आयकर अपीलीय अधिकरण पुणे न्यायपीठ "ए" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.787/PUN/2015
निर्धारण वर्ष / Assessment Year : 2010-11

The Dy. Commissioner of Income Tax (IT)-II,
Pune .... अपीलार्थी/Appellant

Vs.

M/s. Skoda Auto A.S.,
C/o Skoda Auto India Pvt. Ltd.,
A1/1, Five Star Industrial Area,
MIDC, Shendra,
Aurangabad - 431201 .... प्रत्यर्थी / Respondent

PAN: AAHCS7956H

अपीलार्थी की ओर से / Appellant by	:	Ms. Divya Bajpai, CIT
प्रत्यर्थी की ओर से / Respondent by	:	S/Shri Nikhil Pathak & Tejas Dharwadkar

सुनवाई की तारीख / **Date of Hearing : 05.03.2018**		घोषणा की तारीख / **Date of Pronouncement: 25.05.2018**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The appeal filed by the Revenue is against order of DCIT (IT), Circle-II, Pune, dated 30.03.2015 relating to assessment year 2010-11 passed under section 143(3) r.w.s. 144C(13) of the Income Tax Act 1961 (in short the 'Act').

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

1. *Whether in the facts and circumstances of the case, the Dispute Resolution Panel was right in directing AO to delete proposed disallowance of claim of assessee of Rs.1,90,48,294/- under section 10(6A) of I.T. Act when assessee failed to fulfill the condition that for claiming benefit under the section, the payment made in pursuance to the agreement is to be approved by the Government, as the approval granted by the Government of India had already lapsed and did not cover the relevant financial year.*

2. *Whether in the facts and circumstances of the case, the Dispute Resolution Panel was right in directing AO to delete proposed addition on account of reversal of provision for Royalty of Rs.1,39,18,474/-, though the assessee had failed to reconcile the figures in this regard with the payer's books of account.*

3. The issue raised in the present appeal filed by the Revenue is against the order of Dispute Resolution Panel (DRP) in directing the Assessing Officer to delete the proposed disallowance of ₹ 1,90,48,294/- claimed under section 10(6A) of the Act. The Revenue is aggrieved by non-fulfillment of conditions by the assessee, wherein for claiming the benefit under the said section, payment made in pursuance to the agreement was to be approved by the Govt. of India and in the case of assessee, approval granted by the Govt. of India had already lapsed and did not cover the relevant financial years.

4. The second issue raised by the Revenue is against the order of DRP in directing the Assessing Officer to delete the proposed addition on account of reversal of provision for royalty of ₹ 1,39,18,474/-.

5. Briefly, in the facts of the case, the assessee is subsidiary of Volkswagen AG. The Volkswagen Group was one of the world's leading automobile manufacturers and the largest car maker in Europe. The assessee is non-resident company based in Czech Republic, wherein Skoda develops, manufactures and markets passenger cars throughout the world. The assessee

company has subsidiary in India i.e. Skoda Auto India Pvt. Ltd., which is engaged in assembly, marketing and sale of motor vehicles, parts and accessories. For the year under consideration, the assessee filed return of income declaring total income of ₹ 44,47,30,190/-. The case of assessee was selected for scrutiny. From the details furnished by the assessee, the Assessing Officer noted that during the year under consideration, the assessee had received certain amounts from Skoda Auto India Pvt. Ltd. (SAIPL) and Volkswagen Group Sales India Pvt. Ltd. and Volkswagen India Pvt. Ltd. The assessee had received royalty in consideration under Technology Transfer and Trademark License Agreement (TTA) of ₹ 19,23,18,334/-, Fees for Technical Services (FTS) from SAIPL of ₹ 4,24,09,670/-, FTS from Volkswagen Group Sales India Pvt. Ltd. of ₹ 2,68,15,447/-; and FTS from Volkswagen India Pvt. Ltd. of ₹ 18,31,86,736/-, totaling ₹ 44,47,30,186/-. The Assessing Officer observed that since the assessee was tax resident of Czech Republic, its taxability was governed by the provisions of DTAA between India and Czech Republic or the provisions of the Income Tax Act, whichever were more beneficial to the assessee. Accordingly, taxability of the assessee has elected to be governed by the provisions of DTAA and Czech Republic i.e. Article 12(2) of DTAA and taxable @ 10%. The Assessing Officer noted from the notes appended below the computation of income that during the year the assessee had changed the method of accounting from cash to mercantile and accordingly, the income of earlier years was due but not offered for taxation due to cash method of accounting and accordingly, the income of earlier years which was due but not offered for taxation due to cash method of accounting, was now offered due to change in accounting period. On verification of TDS certificates filed during the year under consideration and the

reconciliation statement filed during scrutiny assessment proceedings for assessment year 2008-09, order under section 154 of the Act for assessment year 2009-10 that the total income of royalty / FTS received/receivable from SAIPL was to be offered to taxation in assessment year 2010-11 and the same came to ₹ 29,45,65,497/-. The Assessing Officer also tabulated the amount as per TDS certificates which are tabulated at page 3 of the draft assessment order. The Assessing Officer noted that though the total income of royalty / FTS received / receivable and chargeable to tax worked out to ₹ 29,45,65,497/-, whereas the assessee had offered ₹ 25,37,76,296/-, thus income of ₹ 4,07,89,201/- was found to have not been offered for taxation. This discrepancy was pointed out to the assessee and show caused as to why the difference should not be taxed as royalty income / FTS @ 10%. Further, it was noted from the computation of income that the assessee had claimed exemption under section 10(6A) of the Act at ₹ 1,90,48,294/-. However, the assessee failed to furnish supporting documentary evidence to qualify the said exemption during the course of assessment proceedings. The assessee was also show caused as to why the said exemption should not be withdrawn. The assessee explained that during the year under consideration, it had received royalty from SAIPL pursuant to TTA agreement and the assessee company had offered TDS made by SAIPL on royalty to income as per provisions of section 198 of the Act but the same was claimed as exemption under section 10(6A) of the Act. The assessee pointed out that agreement was entered into with SAIPL before 1st June, 2002 and the said agreement was approved by the Govt. of India and hence, the conditions specified under section 10(6A) of the Act to claim exemption had been complied with and the assessee was eligible to claim the same. The assessee

also explained the reversal of royalty provisions to the extent of ₹ 1,39,18,473/-. The assessee pointed out that in view of details of royalty, provision of ₹ 2,51,36,143/- for the period January to March, 2010, total amount of royalty for assessment year 2010-11 amounted to ₹ 6,29,59,868/-. It was further pointed out that as per provisions of section 195 of the Act, tax was required to be deducted on the date of booking of particular expense or payment, whichever was earlier. Accordingly, SAIPL to comply with the provisions of section 195 of the Act, had deducted tax of INR 62,959,868 which was after considering the provision for January to March, 2010. The assessee had made corresponding provisions in its books of account but had actually received sum of ₹ 4,90,41,394/- as royalty and as such, sum of ₹ 1,39,18,474/- towards excess provision made was reversed by the company. The assessee thereafter reconciled the income with TDS certificate and pointed out that because of the year under consideration being transitional year, certain items of income which had accrued in earlier year but had actually received, had been considered as income of the assessee for assessment year 2010-11. The assessee pointed out that income of ₹ 52,65,843/- along with TDS of ₹ 5,26,584/- was inadvertently not considered in the return of income by the assessee company for the year under consideration but there was no default in payment of taxes as tax @ 10%, which was deducted and paid by SAIPL as per provisions of section 195 of the Act. It was requested that in case sum of ₹ 52,65,483/- was considered as income and corresponding TDS credit of ₹ 5,26,584/- be allowed to the assessee. Referring to the provisions of section 10(6A) of the Act, the Assessing Officer observed that in the case of assessee, TDS was deducted by the Indian concern from the payment to the assessee and the TDS certificate was issued

accordingly. The assessee had also claimed the credit of said TDS. The Assessing Officer thus, held that it was not case of grossing up of income for TDS purpose and as such, the assessee was not entitled for exemption under section 10(6A) of the Act. Without prejudice to the above, he further pointed out that if exemption under section 10(6A) of the Act was allowed to the assessee, then the assessee was not entitled to claim the credit of TDS amount. Therefore, claim of assessee for exemption under section 10(6A) of the Act was not accepted.

6. In respect of reversal of royalty of ₹ 1.39 crores during the course of assessment proceedings, the assessee was requested to explain the basis of royalty payment worked out initially as per the books of account. The assessee submitted revised royalty computation. However, the assessee could not explain the basis and could not reconcile the sale figures in the revised working of royalty payment with reference to the sales figures reflected in the audited statement of accounts of SAIPL for financial year 2009-10 to ascertain the correctness of royalty working. Therefore, claim of reversal of royalty provision was not accepted. In view thereof, sum of ₹ 1.39 crores which was not considered by the assessee as income, was added to the total income returned by the assessee. The Assessing Officer also added the receipts not offered to tax by the assessee at ₹ 52,65,843/-. The Assessing Officer had referred to the computation of arm's length price in respect of international transactions to the Transfer Pricing Officer (TPO), who did not make any adjustment and hence, the income was computed in the hands of assessee. The Assessing Officer proposed the assessment,

wherein income was proposed to tax @ 10% as per DTAA between India and Czech Republic.

7. The assessee filed objections against the same to the DRP. The first objection raised by the assessee was against disallowance of exemption under section 10(6A) of the Act. The case of assessee before the DRP was that in order to claim exemption under section 10(6A) of the Act, an agreement is to be approved by the Central Government, grossing up for the purpose of TDS was not required as TDS did not form part of total income of assessee. The assessee claimed that it satisfied the conditions of section 10(6A) of the Act, it is entitled to said exemption as it is available to the assessee and there is no requirement of grossing up of TDS for the purpose of claiming exemption. The DRP noted that agreement had been entered into before 1st June, 2002 and the same was approved by the Govt. of India. It was further held by the DRP that there was no requirement under section 10(6A) of the Act to gross up TDS.

8. In respect of second addition of reversal of royalty, the assessee pointed out that SAIPL had made provision of ₹ 6.29 crores towards royalty payable for assessment year 2010-11. As per provisions of section 195 of the Act, the tax was required to be deducted on the date of booking of particular expense or payment, whichever was earlier. Accordingly, to comply with the said provisions, SAIPL deducted tax on ₹ 6.29 crores. Subsequently, SAIPL reversed the excess provision amounting to ₹ 1.39 crores in its books of account. The assessee for the year under consideration actually accrued and received sum of ₹ 4.94 crores

as royalty and the same was offered to tax. It was further explained that in view of TTA agreement dated 01.10.2001 between assessee and SAIPL, the assessee received royalty @ 8% on export sales and 5% on domestic sales. Since the amount was linked to quantum of sales, it was difficult to ascertain the exact amount of royalty for a particular year till the time the sales figure for the said year was finalized and hence, the provision was made to royalty payable to Skoda. But subsequently, SAIPL determined the actual amount of royalty due to assessee company and reversed excess provision. The assessee claimed before the DRP that it had submitted detailed working of royalty which was not considered by the Assessing Officer. The DRP accepted the submissions of assessee and directed the Assessing Officer to delete proposed addition of ₹ 1.39 crores and also allow corresponding TDS credit.

9. The Revenue is in appeal against the order of DRP.

10. The first issue raised by the Revenue is against deletion of proposed disallowance of claim of ₹ 1.90 crores under section 10(6A) of the Act. The contention of Revenue in this regard is that the approval granted by the Govt. of India had already lapsed and did not cover the relevant financial year. The second issue raised is against deletion of proposed addition on account of reversal of provision for royalty, wherein the assessee had failed to reconcile the same with payer's books of account. The learned Departmental Representative for the Revenue stressed that the ground of appeal No.1 talks of approval not being available and the ground of appeal No.2 raised by the Revenue is against

reversal of provision made. In this regard, he placed reliance on the order of Assessing Officer.

11. The learned Authorized Representative for the assessee pointed out that the assessee was non-resident entity and had entered into an agreement with Skoda India. The royalty agreement was entered into in 2001, under which royalty had to be paid @ 5% on export sales and 8% on domestic sales. The royalty was paid at 100% to the assessee, wherein withholding of tax was responsibility of Indian entity. He referred to the provisions of section 198 of the Act, under which tax paid on behalf of the person of any person was the said person's income. However, under section 10(6A) of the Act, in case any agreement is entered prior to 1st June, 2002 which is approved by the Central Government, then tax paid on behalf of the said person is not to be treated as income of the foreign entity. He referred to the order of Assessing Officer and pointed out that the objection was that SAIPL did not gross up TDS correctly, so the provisions of section 10(6A) of the Act were not applicable.

12. The learned Departmental Representative for the Revenue on the other hand, said that grossing up was immaterial. In this regard, the learned Authorized Representative for the assessee pointed out that in assessment year 2011-12, similar objections were dismissed by the DRP and the Assessing Officer giving effect to the order of DRP, had allowed the claim of assessee and no appeal has been filed by the Revenue. He further pointed out that the Assessing Officer himself at pages 78 to 82 relating to assessment year 2012-13 while passing order under section 143(3) of the Act has allowed the claim of

assessee and no disallowance has been made under section 10(6A) of the Act, though similar claim was made in those years also.

13. Coming to next ground of appeal, it was pointed out by the learned Authorized Representative for the assessee that SAIPL deducted tax at ₹ 6.29 crores but in the Profit and Loss Account, it had debited sum of ₹ 4.98 crores as royalty to the assessee. The excess TDS amount deducted was not claimed as deduction under section 10(6A) of the Act. The learned Authorized Representative for the assessee pointed out that it had offered excess TDS to tax i.e. ₹ 2,08,83,684/- as against claim of TDS of ₹ 1.90 crores. He fairly pointed out that TDS which was claimed by the assessee was ₹ 2.08 crores, whereas the deduction under section 10(6A) of the Act was only ₹ 1.90 crores. He further referred to form NO.10CEB of SAIPL placed at page 58 of Paper Book and payment of royalty of ₹ 4.90 crores, which is clear from page 58 of Paper Book and pointed out that though SAIPL made provision but debited only the amount which was eventually paid to the assessee. The learned Authorized Representative for the assessee pointed out that royalty includes royalty of this year and earlier years, since the assessee had changed its method of accounting from cash to mercantile.

14. We have heard the rival contentions and perused the record. The assessee is non-resident based Czech Republic. The assessee is tax resident of said country. As per DTAA between India and Czech Republic, royalty is to be taxed @ 10%. There is no dispute between the assessee and the Revenue that the income arising on account of royalty is to be charged in the hands of assessee company under DTAA @ 10%. The first dispute which arises in the

present appeal is in respect of TDS deducted by SAIPL, whether the said withholding tax is to be included as income of the assessee. The assessee had received royalty income of ₹ 19.04 crores from SAIPL, which was offered to tax. The said concern SAIPL had withheld the tax of ₹ 1.90 crores on royalty paid to the assessee company @ 10%. Under the provisions of section 198 of the Act, the said tax withheld by SAIPL was taxable as income of the assessee. However, the assessee claimed deduction under section 10(6A) of the Act on the ground that there was no requirement for grossing up the amount. The assessee had entered into an agreement with SAIPL on 01.10.2001 and the copy of said agreement is placed at pages 12 to 28 of Paper Book. The said agreement for transfer of technology between the assessee company and SAIPL was approved by the Department of Industrial Policy and Promotion (SIA), dated 02.11.1999, copy of which is placed at pages 7 to 11 of Paper Book. As per provisions of section 10(6A) of the Act, exemption is to be allowed to the assessee company, who is non-resident and the tax which is withheld by SAIPL is not to be added as income in the hands of assessee, such is the exemption provided under the Act, which has been claimed by the assessee in all the earlier years and has been so allowed. The DRP has allowed the claim of assessee, against which the Revenue is in appeal. It may be pointed out that similar denial of exemption under section 10(6A) of the Act was made in assessment year 2011-12. However, the DRP allowed the claim of assessee, copy of which is placed at pages 68 to 77 of Paper Book and the Assessing Officer in final assessment order passed under section 143(3) of the Act relating to assessment year 2011-12 held the assessee entitled to claim the deduction under section 10(6A) of the Act, copy of the same is placed at pages 61 to 67 of Paper Book. Further, the

said deduction has been allowed to the assessee in assessment years 2012-13 and 2014-15 vide order passed under section 143(3) of the Act, copies of which are placed at pages 78 to 86 and 87 to 94 of Paper Book, respectively.

15. In the totality of the above said facts and circumstances, there is no merit in the grounds of appeal raised by the Revenue, wherein the stand of assessee has been accepted in subsequent years, though the facts are identical. The assessee having satisfied the conditions laid down in section 10(6A) of the Act is entitled to claim the said exemption of ₹ 1.90 crores. Accordingly, the order of DRP is upheld and ground of appeal No.1 raised by the Revenue is dismissed.

16. Now, coming to the issue vide ground of appeal No.2, wherein the issue raised is in respect of difference between the provision made on account of royalty and actual royalty booked for SAIPL for the year under consideration. SAIPL had made provision of ₹ 6.29 crores in its books of account being royalty payable to the assessee for the year under consideration and had accordingly deducted tax at source. However, before proceeding further, it may be pointed out that basis of royalty is the sales made during the year, wherein as per agreement between the parties royalty is payable @ 5% on export sales and 8% on domestic sales. The assessee pointed out that earlier provision was made at ₹ 6.29 crores by SAIPL in its books of account. However, while finalizing books of account, the said provision was reduced to ₹ 4.90 crores. The assessee has accounted for royalty of ₹ 4.90 crores. The TDS though was deducted at ₹ 6.29 crores and the assessee has also claimed the benefit of TDS deducted on ₹ 6.29 crores, but deduction under section 10(6A) of the Act has been claimed only in respect of TDS due on ₹ 4.90 crores. SAIPL in its audited books of account

which is accompanied to audited accounts in form No.3CEB, has only debited ₹ 4.90 crores. In the totality of the above said facts and circumstances, what has to be accounted for by the assessee is revised royalty at ₹ 4.90 crores and not the royalty which was provision made during the year before finalization of figures of sales at ₹ 6.29 crores. Accordingly, we uphold the order of DRP in deleting proposed addition of ₹ 1.39 crores. The ground of appeal No.2 raised by the Revenue is thus, dismissed.

17. In the result, appeal of Revenue is dismissed.

Order pronounced on this 25th day of May, 2018.

Sd/-	**Sd/-**
(ANIL CHATURVEDI)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 25th May, 2018.

GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. The Appellant;
2. The Respondent;
3. The DRP, Pune;
4. The DIT (TP/IT), Pune;
5. The DR 'A', ITAT, Pune;
6. Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune