IN THE INCOME TAX APPELLATE TRIBUNAL DELHI BENCH 'I-1', NEW DELHI

BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER AND SH. KULDIP SINGH, JUDICIAL MEMBER

(THROUGH VIDEO CONFERENCING)

ITA No.6194/Del/2015 (for Assessment Year 2009-10)
ITA No.463/Del/2016 (for Assessment Year 2009-10)

Havells India Ltd., **1, Raj Narain Marg,** **Civil Lines** **Delhi – 110054** **PAN No. AAACH 0351 E**	**Vs.**	**DCIT (LTU),** **NBCC Plaza,** **Sector – 4,** **Pushp Vihar, Saket** **New Delhi**
(APPELLANT)		**(RESPONDENT)**

Assessee by	**Shri Ved Jain, Advocate** **Shri Akshat Goyal, Advocate**
Revenue by	**Shri Bhagwati Charan, CIT(DR)**

Date of hearing:	**09/12/2020**
Date of Pronouncement:	**19/01/2021**

ORDER

PER ANIL CHATURVEDI, AM:

Both the appeals by the assessee are preferred against the order of the Commissioner of Income Tax (Appeals)-22 & 44, New Delhi dated 23.10.2015 & 29.10.2015 respectively pertaining to Assessment Year 2009-10. Appeal No 6194/Del/2015 is against the quantum additions confirmed by CIT(A) and appeal No ITA No.463/Del/2016 is against the order passed u/s 154 of the Act.

2. The relevant facts as culled from the material on records are as under:

3. The assessee is a company stated to be engaged in the business of manufacturing of switchgears, energy meters etc. Assessee electronically filed its return of income for A.Y. 2009-10 on 26.09.2009 declaring total income of Rs.2,73,93,854/- under the normal provisions and Rs.1,67,73,82,769/- under the MAT provisions. The case was selected for scrutiny and notice u/s 143(2) of the Act dated 06.09.2010 was issued and served on the assessee.

4. AO noted that during the year under consideration, assessee had entered into international transactions with its Associate Enterprise (AEs) and the value of such transactions exceeded Rs.15 crores. He therefore referred the case to TPO on 25.07.2011 u/s 92CA for computing the Arm's Length Price (ALP) of the international transactions entered by the assessee with its AEs. The TPO vide order dated 22.01.2013 passed u/s 92CA(3) proposed adjustment of Rs.59,02,538/- with respect to market support services and Rs.15,19,68,061/- towards interest on excess amount of investments in share and thus proposed aggregate adjustment of Rs.15,78,70,599/- to the total income on account of ALP with respect to international transaction with associated enterprises. AO thereafter in the order passed u/s 143(3) r.w.s 144C(4)(a) of the Act dated 28.05.2013 determined

the total income of the assessee under normal provisions of the Act at Rs.21,18,15,600/- and book profit of Rs.165,91,02,036/-.

5. Aggrieved by the order of AO, assessee carried the matter before the CIT(A) who vide order dated 23.10.2015 in Appeal No.30/14-15/CIT(A)-22, New Delhi granted partial relief to the assessee. Aggrieved by the order of CIT(A), assessee is now in appeal before us and has raised following grounds in ITA No. 6194/Del/2015 and ITA No.463/Del/2016 for A.Y. 2009-10.

ITA No.6194/Del/2015

1. **That the impugned order of IT (Appeals)-22, New Delhi is bad in law and wrong on the facts and in the circumstances of the case and legal position.**

2. **That on the facts and in the circumstances of the case and the legal position, the learned CIT (Appeals) has erred in confirming the Order passed by the AO re-computing the book profit u/s 115JB by adding the amount at Rs.2,47,68,964/- on account of Sales incentive under 'Shahenshah Scheme' treating the same as unascertained and contingent liability.**

3. **That on the facts and in the circumstances of the case and the legal position, the learned CIT (Appeals) has erred in confirming the Order of the AO when :**

i. **addition made by the AO in the assessment proceedings u/s 143(3) is debatable addition.**

ii. **the addition u/s 143(3) is debatable, the rectification proceedings u/s 154 are illegal and void-ab-initio.**

4. **That the appellant, craves, leave to add/alter/delete/amend any ground(s) of appeal before or at the time of hearing."**

ITA No.463/Del/2016

1. That the impugned order of CIT (A)-44, New Delhi is bad in law and wrong on the facts and in the circumstances of the case and legal position.

2.01 That on the facts and in the circumstances of the case and the legal position, the learned CIT(A) has erred in confirming the disallowance of Rs.17,59,124/- u/s 40(a)(i) of the Act, 1961 paid to a foreign entity as testing / certification fees outside India, as no income has accrued /arisen in India.

2.02 That the Learned CIT(A) has failed to appreciate that testing/certification fees paid outside India was not chargeable to tax under the provisions of the IT Act, 1961 read with the overriding provisions of the applicable DTAA and therefore, there was no default in not deducting tax at source.

2.03 That the learned CI (A) has erred in holding that the amount paid to foreign entity towards testing/ certification fees is for technical services for the purpose of making/earning income in India.

3. That on the facts and in the circumstances of the case and the legal position, the learned CIT(A) has erred in confirming the disallowing a sum of Rs.2,47,68,964/- in respect of provision made for sales incentive under "Shahensha Scheme" and holding that the provision made by the appellant under the aforesaid scheme was not being made on a scientific or logical basis and therefore the provisions, is not allowable as deduction.

4. That on the facts and in the circumstances of the case and the legal position, the learned CIT(A) has erred in not allowing the sum of Rs. 23,059/- being the interest income of Rs.16,725/- and

Rs.6,334/- in respect of Baddi and Haridwar units respectively for the purpose of deduction u/s 8OIC of the I.T. Act, 1961.

5.01. That on the facts and in the circumstances of the case and the legal position, the learned CIT (A) has erred m not allowing the deduction of education cess and secondary and higher education cess of Rs.54,75,037/-.

5.02. That on the facts and in the circumstances of the case and the legal position, the learned CIT (A) has erred in not adjudicating the aforesaid claim on the ground that the claim was not made by filing a revised return, without appreciating that the embargo/ prohibition contained in the case of Goetze India Limited 284 ITR 323 (SC) do not apply to the powers of the appellate authority to entertain any fresh/ new claim.

6. That on the facts and in the circumstances of the case and the legal position, the learned CIT (A) has erred in not allowing the deduction of interest expenses of Rs.1,57,80,709/- when:

a) the proviso to section 36(1)(iii) of the IT Act, 1961 is not applicable to the appellant Company.
b) interest expenses has been incurred for expansion and not for the extension of existing business activities of the appellant Company.
c) without prejudice, the learned CIT (A) has erred in not adjudicating the aforesaid claim on the ground that the claim was not made by filing a revised return, without appreciating that the embargo/ prohibition contained in the case of Goetze India Limited 284 ITR 323 (SC) do not apply to the powers of the appellate authority to entertain any fresh/ new claim.

7. That on the facts and in the circumstances of the case and the legal position, the learned CIT (A) has erred in confirming the adjustment by re-determining the arm's length price under Section 92CA of the Act, of the appellant Company's international transactions of support services provided to wholly owned foreign subsidiary Company and step down subsidiary Company (AE) at Net Cost plus margin ('NCP') of 12.92% as against 7.70% claimed

by the appellant Company and thus confirming the disallowance of Rs.36,04,286/-."

6. We thus first proceed to dispose of assessee's appeal in ITA No.463/Del/2016.

7. Before us, at the outset, Learned AR submitted that the Ground No.1 is general in nature therefore requires no adjudication.

8. Ground No.2 and the sub grounds are with respect to the disallowance u/s 40(a)(i) of the Act.

9. During the course of assessment proceedings, AO noticed that assessee had paid Rs.17,59,124/- to a foreign entity and while making the aforesaid payment no TDS was deducted. The assessee was asked to explain as to why the amount not be disallowed u/s 40(a)(i) of the Act to which the assessee inter alia stated that the amount was paid as testing expenses to various foreign entities for the purpose of certification of electrical products manufactured by it. It was further submitted that the testing was done by foreign entity outside India for the purpose of exports outside India, the services was rendered and utilized outside India and the payment have also been received by the foreign entity outside India, the assessee's case falls under the exemption provided u/s 9(1)(vii)(b) of the Act and therefore assessee was not required to deduct TDS on the payments. The

submissions of the assessee was not found acceptable to AO as he was of the view that the payment made by the assessee falls within the purview of "fees for technical services" and the testing report certification etc. was in respect of products to be utilized for the purpose of the business of the assessee. AO also noted that the Hon'ble Delhi High Court in assessee's own case for A.Y. 2005-06 had decided the issue against the assessee. He therefore, held that non-deduction of tax by the assessee would lead to attraction of provision u/s 40(a)(i) of the Act and accordingly he disallowed the payments of Rs.17,59,124/-.

10. Aggrieved by the order of AO, assessee carried the matter before the CIT(A) who upheld the order of AO. Aggrieved by the order of CIT(A), assessee is now before us.

11. Before us, Learned AR reiterated the submission made before the AO and CIT(A). He further submitted that AO had made the disallowance after wrongly inferring the order passed by the Delhi High Court for A.Y. 2005-06 to be against the assessee. He submitted that AO had quoted only a part of order of the Delhi High Court in the assessment order and had failed to notice that Delhi High Court had restored the issue to the ITAT to examine the issue relating to the applicability of Indo-US Treaty to the receipts in question and consequently applicability of provision of Section 40(a)(i) of the Act. He submitted that pursuant to the

directions of the Hon'ble Delhi High Court, the Tribunal after reviewing the facts had vide order dated 24.05.2018 in ITA No.1300/Del/2010 decided the issue in favour of the assessee. He pointed to the relevant order which is placed in the paper book submitted by the assessee. He therefore submitted that the reliance placed by the AO on the decision of Hon'ble Delhi High Court in the case of assessee is misplaced. He thereafter submitted that identical issue came up in subsequent year i.e. A.Y. 2006-07 and the Tribunal following the findings given by the Tribunal in A.Y.2005-06 deleted the addition made by AO. He submitted that identical issue once again came before the Tribunal in A.Y. 2007-08 (ITA No.6073/Del/2010) wherein the Tribunal following the findings given by the Tribunal in A.Y. 2005-06 and 2006-07 deleted the addition made by AO. He further submitted that the order for A.Y. 2007-08 was followed by the Tribunal while passing the order for A.Y. 2008-09. He thus submitted that the issue is thus squarely covered in favour of the assessee by the orders of Tribunal for A.Ys. 2005-06, 2006-07, 2007-08 & 2008-09. Learned AR further submitted that the facts of the issue in the year under consideration are identical to that of earlier years. He therefore, submitted that addition made by the AO be deleted.

12. Learned DR on the other hand supported the order of AO in CIT(A).

13. We have heard the rival submissions and perused all the materials available on record. The issue in the present ground is w.r.t disallowance u/s 40(a)(i) of the Act. The AO was of the view that on the amount of Rs 17,59,124/- paid by the assessee to various foreign entities for the purpose of certification of the electrical products manufactured by it, assessee should have deducted TDS as it was in the nature of technical services received by assessee. Before us, Learned AR has submitted that identical issue of disallowance has been decided by the Co-ordinate Benches of Tribunal in favour of the assessee in A.Ys. 2005-06, 2006-07, 2007-08 & 2008-09. The aforesaid contention of the Learned AR has not been controverted by the Learned DR. We find that while deciding the issue in A.Y. 2008-09 (order dated 10.11.2020) in favour of the assessee, the coordinate Bench of the Tribunal has observed as under:

> **"3. As regards Ground No. 1, 1.1 and 1.2 relating to addition of Rs. 5,68,856/- u/s 40(a)(i) paid to foreign entity as treaty/certification fees outside India. The Ld. AR submitted that during the previous year's relating to the Assessment Year 2008-09, the assessee paid levy and certificate charges aggregating to Rs.5,68,856/- to M/s KEMA Quality BV, Netherlands for the purpose of certification of electrical products manufactured by the assessee. The aforesaid foreign entity was authorized for certification of products for export which is a mandatory requirement for selling products in Europe, Middle East Countries, and South African Countries. The assessee did not withhold tax at source on the aforesaid payment of Rs. 5,68,856/- made to the overseas entity, since the assessee bonafidely believed that such certification fee was not liable to tax in India. The Ld. AR**

submitted that the aforesaid issue stands covered in favour of the assessee by the order of the Tribunal passed in the assessee's own case for Assessment Year 2006-07 (ITA No. 4813/Del/2010) & Assessment Year 2007-08 (ITA No. 6073/Del/2010) vide order dated 30/09/2019.

4. The Ld. DR relied upon the assessment order and the order the CIT(A).

5. We have heard both the parties and perused the material available on record. It is pertinent to note that in A.Y. 2007-08, the assessee paid levy and certificate charges aggregating to Rs.5,68,856/- to M/s KEMA Quality BV,Netherland for the purpose of certification of electrical products manufactured by the assessee. The aforesaid foreign entity was authorized for certification of products for export which is a mandatory requirement for selling products in Europe, Middle East Countries, and South African Countries. The explanation given by the assessee before the Assessing Officer for not withhold tax at source on the aforesaid payment of Rs.5,68,856/- made to the overseas entity, since the assessee bonafidely believed that such certification fee was not liable to tax in India, as the same was not covered within the meaning of " Fee for Technical Services" as provided u/s 9(1) (vii) of the Act and/or the overriding provisions of the Double Taxation Avoidance Agreements. The aforesaid issue stands covered in favour of the assessee by the order of the Tribunal passed in the assessee's own case for Assessment Year 2006-07 (ITA No. 4813/Del/2010 & Assessment Year 2007-08 being ITA No. 6073/Del/2010). The Tribunal vide order dated 30/09/2019 passed in Assessment Year 2006-07 held that the payment made by the assessee to very same party i.e. M/s KEMA Quality BV Netherland cannot be brought to tax in India as "Fees for Technical Services" in accordance with India Netherland DTAA. In the present Assessment Year also the facts remain identical. Thus, the issue is squarely covered in assessee's own case for Assessment Year 2006-07 & 2007-08 vide order dated 30/09/2019 passed by this Tribunal. Hence, Ground No. 1, 1.1, 1.2 are allowed."

14. Before us, no material has been placed by the Revenue to point out that the orders passed by the Co-ordinate Bench of

Tribunal in A.Y. 2005-06 to 2008-09 in assessee's own case has been set aside/ stayed or over ruled by the higher judicial forum nor has it pointed to any distinguishing feature in the facts of the case in the year under consideration and that of earlier years. Considering the totality of the aforesaid facts and following the order of the Co-ordinate bench in the assessee's own case and for similar reasons, we hold that the Revenue was not justified in making the addition. We therefore set aside the action of AO. Thus the ground of the assessee is allowed.

15. Ground No.3 is with respect to disallowance of Rs.2,47,68,964/- in respect of provision made for sales incentive under "Shahenshah Scheme".

16. During the course of assessment proceedings, AO noticed that assessee had made provision in respect of "Shahenshah Scheme" and the assessee was asked to furnish the details of the same. Assessee inter alia submitted that it had made provision of Rs.5,67,26,847/- in respect of "Shahenshah Scheme" towards sales incentive payable to dealers and distributors and had paid Rs.2,61,14,170/- in respect to the said scheme and Rs.58,43,713/- was written back and credited to Excess Provisions of bad debts/sales incentive written back. The assessee also pointed to the relevant features to the "Shahenshah Scheme" and it was further submitted that the provision made for the scheme is not a contingent liability but rather a contractual

liability which is legally enforceable by the dealers and distributors. The submissions made by the assessee were not found acceptable to AO. AO considering the fact that as against the provision of Rs. 5,67,26,847/-, the actual payment made by the assessee was Rs.2,61,14,170/- and Rs.58,43,713/- was written back, concluded that the provision made by the assessee was not based on any scientific method but was in the nature of contingent liability. He also noted that CIT(A) while deciding the issue in assessee's own case for A.Y. 2008-09 had analyzed scheme and had confirmed the addition made by the AO. He therefore disallowed Rs.2,47,68,964/- [5,67,26,847 – 2,61,14,170 – (5843713/-)].

17. Aggrieved by the order of AO, assessee carried the matter before the CIT(A), who following the order of his predecessor in assessee's own case for A.Y. 2008-09, upheld the action of the AO. Aggrieved by the order of CIT(A), assessee is now before us.

18. Before us, Learned AR reiterated the submissions made before the AO and CIT(A) and further submitted that against the order of CIT(A) for A.Y. 2008-09, assessee had carried the matter before the Tribunal. The Tribunal vide order dated 30.09.2019 in ITA No.4695/Del/2012 has decided the issue in favour of the assessee by holding that the provision made in respect of "Shahenshah Scheme" is on a scientific basis. He further

submitted that the Co-ordinate Bench of Tribunal had deleted the similar additions made by AO in A.Y. 2007-08 & 2006-07. He pointed to the relevant findings in the synopsis filed by him. He therefore submitted that since the issue in the year under consideration is identical to that of earlier years, therefore following the order of tribunal in earlier years, the additions made by AO be deleted.

19. Learned DR on the other hand supported the order of AO in CIT(A).

20. We have heard the rival submissions and perused all the materials available on record. The issue in the present ground is with respect to the disallowance of provision made with respect to the sales incentive payable under "Shahenshah Scheme". The AO had disallowed the provision by holding that the provision made by the assessee was not based on any scientific method and there is an element of contingent liability and therefore the sum is not allowable. We find that identical issue arose in assessee's own case in AY 2006-07, 2007-08 and 2008-09 before the co-ordinate Bench of Tribunal. The Co-ordinate Bench of Tribunal in earlier years has decided the issue in favour of the assessee by holding that the provision made by the assessee in respect to "Shahenshah Scheme" to be on scientific basis. Before us, no material has been placed by the Revenue to point out any

distinguishing feature in the facts of the case in the year under consideration and that of earlier years. Further Revenue has also not placed any material to demonstrate that the decision of the Tribunal in assessee's own case in A.Y. 2006-07, 2007-08, 2008-09 has been set aside/ stayed or over ruled by the higher judicial forum. Considering the totality of the aforesaid facts and following the order of the Co-ordinate bench in the assessee's own case and for similar reasons, we hold that the Revenue was not justified in making the addition. We therefore set aside the action of AO. Thus the ground of the assessee is allowed.

21. Ground No.4 is with respect to the denial of claim of deduction u/s 80IC on interest income.

22. AO noticed that assessee had credited Rs.16,725/- and Rs.6,334/- on account of interest income in the accounts of Baddi Unit and Haridwar Unit. The assessee was asked to show cause as to why the deduction u/s 80IC not be disallowed on such interest income as it was not derived from the business activity of the industrial undertaking. Assessee made the submissions which were not found acceptable to AO. AO was of the view that as per the provisions of Section 80IC, deduction is available only on income derived from business activity of industrial undertaking and since interest has been derived from fixed deposits, the interest was not eligible for deduction. He

accordingly denied the claim of deduction u/s 80IC on such interest income.

23. Aggrieved by the order of AO, assessee carried the matter before the CIT(A) who upheld the order of AO. Aggrieved by the order of CIT(A), assessee is now before us.

24. Before us, Learned AR reiterated the submissions made before the lower authorities and further submitted that interest income was earned on the fixed deposits which was required to be maintained as per the statutory requirements of the respective state. He submitted that since the interest income was inextricably linked to the main business activity of the assessee, it should be considered to be treated as eligible for claiming deduction. In support of its claim for interest being eligible for deduction, he also relied on the decision of Hon'ble Delhi High Court in the case of PCIT vs. Bharat Sanchar Nigam Ltd. in ITA No.477/2016 dated 01.08.2016 and the decision of ITAT in the case of M/s. NHPC Ltd vs. ACIT in ITA No.3738/Del/2015 in order dated 08.05.2019.

25. Learned DR on the other hand supported the order of lower authorities.

26. We have heard the rival submissions and perused all the materials available on record. The issue in the present ground is

with respect to the denial of claim of deduction u/s 80IC on the interest income earned by the assessee. Before us it is Learned AR's contention that the interest income earned is inextricably linked to the main business activity of the assessee as it was earned from fixed deposits which was required to be maintained as per the statutory requirements. The aforesaid contentions of the assessee have not been controverted by the Revenue. We find that the Hon'ble Delhi High Court in the case of PCIT vs. Bharat Sanchar Nigam Ltd. (supra) and the Co -ordinate Bench of Tribunal in the case of M/s. NHPC Ltd. (supra) has held that the Revenue was not justified in denying the claim of deduction on such income. Before us, Revenue has not pointed any contrary binding decision in its support. We therefore, hold that AO not justified in denying the claim of deduction u/s 80IC of the Act and thus direct the AO to grant deduction u/s 80IC on the interest income earned by the assessee. Thus the ground of the assessee is allowed.

27. Fifth ground is with respect to deduction of education cess and secondary and higher education cess of Rs.54,75,037/-.

28. During the course of assessment proceedings, assessee submitted before the AO that it has paid Education Cess and Secondary and Higher Education Cess of Rs.54,75,037/- and the same being allowable expenditure, therefore the claim of

expenditure be allowed. AO noted that claim of deduction was not made in the return of income nor assessee had filed revised return of income to claim such deduction. AO was of the view that the claim of deduction without filing the revised return cannot be allowed in view of the decision of Hon'ble Apex Court in the case of Goetz (India) Ltd vs. CIT (2006) 284 ITR 323 (SC). On the merits of the denial of claim of deduction, AO was of the view that income tax, surcharge in the form of cess whether called by Educational Cess or Senior Higher Secondary Education Cess are levied on the net income and determined on the basis of income tax/ corporate tax on the net income earned by the assessee. He was of the view that the cess was not a deductable expenditure. He accordingly denied the claim of deduction.

29. Aggrieved by the order of AO, assessee carried the matter before the CIT(A) who upheld the order of AO.

30. Aggrieved by the order of CIT(A), the assessee is now before us.

31. Before us, Learned AR submitted that identical issue arose in assessee's own case in A.Y. 2008-09, wherein on identical facts, when the claim was made without filing the revised return of income, the Co-ordinate Bench of Tribunal has allowed the deduction. He pointed to the relevant findings noted in the

synopsis. He submitted that since the facts of the case in the year under consideration are identical to that of A.Y. 2008-09, therefore following the order for AY 2008-09, the claim of the assessee are allowed.

32. Learned DR on the other hand supported the order of lower authorities.

33. We have heard the rival submissions and perused all the materials available on record. The issue in the present grounds is with respect to the claim of deduction on account of education cess and secondary and higher education cess.

34. It is an undisputed fact that the claim of deduction was not made in the return of income nor any revised return of income was filed for claiming the deduction. The claim of deduction was made before the AO during the course of assessment proceedings. We find that identical issue arose in assessee's own case in A.Y. 2008-09 wherein the claim of deduction was denied by the AO. When the matter was carried by the assessee before the Tribunal, the Co-ordinate Bench of Tribunal decided the issue in favour of the assessee by observing as under:

> **"17. We have heard both the parties and perused the material available on record It is pertinent to note that the levy of education cess on Income tax is distinct from that of an income tax or surcharge since the letter to form part of part one of the First**

Schedule which defines income tax and provides rate of levy thereof. Unlike income tax and surcharge which are levied for general purpose, Government has explained an cess and is admittedly levied for specific purpose that is to fulfill the commitment of the government to provide quality health services and finance universalized quality basic education and secondary and higher education. Unlike surcharge which was an exclusive component of income tax, education cess as introduced vide Finance Act, 2004 was also imposed an additional levy on indirect taxes namely Customs, Excise and Service Tax. Education cess does not part take the care of being a component of income tax per say as levied under the Provisions of the Act. The decision of the Hon'ble Supreme Court in case of Goetz India (supra) will not be applicable in the present case. The claim of the assessee in respect of the education cess is allowable as deduction for the purpose of computation of taxable profits under the Act as held in the Hon'ble Bombay High Court's decision in case of Sesa Goa Ltd. (supra)."

35. Before us, no material has been placed by the Revenue to point out that the orders passed by the Co-ordinate Bench of Tribunal in earlier years in assessee's own case has been set aside/ stayed or over ruled by the higher judicial forum. The Revenue has also not pointed to any distinguishing features in the facts of the case in the year under consideration and that of AY 2008-09 decided by the co-ordinate Bench of the tribunal. Considering the totality of the aforesaid facts and following the order of the Co-ordinate bench in the assessee's own case for AY 2008-09 and for similar reasons we hold that the Revenue was not justified in denying the claim of deduction. We therefore set aside the action of AO. Thus the ground of the assessee is allowed.

36. Ground No.6 is with respect to denial of claim of deduction of interest expenses of Rs.1,57,80,709/-.

37. During the course of assessment proceedings, assessee claimed that the interest expenses capitalized in respect of land of Greater Noida amounting to Rs.20,72,556/-, interest in respect of land of Neemrana to RICCO amounting to Rs.50,69,120/- and interest of Rs.82,39,033/- paid to Canara Bank in respect of Neemrana Plant aggregate interest being Rs.1,57,80,709/- which has been capitalized be allowed as a revenue expenditure. To justify the claim of expenditure as revenue expenses it was submitted that the interest has been paid for the expansion of existing business activities of the assessee which was already being carried out at other units. It was further submitted that since there was a complete unity, interlacing, inter dependence and inter connection of management, financial, administrative and production aspects amongst all division of each unit and amongst all units of the business as a whole, the expenditure incurred in connection with the new unit is deductible. It was further submitted that proviso of section 36(1)(iii) was not applicable in assessee's case. The interest has been paid for extension of existing business activity. The submissions of the assessee was not found acceptable to AO for the reasons that no such claim of expense was made in the return of income or nor any revised return was filed by the assessee to claim such deduction. On the merits, it was noted by the AO that since the interest has been paid to acquire capital assets, the interest was

not allowable as revenue expenditure. AO also noted that assessee had capitalized the interest attributable to loans used to acquire such assets and on such enhanced cost had claimed depreciation. He accordingly denied the claim of deduction. When the matter was carried before the CIT(A), CIT(A) upheld the order of AO. He therein after considering the submission of the assessee noted that the products manufactured in two units i.e. Greater Noida at Neemrana and at RICCO were completely different and therefore assessee had entered into expansion of its existing business activities by setting of units namely Greater Noida at Neemrana. He therefore held that proviso of Section 36(1)(iii) were applicable and accordingly upheld the disallowance of interest.

38. Aggrieved by the order of CIT(A), assessee is now before us. Before us Learned AR with respect to the admissibility of claims during the assessment proceedings submitted that if the claim is genuine the same can be admitted even without filing revised return of income and for this proposition he relied on the decision of the Hon'ble Apex Court in the case of Jute Corporation of India Limited vs. CIT 187 ITR 688 (SC) and National Thermal Power Company Ltd vs. CIT 229 ITR 383 (SC). On the issue of claim on merits, he submitted that assessee is a leading company engaged in the business of manufacturing of switch gears, wires, electrical fans, CFL, electric motors and other electrical goods at various units and all the units are interdependent. He submitted that there is complete interdependence and interconnection between

management, financial, administrative and production aspects amongst all divisions of each unit and amongst all units of the business. He submitted that the interest on loan was for the expansion of business its existing business operations in the same line of products, being electrical products such as CFL and electric motor, spares etc. for which assessee had two plants, one in Greater Noida and other in Neemrana. He further submitted that during the course of assessment proceedings, the AO had asked for a specific query regarding the pre-operative expenditure of Rs.4,30,88,908/- incurred for setting up the manufacturing unit at Neemrana and it was submitted that it was for the expansion of the business and not for Extension of the business and the AO had allowed the expenses without invoking the provision of Section 35D of the Act. He further submitted that Hon'ble Delhi High Court in assessee's own case for A.Y. 2005-06 are held that where there were intermingling and interlacing of the funds of the units and common management, then all the business constituted the same or single business and expenditure incurred by the assessee on new unit would be considered as expenditure in respect of an expansion of the existing business. He further submitted that pre-amended proviso to Section 36(1)(iii) shall be applicable to the relevant assessment year in question (prior to its amendment by Financial Act, 2015) as amended Proviso will not be applicable retrospectively. He therefore submitted that the assessee be allowed the claim of deduction.

39. Learned DR on the other hand pointed to the findings of CIT(A) and submitted that in the present case the AO in CIT(A) is fully justified in denying the claim of deduction. He thus supported the order of lower authorities.

40. We have heard the rival submissions and perused the material on record. In the present ground assessee is seeking the deduction of interest paid. It is an undisputed fact that during the year under consideration assessee had capitalized interest expenses of Rs.20,72,556/- in respect of land at Greater Noida & Interest of Rs.50,69,120/- for land purchased at Neemrana to RICCO. The aforesaid interest was capitalized in the books of accounts and not claimed as revenue expenditure. However, during assessment proceedings, assessee claimed the interest expenses pertaining to Noida & Neemrana Unit as revenue expenses u/s 36(1)(iii) of the Act which was denied by AO.

41. We find that CIT(A) while deciding the issue and after examining the excise returns of various manufacturing units of Assessee has given a finding that the products manufactured at Greater Noida are capacitors and reactors and the products manufactured at Neemrana are electric motors, CFL bulbs etc. The products manufactured at Greater Noida and Neemrana Unit are completely different and the technology, plant & machinery, skill required for its production cannot be same for the

manufacturing of existing products and therefore assessee had entered into extension of business and it is not a case of expansion of business. In such a situation he held that proviso to Section 36(1)(iii) are applicable and therefore assessee is not eligible for deduction of interest. Before us, no fallacy has been pointed in the finding of CIT(A) therefore we find no reason to interfere with the order of CIT(A). Thus the ground of Assessee is dismissed.

42. Ground No.7 is with respect to Transfer Pricing Adjustments of Rs.36,04,286/-.

43. AO noted that assessee had entered into service agreement with Havells Sylvania Europe Ltd., its associated enterprises to provide various business support services like development and implementation of strategic plans, restructuring and reorganization programs, identification and mitigation of business and financial risk, development and management of the company's supply chain and other procurement services etc, (the details of which are listed in the order) for which assessee had received consideration of Rs.4,78,20,606/-. For benchmarking of aforesaid international transactions, Assessee had applied Transactional Net Margin Method (TNMM) by considering itself to be the tested party and operating profit to operating cost (OP/OC) as the Profit Level Indicator ('PLI'). Assessee considered three comparable companies namely Hartron Informatics Ltd. (with

OP/OC of 12.05%), Escorts Asset Management Ltd. (with OP/OC of 1.22%) and Mecklai Financial and Commercial Services Ltd. (with OP/OC of 9.82%) as comparable companies and the average operating profit margin of those comparable companies was worked out at Rs.7.70%. Since the profit margin of the assessee was at 5.01%, which was within the arm's length range of +/- 5% of the average operating profit margin of the comparable companies at 7.70%, Assessee considered the international transaction of provision of services to be at arm's length. During the proceeding before the TPO, TPO disregarded the benchmarking analysis undertaken by the appellant and rejected the comparable companies considered by the assessee. He thereafter arrived at the following set of five comparable companies with an average operating profit margin @ 17.97% :

Sr. No.	Company Name	OP/OC (%)
1.	Best Mulyankan Consultants 9.91 Ltd.	
2.	IDC (India) Ltd.	10.46
3.	Piramal Enterprises Ltd.	22.69
4.	Choksi Laboratories Ltd.	23.19
5.	WAPCOS Ltd.(Segment)	23.60
	Average	17.97

44. The TPO accordingly made an adjustment of Rs.5,902,538/-on account of arm's length price of the international transaction of provision of services. Assessee challenged the inclusions of the

comparable before CIT(A). CIT(A) after considering the submission made by the assessee arrived at following set of comparables:

Sr. No.	Particulars	After appeal effect of order of CIT(A)
(A)	Name of the Company for ALP	
1	Best Mulyankan Consultants Ltd.	9.91%
2.	IDC (India) ltd.	9.99%
3.	Piramal Enterprises Ltd.	17.13%
4.	WAPCOS Ltd. (Segment)	23.60%
5.	In house Production Ltd.	5.16%
6.	India Tourism Development Corporation Ltd.	11.75%
(B)	Average (Arithmetic Mean)	12.92%

45. The assessee is aggrieved by the action of CIT(A) in the inclusions of Piramal Enterprises Ltd. and WAPCOS Ltd. (Segment).

46. Before us, Learned AR submitted that extract of service income of Piramal Enterprises Ltd. shared by the TPO in its order does not match with the figures reported in the annual report available in the Public Domain and in support of which he pointed to the copy of the annual report which is placed in the paper book. He submitted that TPO cannot use the information which does not match with the figures reported in the Annual Report and for this proposition he placed reliance on the decision of the case of M/s. Dell International Services India Pvt. Ltd. vs.

DCIT, IT(TP)A No.879/Bang/2018 order dated June 24, 2020, AIRCOM International (India) (P.) Ltd. vs. DCIT Appeal No.4403(Delhi) of 2012 where the Tribunal had held that the information which was not available in public domain could not have been used by the TPO, when the same is contrary to the Annual Report. He further submitted that as per the Annual Report of Piramal Enterprises Ltd. which is available in the public domain, it was formerly known as Piramal Healthcare Ltd and it is a pharmaceutical company and is engaged in the business of manufacture of medicines, drugs and formulations. He further submitted that the information provided in the Annual Report reveals that 98.79% of the company's total revenue is earned from sale of manufactured and traded pharmaceutical products and therefore it is functionally different with the assessee company and therefore cannot be considered to be a comparable company. He further pointed out that during the year extra-ordinary events in the form of exclusion of Minrand International Inc. and RxElite Holdings Inc. had taken place in Piramal Enterprises Ltd. to enhance its presence in the Inhalation anesthetics segment. He therefore, relying on the decision rendered by Hon'ble Delhi High Court and Delhi Tribunal submitted that companies having extra-ordinary income has to be excluded. He therefore, submitted that since the comparable company is functionally not comparable to the assessee therefore it should not have been considered as a comparable company. He in the alternative submitted that the

matter may be remitted to the TPO with a direction to him to share the financial details which has been relied upon by him.

47. With respect to WAPCOS Ltd., he submitted that is functionally dissimilar to the company as it is engaged in the high-end consultancy and works on engineering projects. The segment of the company is functionally not comparable as it undertakes high-end technical services as against the routine support services undertaken by the assessee. He pointed to the detailed description of the services provided by it in the Annual Report of the paper book. He therefore submitted that it cannot be considered as comparable to the assessee. He further submitted that it is a Govt. of India undertaking and has the support and backing of the Government which also makes it to be not comparable to the assessee and further the function profiles of the entity is completely different. He submitted that the business profile of Government owned undertakings is dissimilar to that of the entities operating in free market/ uncontrolled environment. In support of his proposition to the Government undertaking cannot be selected as a comparable, he placed reliance on the decision of Hon'ble Bombay High Court in the case of Thyssen Krupp Industries India (P) Ltd. ITA No.2218 of 2013 and Hyderabd ITAT order in the case of Worley Parsons India Pvt. Ltd. in ITA No.273/Hyd/2016 wherein it has been held that public sector undertakings are not driven by profit motive alone but such other considerations also weigh such as discharge

of social obligations etc. and hence they cannot be considered as comparable to the private companies. He therefore submitted that this company be excluded as a comparable company.

48. Learned DR on the other hand supported the order of lower authorities.

49. We have heard the rival submissions and perused all the materials available on record. With respect to inclusion of Piramal Healthcare Ltd., it is the contention of the Learned AR that the extract of services income extracted the TPO in the order does not match with the figures reported in the Annual Report which are available in the public domain. The fact of the figures being different when pointed out by the Learned AR has not been controverted by the Learned DR. The Learned AR for the Annual Report placed in the paper book has also pointed out that 98.79% of its revenue are earned from sale of manufactured and traded pharmaceutical products. On the other hand the revenue earned by the assessee are for various business services. In such a situation, we find force in the argument of Learned AR that it cannot be considered to be a comparable to assessee company. We thus direct its exclusion as a comparable company.

50. As far as the inclusion of WAPCOS Ltd. is concerned, we find that it is a Govt. India undertaking and undertaking high-end technical consultancy services like rural electrification, Water

harvesting, low cost Sanitation, lakes and wetlands etc. it is also engaged in independent review and monitoring agency for projects in Rajasthan and West Bengal and it provides supervision for construction/ up gradation of Rural roads under Pradhan Mantri Gram Sadak Yojana. Considering the functions undertaken by it, we are of the view that the functions performed by it are not comparable to the assessee company which is engaged in providing basic business support services and therefore we are of the view that it cannot be considered to be a comparable company. We further find that Co-ordinate Bench of Tribunal in the case of Worley Parsons India Pvt. Ltd. (supra) has noted that public sector undertakings are not driven by profit motive alone but other considerations such as discharge of social obligations etc also weigh and hence they cannot be considered as comparable to the private companies. Considering the totality of the aforesaid facts and relying on the aforesaid decision of Worley Parsons (supra) we hold that WAPCOS Ltd. cannot be considered to be a comparable company and we therefore direct its exclusion. Thus this Ground of assessee is allowed.

51. In the result, appeal of the assessee is allowed.

52. Now we take up assessee's appeal in ITA No.6194/Del/2015. Before us, Learned AR submitted that if the issue of "Shahenshah Scheme" raised in Ground No.3 in ITA No.463/Del/2016 is decided in favour of the assessee, then the

grounds raised in the present appeal would be rendered academic and will not require any adjudication.

53. We while deciding the issue with respect to "Shahenshah Scheme" in ITA No.463/Del/2016 have decided it in assessee's favour therefore in view of the submission of Learned AR, the grounds raised in present appeal are held to be academic and therefore dismissed. Thus the appeal of the assessee is dismissed.

54. In the result, appeal of the assessee is dismissed.

55. In the combined result, appeal of the assessee in ITA No.463/Del/2016 is partly allowed and appeal in ITA No.6194/Del/2015 is dismissed.

Order pronounced in the open court on 19.01.2021

Sd/-	**Sd/-**
(KULDIP SINGH)	**(ANIL CHATURVEDI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Date:- 19.01.2021

PY*

Copy forwarded to:

1. **Appellant**
2. **Respondent**
3. **CIT**
4. **CIT(Appeals)**
5. **DR: ITAT**

ASSISTANT REGISTRAR
ITAT NEW DELHI