आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'D' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री जी. मंजुनाथ, लेखा सदस्य के समक्ष

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENTAND
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

आयकर अपीलसं./**I.T.(TP).A.No.39/CHNY/2021**

(निर्धारण वर्ष/Assessment Year: 2016-17)

M/s. Hyundai Motor India Ltd., Plot No.H-1, SIPCOT Industrial Park Irrungattukottai, Sriperumbudur Taluk Kancheepuram Dist. PIN: 602 117. **PAN: AAACH 2364M** (अपीलार्थी/Appellant)	Vs	**The Asst. Commissioner of Income Tax**, LTU-2, Chennai - 34. (प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by	:	Shri S.P. Chidambaram, Advocate
प्रत्यर्थी की ओर से/Respondent by	:	Shri Durgesh Sumrott, CIT

सुनवाई की तारीख/Date of hearing	:	30.11.2021
घोषणा की तारीख /Date of Pronouncement	:	22.12.2021

आदेश / O R D E R

PER G. MANJUNATHA, AM:

This appeal filed by the assessee is directed against final assessment order passed by the Assessing Officer u/s.143(3) r.w.s 144C(13) r.w.s.144B of the Income Tax Act, 1961 (hereinafter the 'Act') dated 30.04.2021, in pursuant to the directions of the learned DRP-2, Bengaluru dated 23.03.2021 u/s.144C(5) of the Act for the assessment year 2016-17.

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

1. "The Appellant objects to the order dated 30 April 2021 issued under Section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 ('Act') by the National e-Assessment Center ('NeAC) for the aforesaid assessment year on the following grounds:

TRANSFER PRICING GROUNDS

The directions of the Dispute Resolution Panel (DRP), the Transfer Pricing Order and the Final Assessment order are erroneous in so far as the following issue/adjustment:

2. ***Transfer Pricing Order is barred by limitation***

2.1 The NeAC/DRP failed to appreciate that the order passed by Transfer Pricing Officer (TPO) dated 0 .11.2019 is marred by statutory limitation as prescribed under Section 92CA(3A) of the Act and as such it is bad in law, void ab initio and deserves to be quashed.

2.2 The NeAC/DRP failed to cognizance of Central Action Plan issued by Central Board of Direct Taxes (CBDT) for the guidance of officers in the Income Tax Department wherein in Chapter VII thereof, dealing with International Taxation and Transfer Pricing, the CBDT has explicitly stated that completion of transfer pricing audits gets time barred on 31 October 2019.

2.3 The NeAC/DRP failed to appreciate that the transfer pricing proceedings under section 92CA is an independent assessment akin to a regular assessment proceeding under section 143(3) of the Act.

2.4 The NeAC/DRP has incorrectly interpreted the provisions of section 92CA(3) and concluded that period of limitation specified under section 92CA(3) is only for internal convenience and failed to appreciate that the timelines specified under section 153 and section 92CA are mandatory and ought to be independently complied with.

2.5 The NeAC/DRP failed to take cognizance of the specific reference in the Memorandum while introducing sub-section (3A) to Section 92CA vide Finance Act 2007, wherein it is explicitly mentioned the TPO has to determine the Arm's length price (ALP) at least two months prior to limitation stipulated under section 153 of the Act.

2.6 The NeAC/DRP while determining the period of limitation for passing the TPO order as per provisions of section 92CA(3A), which requires TPO to pass an order before 60 days prior to the period of limitation specified under section 153, has conveniently disregarded the words "before" and

prior" specified under the said section and failed to appreciate the legislative intent behind specifying timeline for passing TPO order.

2.7The NeAC/DRP failed to appreciate in the context of sub-section (3A) of section 92CA word may' ought to be read as shall' as the Act signifies mandatory compliance on the part of TPO to pass order within the stipulated time limit.

2.8 The NeAC/DRP grossly erred in not following the binding jurisdictional High Court decision in the case of M/s Pfizer Healthcare India Private Limited vs. DCIT [WP No. 32699 of 2019] wherein it was held that the Transfer Pricing Orders passed under section 92CA are barred by limitation.

Without prejudice to the above legal ground on limitation, the Appellant raises the following grounds in respect of TP adjustment:

3. Attribution** of **notional** income **towards** deemed **brand development

3.1 The NeAC/ DRP erred in facts and circumstances of the case and in law in confirming the action of the TPO in attributing notional income of Rs.237,51,90,000/- on the premise that the Appellant has undertaken brand promotion/building activity for its AE i.e., Hyundai Motor Corporation, Korea.

TPO exceeded jurisdiction

3.2 The NeAC/DRP failed to appreciate the fact that the TPO exceeded his jurisdiction by analysing brand building as a separate international transaction though the NeAC has not referred the same for determination of ALP as per Section 92CA of the Income Tax Act, 1961 ("the Act").

3.3 The NeAC/DRP ought to have held that the order of the TPO is vitiated inasmuch since it is based on a show cause notice that is void ab initio, as it has not established a prima facie case of brand promotion activity undertaken by the Appellant.

3.4 The NeAC/DRP ought to have held that the TPO has acted in excess of jurisdiction by suo-motto considering the incurring of advertisement expenses as an "international transaction".

3.5 The NeAC/TPO erred in facts and circumstances of the case and in law by stating that the Appellant failed to report the "Advertisement Marketing and Promotion ("AMP") expenses" in the Form 3CEB when the same is not per se an international transaction as per Section 92B of the Act.

Brand promotion is not an international transaction

3.6 The NeAC/DRP failed to appreciate that the Appellant has not rendered any brand building service to its AE (i.e., Hyundai Motor Corporation, Korea) and as such there is no international transaction.

3.7 The NeAC/DRP failed to appreciate that in the absence of contract among the parties (i.e. Appellant and AE) deeming rendition of brand building service is null and void.

3.8 The NeAC/TPO failed to appreciate that even an independent entity would have charged for brand building service only if the brand building activity has been actually agreed to/ undertaken as the primary activity and not where the promotion of brand name is ancillary to the core business activity of manufacture and sale of vehicles.

3.9 The NeAC/DRP having acknowledged that the facts and circumstances are similar to the previous Assessment years erred in not following the binding judicial precedent in the Appellant's own case, for AYs 2009-10 to 2011-12 decided by the this Hon'ble Income Tax Appellate Tribunal ("ITAT") [[2017] 81 taxmann.com 5 (Chennai – Trib.)] holding that there is no "International transaction" between the Appellant and the AE and deleted the adjustment on Brand building / AMP expenses.

Separate benchmarking is void

Separate benchmarking is void

3.10 The NeAC/TPO having accepted the Royalty transaction which is inclusive of right to use "Brand" is at arms length, is precludes from once again independently benchmarking the brand usage as separate international transaction.

3.11The NeAC/TPO having accepted that the overall net margin of the Appellant under TNMM method is at arms length as per Section 92C(2) of the Act read with Rule 10B of the Income tax Rules, erred in independently benchmarking brand usage as separate international transaction.

3.12 Without prejudice to the above, the NeAC/TPO failed to appreciate that the excess margin earned by the Appellant over that of comparable companies indicates that it is the Appellant who has benefited mom the use of the brand name and has offered more income for tax in India.

3.13 The NeAC/TPO failed to appreciate that as per the principles laid down in Chapter VII of the OECD TP Guidelines, 2017, the incidental/ancillary benefits, if any, arising out of the AMP expenses

incurred by the Appellant does not require any separate compensation as it is not in the nature of active service to AE.

NeAC/TPO failed to appreciate the business prerogative of the Appellant

3.14 The NeAC/TPO failed to appreciate that in view of the rights granted in the agreement between the Appellant and the AE, the former gets the right to use the "Brand"

3.15 The NeAC/TPO has failed to appreciate that the Appellant is not restricted from creating its own brand through the agreement and it is the prudent business decision of the Appellant to use the Brand name of the AE so as to increase its sales in India.

3.16 The NeAC/TPO failed to appreciate that the AMP expenses incurred by the Appellant is purely to promote the sales of the cars manufactured and not towards promotion of Brand.

Economic Ownership

3.17 The NeAC/TPO erred in facts and circumstances of the case and in law in not appreciating that the Appellant is the economic owner of the brand name and uses the brand for its own benefit.

3.18 Without prejudice to the above and assuming without admitting that the Appellant has been providing brand building service, the NeAC/TPO failed to appreciate that the income, if any, can be attributed only when brand is alienated at a future date and as sue h the question of attributing a notional income for the deemed brand biii1ding service does not arise for AY 2016-17.

Determination of ALP of alleged brand building service is grossly flawed

3.19The NeAC/DRP erred in facts and circumstances of the case and in law in not appreciating that the TPO has incorrectly considered and applied "Other Method" as the Most Appropriate Method in violation of Section 92C(1) of the Act read with Rule 10AB of the Income tax Rules while determining arm's length price of deemed "Brand Promotion".

3.20 The NeAC/DRP erred in facts and circumstances of the case and in law in not appreciating that the TPO has incorrectly considered and applied "Other Method" as the Mist Appropriate Method without bringing on record uncontrolled comparable companies while benchmarking deemed "Brand Promotion".

3.21 The NeAC/DRP erred in facts and circumstances of the case and in law in not appreciating that the TPO has not provided any cogent

reasons/basis of allocating 50% of the AMP expenses incurred by the Appellant to be recovered from the AE towards brand promotion.

3.22 Without prejudice to the above ground, the NeAC/DRP ought to have appreciated that the TPO's action of allocating a mark-up of 9.15% on 50% of the AMP expenses is devoid of any merit and unsustainable in law as it is highly arbitrary and unreasonable.

3.23 The NeAC/DRP erred in confirming the action of the TPO in conducting a fresh search for identifying the comparable companies for the limited purpose of quantifying the mark-up to be added to the 50% of AMP expenses which was incorrectly considered to be incurred by the Appellant for the benefit of its AE.

3.24 Without prejudice to the above, the NeAC/DRP failed to appreciate that the comparables selected by the TPO are functionally dissimilar as they are engaged in the business of advertisement and media whereas the Appellant is engaged in manufacturing of passenger cars and not brand promotion.

3.25 Without prejudice to our above grounds, NeAC/DRP ought to have appreciated that even if brand promotion is considered as International Transaction, the TPO ought to have compared the AMP to sales ratio of the Appellant with that of the comparable compar.ies to determine the ALP of the transaction.

3.26 Without prejudice to our above grounds, the NeAC/DRP ought to have appreciated that the TPO hams reckoned incorrect quantum of advertisement expenses (i.e. expenses not in the nature of Advertisement).

CORPORATE TAX GROUNDS

4. Disallowance of expenditure under section 14A of the Act r.w.r 8D of the Rules

4.1 The NeAC / DRP erred in disallowing a sum of Rs.70,07,153 under section 14A of the Act by applying the provisions of Rule 8D of the Rules.

4.2 The NeAC / DRP ought not to have made disallowance under section 14A of the Act when the Appellant has not claimed any exempt income being dividend income amounting to Rs.1,11,645, during the year.

4.3 The NeAC / DRP ought to have appreciated that the Assessee has not incurred any expenditure which may be attributable towards earning of

exempt income (no exempt income claimed during the subject AY).

4.4 The NeAC, having acknowledged the fact that the Assessee had sufficient surplus funds in earlier AY's to make the investments, ought not to have resorted to making ad hoc disallowance under section 14A r.w.r 8D of the Rules.

4.5 The NeAC / DRP ought to have appreciated that merely because there are investments (for strategic purposes) and payment of interest (towards purchase of fixed assets), it cannot be assumed that loan funds have been utilized for the purpose of making investments.

4.6 The NeAC / DRP erred in presuming that the Appellant had incurred a portion of personnel expenses, rent, salaries, communication, travel, printing & stationery, interest, etc. debited during the subject AY towards carrying out investment transactions / earning income from investments without appreciating that the nature of Assessee's investments (in wholly owned subsidiaries) does not require any continuous monitoring and as such the presumption of the NeAC is misconceived.

4.7 The NeAC / DRP erred in not following the binding decision of the Hon'b1e Tribunal in the Appellant's own case for AY 2007-08 wherein the Tribunal had held that no disallowance can be made under section l4A of the Act in the absence of exempt income.

4.8 Without prejudice to the above, the NeAC ought not to have considered interest on long term loans, working capital, dealers advances/deposits, and bank/financial charges while computing the quantum of disallowance under clause (ii) of Rule 8D(2) of the Rules.

4.9 Without prejudice to the above, the NeAC / DRP ought to have excluded the investments which did not yield exempt income during the subject AY while computing the quantum of disallowance under Rule 8D(2)(ii) and (iii) of the Rules.

4.10 Without further prejudice to the above, the disallowance under section l4A of the Act by applying Rule 8D of the Rules is erroneous, high and arbitrary.

4.11 Without prejudice to the above, the disallowance ought to be restricted to Rs.1,11,645 being the amount of dividend received during the subject AY, which is already offered to tax in the subject AY and as such there is no requirement for any further disallowance u/s 14A.

4.12 The NeAC / DRP ought to have appreciated that the provisions of section 14A of the Act r.w.r. 8D of the Rules is not applicable while

determining book profits under section 115JB of the Act.

5. Disallowance of depreciation to the extent of subsidy

5.1 The NeAC / DRP erred in disallowing depreciation amounting to Rs.1,24,585 in the subject AY by considering the cash subsidy granted by SIPCOT in the AY 2003-04 as capital income to be adjusted against cost of assets.

5.2 The NeAC / DRP ought to have appreciated that SIPCOT had given the subsidy for setting up the mega project and not for the purpose of meeting any liability towards acquisition of assets and as such the subsidy is a capital receipt, which cannot be adjusted against the cost of the asset.

5.3 The AO / DRP failed to appreciate that in the year of receipt of subsidy, i.e. AY 2003-04 the AO has verified the claim and deleted the disallowance on depreciation by passing the order giving effect to the CIT(A) order and therefore the question of disallowance of depreciation on subsidy in subsequent AY's does not arise.

6 Disallowance of performance reward under section 43B of the Act

6.1 The NeAC / DRP erred in disallowing performance reward amounting to Rs.1,54,58,594 under section 43B of the Act.

6.2 The NeAC / DRP ought to have appreciated that the expenditure incurred towards performance reward is not in the nature of "bonus" and therefore the provisions of section 43B(c) of the Act is not applicable.

6.3 The NeAC / DRP ought to have appreciated that the performance reward is not on the nature of "commission" since the reward is based on the performance of the employee.

6.4 Without prejudice to the above, the NeAC / DRP ought to have appreciated that the Appellant is not covered by the provisions of Payment of Bonus Act, 1965 and as such no disallowance can be made under section 43B r.w.s. 36(1)(ii) of the Act.

6.5 Without prejudice to the above, appropriate consequential directions may be issued to be NeAC to allow the expenditure in the year in

which the amounts are actually paid as otherwise the payments will never be allowed as deduction.

6.6 Without prejudice to the above, appropriate consequential directions may be issued to NeAC to allow the actual payment made during subject AY.

7. Education cess and secondary & higher education cess is allowable as revenue expenditure

7.1 The NeAC/DRP ought to have appreciated that education cess and secondary & higher education cess is an allowable expenditure under section 37(1) of the Act.

7.2 The NeAC/DRP ought to have appreciated that the education cess and secondary & higher education cess paid by the Appellant is not covered within the provisions of section 40(a)(ii) of the Act and as such allowable under section 37(1) of the Act.

7.3 The NeAC/DRP ought to have appreciated that the CBDT vide Circular No.91/58/66 ITJ (19) has clarified that omission of the word "cess" is to disallow only "taxes" section 40(a)(ii) of the Act and not education cess.

7.4 The NeAC/DRP ought to have appreciated that 'education cess and secondary & higher education cess' is not in the nature of 'tax' as envisaged in section 40(a)(ii) of the Act and cannot be disallowed.

7.5 The NeAC/DRP outlet to have appreciated that taxes are levied on profits whereas 'cess' is levied only on taxes and not profits and as such 'cess' is not covered within the meaning of taxes under section 40(a)(ii) of the Act.

7.6 The NeAC/DRP ought to have appreciated that cess cannot be construed as tax since it is levied for the specific purpose of providing universa1ized quality basic / secondary and higher education whereas tax is towards the general collection of the Union of India.

8. Subsidy received from Govt. of Tamil Nadu in the form of refund of output/input X AT is a capital receipt not chargeable to tax.

8.1 The NeAC/DRP ought not to have rejected the Appellant's claim in limine to treat output / input VAT subsidy as a capital receipt not chargeable to tax.

8.2 The NEAC/DRP ought to have appreciated that the subsidy (refund of VAT) was granted for the purpose of setting up of Phase II manufacturing facility and as such the said subsidy should be treated as a capital receipt' not chargeable to tax.

8.2 The NEAC/DRP ought to have appreciated that the object of the subsidy (refund of VAT) was for the purpose of setting up the plant and not to enhance the profitability of the Appellant or to fund the cost of fixed assets and as such the said subsidy should be treated as a 'capital receipt' not chargeable to tax.

8.4 Without prejudice to the above, the Hon'b1e Tribunal should consider and allow the claim of the Appellant in light of the Supreme Court decision in Goetze (India) Limited vs CIT (TS-21-SC-2006-O) (SC) since the details are already available on record.

9. Export incentives under the Focus Market Scheme is a capital receipt not chargeable to tax

9.1 The NeAC/DRP ought to have appreciated that the export incentives under the FMC earned during the year is a capital receipt not chargeable to tax.

9.2 The NeAC/DRP ought to have appreciated that it is a well settled principle that the "purpose" for which an incentive is granted should be considered to determine whether the nature of subsidy / incentive is revenue or capital and as such the nature of export incentive cannot be determined based on the item of expenditure against which the set-off is intended.

9.3 The NeAC/DRP ought to have appreciated that the export incentive under the FMS was provided to enhance India's export potential in the international market and not for running the business of the Appellant more profitably and as such the export incentive is capital in nature.

9.4 The NeAC/DRP ought to have appreciated that the amendment to the definition of income by way of insertion of clause (xviii) to section 2(24) of the Act does not apply to non-taxable capital subsidies as object of introduction as mentioned in Notes on Clauses to Finance Act 2015 was only to align with the provisions of Income Computation and Disclosure Standards (ICDS).

9.5 The Hon'ble Tribunal may issue suitable directions to the NeAC to treat the export incentive under the FMS / MEIS as a capital receipt not chargeable to tax and re-compute the total income by reducing the amount of incentive for the subject AY 2016-17.

10. Non grant of deduction under section 80G of the Act

10.1 The NeAC erred in not granting deduction under section 80G of the Act amounting to Rs.3,79,50,000, being the sum total of Chapter VI-A deductions, while assessing the total tax liability for the subject AY.

10.2 The NeAC ought to have appreciated that deduction under section 80G was not a subject matter of issue in the draft assessment order and as such the NeAC is precluded from disallowing the same in the Final Assessment Order.

10.3 The Ne.AC cannot disallow, deduction under Section 80G of that Act in the Final Assessment Order in the absence of any specific direction issued by DRP in this regard.

11. Miscellaneous

11.1 The NeAC erred in granting lower TDS credit amounting to Rs. 20,87,82,316 as against Rs.20,93,08,739 claimed for the subject A Y.

11.2 The NeAC erred in levying excessive interest amounting to Rs.86,37,309 under section 234B of the Act.

12. The Appellant prays that directions be given to grant all such relief arising from the grounds of appeal mentioned supra as also all consequential relief thereto.

13. The Appellant craves to add, alter, amend, substitute, rescind, modify and / or withdraw in any manner whatsoever all or any of the foregoing grounds at or before the hearing of appeal.

4. Brief facts of the case are that the assessee M/s. Hyundai Motor India Ltd., is wholly owned subsidiary of M/s. Hyundai Motor Company Ltd., South Korea. The assessee is engaged in the business of manufacturing and selling passenger cars in domestic and export market. The assessee company has filed its return of income for assessment year 2016-17 on 29.11.2016 admitting total income of Rs.1865,03,71,585/- under normal provisions of the Act and book profit u/s.115JB of the Act at Rs.1918,63,89,313/-. The assessee had entered into various international transactions with its AEs and international transactions were duly reported in Form 3CEB filed in accordance with provisions of Indian Transfer Pricing Regulations contained in section 92, 92A to 92F of the Income Tax Act, 1961. The case was taken up for scrutiny and during the course of assessment proceedings; a reference was made to JCIT (Transfer Pricing) for determination of arm's length price of international transactions of the assessee with its AEs. The learned TPO vide its order dated 01.11.2019 has suggested upward adjustment for brand development services.

5. The Assessing Officer, in pursuant to TPO order, has passed draft assessment order u/s.143(3) r.w.s 144C of the Act on 27.12.2019 and made transfer price adjustments as suggested by the TPO at Rs.237,51,90,000/-. The Assessing Officer had also proposed certain corporate tax adjustments including disallowances u/s.14A, r.w.r 8D of IT Rules, 1962, disallowance of subsidy received towards capital expenditure, disallowance of focus marketing scheme expenses, disallowance of additional depreciation claimed on fixed assets for regional offices and disallowance of bonus / performance reward u/s.43B of the Act. The assessee has filed objections before learned DRP against draft assessment order, but the learned DRP vide its directions dated 23.03.2021 has rejected objections filed by the assessee. The Assessing Officer in pursuant to the directions of the learned DRP has passed final assessment order incorporating directions of the ld. DRP. Aggrieved, the assessee has filed present appeal before the Tribunal.

6. The first issue that came up for our consideration from ground No.2 of assessee's appeal is the order passed by TPO is

barred by limitation. The ld.AR for the assessee at the time of hearing submitted that the assessee does not want to press the ground and thus, ground No.2 of assessee is dismissed as 'not pressed'.

7. The next issue that came up for consideration from ground no.3 of assessee appeal is transfer pricing adjustment made towards brand development services. During the year under consideration, the learned TPO has made upward adjustment of Rs.237,51,00,000/- in relation to brand fees receivable from its AEs towards enhancement of brand value of assessee parent company. The learned TPO used Spearman's Rank Correlation method to conclude that there is positive correlation between the brand value of Hyundai Motor India Limited and market capitalization of Hyundai market Corporation, South Korea. Therefore, by applying Spearman's Rank Correlation method, the ld. TPO has computed incremental brand value and attributed a portion of the same to the assessee in proportionate to its sales.

7.1 The ld.AR for the assessee, at the time of hearing submitted that this issue is covered in favour of the assessee by

the decision of ITAT., Chennai in assessee's own case for the assessment year 2015-16 in IT(TP)A No.10/Chny/2020, wherein the Tribunal by following the earlier Tribunal order for assessment year 2013-14 in ITA No. 3192/Chny/2017, held that the issue is identical to earlier years and accordingly deleted the brand fee adjustment.

7.2 The ld. DR on the other hand, fairly agreed that this issue is covered in favour of the assessee. But strongly supported ld. TPO/DRP order.

7.3 We have heard both the parties, perused material available on record and gone through orders of the authorities below. An identical issue has been considered by Tribunal in assessee's own case for the assessment year 2015-16 in IT(TP) No.10/CHNY/2020, dated 17.09.2021, wherein the Tribunal following the earlier decision in assessee's own case for assessment year 2013-14 in ITA No.3192/Chny/2017, dated 01.09.2021, held that learned TPO as well as learned DRP were erred in making transfer pricing adjustments towards brand services by adopting Spearman's Rank Correlation method and concluded that there is positive accretion between brand value

and market capitalization of HMC Korea and hence, directed the AO/TPO to delete transfer pricing adjustment made towards brand development services. Therefore, consistent with the view taken by the coordinate Bench, we direct the AO to delete addition made towards brand fee adjustment.

8. The next issue that came up for our consideration from ground no.4 of assessee appeal is disallowances u/s.14A r.w.r 8D of Income Tax Rules, 1962, amounting to Rs.70,07,153/-. The facts with regard to impugned dispute are that during the year under consideration, the assessee has earned dividend income from mutual funds, which is exempt from tax amounting to 1,11,645/-, however, did not made any suo-motto disallowance of expenditure relatable to exempt income. Therefore, the Assessing Officer has invoked provisions of Rule 8D of Income Tax Rules, 1962, and determined disallowances of Rs.70,07,153/- u/s.14A of Income Tax Act, 1961.

8.1 The ld.AR for the assessee, at the time of hearing submitted that this issue is also covered in favour of the assessee by the decision of ITAT., Chennai in assessee's own case for the assessment year 2015-16 in IT(TP)A No.10/Chny/2020, wherein

the Tribunal by following the earlier Tribunal order for assessment year 2013-14 in ITA No. 3192/Chny/2017, held that disallowance u/s.14A should be restricted to the extent of exempt income earned for the impugned assessment year.

8.2 The ld.DR on the other hand, fairly agreed that this issue is covered in favour of the assessee.

8.3 We have heard both the parties, perused materials available on record and gone through orders of the authorities below. An identical issue has been considered by Tribunal in assessee's own case for the assessment year 2015-16 in IT(TP) No.10/CHNY/2020, dated 17.09.2021, wherein the Tribunal following the earlier decision in assessee's own case for assessment year 2013-14 in ITA No.3192/Chny/2017, dated 01.09.2021 directed the AO to restrict disallowances u/s.14A of the Act, to the extent of exempt income earned for the impugned assessment year. The relevant findings of the Tribunal in ITA No.3192/Chny/2017 are as under:-

> "10. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. It is well settled principles of law that disallowances u/s.14A cannot exceed amount of exempt income. The Hon'ble Supreme Court in the case of Pr.CIT Vs State Bank of Patiala (supra), while dismissing SLP

> filed by the Revenue against order of the Hon'ble Punjab & Haryana High Court in the case of Pr.CIT Vs State Bank of Patiala, held that disallowance u/s.14A could be restricted to amount of exempt income only. The Hon'ble Jurisdictional High Court of Madras in the case of Marg Ltd Vs.CIT (2020) 120 Taxmann.com 84, has taken a similar view and held that disallowances under Rule 8D r.w.s 14A can never exceed exempt income earned by the assessee during particular assessment year. In this case, admittedly, exempt income for impugned assessment year was Rs.57,826/-, whereas the Assessing Officer has determined disallowance u/s.14A at Rs.86,54,491/- contrary to settled principle of law. Therefore, considering facts and circumstances of this case and also by following the decisions of Hon'ble Supreme Court and Hon'ble Madras High Court, we direct the Assessing Officer to restrict disallowances u/s.14A to the extent of exempt income earned for the impugned assessment year."

In this view of matter and consistent with view taken by the Co-ordinate Bench, we direct the AO to restrict disallowance u/s.14A to the extent of exempt income earned for the impugned assessment year.

9. The next issue that came up for our consideration from ground no.5 of assessee appeal is disallowance of depreciation on capital subsidy. During the financial year 2002-03, the State Industrial Promotion Corporation of Tamil Nadu (SIPCOT) had granted subsidy of Rs.100 lakhs to encourage and recognize huge investments made for setting up of mega project viz., passenger car manufacturing unit in Irungattukottai. The assessee has treated subsidy received from SIPCOT as capital receipt and did

not reduce the same from cost of assets, as it was not directly or indirectly used to purchase any asset. The Assessing Officer has held that capital subsidy received from SIPCOT being utilized by the assessee for capital expenditure, same ought to have been reduced from the cost of asset added in that year by contending that subsidy was directly or indirectly used to purchase of asset and as per explanation (10) to section 43 the same needs to be deducted from cost of assets and consequently, reworked depreciation by reducing amount of subsidiary and disallowed a sum of Rs.1,24,585/-.

9.1 The learned AR for the assessee submitted that this issue is covered in favour of the assessee by the decision of ITAT., Chennai, in assessee's own case for assessment year 2015-16 in IT(TP)A No.10/Chny/2020, wherein the Tribunal by following the earlier Tribunal order for assessment years 2006-07 & 2013-14 in IT(TP)A.No.14/Chny/2018 & ITA No. 3192/Chny/2017, held that subsidiary received from SIPCOT is capital receipt not liable for tax.

9.2 The learned DR, on the other hand, fairly agreed that this issue is covered in favour of the assessee, however strongly supported AO/DRP orders.

9.3 We have heard both the parties, perused materials available on record and gone through orders of the authorities below. An identical issue has been considered by Tribunal in assessee's own case for the assessment year 2015-16 in IT(TP)A No.10/Chny/2020, wherein the Tribunal by following the decision of the Tribunal in assessee's own case for assessment year 2013-14 in ITA No.3192/Chny/2017, dated 01.09.2021 & 2006-07 in IT(TP)A No.14/Chny/2018 and after considering nature of subsidy has allowed claim of the assessee by observing that for earlier years, the CIT(A) has allowed claim of the assessee and the AO has accepted decision of the CIT(A) and deleted additions, while passing order giving effect to the order of the CIT(A). Therefore, consistent with the view taken by the coordinate Bench, we direct the AO to delete addition made towards disallowance of depreciation on capital subsidy received from SIPCOT.

10. The next issue that came up for consideration from ground No.6 of assessee appeal is disallowance u/s.43B(c) of the Act, in respect of performance incentive paid to employees. Facts with regard to impugned dispute are that for the financial year relevant to the assessment year 2016-17, the assessee has paid performance reward to employees in the cadre of executives and senior executives. The assessee has provided for expenses for the year ended March, 2016. However, payment was made only after due date of filing return of income for assessment year 2016-17. The Assessing Officer has disallowed performance incentive paid to staff u/s.43B(c) r.w.s. 36(1)(ii) of the Act, amounting to Rs.1,54,58,594/- on the ground that as per section 43B(c), any sum referred to in clause (ii) of sub-section (1) of section 36, shall not be allowed as deduction, unless the same is paid on or before due date for furnishing return of income u/s.139(1) of the Act. The Assessing Officer further noted that as per section 36(1)(ii), any sum paid to an employee as bonus or commission for services rendered, where such sum would not have been payable to him as profit or dividend, if it had not been paid as bonus or commission is covered. Therefore, he opined that any payment made to an employee which is in the nature of bonus or commission for services rendered is covered u/s. 36(1)(ii) of the Act, and thus, if

such payment is not made on or before due date of filing of return of income u/s.139(1) of the Act, then same cannot be allowed as deduction, as per section 43B(c) of the Act. The assessee has filed objections before learned DRP and challenged additions made by the AO. The learned DRP vide its directions dated 23.03.2021 has rejected objections filed by the assessee and confirmed additions made by the AO.

10.2 The learned A.R for the assessee submitted that the learned DRP erred in sustaining additions made by the AO towards disallowance of performance incentive paid to employees u/s.43B(c) of the Act, without appreciating fact that said payment is neither bonus nor commission and thus, same cannot be brought within the ambit of provisions of section 36(1)(ii) r.w.s.43B(c) of the Income Tax Act, 1961.

10.3 The ld.DR on the other hand strongly supporting order of the ld.DRP submitted that this issue is covered against the assessee by the decision of ITAT., Chennai in assessee's own case for assessment year 2015-16 in IT(TP)A No.10/Chny/2020, wherein the Tribunal by following the earlier Tribunal order for assessment

year 2013-14 in ITA No. 3192/Chny/2017, decided the issue against the assessee.

10.4 We have heard both the parties, perused materials available on record and gone through orders of the authorities below. We find that an identical issue has been considered by the Tribunal in assessee's own case for assessment year 2015-16 in IT(TP)A No.10/Chny/2020, wherein the Tribunal by following the earlier Tribunal order for assessment year 2013-14 in ITA No. 3192/Chny/2017, where under identical circumstances, the Tribunal has held that payment made to an employee which is in the nature of bonus or commission for services rendered is covered u/s. 36(1)(ii) of the Act, and thus, if such payment is not made on or before due date of filing of return of income u/s.139(1) of the Act, then same cannot be allowed as deduction, as per section 43B(c) of the Act. The relevant findings of the Tribunal are as under:-

> *"23. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. Admittedly, none of the employees of the assessee are covered under payment of Bonus Act, because all employees' salary is above threshold limit fixed under payment of Bonus Act. It is also an admitted fact that the assessee is paying performance incentive/reward to employees regularly and such incentive has been paid for services rendered by the employees. Therefore, it is*

necessary to examine performance incentive paid to employees in light of provisions of section 36(1)(ii) read with section 43B(c) of the Income Tax Act, 1961. As per section 36(1)(ii) of the Act, any sum paid to an employee as bonus or commission for services rendered, where such sum would not have been payable to him as profits or dividend, if it had not been paid as bonus or commission is allowable as deduction. The provisions of Section 43B(c) provides that any sum referred to in section 36(1)(ii) will not be allowed as deduction, unless actually paid. Therefore, from a combined reading of provisions of section 36(1)(ii) read with section 43B(c), it is seen that provisions of section 36(1)(ii) is not only covers for payment of bonus to staff, but it also applies to commission paid to the employees for services rendered. The assessee claims that expenditure incurred is towards performance reward, which is not in the nature of bonus and hence, will not be covered u/s. 36(1)(ii) of the Act.

24. We have given our thoughtful consideration to facts brought out by the ld. AO in light of arguments of the ld. AR for the assessee and we do not ourselves subscribe to the arguments of ld. AR for the assessee, for simple reason that once performance incentive is paid for rendering services, then such payment is in the nature of bonus or commission which comes under the provisions of section 36(1(ii) of the Act. It is immaterial whether the assessee terms it as performance reward or bonus. But, what is relevant is nature of payment and purpose of payment. In this case, it is in the nature of bonus or commission and such payment is for services rendered by employees. Just because nomenclature was changed to some other name, a particular expenditure would not change its original character. In this case, sum was paid to employees for services rendered and further, this sum would not have been paid as profits or dividend had it not been paid as commission or performance reward. Therefore, we are of the considered view that provisions of section 36(1)(ii) of the Act is squarely applicable and consequently, mischief of section 43B(c) would come into play, if such payment is not made on or before due date of furnishing of return of income. In this case, admittedly, the assessee has paid performance incentive

only after due date of filing of income-tax return. Insofar as case laws relied upon by the assessee, we find that facts those case laws are different from facts of present case and has no application to case of the assessee. Therefore, we are of the considered view that there is no error in the reasons given by the Assessing Officer as well as learned DRP to disallow performance reward u/s.43B(c) of the Act. Hence, we are inclined to uphold the order of Assessing Officer as well as directions of learned DRP and reject ground taken by the assessee."

In this view of matter and consistent with view taken by the Co-ordinate Bench, we are inclined to uphold the order of the AO as well as the directions of ld.DRP and reject ground taken by the assessee.

11. The next issue that came up for our consideration from additional ground no.7 of the assessee appeal is deduction towards education and secondary education cess u/s.37(1) of the Act.

11.1 The ld.AR for the assessee submitted that this issue is covered in favor of the assessee by the decision of ITAT., Chennai in assessee's own case for 2015-16 in IT(TP)A No.10/Chny/2020, wherein the Tribunal by following the earlier Tribunal order for assessment year 2013-14 in ITA No. 3192/Chny/2017, where under identical circumstances, the Tribunal has remanded the

matter to the file of the AO to consider the issue in accordance with law.

11.2 The learned DR, on the other hand, fairly agreed that this issue has been set aside to the file of AO for earlier years and hence, this year also the issue may be remanded back to the file of Assessing Officer.

11.3 Having heard both the parties and considered material on record, we find that the Tribunal had considered an identical issue for assessment year 2015-16 in IT(TP)A No.10/Chny/2020, wherein the Tribunal by following the earlier Tribunal orders 2013-14 in 3192/Chny/2017, where the issue has been remanded back to the file of AO to consider the issue denovo on merits in accordance with law, set aside issue to the file of Assessing Officer. Facts being identical for the year under consideration, by following the decision of Tribunal in assessee's own case for assessment year 2015-16, we set-aside the issue to file of the AO to re-examine the issue as per the directions given by the Tribunal.

12. The next issue that came up for our consideration from ground no.8 of assessee appeal is addition towards VAT incentive received from Government of Tamil Nadu. During the year under consideration, the assessee has received refund of output VAT amounting to Rs.90,95,09,568/- from Govt. of Tamil Nadu and credited to profit and loss account under the head income from other sources. The assessee has treated above incentive as revenue receipt both for its books of account and its tax returns. However, during the course of assessment proceedings, the assessee has raised a fresh claim to treat incentive as capital receipts not chargeable to tax. The AO has not adjudicated fresh claim made by the assessee. The learned DRP has rejected objections filed by the assessee without giving any specific direction.

12.1 The learned AR for the assessee submitted that this issue is also covered in favor of the assessee by the decision of ITAT., Chennai in assessee's own case for 2015-16 in IT(TP)A No.10/Chny/2020, wherein the Tribunal by following the earlier Tribunal order for assessment year 2013-14 in ITA No. 3192/Chny/2017, where under identical circumstances, the Tribunal has remanded the matter to the file of the AO to consider

the issue in accordance with law. Therefore, the issue may be set aside to file of the Assessing Officer for verification.

12.2 The learned DR, on the other hand, fairly agreed that this issue has been set aside to the file of AO for earlier years and hence, this year also the issue may be remanded back to the file of Assessing Officer.

12.3 Having heard both the parties and considered material on record, we find that the Tribunal had considered an identical issue for assessment year 2015-16 in IT(TP)A No.10/Chny/2020, wherein the Tribunal by following the earlier Tribunal orders 2011-12 & 2013-14 in ITA Nos.853/Chny/2014 & 3192/Chny/2017, where the issue has been remanded back to the file of AO to consider the issue denovo on merits in accordance with law, has set aside issue to the file of Assessing Officer. Facts being identical for the year under consideration, by following the decision of Tribunal in assessee's own case for assessment year 2015-16, we set aside the issue to file of the AO and direct him to reconsider the issue in accordance with law.

13. The next issue that came up for our consideration from ground no.9 of assessee appeal is amount received from Focus Market Scheme to be treated as capital in nature and exclude

from total income. Facts with regard to impugned dispute are that Government of India with an intention to promote exports to certain regions / countries introduced Focus Market Scheme which provides incentive of 2.5% of FOB value for each licensing year commencing from 1st April, 2006. The export of products to those countries which are covered under list of countries in Schedule 37C would be entitled for duty credit scrip equivalent to 2.5% of FOB value of exports. During the year under consideration, the assessee was eligible for above scheme, as it has export sales to specified markets. Accordingly, the assessee has received an amount of Rs.1,74,21,68,524/- as incentive from Govt. of India. The license under the scheme was given only for exports to potential new markets / specified products and not for all exports or all products to all markets. The assessee has treated amount received under Focus Market Scheme as revenue in nature and has offered to tax. Based on certain subsequent decisions, the assessee has raised additional ground and argued that subsidy received under Focus Market Scheme is capital in nature and not chargeable to tax.

13.1 The ld.AR for the assessee submitted that the character of receipt has to be determined with respect to purpose for which subsidy is given and in the present case, if you consider the

purpose for which subsidy was given, it is clearly in the nature of capital receipts, because said subsidy was given to explore new market across the globe. Therefore, the same is in the nature of capital receipt and not chargeable to tax. In this regard, he relied upon the decision of ITAT Chennai, in the case of Eastman Exports Global Clothing Pvt. Ltd. in ITA No.47 & 48/Chny/2016, where the issue relating to taxability of subsidy received under Focus Market Scheme was held to be capital in nature.

13.2 The ld.DR, on the other hand, strongly supporting order of learned DRP submitted that the issue is covered against the assessee by the decision of ITAT, Chennai for the assessment year 2015-16 in IT(TP)A No.10/Chny/2020, wherein the Tribunal by following the earlier Tribunal orders 2007-08 & 2013-14 in ITA Nos.2157/Chny/2007 & 3192/Chny/2017 had decided the issue against the assessee.

13.3 We have heard both the parties, perused material available on record and gone through orders of the authorities below. An identical issue has been considered by the Tribunal in assessee's own case for for the assessment year 2015-16 in IT(TP)A No.10/Chny/2020, wherein the Tribunal by following the earlier Tribunal orders 2007-08 & 2013-14 in ITA Nos.2157/Chny/2007

& 3192/Chny/2017 held that duty credit scrips received from Govt. of India under Focus Market Scheme is revenue in nature. The relevant findings of the Tribunal are as under:-

> "32. We have heard both the parties, perused material available on record and gone through orders of the authorities below. The Government of India, Ministry of Commerce and Industry has come out with Foreign Trade Policy for the period 1st September, 2004 to 31.03.2009 and as per the said policy, it has announced a scheme for exporters of certain goods to certain regions called Focus Market Scheme . As per said scheme, export of products to those countries which are covered under list of countries in Schedule 37C would be entitled for duty credit scrip equivalent to 2.5% of FOB value of exports. The assessee being eligible exporter had received licenses/duty credit scrip/ market linked focus scrips amounting to Rs.150.57 crores for the year under consideration. The assessee has considered amount received under focus market scheme as revenue receipt and offered to tax. However, based on some subsequent decisions of appellate authorities has filed an additional claim seeking exclusion of said receipt from taxation on the ground that it is in the nature of capital receipt and not exigible for tax. Therefore, in order to understand whether amount received from Focus Market Scheme is revenue in nature or capital receipt, which is exempt from tax, one has to understand objectives of Focus Market Scheme announced by Govt. of India. As per Foreign Trade Policy document, the objective of the scheme is to offset high freight cost and other disabilities to select international market with a view to enhance our competitiveness to these countries. On the basis of objectives of the scheme alone, it can be easily concluded that amounts received under the scheme is revenue in nature, because it is primarily focusing to reduce cost of our exporters to compete with other export markets to these regions. However, various courts including Hon'ble Supreme Court in number of cases has examined nature of subsidy received from Govt. of India on the basis of purpose test and has held capital or revenue in nature depending upon purposes for which said subsidy was given. In our considered view, this controversy can be resolved

if we apply test laid down in the judgement of Hon'ble Supreme Court in the case of Sahney Steel & Press Works Ltd. Vs. CIT (228 ITR 253). The importance of judgement of Hon'ble Supreme Court in the above case lies in the fact that it has discussed and analyzed the entire case laws on the issue and it has laid down basic test to be applied in judging the character of subsidy. That test is the character of receipt in the hands of the assessee has to be determined with respect to the purpose for which the subsidy is given. In other words, in such cases, one has to apply purpose for test. The point of time at which subsidy paid is not relevant. The source is immaterial. The form of subsidy is immaterial.

33. Therefore, in the light of decision of the Hon'ble Supreme Court, in the case of Sahney Steel & Press Works Ltd. Vs. CIT(supra), if we examine facts of the present case, we are of the considered view that duty credit scrips received by the assessee from Govt. of India for export of certain goods to some specified regions is certainly in the nature of revenue receipt, because which is primarily given to offset higher freight cost and other disabilities to select international markets, with a view to enhance our export competitiveness to these countries. We further, are of the opinion that this subsidy was given by way of assistance in carrying on of trade or business and to meet recurring expenses, but it was not for acquiring any capital asset. It was not to meet part of the cost to manufacturing activity. It was not granted for production or bringing into existence any new asset. The subsidy was given year after year only after setting up of industry and only after commencement of production and therefore, such subsidy could only be treated as assistance given for the purpose of carrying on business of the assessee. It is well settled principles of law that any subsidy given for the purpose of offsetting part of cost of setting up of new industry, as per industrial policy of various State Governments or Govt. of India is considered as part of capital contribution and capital in nature, whereas subsidy given after commencement of production of products and further for enhancing profitability of the assessee is certainly in the nature of assistance given for running of business of

the assessee more profitable and hence, it is definitely revenue in nature.

34. In this case, on perusal of facts available on record including foreign trade policy of Government of India, it is very clear from documents that main objective of Focus Market Scheme is to offset high freight cost and other disabilities of exporter to select international market with a view to enhance our export competitiveness to these countries. The expenditure incurred by the assessee under this scheme for exploring new market across the globe is mainly freight cost and other recurring expenses like sales promotion expenses, including manpower cost of staff employed in marketing department. Those expenses are generally in the nature of revenue expenditure and thus, can be considered as revenue expenditure. Since, the assessee got duty credit scrip benefit to offset cost incurred for exploring new market including higher freight cost and further, said expenditure is in the nature of revenue expenditure, then any subsidy including duty credit scrips given by Govt. of India for such purpose is definitely in the nature of revenue receipt. Thus, at any stretch of imagination, the amount received under Focus Market Scheme cannot be considered as capital in nature, which is given to offset cost or part of cost of any asset or facility created by the assessee. Moreover, in this case, the assessee itself had considered amount received under Focus Market Scheme as revenue receipts and offered to tax, considering nature and purpose of receipt of subsidy from the Govt. of India. It is a well known fact that the assessee is best judge to decide a particular item of income or expenditure, because it is well aware facts of its case. In this case, the assessee, after considering nature and purpose of amount received under Focus Market Scheme, has very well considered the same as revenue receipt and offered to tax. Therefore, based on some judgements of higher forum making a claim for excluding said receipt from tax by claiming that it is in the nature of capital receipt is not correct, unless the assessee demonstrates that facts of those case laws considered by appellate forum and facts of assessee's case are similar in nature. As regards various case laws relied upon by the assessee including the decision of ITAT., Chennai

in the case of Eastman Exports Global Clothing Pvt.Ltd. in ITA No.47 & 48/Chny/2016, we find that the ITAT, Chennai Bench in above case has not apprised facts in right perspective of law and hence, the judgment of Chennai Bench is not considered. As regards decision of Hon'ble Rajasthan High Court in the case of Pr.CIT Vs. Nitin Spinners Ltd. in Income Tax Appeal No.31 of 2019, we find that facts of case before Hon'ble High Court and facts of present case are different and hence, same is not considered.

35. In this view of the matter, and considering facts and circumstances of the case, we are of the considered view that duty credit scrips received from Govt. of India under Focus Market scheme is revenue in nature and further, same was given to offset higher cost of freight and other disabilities of exporters to be more competitive in exports to certain regions. Thus, the same cannot at any stretch of imagination be considered as capital in nature. Hence, we reject the ground taken by the assessee."

In this view of matter and consistent with view taken by the Co-ordinate Bench, we are of the considered view that subsidy received from Govt. of India under Focus Market scheme cannot be considered as capital in nature and hence, we reject ground taken by the assessee.

14. The next issue that came up for consideration from Ground No.10 is non grant of deduction u/s. 80G of the Act. The ld.AR for the assessee at the time of hearing submitted that the assessee does not want to press the ground and thus, ground No.10 of assessee is dismissed as 'not pressed'.

15. The next issue that came up for our consideration from Ground No.11.1 is granting lower TDS credit amounting to Rs.20,87,82,316/- as against Rs.20,93,08,739/-.

16. Having heard both sides, we set aside this issue to the file of the Assessing Officer and direct the Assessing Officer to verify claim and grant credit for TDS in accordance with law.

17. The next issue that came for consideration from Ground No.11.2 is interest charged u/s.234B of the Act. Interest u/s.234B is consequential and thus, the Assessing Officer is directed to recompute interest u/s.234B in accordance with law.

18. In the result, appeal filed by the assessee is treated as partly allowed for statistical purposes.

Order pronounced in the court on 22nd December, 2021 at Chennai.

Sd/-	Sd/-
(महावीर सिंह)	(जी. मंजुनाथ)
(MAHAVIR SINGH)	**(G. Manjunatha)**
उपाध्यक्ष /VICE PRESIDENT	लेखा सदस्य /Accountant Member

चेन्नई/Chennai,
दिनांक/Dated, the 22nd December, 2021

RSR

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.