IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SHRI VIKRAM SINGH YADAV, ACCOUNTANT MEMBER

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.671/AHD/2015
(Assessment Year: 2010-11)

Vodafone West Limited.
(formerly known as Vodafone Essar Gujarat Limited)
Vodafone House, B Wing,
4th Floor, Corporate Road, ... Appellant
Prahladnagar, Ahmedabad- 380051
PAN : AAACF1190P

v/s

Deputy Commissioner of Income Tax
Circle - 4(1)(2)
Ahmedabad ..... Respondent

ITA No.1634/AHD/2015
(Assessment Year: 2010-11)

Deputy Commissioner of Income Tax
Circle 4(1)(2) ..... Appellant
Ahmedabad

v/s

Vodafone West Limited
(Formerly Known As Vodafone Essar Gujarat Limited)
Vodafone House, B Wing,
4th Floor, Corporate Road,
Prahladnagar, Ahmedabad- 380051 ..... Respondent
PAN : AAACF1190P

Assessee by : Shri K.K. Ved,
Shri N.A. Patade
Revenue by : Shri Pankaj Kumar, CIT-DR

Date of Hearing – 06/11/2025	Date of Order - 11/12/2025

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present cross appeal arises from the final assessment order dated 23.02.2015, passed under section 143(3) read with section 144C of the Income Tax Act, 1961 (*"the Act"*) pursuant to the directions dated 10.12.2014 passed by the learned Dispute Resolution Panel, Ahmedabad [*"learned DRP"*], for the assessment year 2010-11.

2. The brief facts of the case are that the assessee is a cellular mobile telephony service provider in the State of Gujarat. For the year under consideration, the assessee filed its return of income on 29.09.2010, declaring a total income of Rs.4,00,97,74,506/-. Subsequently, the assessee filed its revised return of income on 29.03.2012, declaring a total income of Rs.4,10,84,31,389/-. The return filed by the assessee was selected for scrutiny, and statutory notices under section 143(2) and section 142 (1) were issued and served upon the assessee. Vide draft assessment order dated 31.03.2014 passed under section 144C read with section 143(3) of the Act, the Assessing Officer *("AO")* proposed certain additions and disallowances to the total income declared by the assessee. Being aggrieved, the assessee filed detailed objections before the learned DRP, which were disposed off vide direction dated 10.12.2014 issued under section 144C(5) of the Act, agreeing partially with the assessee, allowing certain objections against the additions/disallowances proposed by the AO. In conformity, the AO passed the impugned final assessment order, assessing the total income of the

assessee at Rs.6,54,61,22,360/-. Being aggrieved, both the assessee and the Revenue are in appeal before us.

ITA No. 671/Ahd./2015
Assessee's Appeal (A.Y. 2010-11)

3. In this appeal, the assessee has raised the following grounds: -

*"**Ground no 1-Disallowance of depreciation amounting to Rs 31,60,00,000***

1. On the facts and in the circumstances of the case and in law, the learned AO, based on the directions of the learned DRP, has erred in treating the transfer of Passive Infrastructure ('PI') by the Appellant to Vodafone Infrastructure Limited (VinfL'), duly approved by the Hon'ble High Court, as a transaction purposely planned to avoid tax and thus, disallowing depreciation of Rs 31.60 crores on Pl assets.

1.1 On the facts and in the circumstances of the case and in law, the learned AO, based on the directions of the learned DRP has grossly erred in holding that transfer of Pl assets by the Appellant to VinfL and thereafter, by VinfL to Indus was a means to evade taxes, which would have otherwise been payable by the Appellant had the transaction been undertaken as a simple transaction between the Appellant and Indus Towers Limited ('Indus').

1.2 On the facts and in the circumstances of the case and in law, the learned AO, based on the directions of the learned DRP has erred in holding that transfer of Pl assets by the Appellant to VinfL without consideration does not qualify as a 'gift' and hence, not exempt under section 47(iii) of the Act.

1.3. On facts and circumstances and in law, the learned AO, based on the directions of the learned DRP has erred in not appreciating that in absence of any consideration received/accrued to the Appellant, the computation mechanism provided under section 48 of the Act fails and accordingly, the charging section 45 of the Act also fails and hence, no capital gain/income could arise in the hands of the Appellant,

1.4 On the facts and in the circumstances of the case and in law, the learned AO, based on the directions of the learned DRP has erred in imputing a notional sale consideration, when no such provision exits in the Act which permits the learned AO to notionally assume a consideration in absence of receipt of any consideration by the Appellant;

1.5 On the facts and in the circumstances of the case and in law, the learned AO, based on the directions of the learned DRP has erred in applying the provisions of section 50D of the Act, which are neither applicable to the year under consideration nor attracted where the consideration for transfer of the asset is 'determinable' or 'nil';

1.6 On the facts and in the circumstances of the case and in law, the learned AO has erred in applying the GAAR provisions prescribed under section 95 of the Act which are clearly not applicable for the year under consideration.

Ground no 2-Disallowance of network site rentals amounting to Rs 172.90 crores

2. On the facts and in circumstances of the case and in law, the learned AO, based on the directions of the learned DRP has erred in disallowing the expenses of Rs 172.90 crores paid to Indus Towers Limited ('Indus') as "Network Site Rentals" under section 37(1) of the Act.

2.1 On the facts and in circumstances of the case and in law, the learned AO, based on the directions of the learned DRP has erred in holding that there is excessive payment of Rs 172.90 crores by the Appellant to Indus which is not "wholly and exclusively for the purpose of business".

2.2 On the facts and in circumstances of the case and in law, the learned AO, based on the directions of the learned DRP has erred in not considering the fact that significant costs which were being incurred by Appellant in the prior years for running and maintenance of such towers have reduced in the subject year since Indus took over the running and maintenance of such towers.

Ground no 3-Disallowance of Rs 92,75,000 under section 14A of the Act.

3 On the facts and circumstances of the case and in law, the learned AO, based on the directions of the learned DRP has erred in applying the provisions of section 14A of the Act read with Rule 8D of the Income Tax Rules, 1962 ('Rules') and disallowing expenses amounting to Rs. 92,75,000 as expenditure incurred in respect of exempt income without considering the fact that no exempt income was earned by the Appellant during the year.

Ground no 4-Disallowance of roaming charges amounting to Rs 64,81,13,995

4. On the facts and circumstances of the case and in law, the learned AO, based on the directions of the learned DRP has erred in making addition of Rs 54,77,90,700 under section 40(a) (ia) and Rs 10,03,23,295 under section 40(a)(i) of the Act on account of non-deduction of taxes on the national and international roaming charges respectively paid by the Appellant to other telecom operators.

4.1 On the facts and circumstances of the case and in law, the learned AO, based on the directions of the learned DRP has erred in holding that taxes are deductible on the roaming charges paid by the Appellant.

4.2 Without prejudice to the above ground 4 and 4.1, on the facts and circumstances of the case and in law, based on the directions of the learned DRP, the learned AO has erred in holding that human intervention is present in roaming services by placing reliance on a technical expert opinion obtained for another entity without providing any opportunity of being heard to the Appellant.

4.3 Without prejudice to the ground 4, 4.1 and 4.2, on the fact and in the circumstances of the case and in law, the learned AO, based on the directions of the learned DRP has erred in not giving effect to taxes paid by the recipient (based on Form 26A submitted by the Appellant) and hence, no disallowance should be made by virtue of second proviso to section 40(a)(ia) of the Act which is curative in nature and the benefit should be extended to past years.

Ground no 5-Addition in respect of trade discount amounting to Rs 71,82,87,365

5. On the facts and circumstances of the case and in law, the learned AO, based on the directions of learned DRP, has erred in making an addition under section 40(a)(ia) of the Act on account of non-deduction of taxes on the trade discount given to prepaid distributors amounting to Rs 71,82,87,365. 5.1 On the facts and circumstances of the case and in law, the learned AO, based on the directions of learned DRP, erred in holding that the trade discount given is in the nature of commission and hence taxes are deductible under the provisions of section 194H of the Act.

5.2 On the facts and circumstances of the case and in law, the learned AO, based on the directions of learned DRP, erred in not appreciating the fact that in the given case trade discount given to prepaid distributors has neither been credited nor paid to prepaid distributors and has not been claimed as deduction and hence, provisions of section 40(a)(ia) of the Act are not applicable.

5.3 Without prejudice to the above, on the fact and in the circumstances of the case and in law, the learned AO, based on the directions of the learned DRP has erred in not giving effect to taxes paid by the recipient and hence, no disallowance should be made by virtue of second proviso to section 40(a)(ia) of the Act which is curative in nature and the benefit should be extended to past years.

Ground no 6- Non allowance of deduction under section 801A

6. On the facts and circumstances of the case and in law, the learned AO, based on the directions of learned DRP, has erred in not allowing the deduction under section 801A of the Act on the following:

6.1 Served from India Scheme (SFIS) income of Rs 3,31,38,860

6.2 Rs 92,75,000 disallowed under section 14A of the Act

Ground no 7- Addition of Rs 92,75,000 disallowed under section 14A while computing book profits under section 115JB of the Act

7. On the facts and circumstances of the case and in law, the learned AO, based on the directions of learned DRP, has erred in adding back Rs 92,75,000 disallowed under section 14A of the Act while computing book profit under section 115JB of the Act.

Ground no 8-Initiation of penalty proceedings under section 271(1)(c) of the Act

8. On the facts and circumstances of the case and in law, the learned AO, based on the directions of learned DRP, has erred in initiating penalty proceedings against the Appellant under section 271(1)(c) of the Act, without appreciating the fact that the Appellant had neither concealed any information nor furnished inaccurate particulars of income in its return of income."

4. The issue arising in Ground No. 1, raised in assessee's appeal, pertains to the disallowance of depreciation on Passive Infrastructure ("*PI*") assets.

5. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the year under consideration, the assessee entered into a Scheme of Demerger, whereby PI assets, being 2932 towers, were transferred to M/s. Vodafone Infrastructure Ltd., without any consideration. The said Scheme of Demerger was approved by the Hon'ble Gujarat High Court vide order dated 28.08.2012. During the assessment proceedings, the assessee was asked to show cause why the transfer of PI assets to M/s. Vodafone Infrastructure Ltd. be not considered as transfer within the meaning of section 2(47) of the Act and subjected to capital gains as per the provisions of section 45 of the Act. In response, the assessee submitted that the PI assets were transferred to M/s. Vodafone Infrastructure Ltd. voluntarily and without any consideration, and hence, the transfer is in the nature of a gift, and therefore, as per the expressed provisions of section 47(iii) of the Act, the same is not exigible to capital gains tax. The assessee further submitted that no loss, either capital or otherwise, has been claimed in relation to the above transfer of PI assets. Further, the loss on transfer of PI assets amounting to Rs.293.23 crores debited to the profit and loss account has been added while computing the total income. The assessee further submitted that, in the absence of any consideration, the tax WDV of the books of assets where

the PI assets were capitalised were also not required to be adjusted by any amount. Even then, in line with its motive of not claiming any tax advantage by this transaction, the assessee submitted that it voluntarily reduced the tax WDV as the PI assets transferred by it to M/s. Vodafone Infrastructure Ltd. from the said block of assets.

6. The AO, vide its draft assessment order, disagreed with the submissions of the assessee and held that every transfer without any consideration cannot be termed as a gift and every transaction should be viewed in isolation and seen as part of the above transactions. The AO held that the entire process of transfer of PI assets was to consolidate PI assets held by Vodafone Group of Companies and another telecommunication operator into one single entity, which would result in synergies of operation and reduction in operational costs. Thus, it was held that the object of the entire transfer was business reorganisation and not a gift. Accordingly, the AO rejected the contention of the assessee that the transfer of PI assets is in the nature of a gift and is thus not liable to capital gains tax as per the provisions of section 47(iii) of the Act. The AO considered the market value of PI assets, which was Rs.503.86 crores as the deemed sale consideration. Since the PI assets were depreciable assets, the AO reduced the WDV of the plant and machinery block by the aforesaid deemed sale consideration. Considering the fact that the assessee had *suo moto* reduced an amount of Rs.293.23 crore from the block of assets, the AO reduced a further amount of Rs.210.66 crore [i.e., Rs.503.86 crore minus Rs.293.23] from the WDV of the plant and machinery block, which resulted in the proposed disallowance of depreciation of Rs.31.60 crore, being

15% of Rs.210.66 crore. The aforesaid addition, as proposed by the AO vide draft assessment order, was upheld by the learned DRP, and the assessee's objections to this issue were rejected. Accordingly, in compliance with the directions of learned DRP, the AO vide final assessment order made a disallowance of Rs. 31.60 crore to the total income of the assessee. Being aggrieved, the assessee is in appeal before us.

7. We have considered the submission of both sides and perused the material available on record. During the hearing, the learned Authorised Representative *("learned AR")* by referring to the recent decision passed by the Co-ordinate Bench of the Tribunal in the case of assessee's sister concern submitted that a similar addition on account of disallowance of depreciation due to transfer of PI assets from one of the entities of the Vodafone Group to Vodafone Infrastructure Ltd. has been deleted. From the perusal of the decision in Vodafone Digilink Ltd. Vs. DCIT, in ITA No. 1073 and 1158/Del./2015, vide order dated 14.10.2025, for the assessment year 2010-11, we find that the Co-ordinate Bench of the Tribunal, while deciding a similar issue, observed as follows: -

> *"8.5. On perusal of the order passed by the DRP, we find that the DRP has made following observations while deciding the issue in favour of the Assessee:*
>
> > *"18.3 The panel has carefully considered the submission of the assessee in this regard. The assessee has tried to justify the aforesaid transaction to be a purely business decision based on commercial consideration. On the other hand, the AO is of the view that VDL is camouflaging the demerger scheme and getting it legalized by obtaining sanction from the Hon'ble High Court, which too by misrepresenting facts. In fact the assessee has transferred its Pl assets just to evade taxes in a manner to benefit Its ultimate holding company, for which it has claimed a loss. However, section 47(iii) of the Act provides that any transfer of a capital asset under a will or an irrevocable trust or as gift will not be regarded as a transfer. In the instant case. the transaction under reference is by way of gift duly approved by the High Court & hence a legitimate transaction and the Act itself recognizes such*

Gift by corporate. Further, clause 40 of the Memorandum of Association specifically permits the assessee to grant gift to any person. This is in consonance with the decision of Hon'ble Supreme Court in the case of Laksmanswami Mudaliar V. L.I.C. (33 Com Cases 420), where it was observed that a company can make a gift provided that the Memorandum of Association/Charter documents of the company permit such a transaction. Further, the fact that the transaction in the present case is in the nature of gift has been affirmed by the Hon'ble Delhi High Court while approving such scheme, where the Hon'ble Court has observed as below.

> *"45. For all of the above reasons, and since the objector has not been able to place any direct authority, precedent or Rule before this Court to support his contention, and in view of the authorities relied on by the petitioners, counsel for the Income Tax has failed to persuade this Court that a transfer by way of gift was not permissible under Section 391 of the Companies Act, 1956, or that the Scheme in question was confiscatory, this objection does not survive this objection does not survive".*

Further, the aspect that the aforesaid transaction is a "gift" was also confirmed by the Hon'ble Gujarat High Court in the case of VWL (ie. a group company of the assessee), where in a similar scheme was filed. The Hon'ble High Court specifically observed as under.

> *"The objection raised by the Income Tax Department that the Appellant should not be permitted to argue that for the purpose of Income Tax Act, the transfer is by way of a gift and that for the purpose of the Companies Act, the same is with consideration is completely misplaced"*

It has been further contended by the assessee that it has merely transferred its PI assets to Vinfl, without any consideration. The loss to VDL (assessee) on such transfer was duly added back by VDL in its return of income. Further, even though in absence of any sale consideration, the assessee was not required to adjust its tax block, the assessee Suo-moto reduced the tax WDV of such PI assets from its P&M block. Therefore, it cannot be stated that the assessee transferred Pl assets to Vinfl in order to evade taxes but the aforesaid transfer of Pl assets was driven solely by business expediency. On careful consideration of the facts of the case, it is amply clear that the business purpose and commercial expediency were the only factors that led to the transfer of the Pl assets, as duly approved by the Hon'ble High Court of Delhi. Even otherwise a company is an artificial juridical person with a separate legal entity of its own, unless the Corporate Veil is lifted by court orders. The case of the assessee is that of a real gift and not deemed gift as in the case of CIT V. Tibruz Mustafa Bilgen (1986) 157 ITR 723 (Mad), the Hon'ble Medras High Court has held that section 47(iii) applies only to real gift and not deemed gift. Therefore, the action of the AO in disallowing depreciation on passive Infrastructure Assets (PI) is held by the panel to be not tenable and the AO is therefore directed to delete the said addition." (Emphasis Supplied)

8.6 We are in agreement with the view taken by the DRP. The Scheme of Demerger which clearly provided that the Assessee shall gift PI Assets to Vodafone Infrastructure Ltd.. Before the Hon'ble Delhi High Court the Revenue had filed objection to the Scheme of Demerger contending, inter alla, that a transfer by way of gift was not permissible under Section 391 of the Companies Act, 1956. However, the aforesaid objection was rejected by the Hon'ble Delhi High Court observing that the Revenue had failed to place any direct authority, precedent or Rule before the Hon'ble Court in support its contention. The aforesaid was taken note of by the DRP while allowing the objections raised by the Assessee. Therefore, we concur with the view taken by the DRP that the transaction of transfer of PI Assets by the Assessee to Vodafone Infrastructure Ltd as gift cannot be regarded as sham transaction having been accepted and approved by the Hon'ble Delhi High Court as part of the Scheme

of Demerger after due consideration of the objections raised by the Revenue. DRP has correctly concluded that transaction of transfer of PI Assets by the Assessee to Vodafone Infrastructure Ltd qualified as 'gift' and the same could not be regarded as transfer for the purpose of Section 2(47) of the Act in terms of Section 47(III) of the Act. It was not disputed by the Revenue that the Assessee had not claimed deduction for loss arising from the transfer of PI Assets to Vodafone Infrastructure Ltd. In view of the aforesaid we are not persuaded to interfere with the Final Assessment Order and the directions issued by the DRP on this issue and therefore, Ground No. VI raised by the Revenue is dismissed."

8. In the absence of any allegation of a change in facts or law in the instant appeal, respectfully following the decision of the Coordinate Bench of the Tribunal cited supra, the disallowance of depreciation on account of the transfer of PI assets is deleted. As a result, Ground No. 1 raised in assessee's appeal is allowed.

9. The issue arising in Ground No.2, raised in the assessee's appeal, pertains to the disallowance of network site rentals paid by the assessee to M/s. Indus Towers Ltd.

10. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the assessment proceedings, it was noticed that the assessee paid "*network site rentals*" amounting to Rs.210.8 crore to M/s. Indus Towers Ltd. for the use of PI assets transferred by the assessee to Vodafone Infrastructure Services Ltd. (with effect from 01.04.2009), which in turn got merged with M/s. Indus Towers Ltd. (with effect from 01.04.2009) for Nil consideration. Accordingly, the assessee was asked to show cause why the payment made to M/s. Indus Towers Ltd. for the use of PI assets be not treated as unreasonable and disallowed under the provisions of section 40A(2)(b) of the Act. After considering the submissions of the assessee, the

AO, vide draft assessment order, held that the entire scheme of transfer of PI assets to M/s. Vodafone Infrastructure Ltd. and then to M/s Indus Towers Ltd. on the same date was to evade taxes and reduce tax liability. The AO further held that before the transfer of PI assets, the assessee was earning Indefeasible Right to Use ("*IRU*") amounting to Rs.37.9 crore from M/s. Indus Towers Ltd., and after the transfer of PI assets for "*Nil*" consideration, the assessee is paying Rs.210.8 crore to M/s. Indus Towers Ltd. for the use. Thus, the AO held that the expenses of Rs.210.8 crore for the use of assets previously owned by the assessee is only to reduce the tax liability and the same is excessive and unreasonable within the meaning of provisions of section 40A(2)(b) of the Act. Accordingly, the entire payment of network site rentals amounting to Rs.210.8 crore was proposed to be disallowed and added to the total income of the assessee. In further proceedings, the learned DRP accepted the contention of the assessee that the provisions of section 40A(2)(b) of the Act are not applicable to the instant case. However, the learned DRP held that the payment to an extent of Rs.172.90 crore (i.e., Rs. 210 crore minus Rs.37.9 crore) as excessive on the basis that there was no value addition by M/s. Indus Towers Ltd., which can justify an abnormal increase in the rentals for the same assets. Accordingly, the learned DRP held that the remaining amount of Rs.172.9 crore was not incurred by the assessee wholly and exclusively for the purposes of its business and directed the AO to disallow the same under section 37(1) of the Act. In conformity, the AO passed the final assessment order, *inter alia,* making the impugned addition on this issue.

11. We have considered the submissions of both sides and perused the material available on record. During the hearing, the learned AR submitted that the very intent of transferring the PI assets to M/s. Indus Towers Ltd. was to promote PI sharing for the administration of running and maintenance of such PI assets, and also to enable the operators to avail the benefits of economies of scale and provide improved quality of services. It is further the submitted that significant costs were incurred by the assessee in the earlier years, for running and maintenance of such towers in terms of depreciation of towers owned by it, site rentals for towers of other telecommunication companies used by it, power and fuel costs, security, repairs and maintenance expenses, etc. Thus, it was submitted that these costs were being incurred by the assessee in earlier years, and were reduced in the year under consideration since M/s. Indus Towers Ltd. took over the running and maintenance of such towers for which the assessee now makes the payment to M/s. Indus Towers Ltd. During the hearing, it was further submitted that this restructuring would significantly benefit the future years since increasing tower sharing amongst telecom operators would further reduce the service cost incurred by the assessee on availing Tower services. The learned AR also submitted that the assessee received Rs.37.9 crore from M/s. Indus Towers Ltd. as IRU revenue, as the assessee was also using these towers and now after these towers being transferred to M/s. Indus Towers Ltd. is entirely used by the assessee, and therefore, the assessee is paying Rs. 210.8 crore to Indus Towers Ltd. as network site rentals. On the other hand, the learned Departmental Representative ("*learned DR*") submitted that these submissions need examination on the basis of relevant factual details.

12. Having considered the submissions and perused the material available on record, we find that these submissions were not examined by any of the lower authorities, and the payment made by the assessee as network site rentals to M/s. Indus Towers Ltd. was treated as excessive in the absence of any value addition by M/s. Indus Towers Ltd. We further note that the assessee, on one hand, claims that high costs were incurred by it in the earlier years for running and maintenance of towers, which, after being transferred, have now been incurred by M/s. Indus Towers Ltd, and therefore, the assessee is being charged the high rental. However, we find that there is no examination of the aspect that the assessee charged the costs incurred by it from M/s. Indus Towers Ltd., when running and maintaining such towers was under its control. Therefore, we are of the considered view that the various arguments now raised before us require detailed examination, which has not been done by any of the lower authorities. Therefore, in the interest of justice, we deem it appropriate to restore this issue to the file of the jurisdictional AO for *de novo* adjudication after necessary examination of submissions of the assessee and due verification of the details as may be filed by the assessee in support thereof. We order accordingly. Needless to mention, no order shall be passed without affording reasonable and adequate opportunity of hearing to the assessee. As a result, the impugned final assessment order on this issue is set aside, and Ground No.2 raised in the assessee's appeal is allowed for statistical purposes.

13. The issue arising in Ground No.3, raised in assessee's appeal, pertains to the disallowance made under section 14A of the Act.

14. We have considered the submissions of both sides and perused the material available on record. The brief facts of the case are that during the assessment proceedings, it was noted that the assessee has an investment in shares, which stands at Rs.1855 million, however the assessee has not disallowed any expenditure incurred for earning exempt income under section 14A of the Act read with Rule 8D of the Income Tax Rules, 1962 *("the Rules").* The assessee submitted that no disallowance is called for under section 14A of the Act, read with rule 8D of the Rules, as the assessee has not earned any exempt income and the investment is from its own funds. The AO, vide draft assessment order, proposed disallowance of Rs.92,75,000/- under section 14A read with Rule 8D(2)(iii) of the Rules. The learned DRP, vide its directions, rejected the objections filed by the assessee on this issue. In conformity, the AO passed the impugned final assessment order making a disallowance under section 14A of the Act. Being aggrieved, the assessee is in appeal before us.

15. Having considered the submissions of both sides and perused the material available on record, we find that during the year, the total investment declared is Rs.1855 million. We further find that during the year the assessee received no dividend income from its investments and thus claimed no exemption under section 10(34) of the Act while filing its return of income. While deciding the similar issue, the Co-ordinate Bench of the Tribunal in assessee's own case in DCIT Vs M/s Vodafone West Ltd. in ITAs No. 909 & 944/Ahd/2014, vide order dated 17.11.2016, for the assessment year 2009-10, in similar circumstances following the decision of the Hon'ble Gujarat High Court in CIT vs. Cortech Energy Pvt. Ltd., reported in 45 taxman.com 116

(Guj.) upheld the deletion of disallowance made under section 14A read with Rule 8D of the Rules, as no exempt income was earned by the assessee. The Revenue could not bring any material to deviate from the decision so rendered by the Tribunal on this issue in the assessee's own case. Accordingly, respectfully following the decision cited supra, the disallowance made under section 14A of the Act read with Rule 8D of the Rules is deleted. Accordingly, Ground No.3 raised in assessee's appeal is allowed.

16. The issue arising in Ground No.4, raised in assessee's appeal, pertains to the disallowance of roaming charges under section 40(a)(ia) and section 40(a)(i) of the Act on account of non-deduction of tax on the national and international roaming charges paid by the assessee to other telecom operators.

17. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the year under consideration, the assessee paid an amount of Rs.64,81,13,995/- as roaming charges to domestic and overseas service providers. Out of the above roaming expenses, Rs.10,03,23,295/- pertained to international roaming charges paid to foreign companies and the balance Rs.54,77,90,700/- pertained to roaming charges paid to domestic companies. During the assessment proceedings, it was noticed that the assessee had not deducted tax at source on these payments. The AO, vide draft assessment order, disagreed with the submissions of the assessee and held that during the process of carriage of calls, the intervention of a technical expert is persistently required to make the process of carriage of calls successful. It was further held that persons involved in these areas cannot be

merely technicians but are professionally and highly qualified experts having good knowledge of network management, knowledge of hardware and software, knowledge of network configuration etc. as no service provider can take a risk of leaving the network system unattended when the networks are interconnected with each other during the process of carriage of calls, as the slightest fault can collapse entire system. Thus, the AO held that the human invention is required to make the process of carriage of calls successful, and the level of human intervention is of a much higher and sophisticated technical level. Accordingly, the AO held that the payment of roaming charges by the assessee to other telecom operators for the provision of roaming services to the subscribers of the assessee is subject to tax deduction at source in terms of provisions of section 194J read with section 9(i)(vii) of the Act. As the assessee failed to deduct the tax at source, the entire expenditure towards roaming charges was proposed to be disallowed under section 40(a)(ia) and section 40(a)(i) of the Act, added to the total income of the assessee. The detailed objections filed by the assessee on this issue were rejected by the learned DRP vide its directions issued under section 144C(5) of the Act. The AO, in conformity with the directions issued by the learned DRP, made the impugned addition vide final assessment order. Being aggrieved, the assessee is in appeal before us.

18. We have considered the submissions of both sides and perused the material available on record. We find that this issue is no longer *res integra* and has been decided in favour of the assessee by the Co-ordinate Bench of the Tribunal in assessee's own case in DCIT vs. M/s. Vodafone West Ltd., in

ITAs No.909 and 944/Ahd/2014, vide order dated 17.11.2016, for the assessment year 2009-10, wherein a similar issue was decided in favour of the assessee, following another decision of the Co-ordinate Bench of the Tribunal in assessee's sister concern in Vodafone East Ltd. in ITA No.1864/Kol/2012. We further find that recently, in the case of another sister concern of the assessee, the Co-ordinate Bench of the Tribunal in Vodafone Digilink Ltd. (supra), vide order dated 14.10.2025, deleted the similar disallowance of roaming charges for non-deduction of tax under the provisions of section 194J of the Act. The Revenue could not bring any material to deviate from the decision so rendered by the Tribunal on this issue. Accordingly, respectfully following the decision cited supra, the disallowance made in respect of roaming charges under section 40(a)(ia) and section 40(a)(i) are deleted. Accordingly, Ground No.4 raised in assessee's appeal is allowed.

19. The issue arising in Ground No.5, raised in assessee's appeal, pertains to the addition under section 40(a)(i) of the Act on account of non-deduction of taxes on the trade discount given to prepaid distributors.

20. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the year under consideration, the assessee debited an amount of Rs.71,82,87,365/- as commission on prepaid products. The said commission was given to the distributors/agents of the assessee for the sale of the assessee's prepaid products. The said amount was the difference between the MRP of the prepaid starter packs ("*sim cards*") or recharge coupons ("*prepaid talk time*") and the amount charged from the prepaid distributors. As per the assessee, the difference between the aforesaid MRP

of the prepaid products and the price at which the same is transferred to the distributors is in the nature of a trade discount given to the distributors, and the same does not qualify as "*commission*" so as to be subjected to the provisions of section 194H of the Act. The assessee further submitted that the relationship between the assessee and the distributors was in the nature of Principal to Principal rather than Principal-Agent. However, the AO disagreed with the assessee's submissions and, vide draft assessment order, held that the distributors are mere agents of the assessee, notwithstanding the name and nomenclature the assessee gives to these distributors. The AO further held that the SIM cards are not goods and rather the SIM cards and the host of services offered by the assessee are in the nature of services that can only be rendered and not sold. Thus, it was held that when there cannot be any sale of the prepaid products, and only the services can be rendered, then the distributors in such a case have to be treated as agents and not as Principals. Accordingly, the AO held that the trade discount given by the assessee to the prepaid distributors was in the nature of "*commission*" liable to withholding of tax under section 194H of the Act. Since the assessee did not deduct the required tax at source, the entire discount debited to the profit and loss account as commission was proposed to be disallowed under section 40(a)(ia) of the Act. The learned DRP rejected the detailed objections filed by the assessee on this issue. The AO, in conformity with the directions issued by the learned DRP, made the impugned addition vide final assessment order. Being aggrieved, the assessee is in appeal before us.

21. We have considered the submissions of both sides and perused the material available on record. The Hon'ble Supreme Court while deciding a similar issue in case of Bharti Cellular Ltd. vs. ACIT, reported in (2024) 462 ITR 247 (SC), held that the cellular mobile service provider is not under a legal obligation to deduct tax at source on the income/profit component in the payment received by the distributors/franchisees from the 3rd party customers, or while selling or transferring the prepaid coupons or starter kits to the distributors and thus section 194H is not applicable on trade discounts given to prepaid distributors. We find that similar findings have also been rendered recently by the Co-ordinate Bench of the Tribunal in Vodafone Digilink Ltd. (supra), vide order dated 14.10.2024. Therefore, respectfully following the decisions cited supra, the disallowance on account of the trade discount given to the prepaid distributors under section 40(a)(ia) is deleted. Accordingly, Ground No.5 raised in assessee's appeal is allowed.

22. The issue arising in Ground No.6, raised in assessee's appeal, pertains to the non-allowance of deduction under section 80-IA of the Act in respect of Service From India Scheme ("*SFIS*") income received by the assessee.

23. The brief facts of the case pertaining to this issue as emanating from the record are: During the year under consideration, the assessee received an amount of Rs.3,31,38,860/- as SFIS income. Under the said scheme, the Government issues scripts on export of services, which can be utilised for payment of duty levied on imports made by the assessee. Further, the scripts issued by the Government hold certain value and the import duty payable by the assessee gets deducted from the value of the scripts. Thus, the assessee

claimed that the said income pertains to the duty benefit availed by utilising the scripts issued to the assessee on export of services. Accordingly, the assessee claimed a deduction on the said income under section 80-IA of the Act on the basis that the same has accrued directly in the course of the telecommunication business. The AO, vide draft assessment order, disagreed with the submissions of the assessee and held that the SIFS is in the nature of incentive and the income arising from the same is in the nature of "*export incentive*". Accordingly, the AO held that the income arising from the export incentive cannot be treated as "*derived from*" the business of undertaking for the purpose of computing deduction under section 80-IA of the Act. It was further held that SIFS income does not come within the first degree nexus with the assessee's business, as the said incentives flow from SFIS enacted by the Government of India and not from the business of the assessee. Accordingly, the AO proposed to disallow the deduction claimed by the assessee under section 80-IA of the Act in respect of SFIS income. Since the learned DRP did not render any directions on this issue, the AO, vide final assessment order, made the impugned addition disallowing the deduction claimed by the assessee under section 80-IA of the Act in respect of SFIS income. Being aggrieved, the assessee is in appeal before us.

24. We have considered the submissions of both sides and perused the material on record. During the hearing, learned AR submitted that a 100% deduction of the profit and gains of the eligible business of an undertaking providing telecommunication services is provided under section 80IA(2A) of the Act. Thus, it was submitted that the restriction as provided in sub-section

(1) of section 80-IA of the Act, that the income should be "*derived from*" the business of the undertaking for the purpose of computing deduction under section 80-IA of the Act, is not applicable in the case of a telecommunication service provider.

25. In order to examine the submissions of the learned AR, it is pertinent to note the relevant provisions of the Act. Section 80IA(4) deals with the nature of undertakings to which the provisions of section 80-IA of the Act are applicable. As per section 80-IA(4)(ii) of the Act, an undertaking which provides telecommunication services, whether basic or cellular, is one such undertaking to which the provisions of section 80-IA of the Act are applicable. In the present case, it is undisputed that the assessee is a cellular mobile telephony service provider in the State of Gujarat. Further, section 80-IA(2A) of the Act reads as follows: -

> *"(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the deduction in computing the total income of an undertaking providing telecommunication services, specified in clause (ii) of sub-section (4), shall be hundred per cent of the profits and gains of the eligible business for the first five assessment years commencing at any time during the periods as specified in sub-section (2) and thereafter, thirty per cent of such profits and gains for further five assessment years."*

26. Section 80-IA(2) of the Act starts with a *non obstante* clause, and provides that, notwithstanding anything contained in sub-section (1) or sub-section (2) of section 80-IA, the deduction in computing the total income of an undertaking providing telecommunication service shall be 100% of the profits and gains of the eligible business. Therefore, it is pertinent to note that under the provisions of section 80-IA(2A) of the Act, the restriction as provided under sub-section (1) of section 80-IA of the Act that the profits and

gains should be derived from the eligible business is not included. Thus, the language of section 80-IA(2A) is broader as compared to section 80-IA(1) of the Act. Accordingly, we are of the considered view that the test of first-degree nexus as applied by the AO for denying the deduction under section 80-IA of the Act in respect of income from SFIS cannot be extended while computing the deduction in case of a telecommunication service provider under section 80IA(2A) of the Act. We find that while examining the applicability of the provisions of section 80IA(2A) of the Act in case of a taxpayer engaged in providing telecommunication services, the Hon'ble Delhi High Court in PCIT vs. Bharat Sanchar Nigam Ltd., reported in (2016) 388 ITR 371 (Del) observed as follows: -

> *"10. The assessee filed appeals and the revenue filed cross-appeals before the ITAT. The ITAT in the impugned orders concluded that with sub-section (2A) beginning with a non-obstante clause, the legislative intention of making available to an undertaking, providing telecommunication services, the benefit of deduction of 100% of the profits and gains "of the eligible business" was explicit. Indeed, the legislature appears to have made a conscious departure in adopting for sub-section (2A) a wording different from that appearing in sub-section (I). Under section 80-IA(1), what is available for deduction are profits and gains "derived by an undertaking or an enterprise from any business referred to in sub-section (4)" whereas in section 80-IA(2A) what is available for deduction is "hundred percent of the profits and gains of the eligible business". The following conclusion reached by the ITAT in para 13.11 of the impugned order correctly encapsulates the legal position as far as the interpretation of section 80-IA(2A) is concerned.*
>
> > *"13.11 Thus, we find that the legislature being alive to providing tax deductions to business enterprises and undertakings, it wanted to curtail the time line during which deduction can be claimed and also addressing the extent upto which it can be claimed has consciously carved out an exception to specified undertakings/enterprises whose needs and priorities differ has taken care to expand the time line for claiming deductions. It has consciously enabled those undertakings/enterprise who fall under sub-section (2A) to claim 100% deduction of profits and gains of eligible business for the first five years and upto 30% for the remaining five years in the ten consecutive assessment years out of the fifteen years starting from the time the enterprise started its operation. The legislature having ousted applicability of subsection (1) and (2) in the opening sentence brought in for the purposes of time line sub-section (2) into play but made no efforts whatsoever to put the assessee under sub-section (2A) to meet the stringent requirements that the profits so contemplated were to be "derived from".*

The requirements of the first degree nexus of the profits from the eligible business has not been brought into play."

11. As a result, the orders of both the AO and the CIT(A) to the extent they deny the assessee, which in this case is in the business of providing telecommunication services, deduction in respect of the above items in terms of section 80-IA(2A) are unsustainable in law and have rightly been reversed by the ITAT.

12. Learned counsel for the revenue sought to urge that while the assessee in this case is engaged only in the business of telecommunication services, there could be an enterprise which has more than one undertaking and one such undertaking could be in the telecommunication services. According to him, in such an event, a question might arise whether such an enterprise would be able to seek deduction both under section 80-IA(A) as far as the telecommunication business is concerned, and under section 80-IA(1) as far as any other eligible business is concerned.

13. In the first place as far as the present appeals are concerned, the above issue as posed by learned counsel for the revenue is purely hypothetical. In any event, section 80-IA(2A) treats an undertaking providing telecommunication services as a separate species warranting a separate treatment as is evident from the non-obstante clause with which it begins. The Court sees no reason why such an undertaking would not be able to take the benefit of deduction in terms of section 80-IA(2A) notwithstanding that the enterprise of which it forms part may have other eligible businesses for which the deduction would have to be calculated in terms of section 80-IA(l) of the Act.

14. The Court finds no reason to differ from the view expressed by the ITAT in the impugned orders as far as the interpretation of section 80-1A(2A) of the Act is concerned."

27. Therefore, respectfully following the decision of the Hon'ble Delhi High Court cited supra, we do not find any merits in the submissions of the Revenue and the disallowance made under section 80-IA of the Act in respect of SIFS income received by the assessee is deleted. As a result, Ground No.6 raised in assessee's appeal is allowed.

28. Insofar as the claim of deduction under section 80-IA of the Act in respect of disallowance made under section 14A of the Act is concerned, in view of the fact that we have already deleted the disallowance made under

section 14A of the Act, this issue raised by the assessee as part of Ground No.6 has become academic and therefore, is left open.

29. The issue arising in Ground No.7 raised in assessee's appeal pertains to addition of disallowance made under section 14A of the Act read with Rule 8D of the Rules while computing the book profit under section 115-JB of the Act.

30. Having considered the submissions of both sides and perused the material available on record, we find that the Special Bench of the Tribunal in ACIT vs. Vireet Investments Pvt. Ltd., reported in (2017) 58 ITR (T) 313 (Delhi Trib.) (SB) held that the computation under clause (f) of Explanation - 1 to section 115-JB(2) of the Act is to be made without resorting to the computation as contemplated under section 14A of the Act read with Rule 8D of the Rules. Thus, respectfully following the aforesaid decision of the Special Bench of the Tribunal, we direct the AO to compute the book profit under section 115-JB of the Act, without resorting, the disallowance made under section 14A of the Act read with Rule 8D of the Rules. As a result, Ground No.7 raised in assessee's appeal is allowed.

31. Ground No.8 raised in assessee's appeal pertains to the initiation of penalty proceedings under section 271(1)(c) of the Act, which is premature in nature. Therefore, the said ground is dismissed.

32. In the result, the appeal by the assessee is partly allowed for statistical purposes.

ITA No. 1634/Ahd./2015
Revenue's Appeal (A.Y. 2010-11)

33. In this appeal, the Revenue has raised the following grounds: -

"1). "The DRP, Ahmedabad has erred in law and on facts in directing the AO to consider AY.1997-98 (Instead of AY.1996-97) as the initial assessment year in which the Assessee started providing telecommunication services."

2). "The DRP, Ahmedabad has erred in law and on facts in directing the AO to apply amended 801A provisions applicable from AY.2000-2001 and allowing deduction at the rate of 100% of profits of the current year u/s.801A of the Act."

3). "The DRP, Ahmedabad has erred in law and on facts in directing to allow deduction u/s.801A of the Act on foreign exchange gain which can't be termed to have been derived from the business of providing telecommunication services."

4). "The DRP, Ahmedabad has erred in law and on facts in deleting the disallowance of deduction u/s.801A claimed on cell site sharing revenue and IRU revenue."

5). "The DRP, Ahmedabad has erred in law and on facts in directing to allow deduction u/s.801A of the Act on bad debts written back resulting in double deduction."

6). "The DRP, Ahmedabad has erred in law and on facts in directing to allow deduction u/s.801A of the Act on other income."

7). "The DRP, Ahmedabad has erred in law and on facts in directing the AO to allow deduction u/s.80IA of the Act on roaming charges disallowed u/s.40(a)(ia) of the Act."

8)."The DRP, Ahmedabad has erred in law and on facts in directing the AO to allow deduction u/s.801A of the Act on disallowance made u/s.40(a)(ia) of the Act in respect of discount offered to pre-paid distributors."

(9). "The DRP, Ahmedabad has erred in law and on facts in deleting the addition of Rs.133,79,00,000/- made on account of receipt for pre-paid services which crystallized during the year itself."

10). "The DRP, Ahmedabad has erred in law and on facts in deleting the disallowance of Rs.172,48,44,119/-made on account of license fees u/s.37(1) of the Act."

11). "The DRP, Ahmedabad has erred in law and on facts in deleting the disallowance of Rs.85,37,97,840/-made on account of Royalty to WPC (Wireless planning commission)."

12). "The DRP, Ahmedabad has erred in law and on facts in deleting the disallowance of Rs.8,84,47,780/- made u/s.36(1)(iii) of the Act on account of capitalization of interest expenses relating to Capital WIP."

13). "The DRP, Ahmedabad has erred in law and on facts in deleting the addition made on account of Arm's Length Price of international transaction as under:"

13a). "The DRP, Ahmedabad has erred in law and on facts in deleting the adjustment made in respect of the determination of ALP for royalty payments for use of brands "Essar" & "Vodafone".

13b). "The DRP, Ahmedabad has erred in law and on facts in accepting TNMM as the most appropriate method with the comparison being carried out at entity level, in alternative analysis".

13c). "The DRP, Ahmedabad has erred in law by incorrect application of TNMM for benchmarking royalty payments".

13d). "The DRP, Ahmedabad has grossly erred in law in violating the principles of natural justice by accepting the comparability analysis of the respondent, without granting an opportunity to the AO/TPO for its examination".

13e). "The DRP, Ahmedabad has grossly erred in law by accepting the comparability analysis of the respondent, without examining the same itself".

13f). "The DRP, Ahmedabad has grossly erred in law by accepting the comparability analysis of the respondent, by accepting the use of multiple year data".

13g). "The DRP, Ahmedabad has grossly erred in law and on facts by rejecting the determination of Arms' Length Payment of royalty for "Essar" brand at NIL".

13h). "The DRP, Ahmedabad has grossly erred in law and on facts by not examining the alternative contention in respect of "Essar" brand".

13i). "The DRP, Ahmedabad has grossly erred in law and on facts by accepting the agreement provided by the respondent as comparable".

13j). "The DRP, Ahmedabad has erred in law and on facts by rejecting the agreement provided by the AO/TPO as comparable".

14). On the facts and in the circumstances of the case, the DRP, Ahmedabad ought to have upheld the order of the Assessing Officer."

34. The issue arising in Ground No.1, raised in Revenue's appeal, pertains to the determination of the initial assessment year for the purpose of section 80-IA of the Act.

35. Having considered the submissions of both sides and perused the material available on record, we find that while deciding a similar issue in assessee's own case in preceding year, the Co-ordinate Bench of the Tribunal in Vodafone Essar Gujarat Ltd. Vs. ACIT in ITA No.1361/Ahd/2009, vide order dated 29.01.2010, for the assessment year 2006-07, held that since the assessee started providing telecommunication service for the period relevant to the assessment year 1997-98, the initial assessment year for the purpose of section 80-IA of the Act would be assessment year 1997-98. The relevant findings of the Co-ordinate Bench, in the aforesaid decision, are reproduced as follows:

> *"6.3 The aforesaid decision has been followed by the Hon'ble jurisdictional High Court in their subsequent decision in Lalludas Children Trust Vs, CIT,251 ITR 50(Guj) Similar view has been taken in the several cases including in DIT Vs. Lovely Bal Shikha Parishad, 266 ITR 349 (Del.), DIT Vs. Guru Nanak Vidhya Bhandar Trust, 272 ITR 379(Del.), CIT Vs. Leader Valves Ltd.,295 ITR 273(P&H) and CIT Vs. DS Promoters & Developers Pvt. Ltd., 25 DTR (Del) 8, Arihant Builders Developers & Investors (P.) Ltd v. ITAT [2005] 277 ITR 239 (MP), Asstt. CIT v. Gendalal Hazarilal & Co. [2003] 263 ITR 679 (MP), CIT v. Neo Poly Pack (P.) Ltd [2000] 245 ITR 492 (Delhi),. Dhansiram Agarwalla v. CIT [1996] 217 ITR 4 (Gauhati), CIT v. Shiv Sagar Estate [2002] 257 ITR 59 (SC) and Union of India v. Satish Pannalal Shah [2001] 249 ITR 221 (SC). In our opinion, there was no good and justifiable cause to take a different view and conclude in the assessment proceedings for the year under consideration that the AY 1996-97 was the first year when the assessee started providing telecommunication services, without there being any change in the factual position and when the earlier decision was not challenged by the Department. As pointed out in the Director's report for the AY 1997-98 and the relevant accounts for that year, the assessee started providing telecommunication services only in the period relevant to the AY 1997-98. The evidence brought to our notice by the Id. AR on behalf of the assessee and uncontroverted by the Revenue unmistakeably points out that the assessee started providing telecommunication services in the period relevant to the AY 1997-98 and this has already been concluded in the assessment proceedings for the relevant AY 1997-98. In view thereof, we have no hesitation in vacating the findings of the lower authorities on this issue and. therefore, allow ground nos. 1 to 1.3 in the appeal of the assessee."*

36. We find that similar findings have been rendered by the Co-ordinate Bench of the Tribunal in assessee's own case in subsequent assessment years i.e., 2007-08 and 2009-10. Since the learned DRP, following the orders passed by the Co-ordinate Bench of the Tribunal in the assessee's own case in preceding years, has directed the AO to consider assessment year 1997-98 as the initial assessment year for the purpose of section 80-IA of the Act, respectfully following the decisions cited supra, we do not find any infirmity in such directions. Accordingly, Ground No.1 raised in Revenue's appeal is dismissed.

37. The issue arising in Ground no. 2 raised in Revenue's appeal pertains to the applicability of the amended provisions of section 80-IA of the Act to the year under consideration.

38. Having considered the submissions of both sides and perused the material available on record, we find that the Co-ordinate Bench of the Tribunal in assessee's own case in assessment year 2006-07 cited supra held that the amended provisions of section 80-IA of the Act (applicable from the assessment year 2000-01) are applicable to the assessee's case and accordingly, the assessee is entitled to claim deduction @ 100% under section 80-IA of the Act. The relevant findings of the Co-ordinate Bench in the aforesaid decision are reproduced as follows: -

> *"12.8 In view of the foregoing, we are of the opinion that the assessee was justified in exercising option in terms of the amended provisions, especially when the provisions of sec. 801A(4) (ii) clearly stipulate that the option is available even to those undertakings which had started providing telecommunication services on or after 1.4.1995. Therefore, when the assessee fulfilled all other stipulated conditions in terms of the relevant provisions of sec. 801A of the Act, the Id. CIT(A) was not justified in holding that the benefit of substituted provisions was available only to those*

undertakings which were granted a license after 1.4.1995 and could not start operations until 1.4.2002. We are of the opinion that such an restrictive interpretation does not emerge from the amended provisions. The Id. CIT(A) was also not justified in concluding that the assessee having exercised option in the period relevant to the AY 1997-98[even though there was no such provision of exercising option and the assessee could not claim any such deduction in view of loss], provisions of sec. 801A of the Act substituted from the AY 2002-03 would not apply"

39. We find that similar findings were rendered by the Co-ordinate Bench of the Tribunal for the assessment year 2009-10, and a similar ground raised by the Revenue was dismissed. Since the learned DRP following the decision of the Co-ordinate Bench of the Tribunal in assessee's own case in preceding years has directed the AO to apply the amended provisions of section 80IA of the Act, applicable from the assessment year 2000-01, and accordingly, allowed deduction @ 100% of the profits of the current year to the assessee, respectfully following the decisions cited supra, we do not find any infirmity in the same. Accordingly, Ground no.2 raised in Revenue's appeal is dismissed.

40. The issue arising in Ground no.3, raised in Revenue's appeal, pertains to the allowance of deduction under section 80-IA of the Act on foreign exchange gain accrued to the assessee.

41. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the year under consideration, the assessee claimed a deduction under section 80-IA of the Act on the foreign exchange gain amounting to Rs.13.6 million credited to the profit and loss account. As per the assessee, the said gain was earned during the course of undertaking its telecommunication business and is an account of settlement/restatement of

transactions on revenue account as per the method of accounting laid down by Accounting Standard-11. The assessee claimed that since the language of provisions of section 80-IA(2A) of the Act is broader as compared to the provisions of section 80-IA(1) of the Act, the income from telecommunication business, whether direct or indirect, would qualify for deduction under section 80-IA of the Act. The AO, vide draft assessment order, disagreed with the submissions of the assessee and held that profit and gain arising due to foreign exchange rate fluctuation have nothing to do with the sale of goods/services and the same has arisen due to the conditions prevailing in the foreign exchange market. Accordingly, the AO held that such gain, in the present case, cannot be treated as the sale proceeds of the telecommunication business as claimed by the assessee, and the same needs to be treated as separate income. Accordingly, the AO held that the profit and gain arising on account of foreign exchange fluctuation is not eligible for deduction under section 80-IA of the Act. The learned DRP, following the decisions of the Hon'ble Bombay High Court, held that the foreign exchange gain earned by the assessee is directly related to its telecommunication business, and therefore, would be eligible for deduction under section 80IA of the Act. The relevant findings of the learned DRP, vide its direction issued under section 144C(5) of the Act, are reproduced as follows: -

> *"8.3.1 With respect to net foreign exchange gain, we have carefully considered the facts of the case and contentions of the AO as well as the assessee, During the year, while undertaking its telecommunication business, assessee had eamed foreign exchange gain. The said foreign exchange gain has arisen on account of settlement/ re-statement of transactions on revenue account as per the method of accounting laid down by the mandatory Accounting Standard 11 ('AS-11) issued under the Companies Act, 1956, As the said foreign exchange gain is directly related to the telecommunication business undertaken by the assessee, the same would qualify as income from telecommunication business. Further, Hon'ble*

Bombay High Court in case of CIT v Syntel Limited(2010-TIOL-76-HC-Mum-IT) has also heldat the foreign exchange income is eligible for deduction under section 801A of the Act. Relevant observations of Hon'ble Bombay High Court are as under.

"5. Having heard both sides, factual matrix reveal that the respondent has received sale consideration in Dollars, which it were to receive on the date of sale. In terms of Dollars, the receipt is same. But on account of fluctuation in conversion rate it has received mote in terms of rupee. In the submission of the assessee the exchange fluctuation giving benefits cannot be within the teeth of the law laid down by the Apex Court in the case of M/s Liberty India Ltd. (cited supra).

6. Apart from the above, the appeal preferred by the Revenue for the assessment 2000-01 involving identical question has already been dismissed on account of delay.

7. On the above premise, having examined the issue, the submission made by Mr. Vyas deserves acceptance. We do not see any substantial question of law arising in these appeals. Hence, appeals are liable to be dismissed with no order as to costs."

Further, the above principle has also been followed by the Hon'ble Bombay High Court in case of CIT vs M/s Rachna Udhog (2010-TIOL-81-HC-Mum-IT), wherein Hon'ble High Court has held as under.

"5. Having heard the learned counsel appearing on behalf of the appellant and learned counsel appearing for the assessee, we are of the view that the difference on account of exchange rate fluctuation is liable to be allowed under Section 801B. The exchange rate fluctuation arises out of and is directly related to the sale transaction involving the export of goods of the industrial undertaking. The exchange rate fluctuation between the rupee equivalent of the value of the goods exported and the actual receipts which are realized arises on account of the sale transaction, The difference arises purely as a result of a fluctuation in the rate of exchange between the date of export and the date of receipt of proceeds, since there is no variation in the sale price under the contract. The view which we have taken is also consistent with the view taken by a Division Bench of this Court on 15th December 2009 in the case of Syntel Limited (Income Tax Appeal Nos. 1974, 1976 and 1978 of 2009) = (2010-ПОI-76-HC-MUM-IT). In the circumstances, we would affirm the judgment of the Tribunal in so far as the question of exchange rate fluctuation is concerned."

Hon'ble DRP, in its order for AY 2009-10 in assessee's case, has allowed this ground. Hence, in view of the above judgments of Hon'ble Bombay High Court and DRP order of AY 2009-10, as foreign exchange eamed by the assessee is directly related to its telecommunication business, the same would be eligible for deduction under section 801A of the Act. Accordingly, we direct the AO to allow deduction under section 801A of the Act on foreign exchange gain. Accordingly, this ground of the assessee is allowed."

42. In conformity, the AO, *inter alia*, passed the impugned final assessment order. Being aggrieved, the Revenue is in appeal before us.

43. We find that the Co-ordinate Bench of the Tribunal in the assessee's own case for the assessment year 2009-10 cited supra, decided a similar issue

in favour of the assessee, following the decision of the Hon'ble Gujarat High Court in CIT Vs. Deversons Industries Ltd. reported in (2015) 55 taxmann.com 189 (Guj.), and held that foreign exchange gain is eligible for deduction under section 80-IA of the Act. Therefore, having considered the submissions of both sides and perused the material available on record, as the findings of the learned DRP are based on the decisions of the Hon'ble Jurisdictional High Court, respectfully following the said decisions, we do not find any infirmity in the same. Accordingly, the Ground no. 3 raised in Revenue's appeal is dismissed.

44. The issue arising in Ground No.4, raised in Revenue's appeal, pertains to the deletion of the disallowance of deduction under section 80-IA of the Act on cell site sharing revenue and IRU revenue received by the assessee.

45. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the year under consideration, the assessee received Rs.6.1 million for sharing cell site, i.e., towers, etc. with other service providers. As the said income was in the nature of income from telecommunication services, the assessee claimed a deduction under section 80-IA of the Act in relation to the said income while filing its return of income. The AO, vide draft assessment order, disagreed with the submission of the assessee and held that the cell site share revenue received by the assessee is by leasing out its assets, and the assessee is not in the business of leasing out its assets. By referring to the provisions of section 80-IA(1) of the Act, the AO held that the deduction is only eligible in respect of profits and gains derived by the undertaking from the eligible business, and the business of

leasing out of assets is not one such business as referred to in section 80-IA(4) of the Act. The AO further held that the income relating to such sharing of infrastructure with other operators is not related to providing telecommunication services by the assessee but it is primarily related to the leasing of the assets, and therefore, deduction under section 80IA of the Act is not available to the assessee on the income earned from such leasing.

46. The learned DRP, vide its directions, following the decisions of the Co-ordinate Bench of the Tribunal in assessee's own case directed the AO to allow deduction under section 80-IA of the Act on cell site sharing revenue and IRU revenue received by the assessee. In conformity, the AO, *inter alia*, passed the impugned final assessment order. Being aggrieved, the Revenue is in appeal before us.

47. We have considered the submissions of both sides and perused the material available on record. While deciding a similar issue, the Co-ordinate Bench of the Tribunal in the assessee's own case for the assessment year 2009-10, cited supra, granted the deduction claimed under section 80-IA of the Act on income earned by the assessee from the sharing of PI assets and cell sites. The relevant findings of the Co-ordinate Bench of the Tribunal, vide aforesaid decision, are reproduced as follows: -

> *"10. The Revenue's next substantive ground (3C) assails correctness of the DRP's directions to the assessing authority to allow Section 80IA deduction amounting to Rs.94.7 million and Rs.138.90 millions on account of sharing of passive infrastructure and Cell sites; respectively. The Assessing Officer's main reason for disallowing the corresponding claim was that neither the assessee is engaged in the business of leasing of assets nor sharing of cell sites. He held that the above incomes could not be treated to have been derived from an eligible undertaking u/s.80IA in other words. Shri Soparkar places on record Hon'ble Delhi high court's decision in a batch of cases ITA Nos.476-490/2016 PCIT vs. BSNL decided on 01.08.2016 upholding this tribunal's Delhi bench's*

order concluding that the above 'derived from' criteria does not apply in case of an undertaking providing telecommunication services in view of the fact that Section 80IA(2A) starts with a non obstante clause treating the same as a separate species. His further case is that this tribunal's order in assessee's case for A.Y. 2006-07 (supra) also adjudicates the very issue in its favour. The Revenue fails to controvert both these legal developments. We thus find no merit in this substantive ground. It is accordingly rejected."

48. We find that similar findings were rendered by the Co-ordinate Bench of the Tribunal in the case of assessee's sister concern in Vodafone Digilink Ltd., cited supra, for the assessment year 2010-11, and observed as follows:-

"11.10. As regards cellsite sharing revenue is concerned, the Learned Authorized Representative for the Assessee had placed reliance upon the order passed by Co-ordinate Bench of the Tribunal in Assessee's own case for the Assessment Year 2009-2010 [ITA Nos. 1169&1950/Del/2014, dated 14/03/2018, titled Deputy Commissioner of Income Tax, Circle-17(1), New Delhi vs Vodafone Essar Digilink Ltd. reported in [2018] 92 taxmann.com 234 (Delhi)]. In that case it was held that the Assessee was entitled to claim deduction under Section 80IA of the Act in respect of the cellsite sharing revenue. The relevant extract of the aforesaid decision reads as under:

"52. Third item is 'Cell site sharing' revenue of Rs. 42,85,79,640/-. This income was earned by the assessee on sharing the available spare space/capacity on its telecommunication cell sites with other telecom operators for setting up their respective antennas and placing microwave and BTS equipments. We find that there is a direct link of such income with the eligible business of providing telecommunication services. The Id. DR likened such hire charges to the earning of rental income from letting out property and contended that the same cannot be considered as profits and gains of business of telecommunications. In our view, this analogy drawn by the Id. DR is not correct. We are concerned with a situation in which income has resulted from sharing of surplus space on cell sites with other telecom operators. The cell sites are the tools of the assessee's business, without which its business cannot run. If there remains some surplus space on such business tools, which is let out by the assessee, the resultant income will be income from the business of telecommunications. Example of simplicitor hiring of building cited by the Id. DR is not germane to the issue. Such a rental income would obviously fall under the head 'Income from house property' and would not be eligible for deduction. Since the underlying assets in the situation under consideration are cell towers, which are in the nature of tools of the assessee's business, income from their commercial exploitation, in our opinion becomes 'business income' qualifying for deduction in contradistinction to income from simple hiring of property retaining the character of 'Income from house property'. It is, therefore, directed to be considered as eligible for deduction u/s. 80IA of the Act."

In view of the above decision of the Co-ordinate Bench of the Tribunal, exclusion of cell site sharing revenue of INR.0.81 Crores from the business income while computing deduction under Section 80IA of the Act cannot be sustained. Therefore, the Assessing Officer is directed to grant benefit of Section 80IA of the Act in respect of Cell site Sharing Revenue of INR.0.81 Crores."

49. During the hearing, the Revenue could not bring any material on record to deviate from the findings rendered by the Tribunal in the aforesaid decisions. Accordingly, respectfully following the decisions cited supra, we do not find any infirmity in the impugned final assessment order on this issue. As a result, the same is upheld, and Ground No.4 raised in Revenue's appeal is dismissed.

50. The issue arising in Ground No.5, raised in Revenue's appeal, pertains to the allowance of deduction under section 80-IA of the Act on bad debts written back.

51. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the year under consideration, the assessee claimed a deduction under section 80-IA of the Act in respect of debts written back on the basis that the same are in respect of the telecommunication business of the assessee. As per the assessee, bad debts were allowed as deduction while computing income in earlier year and deduction under section 80-IA of the Act has already been reduced to that extent in those years, therefore, the recovery of the bad debts in the year under consideration is taxable as per the provisions of section 41(1) of the Act and the accordingly is eligible for deduction under section 80-IA of the Act. The AO, vide draft assessment order, disagreed with the submissions of the assessee held that if the

argument of the assessee is accepted then there will be double deduction, firstly, when the bad debt was claimed and allowed to the assessee, and now, after crediting to the income again as bad debt recovery, deduction under section 80-IA of the Act is claimed on the very same sum. The AO further held that if the assessee proves that any of the bad debt recoveries are from the bad debt of the current year or from the year in which the assessee was entitled to a deduction under section 80-IA of the Act, the same would be allowable to the assessee. However, in the absence of any details, such a claim cannot be allowed. Accordingly, the AO proposed to reject, vide draft assessment order, the claim of the assessee for deduction under section 80-IA of the Act on bad debts written back.

52. The learned DRP, vide its directions, following its approach adopted in assessee's own case for the assessment year 2009-10, directed the AO to allow deduction under section 80-IA of the Act on bad debts written back. In conformity, the AO*, inter alia*, passed the impugned final assessment order. Being aggrieved, the Revenue is in appeal before us.

53. We have considered the submissions of both sides and perused the material available on record. While deciding a similar issue, the Co-ordinate Bench of the Tribunal in assessee's own case for the assessment year 2009-10 cited supra*,* observed as follows: -

> *"12. The Revenue's next substantive ground (3e) posses challenge to DRP's directions issued to the Assessing Officer for allowing the assessee the relief of Section 80IA deduction on bad debts returned back. Its argument is that the same amounts to double deduction. We find from the case file that assessee's stand before the Assessing Officer was that these bad debts written back are in respect of cellular services only as allowed in earlier years thereby reducing the corresponding Section 80IA deduction claim. It emphasize that these sums are now taxable in the impugned assessment year u/s.41(1) of*

the Act are to be characterized as business income only. It quoted this tribunal's order in Radha Madhav Industries case ITA No.1935/Ahd/2007 holding identical profits u/s.41(1) as to has been derived from the eligible undertaking. The Assessing Officer opined that such a course of action would amount to double deduction as the very sum stood accepted as bad debts in earlier years and now these figures are sought to be included in Section 80IA deduction claim.

13. We come to DRP's findings now. Ld. Panel negates this double deduction reason after holding that assessee's bad debts claim in earlier assessment years would have reduced its eligible deduction therein. It further places reliance on the above Radha Madhav's case law (supra) to accept assessee's contentions leaving behind the Revenue aggrieved.

14. Heard both sides. There is hardly any quarrel that the assessee claimed these sums as bad debts (revenue receipts) in earlier assessment years. The same stood allowed. It thereafter received back these sums in the impugned assessment year in the nature of business income u/s.41(1) of the Act. A coordinate bench of the tribunal (supra) concludes in these facts that such an instance does not amount to double deduction claim. The Revenue fails to indicate any exception in facts of the instant case. We accordingly reject the instant substantive ground as well."

54. The Revenue could not bring any material to deviate from the decision so rendered by the Tribunal in assessee's own case. Accordingly, respectfully following the said decision, we do not find any infirmity in the impugned final assessment order on this issue. As a result, the same is upheld, and Ground No.5 raised in Revenue's appeal is dismissed.

55. The issue arising in Ground No.6, raised in Revenue's appeal, pertains to the allowance of deduction under section 80-IA of the Act on other income received by the assessee.

56. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the year under consideration, the assessee claimed deduction under section 80IA of the Act in respect of advertisement revenue of Rs.3,82,998/-, scrap sale of Rs.44,68,701/- and sharing of switches and ports of Rs.47,68,394/-. Since these incomes did not have a direct nexus with

the business of the assessee, the AO, vide draft assessment order, disallowed the claim of deduction claimed by the assessee under section 80IA of the Act. The learned DRP, vide its direction, agreed with the submissions of the assessee and held that these income have arisen directly from the telecommunication business undertaken by the assessee, and therefore, is eligible for deduction under section 80IA of the Act. In conformity, the AO, *inter alia,* passed the impugned final assessment order. Being aggrieved, the Revenue is in appeal before us.

57. Having considered the submissions of both sides and perused the material available on record, we find that the Co-ordinate Bench of the Tribunal in case of assessee's sisters concern in Vodafone Digilink Ltd., cited supra, for the assessment year 2010-11, after noting the difference in language of the provisions of section 80-IA(2A) and section 80-IA(1) directed the AO to grant the benefit under section 80-IA of the Act in respect of other income. The Revenue could not bring any material to deviate from the decision so rendered by the Tribunal on this issue. Accordingly, respectfully following the decision cited supra, we do not find any infirmity in the impugned order on this issue. As a result, the same is upheld, and Ground No.6 raised in Revenue's appeal is dismissed.

58. Grounds Nos. 7 and 8, raised in Revenue's appeal, pertain to the allowability of deduction under section 80-IA of the Act on roaming charges and discount offered to prepaid distributors, which was disallowed under section 40(a)(ia) of the Act. Since the disallowance on this issue has already been deleted in assessee's appeal, being ITA No.671/Ahd/2015, these

grounds raised by the Revenue have become academic, and therefore, are dismissed.

59. The issue arising in Ground No.9, raised in Revenue's appeal, pertains to the deletion of the addition on account of receipts from prepaid services.

60. The brief facts of the case, pertaining to this issue, as emanating from the record are: During the year under consideration, the assessee received an amount of Rs.1337.9 million from its prepaid customers, which was declared as an advance in its balance sheet, as the services were not rendered during the year under consideration. As per the assessee, it recognises revenue from telecom services on the basis of actual usage of its network by the customer and the services actually rendered to the customer, which is in accordance with the mercantile system of accounting, generally accepted accounting principles, accounting standards notified under the Companies Act, and the provisions of section 145 of the Act.

61. The AO, vide draft assessment order, disagreed with the submissions of the assessee and held that the customers in the "*prepaid service*" have to pay the amount for purchase of "*recharges*", and the said amount is non-refundable even if the services could not be ultimately utilised by the customers. The AO further held that even where a customer opts to cancel the service offered by the assessee, the unutilized balance is non-refundable and, thus, the amount paid is towards the outright purchase of "*recharges*" and not an advance to be set off against future use of the service. The AO held that the assessee acquired the absolute right to utilise the amount so

received and thus the income from "*prepaid services*" crystallises as soon as the customer makes payment. Accordingly, the AO, vide draft assessment order, proposed to add the entire amount at Rs.133,79,00,000/- towards "*prepaid services*" in the year under consideration.

62. The learned DRP, vide its direction, allowed the objections raised by the assessee and held that the assessee is engaged in the business of providing telecommunication services and once the assessee sells its SIM cards and prepaid vouchers, its liability arises to provide the telecommunication services throughout the validity period. Thus, the learned DRP held that even if the amount collected by the assessee on the sale of prepaid vouchers is not refundable, the assessee is still required to provide services during the validity period of prepaid vouchers, and it cannot discontinue to provide services within this period. In this regard, the learned DRP also, *inter alia*, referred to its directions rendered in assessee's own case for the assessment year 2009-10 wherein a similar addition on account of advance prepaid income was directed to be deleted. In conformity, the AO, *inter alia*, passed the impugned final assessment order. Being aggrieved, the assessee is in appeal before us.

63. Having considered the submissions of both sides and perused the material available on record, we find that similar issue came up for consideration before the Co-ordinate Bench of the Tribunal in ACIT vs. Shyam Telelinks Ltd., reported in (2013) 31 taxmann.com 239 (Del-Trib.), wherein the Co-ordinate Bench agreed with the similar mode of revenue recognition by the taxpayer. The Co-ordinate Bench of the Tribunal further directed the AO to verify whether, in the subsequent year, the taxpayer has declared the

revenue in respect of expired prepaid cards, and in case no discrepancy is found in this regard, the Co-ordinate Bench directed that no adjustment is called for with the assessee's mode of revenue recognition. The relevant findings of the Co-ordinate Bench, in the aforesaid decision, are reproduced as follows: -

> *"16. In the present case, the main dispute is regarding revenue recognition relating to unused talk time remaining available as at the end of the year. As noted earlier, there is no "dispute that company had to provide talk time to its subscriber till the expiry of the period of card or till complete utilization of talk time, whichever is earlier. As long as assessee company is under obligation to provide talk time, it cannot long as it is under obligation to provide said services. Therefore, we are of the opinion that learned CIT(A) Representative has submitted that from the system followed by the assessee, there is every likelihood of revenue leakage. In this regard learned counsel has submitted that the matter can be restored to the file of AO for verification of this aspect only. We, therefore, restore the matter to the file of AO for the limited purpose of verification whether in the subsequent year the assessee has declared the revenue in respect of expired prepaid cards or not. in case no discrepancy is found in this regard, no adjustment is called for with the assessee's mode of revenue recognition. In terms of aforementioned observation this ground is partly allowed for statistical purposes."*

64. Further appeal by the Revenue against the aforesaid decision of the Co-ordinate Bench of the Tribunal was dismissed by the Hon'ble Delhi High Court in CIT vs. Shyam Telelinks Ltd., reported in (2019) 101 taxmann.com 218 (Del). We find that in the aforesaid decision, the Hon'ble Delhi High Court further directed and clarified that the AO, while passing the appeal effect order, would ensure that the unutilized talk time has been accounted for and included in the receipt of the year in which the amount has lapsed and was forgone. The Revenue's SLP against the aforesaid decision of the Hon'ble Delhi High Court was dismissed by the Hon'ble Supreme Court vide order dated 12.07.2019, reported in (2019) 108 taxmann.com 333 (SC).

65. We find that the Co-ordinate Bench of the Tribunal in assessee's own case for the assessment year 2009-10 cited supra, following the decision of the Co-ordinate Bench in Shyam Telelinks Ltd. (supra) directed the AO to verify as to whether the assessee has declared the revenue in respect of the expired prepaid cards in the succeeding years. In the absence of any allegation of a change in facts or law in the year under consideration, respectfully following the decision of the Hon'ble Delhi High Court in Shyam Telelink Ltd. (supra), we do not find any infirmity in the directions of the learned DRP in accepting the mode of revenue recognition by the assessee. However, in order to avoid the likelihood of revenue leakage, we restore this issue to the file of the AO for limited verification whether the unutilized talk time has been accounted for and included in the receipt of the year in which the validity of the recharge has expired. We further direct that in case no discrepancy is found in this regard, no adjustment is called for with the assessee's mode of revenue recognition. Accordingly, the impugned order on this issue is set aside, and Ground No.9 raised in Revenue's Appeal is allowed for statistical purposes.

66. The issue arising in Ground No.10, raised in Revenue's appeal, pertains to the deletion of the disallowance made on account of license fees paid by the assessee to the Department of Telecommunication ("*DoT*").

67. The brief facts of the case pertaining to this issue, as emanating from the record are: During the year under consideration, the assessee claimed license fees amounting to Rs.197,12,50,422/- paid to DoT as deduction under

section 37(1) of the Act. Further, an amount of Rs.25,26,41,322/- in respect of earlier years payment was claimed under section 35ABB of the Act. As per the assessee, it entered into a license agreement with the Government of India on 11.06.1996 for obtaining the right to operate and provide the telecom service in the State of Gujarat. Since the license fees paid under the said agreement was for acquiring the telecom license, the assessee claimed that it capitalized the same in its books of account and appropriate deduction was claimed in the return of income in accordance with the provisions of section 35ABB of the Act. Subsequently, the Government announced the New Telecom Policy, 1999, applicable with effect from 01.08.1999, under which it granted an option to the telecom companies to migrate from a fixed license fees to a revenue sharing regime. Accordingly, in terms of the migration package issued by the Ministry of Telecommunication, Government of India, the license fees were bifurcated into two components, i.e., a) onetime entry fees, which would be the license fees dues payable by the existing licensees upto 31.07.1999, and b) with effect from 01.08.1999, the license fees were payable as a percentage of gross revenue on an annual recurring basis. Accordingly, the license fees capitalised by the assessee were claimed as a deduction under section 35AAB of the Act and the license fees which were paid not for acquiring the license but to maintain the license for each year on the basis of revenue sharing were claimed as a deduction under section 37(1) of the Act.

68. The AO, vide draft assessment order, disagreed with the submissions of the assessee and held that the fees paid to keep a license in force as an

enduring benefit since the assessee has obtained a right to operate the telecommunication services for a period upto 17.12.2015. The AO further held that, except for a change in the mode of computation of license fees, the nature of payment remained the same from the commencement of business, and the assessee has acquired a greater enduring benefit. Accordingly, the AO held that the nature of payment clearly indicates that the assessee has acquired an asset or an advantage of enduring benefit, though the payments are recurring. Accordingly, the AO proposed to disallow the treatment of license fees paid during the year as revenue expenditure and, after appropriate deduction under section 35ABB of the Act, an amount of Rs. 172,48,44,119/- was proposed to be added to the total income of the assessee.

69. The learned DRP, vide its direction, following the decision of the Co-ordinate Bench of the Tribunal in assessee's own case for the assessment year 2006-07, held that the license fees paid by the assessee on a revenue sharing basis are allowable as revenue expenditure deductible under section 37(1) of the Act. Accordingly, the learned DRP directed the AO to delete the proposed addition of license fees paid on a revenue-sharing basis. In conformity, the AO, *inter alia*, passed the final assessment order on this issue. Being aggrieved, Revenue is in appeal before us.

70. Having considered the submissions of both sides and perused the material available on record, we find that the Co-ordinate Bench of the Tribunal in case of the assessee's sister concern in Vodafone Digilink Limited

(supra) vide order dated 14.10.2025, after considering the decision of the Hon'ble Supreme Court in CIT vs. Bharati Hexacom Ltd., reported in (2023) 155 taxmann.com 322 (SC) observed as follows: -

> *"12.1 Ground No.2 raised by the Assessee pertains to disallowance of license fees amounting to INR.1,40,20,51,723/- claimed as deduction under Section 37(1) of the Act. Both sides agreed that the issue in dispute stands covered by the decision of the Hon'ble Supreme Court in the case of Commissioner of Income Tax Vs. Bharti Hexacom Ltd. [2023] 155 taxmann.com 322 (SC), dated 16/10/2023. On perusal of the judgment of Hon'ble Supreme Court in the case of Commissioner of Income Tax Vs. Bharti Hexacom Ltd. (Supra), we find that the Hon'ble Supreme Court had held that the annual license fees paid by the Telecom Companies was capital in nature and will be capital in nature and is accordingly required to be amortised under Section 35ABB of the Act. The Learned Authorized Representative for the Assessee had submitted that the license fees paid by the Telecom Companies in terms of the National Telecom Policy (NTP) - 94, being in the nature of capital expenditure was not claimed as business expenditure under Section 37(1) of the Act as the same was amortized in terms of Section 35ABB of the Act. Pursuant to the implementation of the NTP-99 the variable license fee was annual fee payable in the normal course of business for operating and providing telecommunication services and the fees paid covered the relevant previous year only, the Telecom companies claimed the entire amount of variable license fees paid to the Department of Telecommunication as deductible revenue expenditure under Section 37(1) of the Income Tax Act from financial year 199-2000 onwards. However, the Hon'ble Supreme Court has, in the case of Bharti Hexacom Ltd. (Supra), held that even the annual fees paid by telecom operators was capital expenditure covered under Section 35ABB of the Act. The aforesaid judgment of the Hon'ble Supreme Court does not result into permanent disallowance but lead to staggered allowance of annual license fees over the period of license. Accordingly, the amount of variable license fees paid to the Department of Telecommunication annually and debited to Profit & Loss Account would get disallowed and consequential deduction would be allowed to the Assessee over the balance period of license on amortization basis which shall also include consequential deduction towards past year disallowance. During the course of appellate proceedings, the Learned Authorised Representative for the Assessee filed working showing that in view of the aforesaid a disallowance to the extent of INR1.41 Crores would get sustained as per the aforesaid judgment of the Hon'ble Supreme Court. Accordingly, we direct the Assessing Officer to verifying the working furnished by the Assessee and compute the quantum of disallowance as per the judgment of the Hon'ble Supreme Court in the case of Bharti Hexacom Ltd. (Supra). Accordingly, in terms of aforesaid, Ground No.2 raised by the Assessee is partly allowed."*

71. During the hearing, the learned AR has filed the working of disallowance to an extent of Rs. 107,80,87,620/- in line with the decision of the Hon'ble

Supreme Court in Bharati Hexacom Ltd. (supra). Therefore, respectfully following the decision of the Co-ordinate Bench of the Tribunal cited supra, we direct the AO to verify the working of the disallowance furnished by the assessee and compute the quantum of disallowance as per the decision of the Hon'ble Supreme Court in Bharati Hexacom Ltd. (supra). Accordingly, the impugned order on this issue is set aside, and Ground No.10 raised in Revenue's appeal is partly allowed.

72. The issue arising in Ground No.11, raised in Revenue's appeal, pertains to the deletion of the disallowance made on account of royalty paid to Wireless Planning Commissioner ("*WPC*").

73. The brief facts of the case, pertaining to this issue, as emanating from the record, are: During the assessment proceedings, the assessee incurred an expenditure of Rs.97,57,68,959/- in respect of license fees payable to WPC, a wing of Department of Telecommunication towards use of spectrum availed by the assessee. Since the amount paid to WPC was on a quarterly basis as a percentage of revenue and was incurred for carrying on the telecommunication operations, the assessee claimed the expenditure to be revenue in nature. Accordingly, the assessee claimed the expenditure under section 37(1) of the Act. The AO, vide draft assessment order, disagreed with the submissions of the assessee and made the appropriate deduction under section 35ABB of the Act and proposed to add the balance sum of Rs.85,37,97,840/- to the total income of the assessee. The relevant findings of the AO, vide draft assessment order, are reproduced as follows: -

"13.4 The reply of the assessee has been considered and not found acceptable. It was found that in addition to license fee payable to the DOT, the cellular licensees pay spectrum charges on revenue share basis of 2% of Adjusted Cost Revenue (ACR) towards WPC charges covering royalty payment for the use of cellular spectrum and License fee for Cellular Mobile handsets & Cellular Mobile Base Stations and also for possession of wireless telegraphy equipment as per the details prescribed by Wireless Planning & Coordination wing (WPC). Any additional band width, if allotted, subject to availability and justification, shall attract additional License fee as revenue share. Thus such expenditure falls within the purview of section 35ABB being in the nature of capital expenditure incurred for acquiring right to operate telecommunication services and for which the assessee has made a payment to obtain a license. Thus the expenditure continued to be in the nature of capital expenditure for the purpose of income-tax Act and deduction was allowable only within the ambit of the provision of section 35ABB of the Act equal to the appropriate fraction prescribed therein.

13.5 Furthermore the reliance of the assessee on the decision of Hon'ble Delhi High Court in the case of the assessee (221 CTR 305) is not acceptable as the department has not accepted the said decision and SLP in Hon'ble supreme Court has been preferred. The assessee has also relied on the order of DRP for A.Y. 2009-10. However, the said order of DRP has also been not accepted by the Department and further appeal has been recommended.

13.6 In view of the above discussion the claim of the assessee of treating the royalty/license fees paid to WPC during the year as a revenue expenditure is disallowed and after appropriate deduction u/s.35ABB the remaining portion is added back to the total income according to the following calculation;

Current previous year	*2009-10*
Previous year up to which license granted	*2016-17*
Therefore denominator as per section 35ABB	*8 years*
Therefore deduction allowable at appropriate Fraction [Rs.97,57,68,959/08] =	*Rs. 12,19,71,120/-*

13.7 Accordingly the total disallowance works out to Rs 85,37,97,840/- (97,57,68,959 - 12,19,71,120). In view of the above, an amount of Rs. 85,37,97,840/- is disallowed and added to the income of the assessee."

74. The DRP, vide its direction, following the decision of the Hon'ble Delhi High Court in assessee's own case in CIT vs. Fascel Ltd., reported in (2009) 221 CTR 305 (Del), held that the payment of fees of WPC is deductible as revenue expenditure under section 37(1) of the Act. Accordingly, the learned DRP, directed the AO to delete the proposed addition on this issue. In

conformity, the AO, *inter alia*, passed the final assessment order on this issue. Being aggrieved, the revenue is in appeal us.

75. Having considered the submissions of both sides and perused the material available on record, as the learned DRP, following the decision of the Hon'ble Delhi High Court, rendered in the assessee's own case directed the AO to delete the impugned addition, we do not find any infirmity in the findings of the learned DRP on this issue in the absence of any allegation of change in facts or law. Accordingly, the impugned order on this issue is upheld, and Ground No. 11 raised in Revenue's appeal is dismissed.

76. The issue arising in Ground No.12 pertains to the deletion of the disallowance made under section 36(1)(iii) of the Act on account of capitalisation on interest expenses relating to WIP.

77. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the year under consideration, the assessee incurred interest expenditure in respect of various External Commercial Borrowings ("*ECB*") loans obtained for the acquisition of capital assets. Since the ECB loans were availed by the assessee for the acquisition of capital assets used for the continuation and expansion of its business operations and since ECB was incurred on capital borrowed for the purposes of business carried on by the assessee, the assessee claimed a deduction in respect of such interest expenditure under section 36(1)(iii) of the Act. The AO, vide draft assessment order, disagreed with the submissions of the assessee and made the impugned addition on this issue. The learned DRP, vide its directions, following

its approach adopted in assessee's own case for assessment year 2009-10, held that the interest expenditure incurred by the assessee on ECB loans used for acquisition of capital assets is eligible for deduction under section 36(1)(iii) of the Act. In conformity, the AO, *inter alia*, passed the impugned final assessment order on this issue. Being aggrieved, the Revenue is in appeal before us.

78. Having considered the submissions of both sites and perused the material available on record, we find that the Co-ordinate Bench of the Tribunal in assessee's own case for the assessment year 2009-10 cited supra upheld the similar findings of the learned DRP on this issue, and observed as follows: -

> *"28. Heard both sides. The Revenue strongly contends that the Assessing Officer had rightly invoked the impugned disallowance in the above draft assessment by quoting Section 43(1) explanation 8 of the Act. It however fails to dispute that hon'ble apex court decision in Core Healthcare case (supra) categorically holds that the said explanation does not apply in case of 36(1)(iii) deduction. The assessee at this stage states to have incurred the impugned interest expenditure in respect of various external corporate borrowings obtained for acquisition of capital assets for continuing its existing telecom business only and not for extension thereof. Its further case is that the interest in question paid on borrowed funds for acquisition of a capital asset is allowable even for a period to dated of its being put to use. As per hon'ble apex court's decision hereinabove holding that there is no distinction u/s.36(1)(iii) between interest incurred on capital borrowed for revenue or capital purposes provided the same is used for business purposes irrespective of the result of use of such capital. We afforded ample rebuttal opportunity to Revenue. Ld. Departmental Representative fails to take us to any material in the case file so as to prove that assesee's interest in question is covered u/s.36(1)(iii) proviso as amended by the Finance Act, 2015 w.e.f. 01.04.2016 since it is a case wherein the impugned interest is in respect of capital borrowed for the purpose of business already attracting the main limb of statutory provision instead of the above proviso. This Revenue's ground is accordingly declined."*

79. In the absence of any allegation in change of facts or law in the year under consideration, respectfully following the decision of the Co-ordinate

Bench of the Tribunal cited supra, the impugned order on this issue is upheld, and Ground No. 12 raised in Revenue's appeal is dismissed.

80. The issue arising in Grounds No.13, 13(a) to 13(j), raised in Revenue's appeal, pertains to the deletion of the transfer pricing adjustment on account of the payment of brand royalty.

81. The brief facts of the case pertaining to this issue, as emanating from the records, are: The assessee, pursuant to an agreement entered into with Vodafone Ireland Marketing Ltd. ("*VIML*") for the use of the brand name and trademarks/trade name "*Vodafone*" agreed to pay a royalty to VIML. Similarly, pursuant to an agreement entered into with Rising Groups Ltd. ("*RGL*"), the assessee agreed to pay royalty for the use of the brand name "*Essar*". Accordingly, during the year under consideration, the assessee paid brand royalty fees amounting to Rs.12,46,59,030/- to VIML and royalty of Rs.6,33,37,260/- to RGL for the use of brand name "*Vodafone*" and "*Essar*", respectively. As these royalties were paid to the associated enterprises, the assessee benchmarked the international transaction of payment of brand royalty by considering the Comparable Uncontrolled Price ("*CUP*") method as the most appropriate method. Since the royalty paid by the assessee for the use of "*Essar*" and "*Vodafone*" trademarks, respectively was @ 0.25% and 0.5% of the net service revenue, the assessee claimed the same to be at arms' length as compared to the uncontrolled comparable transactions wherein the royalty was paid in the range of 0.75% to 2% within arithmetic mean of 1.24%, for the usage of trademarks or trade names, corporate endorsement or brand or logo. As the international transaction with regard to

payment of royalty by the assessee to VIML and RGL was inextricably linked to the assessee's business, alternatively, the assessee benchmarked the aforesaid international transaction with other international transactions relating to roaming service and software development service undertaken by the assessee by adopting Transactional Net Margin Method ("*TNMM*") as the secondary method for the purpose of benchmarking.

82. Pursuant to the reference by the AO under section 92CA(1) of the Act, the Transfer Pricing Officer ("*TPO*"), vide order dated 28.01.2014, passed under section 92CA(3) of the Act, rejected the comparable instances chosen by the assessee by adopting CUP as the most appropriate method. As regards the royalty paid to RGL for the use of the brand name "*Essar*", the TPO held that not even a single document was produced by the assessee to show the benefit received by it on account of payment of the trademark royalty. The TPO further held that in the geographical region of Gujarat, the brand "*Essar*" is not associated with telecommunication services from the perspective of a common layman. The TPO held that the brand "*Essar*" is associated with sectors such as shipping ports and logistics, and therefore cannot be said to attract customers in the telecommunications sector. Accordingly, the TPO rejecting the submissions of the assessee, held that the arms' length price of royalty paid for "*Essar*" brand is Nil. As regards the royalty paid for the use of the brand "*Vodafone*", the TPO, following the approach adopted in the preceding year, considered the agreement between Virgin Enterprises Ltd. and Virgin Mobile USA LLC to be a comparable transaction. Since the royalty under this agreement was paid @ 0.25% of the gross sales, the TPO held that this

rate has to be considered as arms' length price for the royalty to be paid for "*Vodafone*" brand. In the alternative, the TPO held that if the royalty payment for "*Essar*" brand is not required to be calculated at Nil, then the combined payment by the assessee, i.e., Rs.18,79,96,290/-, which comes to 0.775 of gross sale, needs to be benchmarked against the payment of arms' length price of 0.25%.

83. The learned DRP, vide its direction, allowed the objections raised by the assessee on this issue and observed as follows: -

> *"16.2 We have carefully considered the facts of the case and contentions of the AO as incorporated in the draft assessment order. We have also gone through the various oral and written submission made by the assessee's representative. With respect to royalty payment made by the assesse on use of trademark of "ESSAR", we have considered the facts and the submissions made by the assesse. As per the terms and conditions of the license agreement executed between the Assessee and Rising Group Limited, the Assessee has the right to use 'Essar" trade name and "Essar" trademark in relation to corporate endorsement in India. Further, assessee also has the right to grant sub-licenses of their license rights "Essar' name and "Essar" trade mark in the ordinary course of business to any or all of their affiliates and their service providers, distributors, agents, exclusive dealers and other similar persons, solely in connection with the promotion, marketing, advertising, sale and provision of telecommunications services subject to certain conditions specified in the Agreement.*
>
> *16.2.1 As far as "Essar" brand is concerned, TPO is of the view that as Essar was not associated with telecommunication services in Gujarat region, its brand name did not have any value in the telecommunication business. We are of the view: that value of brand cannot be determined merely on the basis that brand has a presence in a particular business or territory or not. "Essar" brand is globally renowned and the group has a significant presence in the state of Gujarat. Essar Group is a global player in communication sector with presence across multiple countries, namely India, Kenya, Uganda, Congo, etc. Additionally Essar Group is a leading Indian multinational group with business interests in various sectors including telecom, steel, oil and gas, power, business process outsourcing, shipping, ports and logistics, projects, minerals, etc., and significant presence in the state of Gujarat. In times of consumerism, one of the key success factors in the telecommunication business is the use of recognized brand which helps customers identify themselves with the brand. Further, it also communicates assurance of quality and value of services provided to the customers. Also, in telecom industry, several telecom service providers like Bharti Airtel, Idea, Reliance Communication, Tata Teleservices, etc., are marketing their services under the specific brand name. Hence, it also*

becomes essential for the Assessee to use a brand that is not only popular and visible but also helps it in distinguishing itself from the other competitors. Also, customers often select the branded services due to the trust in the reputation of the brand. Customers look on branding as an important value added aspect of the service, as it often serves to denote a certain attractive quality or characteristic. If one cannot ensure a consistent quality on the service, one cannot impart a value to the brand. Trademark is a promise to the customer that a stipulated quality will be: maintained and hence the customer can purchase a branded service believing in its quality which reduces his burden in matters such as, time in searching, examining for ensuring quality etc.

Hence, the contention of the TPO that as 'Essar" was not geographically present in telecommunication business in the state of Gujarat, its brand name did not have any value is not correct.
16.2.2 Further, the TPO has computed ALP for royalty payment made for using "Essar" brand name as NIL on the contention that assessee did not undertake; any cost benefit analysis. In this regards, we are of the view that existing Indian transfer pricing regulations do not mandate the assessee to prepare a cost benefit: analysis for all international transactions undertaken by it. During AY 2010-11, the royalty payment for using the trademark "Essar" was only Rs. 6,33,37,260/- for which assessee cannot be expected to undertake a cost benefit analysis. Hence, mere: absence of cost benefit analysis would not mean that royalty payment is not at ALP. Also, we find that the Hon'ble Mumbai ITAT has clearly held in case of Dresser-Rand India Pvt. Ltd vs. ACIT Range 6(2), Mumbai [ITA No 8753/Mum/2010], that the TPO: cannot question the commercial expediency of the businessman. The role and the responsibility of the TPO under the Indian TP Regulations are restricted to determination of the arm's length price of the international transaction. Similar observations were also made by Hon'ble Delhi High Court in the case of CIT vs. EKL Appliances Ltd [supra). Relevant observations of Hon'ble Delhi High Court are as under:

> *"21. The position emerging from the above decisions is that it is not necessary for the Assessee to show that any legitimate expenditure incurred by him was also incurred out of necessity. It is also not necessary for the Assessee to show that any expenditure incurred by him for the purpose of business carried on by him has actually resulted in profit or income either in the same year or in any of the subsequent years. The only condition is that the expenditure should have been incurred "wholly and exclusively" for the purpose of business and nothing more. It is this principle that inter alia finds expression in the OBCD guidelines, in the paragraphs which we have quoted above.*

16.2.3 Based on above case laws of Hon'ble Delhi High Court and Hon'ble" Mumbai ITAT, we are of the view that action of TPO in treating value of "Essar" brand as NIL was not correct.

16.2.4 The Hon'ble DRP in its order for AY 2009-10 has given relief to the assessee on this issue. The finding of DRP is contained in para 16.10 of the order which is as below :

> *"Hence, based on the above observations and judicial precedents, we are of the view that the royalty payment made by the assessee for the use of "Vodafone" brand name and "Essar' brand name at the rate of 0.30% and 0.15% respectively is at arm's length price. Accordingly, we direct the AO to delete the proposed addition, made in this respect. Accordingly, this ground of the assessee is allowed."*

16.2.5 In view of above, in this year also this ground is allowed."

84. In conformity, the AO, *inter alia*, passed the impugned final assessment order on this issue. Being aggrieved, the Revenue is in appeal before us.

85. During the hearing, the learned Representatives of both parties fairly agreed that this issue is squarely covered in favour of the assessee by the decision of the Co-ordinate Bench of the Tribunal in the assessee's own case, cited supra, for the assessment year 2009-10. From the careful perusal of the aforesaid decision, we find that the Co-ordinate Bench of the Tribunal, while considering the transfer pricing adjustment in respect of similar royalty payment made by the assessee to VIML and RGL, observed as follows: -

> *"30. A perusal of the case record indicates that the assessee had paid brand royalty fee amounting to Rs.5,37,37,397/- and Rs.2,68,68,699/- to its overseas associate enterprises, namely, M/s. Vodafone Ireland Marketing Ltd. and M/s. Rising Groups Ltd.; respectively. It adopted the transaction net margin method (TNMM) to benchmark the same. We find from Transfer Pricing Officer's order dated 28.01.2013 that he rejected assessee's method after holding that the same was an indirect one liable to give way to the other direct methods in the Income Tax Rules. He relied on this tribunal's decision in M/s. Serdia Pharmaceuticals India Pvt. Ltd. case 44 SOT 391 (Mumbai) to adopt CUP method (comparable uncontrolled price) in facts of the instant case. He thereafter was of the view that arms' length price for royalty payment for "Essar" brand as Rs. Nil and corresponding payment had to be restricted to 0.25% on gross sales as against 0.275% declared by the assessee. He adopted similar course of action for the later payee regarding "Vodafone" brand. The same resulted in the impugned upward adjustment of Rs.3,17,53,917/-. We notice from the above TPO's order that he went by assessee's related parties royalty agreement transactions in proposing the impugned adjustment. The Dispute Resolution Panel reverses the same leaving the Revenue aggrieved.*
>
> *31. We have heard rival contentions. Suffice to say, since the transfer pricing officer in the instant case has proceeded to propose the impugned upward adjustment on the basis of related party transactions after adopting CUP method instead of TNMM hereinabove, we find that a co-ordinate bench of this tribunal in ACIT vs. Bilag Industries Pvt. Ltd. ITA No. 1441 & 1670/Ahd/2006 and 343/Ahd/2012 quotes a catena of case law to disagree with such an approach as follows:*

"28. We have heard both the sides. Learned representatives reiterate their respective pleadings in support of and against the impugned transfer pricing There is hardly and dispute that the assessee agreed to supply Deltametrin and its intermediate chemical solutions to the above stated associate enterprise or its designee. This lis however is confined to arms' length price determination of 18 tones supplied to the foreign entity. The assessee charges @ US $ 126.2 per kg by following cost + 55% markup. Its agreement quoted Deltametrin price to be @ 161.20 US $ per kg. The assessee also admitted the latter rate to be at arms length price as already indicated in page 292 of the paper book. This made the TPO to inter alia to reject assessee's other contentions for making impugned upward transfer pricing adjustment of Rs. 2,96,10,000/- subject matter of the instant litigation.

29. We deem it appropriate at this stage to deal with chapter X of the act containing transfer pricing provisions relating to avoidance of tax introduced by the Finance Act, 2001 w.e.f. 01-04-2002. The impugned assessment year before us is the first full fledged year of business thereafter. Section 92(1) mandates any income arising from an international transaction to be computed having regard to arms length price. The same admittedly applies in case of international transactions; as it then was, between two associate enterprises illustrated in section 92A of the Act. We repeat that this assessee and its overseas associate enterprise admittedly fall in this category. There is further no quarrel about its Deltamethrin sale to be in the nature of international transactions w/s. 92B of the Act. We notice that section 92C(I) of the Act postulates arms length price computation by applying six methods namely; comparable un-controlled price method (CUP), re-sale price method (RPM), cost +method (CPM), profit split method (PSM), transactional net margin method (TNMM) and the residuary one such other methods as may be prescribed by the Central Board of Direct Taxes. An Assessing Officer's jurisdictional flows thereafter u/s. 92CA of the Act to make reference to the TPO for ascertaining arms length price of the relevant international transactions.

30. We now come to the corresponding income tax rules. Rule 10A defines various expressions used in all contemporary provisions. Sub-rule (a); as it was in the impugned assessment year defines an un-controlled transaction to mean a transaction other than that between two associate enterprises; whether resident or non-resident. We keep in mind the same and proceed further to Rule 10B prescribing arms length price for the purpose of section 92C(2) of the Act by using any of the six method as the most appropriate method as enumerated in clause (a) to (f): respectively in the given sequence in chapter 10 of the Act. The last clause () relevant for any other appropriate method hereinabove contains a specific rule 10AB. This is admittedly not germane to the issue before us. We find that only clause (a) to (e) hereinabove pertaining to 'CUP' and TNMM' methods are relevant for the instant adjudication. We find it a fit case to repeat that assessee had employed TNMM method for charging @ cost + 55% markup i.e. an indirect method for declaring its ALP. The TPO adopted its direct sale price @ 161.2 US $ per kg for making the impugned upward adjustment. We do not find a single observation even in his order rejecting assessee's TNMM method before adopting the agreement price in question under the CUP method.

31. We stay back on Rule 10B(1)(a) at this stage. It is evident that this clause prescribes CUP methods application to determine controlled price of an international transaction by the price charged or paid for property transfer or services provided in a comparable uncontrolled transaction; or a number of transaction, as identified. The same forms a price charged or paid in relation to property or services as the basis of ALP transaction. We referred to the above stated rule 10A(a) to observe here that the expression 'comparable un-controlled transaction' signifies a transaction between enterprises other than associate ones; whether resident or non-resident. It has already come on record that the

TPO in the instant case relied upon assessee's agreed price rate of US $ 161.20 per kg for Deltamethin supply in order to make the impugned transfer pricing adjustment.
We reply on above stated statutory provision in the act as well as rule to observe that the same is rather in the nature of a comparable controlled transaction between two associate enterprises negating the basic fundamental condition of CUP methods application.

32. We proceed further to observe here that various co-ordinate benches of this tribunal have already adjudicated this issue as to whether an accepted net profit margin from a transaction with an associate enterprise can be taken as comparable or not being an internal comparable for determining arms length price. Two tribunals decisions reported as (2012) 24 taxmann.com 28 (Mum)(TM) Technimont ICB Pvt. Lid. vs. ACIT as reiterated in ITA 2587/Ahd2012 Pino Bisazza Glass Pvt. Lid vs. ACIT already decide this issue in assessee's favour to conclude that such a comparable is not to be adopted as comparable un-controlled transaction price in question.
33. We have already noticed that a comparable un-controlled transaction instead of a controlled forms sine qua non for determining ALP of an international transaction between two associate enterprises leaving behind no scope of application of estoppel principle or acceptance of agreed prices in absence of an comparable un-controlled transaction. The Revenue's vehement contentions advanced in the course of hearing seeking to invoke estoppel principle fails to convince us.

34. We further deem it appropriate to observe at this stage that the impugned assessment year 2002-03 is the first full-fledged business of year after introduction of chapter X transfer pricing provision incorporated in the act. The TPO's order dated 10-03-2005 does not even issue a show cause notice disagreeing with assessee's TNMM method. He has rather proceeded to adopt CUP method(supra) again by ignoring the fundamental condition of applying the same. Same is the case with learned CIT(A) who has proceeded on revenue neutral implication without even taking into section 92(1) r.w.s. 92C and 92C(4) proviso along with rules discussed hereinabove at length. There is hardly any dispute that this chapter and the rules notified thereunder prescribe that an arms length price is not the price an assessee is charging or paying for being a party in the international transaction in question but it is the price ie. to be paid or charged in such a comparable controlled transaction in comparison to a comparable un-controlled transaction. We repeat that the TPO has not kept in mind this fine distinction. We accordingly reverse his action on this sole legal principle. Needless to say, the CIT(A) has already deleted the impugned adjustment. We find no reason to interfere in the lower appellate order albeit on a different score as enumerated hereinabove. This Revenue's ground is declined accordingly."

We have given out thoughtful consideration to rival contentions. Ld. Departmental Representative fails to pinpoint any exception in facts of the instant case vis-à-vis those extracted hereinabove with regard to the impugned upward transfer pricing adjustment based on related party agreements only. We thus find no reason to interfere with the DRP's direction under challenge on this count alone. This substantive ground is also rejected."

86. Thus, respectfully following the decision rendered by the Co-ordinate Bench of the Tribunal in the assessee's own case for the preceding year, cited

supra, in a similar factual matrix, the deletion of transfer pricing adjustment on account of payment of brand royalty is upheld. Accordingly, Grounds No.13, 13(a) to 13(j) raised in Revenue's Appeal are dismissed.

87. Ground No.14 is general in nature. Therefore, the same needs no specific adjudication.

88. In the result, the appeal by the Revenue is partly allowed for statistical purposes.

89. To sum up, the appeal by the assessee and by the Revenue is partly allowed for statistical purposes.

Order pronounced in the open Court on 11/12/2025

Sd/-	**Sd/-**
VIKRAM SINGH YADAV	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 11/12/2025
Prabhat

Copy of the order forwarded to:
(1) The Assessee;
(2) The Revenue;
(3) The PCIT / CIT (Judicial);
(4) The DR, ITAT, Mumbai; and
(5) Guard file.

By Order

Assistant Registrar
ITAT, Mumbai