IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : I-2 : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.6870/Del/2018
Assessment Year: 2014-15

Nikon India Pvt. Ltd., Plot No.71, Sector-32, Institutional Area, Gurgaon.	Vs.	DCIT, Circle-3(1), Gurgaon.

PAN: AACCN5100F

(Appellant)		(Respondent)
Assessee by	:	Shri Vishal Kalra, Shri S.S. Tomar & Shri Ankit Shahni, Advocates
Revenue by	:	Shri H.K. Choudhalry, CIT, DR
Date of Hearing	:	26.11.2018
Date of Pronouncement	:	24.01.2019

ORDER

PER R.K. PANDA, AM:

This appeal by the assessee is directed against the order dated 9th October, 2018 passed u/s 143(3) read with section 144C of the IT Act, 1961 for Assessment Year 2014-15.

2. Facts of the case, in brief, are that the assessee is a company and belongs to Nikon group of cases which is involved in a broad spectrum of business centred on

precision equipment, imaging products, instruments and other business. The activities of the Nikon Group are carried out through the following divisions:-

i) Precision Equipment Business,

ii) Imaging Products Business,

iii) Instruments Business,

iv) Other businesses.

3. The assessee filed its return of income on 24.11.2014 declaring total income of Rs.66,47,37,700/-. The Assessing Officer made a reference u/s 92CA(1) of the IT Act to determine the armôs length price of the international transactions entered into by the assessee with its AEs during the F.Y. 2013-14. The TPO, during the course of TP assessment proceedings observed that the assessee has entered into the following international transactions during the year:-

No.	Nature of Transaction	Value (INR)	Method applied
1.	Purchase of goods, promotional and other supplies	6,571,207,639	RPM
2	Purchase of Fixed Assets	7,049,548	TNMM
3	Service Income	30,717,853	TNMM
4	Warranty Reimbursements received	69,937,244	CUP
5.	Cost Reimbursements received	2,619,750	CUP
6	Cost Reimbursements Paid	5,628,706	CUP

4. He issued a detailed show cause notice asking the assessee to file the various details as called for by him. After considering the various replies submitted by the assessee from time to time the TPO proposed an upward adjustment of

Rs.62,47,42,783/- u/s 92CA(3) of the IT Act on protective basis. While doing so, he observed that an amount of Rs.41,71,29,703/- was spent by the tax payer company over and above the brightline limit for provision of services related to AMP purely for the AE, an independent entity under similar circumstances would have charged a mark up on this amount, for the money spent and for the services element. Since the marketing function provides a return in the market, the average profit margin returned by the entities providing market support functions was identified by the TPO. Considering 7 comparables where the average OP/OC was 12.35%, the TPO proposed adjustment of Rs.46,86,45,221/- on protective basis on the ground that BLT approach on AMP issue is subjudice before various appellate forums.

4.1 He further observed that the assessee has incurred Rs.55,60,68,553/-as AMP expenses. This, according to the TPO is attributed towards the brand building expenses. Since the AMP expenses were incurred by the assessee purely for its AE, an independent entity under similar circumstances would have charged a mark up on this amount for the money spent and for the service element. Considering the average margin of 12.35% as the mark up of AMP expenses, he proposed an adjustment of Rs.62,47,42,783/- on substantive basis.

4.2 Based on the order of the TPO, the Assessing Officer, in the draft assessment order, made the addition of Rs.62,47,42,783/- on substantive basis. The assessee approached the DRP. The DRP reduced the proposed adjustment of Rs.46,86,45,221/-

to Rs.45,56,72,488/-. So far as the adjustment of Rs.62,47,42,783/- on substantive basis is concerned, the DRP directed the TPO to compute AMP adjustment, if any, by applying intensity method as applied in assessment year 2011-12 to 2013-14. The Assessing Officer accordingly passed the final order making addition of Rs.45,56,72,488/- as per the direction of the DRP.

4.3 Aggrieved with such order of the DRP/TPO, the assessee is in appeal before the Tribunal by raising the following grounds:-

1. That on the facts and circumstances of the case and in law, the AO has erred in assessing the total income of the Appellant under section 143(3) of the Act, for the relevant assessment year at INR 1,12,04,10,188 as against the returned income of INR 66,47,37,700.

2. That on the facts and circumstances of the case and in law, the orders passed by the AO / TPO were bad in law as the pre-requisite for applying Chapter - X, i.e., existence of an international transaction between two Associated Enterprises (ñAEò) under section 92B of the Act, was not satisfied or existed as there was no agreement, understanding or arrangement between the Appellant and the AE for incurrence of such expenditure by the Appellant and the Dispute Resolution Panel (ñDRPò) erred in upholding the same.

2.1. That on the facts and circumstances of the case and in law, the AO / DRP / TPO have erred in re-characterizing the Appellant as service provider rendering brand building services to its AE, without appreciating that it is a full risk bearing distributor incurring AMP expenditure in the course of its own business to promote its sales in India.

3. That on the facts and circumstances of the case and in law, the orders passed by the AO / DRP / TPO were bad in law as the unilateral AMP expenditure incurred by the Appellant was categorized as óinternational transactionô under chapter X of the Act, by the AO / DRP / TPO, contrary to law in as much the AO neither granted any opportunity of being heard to the Appellant, nor passed a speaking order recording his satisfaction in relation to characterisation / categorization of the AMP expenditure as an óinternational transactionô.

4. That on the facts and circumstances of the case and in law, the TPO erred in re-characterizing the unilateral AMP expenditure being payments made by Appellant to independent third parties as an óinternational transactionô under chapter X of the Act, particularly when section 92CA of the Act enables the TPO only to compute the armôs length price (ñALPò) of óinternational transactionô. Further, the DRP erred in not adjudicating the objections challenging the jurisdiction of the TPO in this regard.

4.1 That on the facts and circumstances of the case and in law, the TPO erred in *suo-moto* benchmarking the alleged international transaction related to AMP expenditure without there being any order or reference from the AO in relation thereto.

Notwithstanding and without prejudice to the above grounds that the AMP expenditure incurred by the Appellant does not constitute an international transaction under Chapter X of the Act, the Appellant craves to raise following grounds on merits:

5. That on facts and circumstances of the case and in law, the AO / DRP / TPO have erred in making an adjustment in respect of alleged international transaction of AMP expenditure, without appreciating that adjusted gross profit margin as well as operating margin of the Appellant was better than the comparable companies.

6. That on the facts and circumstances of the case and in law, the AO / DRP / TPO grossly erred in applying Bright Line Test ('BLT') for making transfer pricing adjustment amounting to INR 45,56,72,488, on protective basis, without appreciating that BLT has been expressly rejected by the Hon'ble Tribunal in Appellant's own case for earlier AYs.

7. That on the facts and circumstances of the case and in law, AO / DRP / TPO have erred in not appreciating that the Appellant had not provided any value added / brand building services to its AE by incurring AMP expenditure, and therefore, no mark-up could have been charged / levied on such expenditure, even if the same was to be characterized as an 'international transaction'

7.1 Notwithstanding and without prejudice that no mark-up could have been levied, on the facts and circumstances of the case and in law, AO / DRP / TPO have erred in law and facts, by cherry picking the comparable companies for purpose of computing mark-up for the alleged international transaction and without providing an opportunity of being heard in this regard.

7.2 Notwithstanding and without prejudice that no mark-up could have been levied, on the facts and circumstances of the case and in law, the AO / TPO have erred in selection of improper comparable companies for application of mark-up, being entities providing market support functions and without sharing a search process for identifying the comparable companies. Further, the DRP erred in upholding the erroneous approach of AO/TPO.

8. That on the facts and circumstances of the case and in law, the AO / DRP / TPO have erred in not granting set-off of excess profit from distribution of products while benchmarking the alleged international transaction of incurrence of excessive AMP expenditure.

9. That on the facts and circumstances of the case and in law, the AO / DRP / TPO have erred in not granting quantitative / economic adjustments (such as non-payment of royalty / expenses incurred on new product launches) while quantifying arm's length price of the alleged international transaction of AMP expenditure.

> 10. That on the facts and circumstances of the case and in law, the AO be directed to allow deduction under section 43B(a) of the Act for Customs duty amounting INR 10,06,87,20 paid under protest during the subject assessment year for goods purchased and cleared during the subject year.
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> 11. That on the facts and circumstances of the case and in law, the AO has erred in levying/ charging interest under section 234B and 234C of the Act.
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> Each of the above grounds are independent and without prejudice to the other grounds of appeal preferred by the Appellant.
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> The Appellant prays for leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before, or at, the time of hearing of the appeal.ö

5. The ground of appeal No.1 being general in nature is dismissed.

6. The ld. counsel for the assessee submitted that ground of appeal Nos.2 to 4.1 are academic in nature and, therefore, does not require any adjudication. In view of the above and in absence of any objection from the side of the ld. DR, ground of appeal No.2 to 4.1 are dismissed being academic in nature.

7. So far as Ground of appeal No.5 is concerned, the ld. counsel for the assessee fairly conceded that the issue stands decided against the assessee by the order of the Tribunal, therefore, the same is dismissed.

8. So far as ground of appeal No.6 to 7.2 are concerned, the ld. counsel for the assessee, at the outset, submitted that this issue stands decided in favour of the assessee by the decision of the Tribunal in assesseeôs own case for A.Y. 2010-11 vide ITA No.4574/Del/2007, order dated 20th September, 2017. Following the decision of the Tribunal, the Tribunal, again, in assesseeôs own case for A.Y. 2013-14, has

decided the issue in favour of the assessee. Therefore, this being a covered matter in favour of the assessee, the above grounds raised by the assessee should be allowed.

The ld. DR, on the other hand, fairly conceded that the issue has been decided in favour of the assessee by the Tribunal in assesseeôs own case for assessment year 2010-11 and 2013-14.

9. After hearing both the sides, we find identical issue had come up before the Tribunal in assesseeôs own case for assessment year 2010-11. The Tribunal vide ITA No.4574/Del/2007, order dated 20th September, 2017 has discussed the issue from para 15 to 18 of the order and decided the issue in favour of the assessee. The relevant observations of the Tribunal from para 15 onwards reads as under:-

> ñ15. TPO by applying the Bright Line Test (BLT) proposed adjustment of Rs.22,30,18,964/- on protective basis . The ld. AR for the assessee by relying upon the decisions rendered by the coordinate Bench of the Tribunal in Tianjin Tianshi Biologicial Development Company Ltd. vs. DCIT ï (2014) 52 TAXMANN.COM 518 (Delhi-Trib, ITO vs. M/s. Fussy Financial Services Pvt. Ltd. in ITA No.4227/Del/2014 dated 05 .06.2017, Perfetti Van Melle India Pvt. Ltd. vs. DCIT in ITA No.1073/Del/2017 dated 24.05.2017, decision rendered by Hon'ble Delhi High Court in Sony Ericsson Mobile Communications India (P.) Ltd. vs. CIT-III ï (2015) 55 taxmann.com 240 (Delhi) and decision rendered by Hon'ble Gujarat High Court in Veer Gems vs. ACIT ï (2011) 15 taxmann.com 355 (Gujarat) contended that TP adjustment on protective basis is not sustainable and order is itself void ab initio . The ld. AR for the assessee further contended that BLT could have been applied at the first stage.
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> 16. The coordinate Bench of the Tribunal in case cited as Perfetti Van Melle India Pvt. Ltd. vs. DCIT in ITA No.1073/Del/2017 dated 24.05.2017 determined the issue as to applying the BLT for determining the ALP of AMP expenses and observed as under :-
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> > ñ13. We want to clarify that if a situation for determining the ALP of AMP expenses arises, then no transfer pricing adjustment should be made by applying the bright line test, as has been done on protective

basis, because of Hon'ble High Court has not approved the application of the bright line test in several decisions.ò

17. Furthermore, Hon'ble Delhi High Court in Sony Ericsson Mobile Communications India (P.) Ltd. vs. CIT-III ï (2015) 55 taxmann.com 240 (Delhi) also determined the identical issue as to applying the BLT for determining ALP of the AMP in favour of the assessee and has categorically held that BLT has no statutory mandate and it is not obligatory to subject AMP expenses to BLT and considered non-routine AMP as separate transactions by making following observations :-

ñIII. Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Adjustments - AMP expenses) - Assessees were several Indian subsidiaries of Multi National Enterprises (MNEs) engaged in distribution and marketing of imported and branded products, manufactured and sold to them by foreign AEs - They had applied TNMM/RPM for computing ALP - TPO accepted methods so applied by assessees, however, found that assessees had incurred AMP expenses towards promotion of brand in India, however, no reimbursement of expenses was made from AEs - Hence, he used bright line test by segregating non-routine expenses and by deducting amount representing bright line from value of gross sales and determined excess AMP incurred by assessee and added same to income of assessee :- Whether where comparables adopted by assessee, with or without making adjustments as a bundled transaction had been accepted by TPO, it would be illogical and improper to treat AMP expenses as a separate transaction - Held, yes- Whether bright line test has no statutory mandate and it is not obligatory to subject AMP expenses as a bright line test and consider non-routine AMP as a separate transaction ï Held, yesò

18. So, following the decision rendered by Hon'ble Delhi High Court in case of Sony Ericsson Mobile Communications India (P.) Ltd.(supra) and coordinate Bench of the Tribunal in Perfetti Van Melle India Pvt. Ltd. (supra), TP adjustment amounting to RS.22,30,18,964/- by applying BLT is not sustainable on protective basis having no statutory mandate. So, ground no.5 is determined in favour of the assessee.

10. We find following the above decision, the Tribunal in assessee's own case vide ITA No.6299/Del/2017, order dated 06.11.2017, for assessment year 2013-14 has, again, allowed the appeal filed by the assessee by directing the Assessing Officer to delete the addition made on account of AMP adjustment on protective basis by

applying the BLT. Since the Tribunal in assesseeôs own case has already decided the issue and directed the Assessing Officer/TPO to delete the addition made by them by applying brightline test, therefore, in absence of any contrary material brought to our notice, we set aside the order of the Assessing Officer and direct him to delete the addition.

11. So far as ground of appeal No.8 and 9 are concerned, the ld. counsel for the assessee submitted that these grounds are academic in nature and does not require any adjudication.

12. In view of the above submission of the ld. counsel for the assessee and in absence of any objection from the side of the ld. DR, the above two grounds are dismissed.

13. In ground of appeal No.10, the assessee has requested the Tribunal to allow the deduction of Rs.10,06,87,203/- u/s 43B(a) of the Act which has been paid under protest towards Customs Duty. The ld. counsel for the assessee submitted that the assessee is engaged in trading of digital still and video cameras and other imaging products in India after importing the same from its AE. During the year 2013, the Directorate of Revenue Intelligence initiated investigation against the assessee proposing to deny exemption from payment of basic Customs Duty under Notification No.25/2005 ï Cus dated 01.03.2003. A show cause notice was issued to the assessee on 19th August, 2014 and an order dated 28th October, 2016 was passed for the period from March 2012 to March, 2014. The assessee filed an appeal before the CESTAT,

who, vide order dated 12th December, 2017, decided the issue against the assessee. The assessee is in appeal before the Hon'ble Supreme Court and the appeal filed by the assessee has been admitted vide order dated 5th March, 2018.

14. It was submitted that during the pendency of DRI investigation, the assessee was forced to clear various shipments of digital still image video camera upon payment of duty under protest as the Customs Authorities denied the benefit of BCD exemption available to the assessee under Notification No.25/2005-Cus. The assessee, therefore, paid an amount of Rs.72,33,57,083/- to the Customs Department as duty under protest from F.Y. 2013-14 to 2016-17. He submitted that during the F.Y. ended 31st March, 2014, relating to assessment year 2014-15, the assessee paid an amount of Rs.10,06,87,203/- as Customs Duty paid under protest. Thus duty paid under protest was not recovered from the customers. On the basis of the request of the assessee, the Customs Authorities passed a speaking order dated 13th May, 2016 denying the benefit of BCD exemption in respect of bills of entry pertaining to the impugned assessment year and subsequent assessment years. The assessee in its annual accounts showed the aforesaid amount under the head ócurrent assetsô and the same was not charged to Profit & Loss Account. Further, in the income-tax return also the assessee did not claim the deduction for the amount paid during F.Y. 2013-14. He submitted that since the assessee shall not be recovering the said Customs Duty paid from its customers, therefore, the assessee is claiming this deduction in respect of the amount of duty paid under protest u/s 43B(a). Referring to section 43B, he submitted that as per the said provision *'any expenditure, inter alia, in the nature of tax, duty, cess, etc., imposed by*

any law otherwise allowable under the other provisions of the Act, would be allowed as a deduction only in the year in which this sum is actually paid, irrespective of the year in which the liability to pay such sum was incurred.ô Therefore, the assessee is eligible for deduction in respect of Customs Duty amounting to Rs.10,06,87,203/- paid under protest during F.Y. 2013-14. The ld. counsel for the assessee also filed an application requesting admission of certain additional evidences, the details of which are as under:-

Sr. No.	Particulars
1	**Copy of intimation dated March 14, 2014 by Commissioner of Customs (Import & General), denying exemption to the Appellant from payment of Basic Customs Duty under Notification No. 25/2005-Cus dated March 1, 2005.**
2	**Copy of letters filed with Customs Authority intimating payment of duty under protest along with list of bill of entries, corresponding to which such custom duty under protest has been paid:** **Letter dated March 14, 2014 Letter dated March 18, 2014 Letter dated March 26, 2014 Letter dated March 27, 2014 Letter dated April 4, 2014**
3	**Details of duty paid under protest, being the break-up of INR 10,06,87,203 out of total duty paid corresponding to 'Bills of entry' for goods imported during the period Feb and March, 2014, along with copy of bill of entry documents and challans evidencing payment of total duty corresponding to such bill of entry paid for the financial year ended March 31, 2014.**
4	**Copy of order dated December 12, 2017 passed by Custom Excise & Service Tax Appellate Tribunal'('CESTAT') in relation to appeal against order passed by Directorate of Revenue Intelligence in Appellant's own case.**
5	**Copy of the order dated May 13, 2016 passed by Principal Commissioner of Customs (Import), denying the benefit of BCD exemption available under Notification No. 25/2005-Cus, in respect of Bills of Entry pertaining to impugned FY and subsequent FY.**
6	**Copy of order dated March 5, 2018 passed by Hon'ble Supreme Court admitting Appellant's appeal against aforesaid order of Hon'ble CESTAT**

15. Referring to various decisions, he submitted that the assessee is entitled to raise additional claim before the appellate authorities that were made earlier in the return of income. He relied on the following decisions:-

i) Ahmedabad Electricity Co. Ltd. vs. CIT (1993) 199 ITR 351 (Bombay);

ii) CIT vs. Kerala State Co-operative Marketing Federation Ltd. (1992) 193 ITR 624 (Ker.);

iii) DCM Benetton India Ltd. vs. CIT (2008) 173 Taxman 283 (Del);

iv) Allied Motors (P) Ltd. vs. CIT (1997) 224 ITR 677 (SC);

v) CIT vs. C.L. Gupta & Sons (2003) 259 ITR 513 (All);

vi) Maruti Suzuki India Ltd. vs. Addl. CIT (2015) 173 TTJ 513 (Del-Trib.);

vii) DCIT vs. Glaxo SmithKline Consumer Healthcare Ltd. (2007) 107 ITD 343 (Chd.)(SB); &

viii) CIT vs. Modipon Ltd., ITA No.48 of 1999 (Del).

16. He, accordingly submitted that this ground raised by the assessee should be decided in favour of the assessee.

17. The ld. DR, on the other hand, strongly opposed this ground raised by the assessee. He submitted that the assessee has not claimed this amount as deduction either in the return of income filed or in the computation statement. The assessee is also denying its liability and the matter is pending before the Supreme Court. Further, when the liability has not accrued to the assessee due to the dispute raised by the assessee, therefore, the claim of the assessee at this stage cannot be entertained. Further, the assessee is making a fresh claim by filing fresh evidences, therefore, this claim should not be entertained at all.

18. The ld. counsel for the assessee in his rejoinder submitted that the assessee was exempt from Customs Duty till the preceding year. However, only during this year the Customs Authorities have levied the duty and forced the assessee for deposit of the

amount for which the assessee has made deposit under protest to clear the goods. If the claim is not admitted during this year, then, the assessee will be deprived of this claim for ever.

19. We have considered the rival arguments made by both the sides and perused the material available on record. It is an admitted fact that the assessee has not claimed the amount of Rs.10,06,87,203/- as deduction being Customs Duty paid under protest either in the return of income or in the computation statement. Therefore, this issue was neither before the Assessing Officer nor CIT(A). However, it is also an admitted fact that the Customs Authorities have raised a demand during the financial year itself and the assessee has made a payment of Rs.10,06,87,203/- under protest for goods purchased, imported and cleared during the impugned assessment year which has been shown as a current asset in the balance sheet of the assessee company. We find the Hon'ble Bombay High Court in the case of Ahmedabad Electricity Co. Ltd. (supra) has held as under:-

> ñ37. The powers of an appellate authority under the Income-tax Act have been recently considered once again by the Supreme Court in the case of Jute Corporation of India Ltd. v. CIT [1991] 187 ITR 688. In that case, the Appellate Assistant Commissioner permitted the appellate to raise an additional ground for the first time claiming deduction of purchase tax liability in its return because the assessee had been held liable to pay purchase tax Officer, the Appellate Assistant Commissioner allowed the deduction. On appeal, the Appellate Tribunal placed reliance on the decision of the Supreme Court in the case of Gurjargravures Pvt. Ltd. [1978] 111 ITR 1 and held that the Appellate Assistant Commissioner had no jurisdiction to entertain the additional claim. The Tribunal and the High Court rejected the applications of the application for a reference. On appeal, the Supreme Court said:
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> > "An appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the

absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer."

The Supreme Court considered the observations in the case of Gurjargravures P. Ltd. , and said that these do not rule out the case for raising an additional ground before the Appellate Assistant Commissioner if the ground so raised could not have been raised at the stage when the return was filed or when the assessment order was made or if the ground became available on account of change of circumstances or law. There may be several factors justifying the raising of such a new plea in an appeal. Each case has to be considered on its own facts. If the Appellate Assistant Commissioner is satisfied, he would be action within his jurisdiction in considering the question so raised in all its aspects. He must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The Supreme Court said that it was not overruling the decision in Gurjargravures P. Ltd. [1978] 111 ITR 1, since it could be distinguished on facts.

38. The ratio of this judgment would apply to the jurisdiction of the Appellate Tribunal also. The observations of the Supreme Court, in fact, cover all appellate authorities under the Income-tax Act. We do not find anything in section 254(1) of the Income-tax Act which limits the jurisdiction of the Appellate Tribunal in any manner. For reasons which we have set out earlier, the phrase "pass such order thereon" does not in any way restrict the jurisdiction of the Tribunal but, on the contrary, confers the wides possible jurisdiction of the Appellate Tribunal including jurisdiction to permit any additional ground of appeal if, in its discretion, and for good reason, it thinks it necessary or permissible to do so. (See also in this connection a decision of the Bombay High Court in the case of CIT v. Western Rolling Mills (Pvt.) Ltd. [1985] 156 ITR 54.

39. In view of the above decisions, it is quite clear that the Appellate Tribunal has jurisdiction to permit additional grounds to be raised before it even though these may not arise from the order of the Appellate Assistant Commissioner, so long as these grounds are in respect of the subject-matter of the entire tax proceedings.ò

20. We find the Hon'ble Delhi High Court in the case of DCM Benetton India Ltd. (supra), while deciding an identical issue has observed as under:-

ñ5. The assessee had incurred an expenditure of an amount of Rs. 13,10,566 as business expenditure. This was shown by the assessee as a prior expenditure in its balance sheet for the previous year relevant to the asst. yr. 2003-04. However, the expenditure pertained to the previous year relevant to the asst. yr. 2001-02.

6. The issue was, therefore, not raised by the assessee before the AO when its assessment for the asst. yr. 2001-02 was being completed nor was it raised before the Commissioner of Income-tax(Appeals) [CIT(A)].

7. Before the Income-tax Appellate Tribunal (the Tribunal), the assessee sought to raise an additional ground in this regard but this was declined by the Tribunal on the ground that the accounts of the assessee were audited and finalized on 5th Aug., 2003, whereas the order was passed by the CIT(A) on 30th Sept., 2003. Consequently, according to the Tribunal, the assessee could have raised this ground before the CIT(A) but did not do so. Under the circumstances, the Tribunal declined to permit the assessee to raise the additional ground by relying upon the decision of the Supreme Court in National Thermal Power Co. Ltd. vs. CIT (1999) 157 CTR (SC) 249 : (1998) 229 ITR 383 (SC) as well as the decision of the Andhra Pradesh High Court in CIT vs. Gangappa Cables Ltd. 1978 CTR (AP) 332 : (1979) 116 ITR 778 (AP). It was further held by the Tribunal that since the facts were not before the Tribunal, it could not adjudicate the claim.

7. Learned counsel for the assessee submits that under these circumstances, even though the expenditure incurred by the assessee is a genuine expenditure, it cannot get the benefit thereof either for the asst. yr. 2003-04 or for the asst. yr. 2001-02.

8. Learned counsel for the assessee relied upon CIT vs. Kerala State Co-operative Marketing Federation Ltd. (1991) 100 CTR (Ker) 230 : (1992) 193 ITR 624 (Ker) wherein it has been held by the Kerala High Court that in the event relevant facts are not on record, the Tribunal can always remand the matter to the file of the AO to investigate and determine the facts. It is submitted that the Tribunal ought to have remanded the matter to the file of the AO rather than decline to permit the assessee to raise the additional ground.

9. Following the view expressed by the Kerala High Court, with which we have no reason to disagree, particularly since it relies upon a decision of the Madras High Court in CED vs. R. Brahadeeswaran (1986) 57 CTR (Mad) 162 : (1987) 163 ITR 680 (Mad), which in turn relies upon three decisions of the Supreme Court in CIT vs. McMillan & Co. (1958) 33 ITR 182 (SC), Hukumchand Mills Ltd. vs CIT (1967) 63 ITR 232 (SC) and CIT vs. Mahalakshmi Textile Mills Ltd. (1967) 66 ITR 710 (SC), we answer the question of law in the affirmative, in favour of the assessee and against the Revenue and

remand the matter to the file of the AO to determine the claim of the assessee on merits.

21. In view of the decisions cited (supra) the ground raised by the assessee along with the additional evidences are admitted and the matter is restored to the file of the Assessing Officer with a direction to decide the issue as per fact and law after giving due opportunity of being heard to the assessee. We hold and direct accordingly. This ground raised by the assessee is accordingly allowed for statistical purposes.

22. Ground of appeal No.11 relates to levy of interest u/s 234B and 234C which is mandatory and consequential in nature. Accordingly this ground raised by the assessee is dismissed.

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

The decision was pronounced in the open court on 24.01.2019.

Sd/-	Sd/-
(SUCHITRA KAMBLE)	(R.K. PANDA)
JUDICIAL MEMBER	ACCOUNTANT MEMFBER

Dated: 24 January, 2019
dk
Copy forwarded to
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi

		Date
1.	Draft dictated on	11.01.2019
2.	Draft placed before the author	16.01.2019
3.	Draft placed before the other Member	
4.	Approved Draft comes to the Sr.PS/PS	
5.	Order uploaded on	25.01.2019
6.	File sent to the Bench Clerk	
7.	Date on which file goes to the Head Clerk.	
8.	Date on which file goes to the AR	
9.	Date of dispatch of Order.	