allowing withdrawal of add back u/s 43B, this issue is also decided by us against the Revenue in Revenue's appeal in Ground No.13 in para 69 above. Hence, these grounds are allowed.
82. With regard to Ground Nos.4 to 4.3 and 5 to 5.3 in AYs 2012-13 & 2013-14 respectively regarding disallowance u/s 14A of the Act, this issue is dealt by us in assessee's appeal in AY 2011-12 I paras 5 to 13 and the grounds in Assessment Year 2011-12 are allowed. Accordingly, these grounds raised by the assessee are allowed.
83. With regard to Ground Nos.5 to 5.4 and 6 to 6.4 in AYs 2012-13 & 2013-14 respectively regarding deduction claimed on account of expenditure on scientific research under section 35(2AB) – Short approval of expenses granted in Form 3CL, this issue is decided by us in Paras 14 to 18 in assessee's appeal in AY 2011-12 in favour of the assessee. Accordingly, these grounds raised by the assessee are allowed.
84. With regard to Ground Nos.6 to 6.4 and 7 to 7.2 in AYs 2012-13 & 2013-14 respectively regarding disallowance of royalty paid, this issue is decided by us in Revenue's appeal for AY 2011-12 in Ground No.15 against the Revenue. Hence, these grounds raised by the assessee are allowed.

85. With regard to Ground Nos.7 to 7.4 and 8 to 8.2 in AYs 2012-13 & 2013-14 respectively Disallowance of R&D Cess paid, we observe that this issue is covered in favour by ITAT Orders for earlier years. We further observe that Department appeal against the aforesaid order of the Tribunal for AY 2006-07 has not been admitted by the Hon'ble Delhi High Court in ITA No.381/2016 and against the said order of Hon'ble High Court, the department has not gone into appeal before the Hon'ble Supreme Court on this issue. We also observe that similarly, the appeal filed by the department, inter-alia, on this issue before the Hon'ble Delhi High Court for AY 2007-08, 2008-09 and 2009-10 have not been admitted. Accordingly, following the precedent, we allow these grounds.
86. With regard to Ground Nos.8 to 8.5 and 9 to 9.3 in AYs 2012-13 & 2013-14 respectively regarding disallowance on account of Provisional Liability- Expenditure on account of FPI-OE Components, we have dealt this issue in paras 19 to 22 of assessee's appeal for AY 2011-12 above in favour of the assessee. Accordingly, these grounds are allowed in favour of the assessee.
87. With regard to Ground Nos.9 to 9.2 and 10 to 10.2 in AYs 2012-13 & 2013-14 respectively disallowance of expenditure incurred on Corporate Social Responsibility, This issue is dealt by us in Paras 27 to 30 in assessee's appeal for AY 2011-12 above and the same is decided in favour of the assessee as per directions therein. Accordingly, these grounds are decided in favour of the assessee as per directions given in paras 27 to 30.
88. With regard to Ground Nos.11 to 11.2 AY 2013-14 regarding Sales Tax Exemption – a revenue receipt, we observe that this issue is covered in favour of the assessee by order of Hon'ble Delhi High Court for:
- AY 2005-06
 - AY 2006-07
 - AY 2008-09
 - AY 2009-10

We further observe that the aforesaid orders passed by Hon'ble High Court for AY 2005-06 and 2006-07 have now been confirmed by the Hon'ble Supreme Court vide recent order dated 27.03.2025 passed in assessee's own case where the aforesaid issue has been decided in favour of the assessee. We also observe that the Tribunal, while deciding the appeal for AY 2008-09 and 2009-10 decided the aforesaid issue against the assessee. On appeal, the High Court has, vide order dated 26.07.2024, decided the

issue in favour of the appellant (refer pgs. 896 of CLPB Vol III). Respectfully following the order of Hon'ble Delhi High Court dated 26.07.2024. That being the fact on record, before us, both Ld AR and Ld DR made elaborate submissions in the form of written submissions and rejoinders, since the issue under consideration is already covered by the decision of Hon'ble High Court, we are inclined to allow these grounds raised by the assessee.

89. With regard to Ground Nos.10 to 10.3 and 12 to 12.3 in AYs 2012-13 & 2013-14 respectively regarding income from trading in mutual funds/shares treated as business income and not as long term/short term capital gain, this issue is decided by us in assessee's appeal in Ground Nos.9 to 9.4 in paras 40 to 43 above in favour of the assessee with the directions given therein. Hence, these grounds are decided in favour of the assessee as per the directions given in paras 31 to 36 above.
90. With regard to Ground Nos.11 to 11.10 and 13 to 13.9 in AYs 2012-13 & 2013-14 respectively regarding disallowance of purchases made from M/s Suzuki Motor Corporation (SMC) on account of non-deduction of tax, this issue is allowed by us in favour of the assessee in assessee's appeal for AY 2011-12 in Ground Nos.10 to 10.10 in paras 37 to 43 above. Accordingly, these grounds are allowed in favour of the assessee.
91. With regard to Ground Nos.13 to 13.19 and 16 to 16.20 in AYs 2012-13 & 2013-14 respectively regarding TP – royalty, this issue is decided in favour of the assessee in Ground Nos.12 to 12.19 in assessee's appeal for AY 2011-12 in paras 48 to 51 above. Hence, these grounds are allowed in favour of the assessee.
92. With regard to Ground No.12 and 14 AYs 2012-13 & 2013-14 respectively regarding not allowing credit of TDS certificates, this issue is decided by us in assessee's appeal for AY 2011-12 in Paras 44 to 47 above in favour of the assessee for statistical purposes. Accordingly, this issue is decided in favour of the assessee for statistical purposes.
93. With regard to Ground Nos.14 & 14.1 and 17 & 17.1 in AYs 2012-13 & 2013-14 respectively regarding charging interest u/s 234A, 234B, 234C and 234, this issue is decided by us in Ground No.13 of assessee's appeal for AY 2011-12 in Ground No.13 in paras 52 to 55 above in favour of the assessee. Hence, these grounds are decided in favour of the assessee for statistical purposes.

94. With regard to Ground No.15 in AY2013-14 regarding not allowing Foreign Tax Credit, we observe that in the computation of income annexed to the assessment order, the assessing officer has denied foreign tax credit of Rs.2,44,778 claimed by the assessee without assigning any reason thereof. We further observe that the aforesaid credit having being claimed in accordance with provisions of section 90/90A was duly allowable. Accordingly, we direct the AO to allow the claim and allow the ground no.15 after due verification.
95. With regard to additional ground Nos.1& 2 raised in AYs 2012-13 &2013-14, the same are decided vide para 56 in assessee's appeal for AY 2011-12 wherein ld. AR of the assessee has not pressed these additional grounds and the same are dismissed as not pressed.
96. In the result, all the three appeals of the assessee are allowed as indicated above and the appeal of Revenue is partly allowed.

Order pronounced in the open court on this 8th day of October, 2025.

**Sd/-
(VIMAL KUMAR)
JUDICIAL MEMBER**

**sd/-
(S.RIFAUR RAHMAN)
ACCOUNTANT MEMBER**

**Dated: 08.10.2025
TS**

Copy forwarded to:

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

**ASSISTANT REGISTRAR
ITAT, NEW DELHI**