आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI

श्री चंद्र पूजारी,लेखा सदस्य एवं श्रीजी. पवन कुमार,न्यायिकसदस्यकेसमक्ष

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SHRI G. PAVAN KUMAR, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No.766/Mds/2016

निर्धारण वर्ष /Assessment year : 2011-12

The Deputy Commissioner of Income Tax, Corporate Circle 5(1) Chennai.	**Vs.**	M/s. Regen Powertech (P) Ltd. Samson Towers, 3rd, 4th & 5th floors, 403L, Pantheon Road, Egmore, Chennai 600 008.

आयकर अपील सं./I.T.A. No.786/Mds/2016

निर्धारण वर्ष /Assessment year : 2011-12

M/s. Regen Powertech (P) Ltd. Samson Towers, 3rd, 4th & 5th floors, 403L, Pantheon Road, Egmore, Chennai 600 008.	**Vs.**	The Deputy Commissioner of Income Tax, Corporate Circle 5(1) Chennai.

[PAN AADCR 5531M]

(अपीलार्थी/Appellant)	**(प्रत्यर्थी/Respondent)**

Assessee by : Shri. B. Ramakrishnan, FCA
Department by : Shri. Anuragh Sahay, CIT.

सुनवाई की तारीख/Date of Hearing : 14-06-2016
घोषणा की तारीख /Date of Pronouncement : 17-08-2016

आदेश / O R D E R

PER G. PAVAN KUMAR, JUDICIAL MEMBER:

The cross-appeal filed by the Revenue and assessee respectively, is directed against order of the Deputy Commissioner of Income Tax, Corporate Circle 5(1), Chennai dated 29.01.2016 for the assessment year 2011-2012 passed u/s.143(3) r.w.s. 92CA and 250 of the Income Tax Act, 1961 (herein after referred to as 'the Act'). Since the issue in these appeals are common in nature, these appeals are clubbed, heard together, and disposed of by this common order for the sake of convenience, first, we take up assessee appeal in ITA No.786/Mds/2016 of assessment year 2011-2012 for adjudication.

2. The assessee has raised the following grounds of appeal:-

1. *''For that the direction of the Dispute Resolution Panel is contrary to law, facts and circumstances of the case.*
2. *For that the Dispute Resolution Panel erred in confirming the Downward adjustment to the tune of ₹2,95,08,102/- on payment of Royalty to AE for use of Technical Know-how for manufacture of Wind Electric Generator.*
3. *For that the Dispute Resolution Panel erred in confirming the action of the Assessing Officer in disallowing the expenditure incurred towards Corporate Social Responsibility amounting to Rs.4,25,916/- u/s 37(1) without appreciating the fact that the amendment u/s 37(1) in this regard is prospective in nature.*
4. *For that the Dispute Resolution Panel erred in confirming the action of the Assessing Officer in adding the subsidy of Rs. 7,09,35,162/- received from Andhra Pradesh Government treating the same as revenue receipt without appreciating the fact that the*

amendment u/s 2(24)(xviii) in this regard is prospective in nature.

5. *For that the Dispute Resolution Panel erred in confirming the action of the Assessing Officer in disallowing the provision for operation, maintenance and warranty debited to Profit and Loss Account to the tune of Rs.29,68,000/- stating that the same is excess.*

6. *For these grounds and such other grounds that may be adduced before or during the hearing of the appeal, it is prayed that the Hon'ble Tribunal may be pleased to pass such other orders as the Hon'ble Tribunal may deem fit".*

3. The Brief facts of the case are that the assessee company is in the Business of manufacture of wind energy converters and filed Return of income for the assessment year 2011-12 on 30.11.2011 with total income ₹61,00,91,090/- and subsequently Revised Return of income was filed on 30.11.2012 disclosing total income of ₹47,26,67,501/-. The case was selected for scrutiny and notices u/s. 143(2) and 142(1) of the Act were issued. In compliance the ld. Authorised Representative of assessee appeared from time to time and filed information. The ld. Assessing Officer in the assessment found that assessee has international transactions exceeding ₹15 Crores and reference was made to Transfer Pricing Officer (hereinafter "TPO") by letter dated 13.03.2014 for determining Arms's Length Price (ALP) of international transactions. Subsequently, the TPO by order dated 29.01.2015 made a downward adjustment of ₹2,95,08,102/- of payment of Royalty. The ld. Assessing Officer passed draft assessment order u/s.143(3) r.w.s. 92 CA dated 30.03.2015 with

additions. Subsequently, the assessee filed objections before the Dispute Resolution Panel (hereinafter ''DRP'') and the DRP vide proceedings dated 23.12.2005 has upheld the adjustment by the TPO and others additions of the ld. Assessing Officer except disallowance u/s.14A of the Act and the ld. Assessing Officer completed assessment based on the directions.

4. The Transfer Pricing Officer has made downward adjustment to the extent of ₹2,95,08,102/- on payment of Royalty to the Associate Enterprises (Associated Enterprise) for use of technical knowhow for Manufacture of Wind Electric Generator. The assessee has a Associate Enterprises M/s. Regan Renewable Energy Generation Global Limited and the amount of ₹9,87,05,926/- was paid as Royalty for knowhow for manufacture and supply of gearless WEC in India and the assessee entered into Royalty agreement for use of technical knowhow. Further, the knowhow is originally developed by Vensys Germany as in turn sub-licensed to Regen, Cyprus. As per the agreement, the assessee followed TNMM method for calculating Arms Length Price (Arms Length Price). As per the agreement M/s. Regen India shall pay 12,50,000 Euro to licensor on signing of the agreement and there is a difference in payment of Royalty in respect of sales within India and outside India. The assessee on usage of technical knowhow in the relevant period has paid a Royalty of ₹9,87,05,926/- to Regen Cyprus.

In the assessment proceedings, ld. Assessing Officer referred to the Transfer Pricing Officer and based on Royalty payments, the TPO made downward adjustment by restricting payment of Royalty to Regen Cyprus to the extent of ₹6,92,00,000/- only and excess treated for the purpose of addition and the assessee filed objections with the DRP against Assessment order.

4.1 The Dispute Resolution Panel has confirmed the order of the Assessing Officer/Transfer Pricing Officer. Aggrieved by the order, the assessee assailed an appeal before Tribunal.

4.2 Before us, the ld. Authorised Representative submitted that as per agreement the Royalty is computed based on number of units sold and not on percentage of net sale. The rate of royalty computed after excluding the brought out items being 1.14% as against the Arms Length Price (4.61) as per Transfer Pricing Report. Under the erstwhile regulatory laws payment of royalty was permitted to the extent of 5% on domestic sales and 8% in respect of export sale. But in the present case, the rate of royalty has worked to 1.14% which is well within the regulated rates. The ld. TPO relied on the FEMA provisions and could not decide on the business or commercial expediency of the assessee. Once the TNMM is applied there is no necessity for separate analysis and adjustment of Royalty. Further

the margin cannot exceed the margin of Associated Enterprise (AE) being 25% and further the downward adjustment cannot be considered as Arms Length Price as payments cannot be lower than the actual price paid by Regen Cyprus to Vensys, Germany and assessee supported his grounds with submissions and judicial decisions of Hyderabad Tribunal of *DCIT vs. Air Liquid Engineering India (P) Ltd in ITA No.1040 & 1159/2011 & 1408/2010 held that*

> *''Furthermore, it is not disputed that the assessee company maintained the necessary documentation of the international transactions as per Section 92D read with Rule 10D. The Assessee company had also submitted details of the technology knowhow it obtained from its AE and the details of the Royalty payments made.Furthermore, ITAT are of the opinion that once TNMM has been applied to the Assessee company's transaction, it covers under its ambit the Royalty transactions in question too and hence separate analysis and consequent deletion of the Royalty payments by the TPO in the instant case seems erroneous. ITAT draw support from the Hon'ble Mumbai ITAT decision in Cadbury India Ltd vs. ACIT (ITA No 740B/Mum/2010 and ITA No.7641/Mum/2010 dated 13-11-2013) wherein the Hon'ble ITAT upheld the use of TNMM for Royalty as well as relied on many of the above decisions to hold adjustment by TPO was erroneous. With respect to ITANo.1408/Hyd/2010 for the AY. 2006-2007 the facts are identical and hence the conclusions drawn in ITANo.1159/Hyd/2011 have to be applied. Further, the learned Counsel for the assessee had also invited our attention to page 53 wherein the operating cost has been declared at Rs.98,61,88,320/- and the same has been reflected in the P&L account for the year ending 31st March, 2005 at page 234 of the paper book. At page 245 of the paper book under 'Selling Expenses' the amount of Rs. 2,02, 94,565/- against royalty has already been taken into account. Hence, we find that royalty has been already considered and factored in and hence, the Assessing Officer's order has to be*

dismissed as unjustified. Since, [TAT find force in the arguments of the learned Counsel, ITAT allow the appeal of the Assessee ITA No. 1408/Hyd/2010. Hence, following the ratio of the Honb'le Delhi High Court in CIT vs. EKL Appliances (supra) and various other decisions as noted above and given the facts and circumstances of the instant case, ITAT hold that the addition made by the TPO and upheld by the DRP is unsustainable and is to be deleted. Hence Ground No. 2 is held in favour of the assessee. Hence, the appeal of the Revenue ITANo.l040/Hyd/2011 is dismissed and Assessee's appeal in ITA No. 1159/Hyd/2011 is allowed. No disallowance can be made towards payment of royalty if payments exclusively made for purpose of trade.

In the case of Akzo Nobel Chemicals (India) Ltd. vs. DCIT in ITA No.1477/PN/2010, the Pune Bench held that

'Tribunal in assessee 's own case vide ITA No.1477/PN/2010 and ITA No.1659/PN/2011 dated 11.02.2014 held methodology adopted by Revenue to rework net sales value for purposes of computing royalty payable was not justified. Following the aforesaid precedent in the assessee's own case, which has been rendered in identical circumstances, the action of the Assessing Officer in considering certain raw materials used in the production process as mere 'constituent chemicals' and equating it to standard bought-out components so as to reduce their cost from the sales value for the purposes of computing net sales value eligible for royalty payment is liable to be set-aside. We hold so. As a result, the order of the CIT(A) on this aspect is set-aside and the Assessing Officer is directed to delete the addition of Rs. 19,54,132/- made on account of excess royalty. In the result, the appeal of the assessee for assessment year 2001-02 vide ITA No. 1169/PN/2011 is partly allowed. Certain raw materials used in production process cannot be stated as mere 'constituent chemicals' and equate it to standard bought-out component so as to reduce their cost from sales value for purposes of computing net sales value''.

In the case Castrol India Ltd vs. Addl. CIT 151 ITD 76 (Mumbai), held that

> *''Net sales of assessee after excluding export sale and other income were to extent of Rs. 1118.70 crores and royalty paid thereon at Rs. 24.38 crore being less than rate of 3.5% approved by SIA. There was no case of any excess payment made of royalty by assessee than approved by SIA to justify its disallowance by way of TP adjustment. CIT (A) could not appreciate those infirmities in order of TPO despite same were specifically brought to his notice on behalf of assessee and confirmed TP adjustment made by TPO in respect of royalty payment which was totally unjustified. Therefore, impugned addition deleted. Assessee's ground allowed. In absence of excess payment made of royalty by assessee than approved by SIA, disallowance by way of TP adjustment is not justified''.*

In the case of Global Vantedge (P) Ltd vs. DCIT 1 ITR 0326 it was held that

> *''Order of CIT(A) on the point of determination of the arm's length price in respect of the transactions entered into by the assessee with its AE on the basis of average operating margin of comparables method is upheld, and rival contentions raised by assessee as well as cross appeal by Revenue on this issue are rejected for the asst. year 2003-04; similarly for asst. yr. 2004-05, while working on same basis, the resultant ALP derived was lower than book value of the international transaction as declared by assessee, therefore, book value of the international transactions accepted to be at the arm's length price and consequently, entire addition of Rs.5,22,28,112 deleted by CIT(A) was upheld''.*

In the case of ACIT vs. Kehin Panalfa Ltd, the Delhi Tribunal held that

> *Besides similar issue of royalty payment is decided in favor of the assessee is decided by the ITAT in*

the case of Lumax Industries Ltd. [2013- TII-123-ITAT-DEL- TP} holding that:

> *"Payment of royalty was being claimed and allowed right from 1984 to Assessment Year 2003-04, as business expenditure of the Assessee and no new circumstance has been pointed out by either of the authorities below to hold that in the years thereafter, the benefit accrued to the Assessee by the payment of such royalty has dried up.*

ITAT aforesaid view is fortified by the aforesaid judgment of Lumax Industries (supra). Since the Royalty was being paid from 1997 and was continuously examined by the AO, then in the absence of any new facts to hold that there was no need to pay the royalty was uncalled for.

and prayed for allowing the appeal.

4.3 Contra, , the ld. Departmental Representative relied on the orders of ld. Assessing Officer and DRP and vehemently opposed to the grounds.

4.4 We heard the rival submissions, perused the material on records and judicial decisions. The crux of the issue being in respect of downward adjustments made by the ld. TPO considering comparative statements. The assessee has applied TNMM method whereas Arms Length Price Margin (ALP) as per TPO study is 4.6% income and percentage of Royalty on sale is 1.14%. Further, the margin cannot exceed 25% of margin of AE region. The ld. Authorised

Representative drew our attention to the Royalty agreement and also on the submissions made before ld. TPO explaining the methodology and Transfer Pricing study report issued by ERNST & YOUNG referred at page 18 to 60 of the paper book and also highlightened Audit report form no. 3CEB at page 70 of paper book were the international transactions with Associated Enterprise and method used being TNMM method disclosed alongwith comparative statements, on Royalty. The ld. TPO is of the opinion that assessee company has paid excess Royalty were as he considered the deduction of Brought out components and calculated Royalty on sales at 8% and relying on the actual sales and worked out to ₹6.92 crores. The contention of the ld. TPO that the assessee purchased some of the components that are already manufactured and Associated Enterprise does not give any material but only provide technical specification. Hence, royalty in respect of brought out goods are not allowable. We on perusing the comparative statement showing computation of royalty, find the Arms Length Price (ALP) at 4.6% as against Royalty on sales @1.14% and there is also a variation of percentage on sales admitted by the assessee. Considering the apparent facts and material, we are of the opinion that the matter has to be relooked as the percentage computed by the ld.TPO is 1.14% in comparison with the Arms Length Price margin being 4.60%. Therefore, we remit the disputed issue for

recalculation to the file of ld. TPO to consider Royalty payment on brought out components based on technical specifications. The ground of the assessee is allowed for statistical purpose.

5. The second ground raised by the assessee is that the DRP has erred in confirming the action of the ld. Assessing Officer in disallowing expenditure incurred on Corporate Social Responsibility ₹4,25,916/- under Residual Sec.37(1) of the Act and were the amendment is prospective in nature.

5.1 The assessee has claimed expenditure of ₹4,52,916/- as Corporate Social Responsibility debited under the head miscellaneous expenses. In reply to show cause notice issued by the ld. Assessing Officer, the assessee filed letter dated 24.03.2015 explaining the nature of assessee company contribution and its social responsibility initiatives to foster a better future for children in neighborhood communities, by significantly strengthening the social institutions that generally influence well being of children, Family, school and community in general which are strategic areas of focus of the Company. The ld. Assessing Officer considered the submissions and nature of expenses incurred for business purpose is of the view that expenditure incurred towards corporate social responsibility is for non business purposes and not as per the scheme envisaged under

Income Tax Act to encourage the assessee company to conduct activities for Benefit of Society and ignored the purpose of expenses incurred for social cause and alleged that they was not incurred for the purpose of Business and disallowed the claim. Aggrieved by the order, the assessee filed an appeal before Dispute Resolution Panel.

5.2 The Dispute Resolution Panel has confirmed the order of the Assessing Officer. Aggrieved by the order, the assessee assailed an appeal before Tribunal.

5.3 Before us, ld. Authorised Representative submitted that the assessee has incurred the expenditure for a social cause and ld. Assessing Officer erred in observing that the expenditure is for non business purpose whereas the expenses are in the nature of Revenue and incurred for the purpose of business. The ld. DRP confirmed the findings of the ld. Assessing Officer relying on the explanations to Sec. 37 of the Act which are inserted by Finance Act, 2014. Further, CSR activities expenditure offered to foster a better future for children in neighbourhood communities by strengthening the social institutions of well being of Children and this expenditure is not mandatory under Companies Act 2013 were as the assessee company expenses are related prior to the Act. The assessee company has voluntary incurred such expenditure to improve the brand image, corporate

business and goodwill and within the commercial expediency and prayed for allowing the appeal.

5.4 Contra, the ld. Departmental Representative relied on the order Assessing Officer and Dispute Resolution Panel and vehemently opposed to the grounds.

5.5 We heard the rival submissions, perused the material on records and judicial decisions. The expenditure incurred towards corporate social responsibility by the assessee company is Revenue in nature and the objects for which it is offered is for social cause and amendment to Sec. 37(1) of the Act inserted with Finance Act, 2014 is subsequent to assessment year. Therefore, the same is not applicable and assessee company relied the judicial decision of *CIT vs. Madras Refineries Ltd 313 ITR 334*. Considering the apparent facts, we are of the opinion that the expenditure is for a specific cause for the benefit of society was not disputed by the Revenue on genuineness. So, we direct the ld. Assessing Officer to delete the addition and the ground of the assessee is allowed.

6. The third ground raised by the assessee is that DRP has confirmed the addition of ₹7,09,35,162/- subsidiary received from Andhra Pradesh Government was reflected in the profit and loss account and claimed as Capital receipt while computing total income.

6.1 The ld. Authorised Representative explained that the company has accounted subsidiary in the Books of account for Income Tax purpose and it is capital in nature and not taxable. The objects of the scheme is to promote industrialization of the rural areas of the states and setting up of industry at the conceptualization stage. The letter of intent granted before setup for implementation of granting of incentive and the eligibility to receive incentive depends upon the setting up of industries in backward area and commencing production being eligible for incentive under the policy and this subsidy was granted on satisfaction of certain eligibility of minimum capital investments and relied on judicial decisions. But the ld. Assessing Officer considered the object of the company and is of the opinion that it is only a refund of VAT liability and being in the nature of supplementary trading receipt and elaborately dealt at page 8 & 9 of his order and finally considered the subsidy as Revenue receipt and made an addition. Aggrieved by the order, the assessee filed an appeal before Dispute Resolution Panel.

6.2 The Dispute Resolution Panel confirmed the order of the ld. Assessing Officer. Aggrieved by the order, the assessee assailed an appeal before Tribunal.

6.3 Before us, the ld. Authorised Representative reiterated the submissions made before ld. Assessing Officer and DRP and explained that subsidy enables assessee to run business more profitability and subsidiary is not a trading receipt. Further, the ld. Authorised Representative relied on the decision of Supreme Court distinguishing with the current facts and explained that subsidy was not linked to investments. The capital incentive given to the assessee by the State Government is to set up a new unit in State and shall be a Capital receipt and supported his arguments with decision of *CIT vs. Kirloskar Oil Enginess Ltd (364 ITR 88)* wherein held that ''Capital incentive given to assessee by State Government to enable assessee to set up a new unit in State would be capital receipts". In the case of *CIT vs. Ponni Sugars & Chemicals Ltd (129 Taxmann 231)* the Jurisdictional High Court held that the ''subsidy amount received from the State Government is capital receipt not liable to tax". In the case of *Shree Balaji Alloys vs. CIT (2011) 198 Taxmann 122 (J& K)* it was held that ''Excise refund and interest subsidy received by the assessees in pursuance of the incentives announced and sanctioned vide Government of India, Ministry of Commerce and Industry's Office Memorandum dated 14th June, 2002 and Central Excise Notification NOs.56 and 57 dated 14th November, 2002 and other notifications issued on the subject, pertaining to the Industrial Policy for the State

of Jammu & Kashmir, is capital receipt. The Co-ordinate Bench has held in the case of *Ford India (P) Ltd vs. DCIT (2013) (156 TTJ 1*) that assessee received capital subsidy under a scheme for accelerating industrial development in State, same could not be taxed as a Revenue receipt. Further in the case of DCIT vs. Reliance Industries Limited (2004) (88 ITD 273) (Mum) (SB) it was held that if subsidy was given for expansion/setting up of industry in backward area, it will be capital irrespective of modality or sources of funds through from which it is given" and the in the case of *CIT vs. Chaphalkar Brothers (33 Taxmann.com 431)* it was held that the ''purposes for which subsidy is given is relevant factor and if object of subsidy is to enable assessee to set up a new unit then receipt of subsidy will be on capital account"

and the purpose of issue of subsidy plays a very relevant role and were the subsidy is for setup of new unit and in the nature of a capital receipt provided for expansion or setting up of unit of industrial backward area. Subsidy is exempted from tax based on the modality or sources of funds and relied on the decision of *DICT vs. Reliance Industries Limited 88 ITD 273 (Mum) (SB*). The assessee received capital subsidiary under a scheme for accelerating industrial development in the State and same could not be taxed as a revenue receipt. Further, the decision relied by the ld. Assessing Officer based on *Sahney Steel & Press Works* is clearly distinguishable and

subsidiary is not linked to investments. Further, in the case of *CIT vs. Pooni Sugars & Chemicals Ltd (129 Taxmann 231)* the purpose of subsidiary needs to be considered not the source or form of subsidy. In the case of excise, laws Refunds are given as subsidy for the purpose of setting up or expansion of industries would amount to capital receipt in the hands of the industrial unit even though it was received after commencement of operations. Further any subsidy granted to project cannot be in the characteristic of Revenue receipt and prayed for allowing the appeal.

6.4 Contra, the ld. Departmental Representative relied on the orders of ld. Assessing Officer and DRP were the DRP has confirmed that the ld. Assessing Officer was justified in treating the VAT subsidy as Revenue receipt.

6.5 We heard the rival submissions, perused the material on record and judicial decisions cited. The only contention of the ld Authorised Representative that VAT subsidy is in the nature of capital receipt and not Revenue in nature and relied on the legal decisions. The ld. Authorised Representative drew our attention to the order of the ld. Assessing Officer and findings of the DRP were assessee claimed subsidy as Capital receipt. In the course of hearing, the ld. Authorised Representative drew our attention to the page no. 77 of the

paper book filed Government Order dated 01.11.2007 issued to the assessee company to setup Wind Electric Generators Manufacturing Unit in the state with a investment of ₹500 crores and also on request of the assessee company for 100% VAT reimbursement for ten years, Government has considered to grant 75% VAT reimbursement to the assessee company for a period of five years both on output and input VAT and entitled for concessions and incentives as per Industrial Investment policy 2005-2010. The ld. Authorised Representative demonstrated the letter dated 09.01.2008 issued by the Government of Andhra Pradesh, Industries and Commerce Department regarding clarification on request for refund of Central Sales Tax besides VAT and domestic sale. We perused the Industrial Investment Promotion Policy referred at page 159 of the paper book which considered the incentives and subsidy provided to the units according to their investments criteria. Further, the facts that VAT subsidy is as per the order issued by the Government and further due to amendment to Sec. 2(24) (xviii) w.e.f. 01.04.2015 subsidy or a grant defined was made taxable under Income Tax. So, considering the apparent facts, provisions of law, industrial policy regulations, and relY on decision of *Shree Balaji Alloys vs. CIT (2011) 198 Taxmann 122 (J & K)*, subsequently Hon'ble Supreme Court has upheld the decision in Civil Appeal No.10061/2011, dated 19.04.2016 by dismissing the Revenue

appeal. We respectfully following the Supreme Court decision and direct the ld. Assessing Officer to delete the addition of VAT subsidy as being in the nature of Capital Receipt and it is to be treated accordingly and allow the ground of the assessee.

7. The fourth ground raised by the assessee is that the ld. Assessing Officer disallowed provisions for operation, maintenance and warranty were the assessee has provided ₹18.65 crores in Books of account on account of provision for warranty.

7.1 The assessee has filed explanations that the company is in the practice of creating the provisions for operation, maintenance and warranty to cover expected expenditure on serving failed parts of WEG over the period of warranty and during the current year the company has created such provision. In Business operations chartered engineer estimated the cost at ₹1,31,000/- per machine whereas the assessee has claimed ₹1,50,000/- per machine. Therefore, difference of ₹19,000/- per machine is disallowed by the ld. Assessing Officer as excess provision aggregating to ₹46,33,000/-. The assessee filed letter dated 31.03.2015 explaining that in earlier assessment year there is a disallowance of ₹16,65,000/- on account of difference in valuation certificate and actual provision. Hence, it was reversed in the current assessment year and same differential amount should be allowed as deduction. But the ld. Assessing Officer disallowed

₹29,68,000/-. Aggrieved by the order, the assessee filed an appeal before DRP.

7.2 The Dispute Resolution Panel has confirmed the order of the ld. Assessing Officer. Aggrieved by the order, the assessee assailed an appeal before Tribunal.

7.3 Before us, ld. Authorised Representative argued that the ld. DRP has erred in confirming the action of the ld. Assessing Officer in disallowing provision of warranty to the extent of ₹29,68,000/- the action of the ld. Assessing Officer is not acceptable as there is no necessity to disallow a particular line item or expenditure resulting in timing difference and further tax rates are same in both years or alternatively, the ld. Authorised Representative explained that if the differential sum is not allowed in the year of creating provision, the same needs to be allowed in the year of reversal and the ld. Authorised Representative relied on the decision of *CIT vs. Excel Industries Ltd 358 ITR 295(SC)* and prayed for allowing the appeal.

7.4 Contra, the ld. Departmental Representative relied on the orders of ld. Assessing Officer and DRP and vehemently opposed to the grounds.

7.5 We heard the rival submissions, perused the material on record and judicial decisions cited. The ld. Authorised Representative contention that the difference in the value between the provisions made by the assessee and the Chartered Engineer certificate is disallowed but there is no necessity as tax rate for both assessment years are same. The differential sum alternatively if not allowed it needs to be considered in the year of reversal being next year. Further, this provisions are reversed in the next assessment year. We are of the opinion that the ld. Assessing Officer shall allow the claim on verification that the said provisions are reversed on the first day of next financial year and entries are passed in the Books and therefore, we remit the disputed issue for limited purpose to the file of the ld. Assessing Officer for verification and examination and assessee should be provided adequate opportunity of being heard before deciding the issue on merits. The ground of the assessee is allowed for statistical purpose.

8. The last ground raised by the assessee is on Non grant of TDS credit to the extent of ₹68,45,307/-.

8.1 The ld. Assessing Officer while passing the order denied TDS credit in the tax liability without mentioning any reasons. The ld. Assessing Officer probably has not granted TDS credit as this

information was not updated or non available of TDS credit in form 26AS issued by M/s. Regen Infra(P) Ltd. We considering the apparent facts and the TDS credit available with the assessee, direct the ld. Assessing Officer to verify the form 16A and Income Tax website disclosing credit of tax amount in 26AS and obtain confirmation of credit from M/s. Regen Infra (P) Ltd. and the ld. Assessing Officer is directed to allow the tax credit. The ground of the assessee is allowed for statistical purpose.

9. Now, we take up Departmental appeal in ITA No.766/Mds/2015:-

9.1 The ld. Assessing Officer by applying the provisions of Sec. 14A r.w.r 8D has disallowed ₹1,20,83,593/-. The assessee company has made investments in Indian Subsidiary Renewable Energy Generation Private Limited ₹11,55,00,000/- and Regen Renewable Energy Generation Global Ltd (foreign company) ₹24,12,49,000/-. The ld. Assessing Officer computed disallowance u/sec. 14A r.w.r 8D (2) on second and third limb irrespective of the fact that no dividend income was received by the assessee during the previous year. The assessee filed objections before DRP and based on the Co-ordinate Bench decisions the DRP held that no disallowance of expenditure u/s.14A r.w.r. 8D of the Act. Aggrieved by the order, the Revenue assailed an appeal before Tribunal.

9.2 Before us, the ld. Departmental Representative explained that DRP has erred in not considering the board circular No.5/2014 were the provisions of Sec.14 are mandatory and prayed for allowing the appeal.

9.3 Contra, the ld. Authorised Representative submitted that the provisions of Sec. 14A cannot be applied when there is no exempted income earned during the year and relied on the decisions of Co-ordinate Bench. The investments are made in foreign company and does not fetch any income and being part of business strategy and the investments in Domestic and foreign country on the basis of commercial expediency were the investments are made with profit motive but not to earn exempted income were dividend income is incidental. The ld. Assessing Officer has not considered the financial statements that the assessee company is having interest free funds of ₹132 crores whereas investments in Indian subsidiaries company is only ₹11.55 crores. Hence, it is presumed that investments are made out of interest free funds and loans are obtained for specific purpose and interest on loans are to be excluded for calculation of disallowance u/sec. 14A r.w.r. 8D and relied on the decision of Co-ordinate Bench in the cases of ACIT vs. Best & Compton Engineering

Ltd in ITA No.1603/Mds/2012 and Beach Minerals Company (P) Ltd vs. ACIT in ITA No.2110 & 2188/2014 and prayed for allowing the appeal.

9.4 We heard the rival submissions, perused the material on record and judicial decisions cited. The crux of the issue being the assessee has made investments in subsidiary/sister companies and the contention that own funds are generated out of business and no borrowed funds were utilized for the purpose of investments. Further, investments in subsidiary/sister company shall not be considered for the purpose of calculation of disallowance under Rule 8D(2). The ld. Authorised Representative drew our attention to the statement of details of subsidiary group companies and the investments reflected in financial statements and relied on judicial decisions. The assessee company made investments in these companies on Business expediency and no income has been generated by sister/group companies and also shareholding pattern varied from company to company. The provisions of Sec. 14A r.w.r. 8D are mandatorily applicable from assessment year 2008-09 but while calculating the disallowance u/sec. Rule 8D(2), the ld. Assessing Officer shall consider that the investments in subsidiaries are made in ordinary course of business. We found that there are no findings in the assessment order on this subsidiary/group companies which are considered as investments for calculating disallowance u/sec. 14A r.wr.8D(2) and rely

on the Co-ordinate Bench decision of *M/s. Rane Holdings vs. ACIT, Chennai in ITA No.115/Mds/2015*, dated 06.01.2016 were it was held as under:-

''Taking note of the above decisions and the decision of the Chennai bench of the Tribunal in ITA No.156/Mds/13 cited supra, we hereby remit the matter back to the file of Ld. Assessing Officer to examine the issue involved in this case afresh and pass appropriate order as per law and merits and in the light of the decisions cited herein above. While doing so, we also direct the Ld. Assessing Officer to consider the decision of the Tribunal in the case M/s Agile Electric Sub Assembly Pvt. Ltd. cited supra wherein it was held as follows:-

7.2 In regard to applicability of Section 14A of the Act read with Rule 8D also; the above view will be applicable. Moreover in the case EIH Associated Hotels Ltd v. DCIT reported in 2013 (9) TMI 604 in ITA No.1503, 1624/Mds/2012 dated 17th July, 2013, it has been held by the Chennai Bench of the Tribunal as follows:-

> *"Disallowance U/s. 14A rw Rule 8D – CIT upheld disallowance – Held that – investments made by the assessee in the subsidiary company are not on account of investment for earning capital gains or dividend income. Such investments have been made by the assessee to promote subsidiary company into the hotel industry. A perusal of the order of the CIT(Appeals) shows that out of total investment of Rs.64,18,19,775/-, Rs.63,31,25,715/- is invested in wholly owned subsidiary. This fact supports the case of the assessee that the assessee is not into the business of investment and the investments made by the assessee are on account of business expediency. Any dividend earned by the assessee from investment in subsidiary company is purely incidental. Therefore, the investments made by the assessee in its subsidiary are not to be reckoned for disallowance U/s. 14A r.w.r. 8D. The Assessing Officer is directed to re-compute the average value of investment under the provisions of Rule 8D after deleting investments made by the assessee in subsidiary company – Decided in favour of assessee."*
>
> *For the above said reasons, we hereby hold that in the case of the assessee the provisions of Section 14A read with Rule 8D will not be applicable in regard to investments made for acquiring the shares of the assessee's sister concerns.*

Accordingly we restrain ourselves from interfering with the Order of the Ld.CIT(A) on this regard."

It is ordered accordingly''.

We remit the disputed issue to the file of the ld. Assessing Officer to verify and exclude the investments in subsidiary companies for the purposes of calculation of disallowance under Rule 8D(2) and the assessee should be provided adequate opportunity of being heard before passing the order on merits. The ground of the Department is allowed for statistical purpose.

10. In the result, the appeal of the Assessee and Department are allowed for statistical purpose.

Order pronounced on Wednesday, the 17th day of August, 2016, at Chennai.

Sd/-	Sd/-
(चंद्र पूजारी)	**(**जी. पवन कुमार**)**
(CHANDRA POOJARI)	**(G. PAVAN KUMAR)**
लेखा सदस्य /ACCOUNTANT MEMBER	**न्यायिक सदस्य/JUDICIAL MEMBER**

चेन्नई/Chennai

दिनांक/Dated: 17.08.2016

KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF