

IN THE INCOME TAX APPELLATE TRIBUNAL  
“C” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT  
AND SHRI B.R. BASKARAN, ACCOUNTANT MEMBER

SP Nos.267 to 270 & 272/Bang/2019 [in IT(TP)A Nos.2919/B/17, 679 & 700/B/2016, 733/B/2017 & 433/B/2015] Assessment years : 2013-14, 2011-12, 2011-12, 2012-13 & 2010-11
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M/s. Volvo Group India Pvt. Ltd. [formerly Volvo India Pvt. Ltd.], 65/2, Bagmane Tech Park, Block-A, 5 <sup>th</sup> Floor, Parin Building, C V Raman Nagar, Bengaluru – 560 093. <b>PAN: AAACV 6747N</b>	Vs.	The Deputy Commissioner of Income Tax, LTU, Circle 1, Bangalore.
APPLICANT		RESPONDENT

Applicant by	:	S/Shri Neeraj Jain & & Bharath Janarthanan, Advocates; Ramit Katyal, CA
Respondent by	:	Smt. R. Premi, Jt.CIT(DR)ITAT), Bengaluru.

Date of hearing	:	11.10.2019
Date of Pronouncement	:	14.10.2019

**ORDER**

*Per N V Vasudevan, Vice President*

The assessee has filed the above stay applications seeking stay of outstanding demand relating to assessment years 2010-11 to 2013-14.

2. The Ld A.R submitted that the assessee is manufacturer and dealer of bus chassis, road laying machineries and trader in construction equipments and is also engaged in providing software development services. The assessments of the assessment years AY 2010-11 to 2013-14 were completed u/s 143(3) of the Income Tax Act, 1961 (Act), wherein various additions including addition relating to Transfer pricing adjustments were made. He submitted that the assessee has already made payment of substantial amount of outstanding demand and, in this regard, he submitted following table highlighting the position of outstanding demand in each of the years:-

A. As per last order

(Amt. in Rs.)

S No	Particulars	AY 2010-11	AY 2011-12	AY 2012-13	AY 2013-14
1	Tax payable after TDS and Self-assessment tax	33,21,47,203	36,58,59,992	37,36,30,568	38,61,19,079
2	Total demand outstanding including interest	47,23,56,951	55,85,86,885	50,05,25,305	67,22,32,594
3	Pre-deposit (Post final asst order)	17,89,00,000	20,50,00,000	19,50,00,000	13,70,00,000
4	Balance demand outstanding (2)-(3)	29,34,56,961	35,35,86,885	30,55,25,305	53,52,32,594
5	% of pre-deposit out of total demand (3)/(2)	37.87%	37.87%	38.96%	20.38%
6	% of pre-deposit out of total demand (Average)	33.48%			
7	% of pre-deposit on tax component of total demand (3)/(1)	53.86%	56.03%	52.19%	35.48%
8	% of pre-deposit on tax component of total demand (Average)	49.39%			

**Note:** TDS to the tune of Rs.66,59,674 and Rs.11,19,969 were not allowed as credit by the Assessing Officer for AYs 2011-12 and 2013-14 respectively.

**B. If relief is given for covered issues based on ITAT order for AY 2008-09**

(Amt. in Rs.)

S No	Particulars	AY 2010-11	AY 2011-12	AY 2012-13	AY 2013-14
1	Tax payable after TDS and Self-assessment tax	19,26,35,715	28,20,04,510	32,55,99,092	34,90,24,860
2	Total demand outstanding including interest	25,19,27,947	42,60,95,223	42,23,61,946	62,16,34,984
3	Pre-deposit (Post final asst order)	17,89,00,000	20,50,00,000	19,50,00,000	13,70,00,000
4	Balance demand outstanding (2)-(3)	7,30,27,947	22,10,95,223	22,73,61,946	48,46,34,984
5	% of pre-deposit out of total demand (3)/(2)	<b>61.19%</b>	<b>48.11%</b>	<b>46.17%</b>	<b>22.04%</b>
6	% of pre-deposit out of total demand (Average)	<b>46.38%</b>			
7	% of pre-deposit on tax component of total demand (3)/(1)	<b>90.89%</b>	<b>72.69%</b>	<b>59.89%</b>	<b>39.25%</b>
8	% of pre-deposit on tax component of total demand (Average)	<b>65.68%</b>			

**Note:** TDS to the tune of Rs.66,59,674 and Rs.11,19,969 were not allowed as credit by the Assessing Officer for AYs 2011-12 and 2013-14 respectively

3. The Ld A.R submitted that the payments made by the assessee till date works out to more than 50% of the tax portion of the outstanding demand in AY 2010-11 to 2012-13 and to 35.48% of the tax portion of the outstanding demand in AY 2013-14.

4. The Ld A.R further submitted that the financial position of the assessee is very tight due to recession in the automobile industry. He further submitted that though the assessee is having balance of about Rs.50.00 crores in its bank accounts, yet the requirement of cash in the

subsequent month is more than Rs.58.00 crores. He further submitted that the sizeable amount of about Rs.646 crores out of working capital fund is outstanding with GST department, which could only be adjusted against future GST liability and hence the same could not be realised. Due to recession in the industry, there is delay in collection of receivables also. In this regard, it was submitted that the India's automobile industry is currently reeling under massive sales downturn mainly due to the overall sentiment for investment on new vehicles is down. It was also submitted that there is a Liquidity crunch across Non Banking Finance Companies (NBFC's) which has led to virtually stoppage of funding for commercial vehicles and construction equipment. It was submitted that the sales of the Assessee in automobile segment fell and Year-to-date sales as on August 2019 fell less to Rs.1952.8 crore compared to Rs.2,328.5 crore in August 2018. There was a dip in sale of 16%. As a result, the Year-to-date operating income as on August 2019 was Rs.86.80 crore when compared to Rs.179.1 crore in August 2018. It was pointed out that the dip in operating income of 51% due to reduction in sales and the present quantities are being sold by giving additional discounts. To tackle the liquidity crunch in working capital, inventory level were reduced from Rs.1,038.9 crore in December 2018 to Rs.887.7 crore in August 2019 Working capital loan as on 30th September 2019 was Rs.605 crore from banks and other group companies. It was submitted that the Monthly interest payout on account of the borrowings is approximately Rs.5.5 crore every month. It was submitted that the Crisis in the CV industry is expected to continue in the upcoming quarters as well and the liquidity crunch of Volvo is expected to worsen further.

5. The following details of position regarding availability of funds was given:-

## Details of bank balances as on 30th September 2019:

Bank Name	Amount
Standard Chartered Bank Ltd	7,10,21,372
SBI Air Cargo Complex - Current account	1,57,21,116
Banque Nationale de Paris- Current account	5,75,95,072
ICICI Banking Corporation Ltd. Current Account	10,83,82,987
HDFC Bank - Bangalore, Current account	27,98,60,793
Hongkong and Shanghai Banking Corp	(5,97,59,061)
State Bank of India, Residency Road	1,02,682
Citibank	71,76,152
HSBC - USD EEFC account	5,01,43,394
HSBC SEK EEFC A/c	10,58,094
Standard Chartered Bank-ECB Account	(8,67,775)
<b>Total</b>	<b>53,04,34,825</b>

- a. Total demand outstanding (inc. interest)  
for AYs 2010-11 to 2013-14 — Rs.138.82 crore
- b. Total demand outstanding (inc. interest)  
for AYs 2010-11 to 2013-14 if relief is  
given for covered issues — Rs.100.61 crore

**Fixed financial commitments for next four months**

Rs.in Crore

	Oct-19	Nov-19	Dec-19	Jan-20
Salary	42	42	42	42
Rent	5	5	5	5
Funding of gratuity	5	5	5	5
Finance cost	5.5	5.5	5.5	5
Repayment of ECB				60
<b>Total</b>	<b>57.5</b>	<b>57.5</b>	<b>57.5</b>	<b>117</b>

## Working capital position as on August 2019

Inventory	887.70
Accounts Receivables	524.90
Other Current Assets	646.20
Cash and Bank	50.70
<b>Total Current Assets</b>	<b>2,109.50</b>
Accounts Payable	464.40
<b>Other Current Liabilities</b>	<b>651.00</b>
<b>Total Current Liabilities</b>	<b>1,115.40</b>

6. The Ld A.R filed before us a chart, setting out the various issues that arise for consideration in the appeals in AY 2010-11 to 2013-14. The chart also explains as to how each of the issues set out in the chart was already subject matter of dispute before the Tribunal in the earlier assessment years and as to how the issues were decided in favour of the assessee. The chart so filed is placed on record and is not disputed by the parties that the issues have already been decided. It was submitted that in respect of issues that are already decided by the Tribunal in the earlier Assessment years in Assessee's own case, no demand for recovery of taxes can be enforced. The chart so filed is reproduced below:-

**CHART OF ISSUES FOR STAY**

S.No.	Particulars	AY 2010-11	AY 2011-12	AY 2012-13	AY 2013-14
<b>Re: Transfer Pricing issues</b>					
1	Transfer pricing adjustment in Manufacturing Segment	57,14,67,743	29,37,99,626	24,70,87,519	138,89,26,903

<p><b><u>GIST OF ARGUMENTS</u></b>  <b>Transfer Pricing adjustment in Manufacturing Segment</b>  <b>• Difference in Import Content of Raw Materials.</b>  It was submitted that during the years under consideration, the applicant has import significant amount of raw material as against very low content of raw material in the case of the comparable companies selected by the TPO.  It was submitted that the transfer pricing adjustment was deleted after making comparability adjustment on account of difference in the value of import contents in the following cases:. [ Skoda Auto India (P) Ltd. v. ACIT (30 SOT 319) (Pune), <b>Toyota Kirloskar Motors Pvt. Ltd. v. ACIT, Bangalore (ITA No. 828/Bang/2010)</b>, Doowon Automotive Systems India Private Limited vs. DCIT (ITA No. 692/Mds/2016), Demag Cranes &amp; Components (India) Pvt. Ltd. v. DCIT, Pune in ITA No.120/PN/201 1, Putzmeister Concrete Machines Pvt. Ltd. v. DCIT, Panaji — ITA No. 107/PNJ/2012]</p> <p><b>• Applicant engaged in low value added assembly function</b>  It is submitted that the applicant imports components from Volvo Group for its assembly function under manufacturing segment. It is pertinent to note that the applicant carries out very minimal value addition and most of the components are imported from Volvo Group and the applicant carries out very minimal value addition. It is evident that main activity for both assembly and distribution is import and resale with minimal value addition Hence the assembly and distribution segment ought to be aggregated while benchmarking the transaction.</p> <p><b>• Adjustment to be restricted to international transaction.</b>  It is submitted that the TPO ought to have restricted the adjustment to the value of international transaction undertaken by the applicant in the manufacturing segment. [ref: CIT vs. Hindustan Unilever Limited 394 ITR 73 (approved by the Hon'ble Supreme Court in 259 Taxman 218); CIT vs. Kehin Panalfa Limited (ITA no. 11/2015); CIT vs. Tara Jewel Exports (P) Ltd. 129 DTR 410 (Born); CIT vs. Thyssen Krupp Industries India Pvt. Ltd. 129 DTR 412; CIT vs. Goldstar Jewellery design Pvt. Ltd. (ITA No. 2237 of 2013) (Born); CIT vs. Becharlal &amp; Sons. (1906 of 2013) (Bom)]  <b>It is further submitted that for AY 2013-14 the TPO selected functionally dissimilar companies as comparable for the purpose of benchmarking analysis.</b></p>					
2	TP adjustment on account of provision of IT enabled services	6,99,85,529	5,02,42,947	13,16,21,551	-
<p><b><u>GIST OF ARGUMENTS</u></b>  <b>Inappropriate selection of comparables</b>  It is submitted that the comparable companies selected by the TPO are not comparable to a captive ITES Service provider.</p>					

S.No.	Particulars	AY 2010-11	AY 2011-12	AY 2012-13	AY 2013-14
3	TP Adjustment on account of provision of Engineering Design services	-	13,36,81,280	-	-
<p><b><u>GIST OF ARGUMENTS</u></b>  <b>Inappropriate selection of comparables</b>  It is submitted that the comparable companies selected by the TPO are not comparable to a captive Service provider.</p>					
<b><u>Re: Corporate-tax issues</u></b>					
4.	Disallowance of depreciation on goodwill	5,81,96,805 [Correct fig – 6,10,43,906]	4,57,82,916	3,27,35,703	2,45,51,777
<p><b><u>GIST OF ARGUMENTS</u></b>  Covered in favour of the Petitioner by the decision of Hon' ble ITAT for AY 2008-09 [Para No.60 to 68 from Pg.39 to 46 of case laws paper book - 1] and AY 2009-10 [Para 4 to 4.1 from Pg.67 to 68 of Case laws paper book – 1].</p>					
5.	Double disallowance of depreciation on goodwill	5,81,96,805	-	-	-
<p>The above claim of depreciation on goodwill was disallowed by the AO on the ground that the same was not claimed in the return of income. Having held so, he proceeded to make a separate disallowance in the computation of income even though the same was not claimed in the return of income [Page No. 5 of stay paper book - 1]. It is submitted that as no claim was made by the Petitioner in the return of income, separate disallowance cannot be made and any such action is tantamount to double disallowance.</p> <p>It is brought to the attention of the Hon'ble Tribunal a rectification application in this regard was filed before the AO dated 16.02.2015 [Page No. 150 to 151 of stay paper book - 1] and the same is still pending.</p>					
6.	Disallowance of depreciation on assets acquired from Ingersoll Rand	12,46,88,907	7,91,28,750	6,05,23,354	4,64,66,019
<p><b><u>GIST OF ARGUMENTS</u></b>  Covered in favour of the Petitioner by the decision of Hon'ble ITAT for AY 2008-09 [ Para 47 to 51 from Pg.32 to 35 of case laws paper book - 1].</p>					

S.No.	Particulars	AY 2010-11	AY 2011-12	AY 2012-13	AY 2013-14
7.	Addition of Special Additional Duty of Customs / refund of Countervailing Duty credited to P&L account but not accrued in the year	12,63,29,715	10,54,04,678	3,81,85,122	3,08,65,112
<p><b><u>GIST OF ARGUMENTS</u></b>  Covered in favour of the Petitioner by the decision of Hon' ble ITAT for AY 2008-09 [Para No.25 to 27 from Pg. 18 to 20 of case laws paper book - 1].</p> <p>It is further submitted that the difference between the amounts credited to P&amp;L a/c which is excluded for tax purpose in the return of income and the amounts offered to tax on receipt basis from AYs 2008-09 to 2014-15 were cumulatively offered to tax in AY 2015-16 [Page No. 156, 163 to 165 of stay paper book – 1] and the same has been accepted by the Department vide Asst order dated 29.01.2019 for AY 2015-16 [Page No. 172 of stay paper book - 1].</p>					
8.	Disallowance of Expenditure under section 37 of the Act	-	25,43,83,525	27,36,57,949	-
<p><b><u>GIST OF ARGUMENTS</u></b>  It is submitted that the Petitioner, during the previous assessment year 2010-11 and 2011-12, made provisions of Rs.25,43,83,525 and Rs.27,36,57,949 towards the expenses that were not crystallized during those years but for which services were received in those years. Such expenses. after the reversal of the provision at the beginning of the year, were claimed as deductions in the years under consideration i.e subsequent assessment year, on incurring of the expenses after the same are crystallised and after appropriate tax was deducted at source, wherever applicable.</p> <p>In other words, the Petitioner creates a provision for expenses at the time of closing the books which were not crystallised but for which services were received and the expense is debited to P&amp;L account. For tax purpose, the same is added back / disallowed in the return of income filed by the applicant as the expenses were not crystallised and also made disallowance under sec.40(a)(ia) of the Act as no tax were deducted at source while making the payment <b>[Page No. 2,176 of stay paper</b></p>					

**book -1].** In the subsequent financial year, such provision is reversed at the beginning of the year and as and when expenses are incurred after they are crystallised, appropriate entries are passed in the books of accounts and the same are claimed as expenditure after deduction of tax at source, wherever applicable [**Pg.176 of stay paper book — 1 and Pg 366 of stay**

**paper book – II].** The Petitioner makes the claim of such expenditures in the year in which the liability is crystallised (i.e on receipt of bills) and payments are made to the respective parties after deduction of tax at source [**Submission before the AO along with sample bills and sample journal entries from Page No. 342 to 359 of stay paper book — 1 and Pg 511 to 515 of stay paper book - II].**

However, the Assessing Officer disallowed the entire expenditure in the years under consideration when payments were made inter-alia for the reason that (i) once the provision is reversed at the beginning of the year, the same ceases to be for the purpose of business and therefore, cannot be allowed under section 37 of the Act; (ii) the application of section 40(a)(ia) of the Act is only upon an expenditure falling in the ambit of business expenditure and since these expenditure are not business expenditure. provisions of section 40(a)(ia) of the Act would not be applicable; and (iii) the same are prior period expenses which cannot be allowed in the year under consideration.

It is submitted that the contentions of the Assessing Officer cannot be upheld for the following reasons:

- a. The claim of expenditures were disallowed suo-moto by the Petitioner in the AY 2010-11 and 2011-12 for the reason that the same were not crystallised in those years. Having accepted the same in those years, the AO ought to have allowed the same in the years in which the liability was crystallised and payments were made after deduction of tax at source. Disallowing the same in the year of creation of provision and also in the year of incurrance of expenditure is contrary to the scheme of the Act and if the contention of the AO is to be accepted, then the expenditure cannot be allowed as expenditure at all despite the same being incurred for the purpose of the business and appropriate tax having been deducted.
- b. The contention of the AO that the expenditure ceases to be for the purpose of the business once the provision is reversed in the year under consideration is without any basis. It is submitted that the provision created at the end of the previous assessment year is reversed at the beginning of the year under consideration only to recognize the expense and record the same as and when the liability to pay arises [i.e. after receipt of bills] and the payment is made. It is submitted that the expenses incurred are routine business expenses in the nature of rent, commission, contractor's payments etc and the same were disallowed by the Petitioner in the year of creation of provision under section 40(a)(ia) of the Act [ **Details of expenses at Pg Nos.14 and 27, 184 and 199 of stay paper book — 1].**

c. Even if the expenditure is held to be a prior period expense, the same is to be allowed in the year in which the liability is crystallised as held in the following decisions:

- Saurashtra Cement & Chemical Industries: 213 ITR 523 (Guj)
- Nathum al Tularam: 88 ITR 234 (Gauhati)
- Goetze India Ltd: 112 TTJ 1 (Del)
- CIT v. Exxon Mobil Lubricants P. Ltd: 328 ITR 17 (Del.)
- CIT v. Modi Pon Ltd.: 334 ITR 102 (Guj.)
- CIT v. Triveni Engineering & Industries Ltd: 336 ITR 374 (Del.)
- CIT v. Shri Ram Pistons and Rings Ltd.: 174 Taxman 147(Del)
- AC IT v. Birla Soft Ltd.: 46 SOT 437 (Del.)

d. Without prejudice, even if it is assumed that the liability was crystallised in the year in which provisions were created, the same are to be allowed in the year in which the payments are made and the tax is deducted at source. As per the 1st proviso to section 40(a)(ia) as was applicable for the years under consideration, if the tax is not deducted at source in the year in which the expenditure was incurred but is deducted in the subsequent assessment year, then such expenditure shall be allowed as a deduction in computing the income of the previous year in which the tax has been paid. Even in the instant case, as the expenditure was not claimed in the year in which the services were received, but in the subsequent AY where tax was deducted at source. then the same is to be allowed in the years under consideration. For ready reference, the 1st proviso to section 40(a)(ia) as was applicable for the years under consideration reads as under:

*"Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid."*

e. Reliance in this regard is also placed upon the decision of the Bangalore Bench of the Tribunal in the case of **IKA India Pvt Ltd vs ACIT: 101 taxmann.com 276 (Bang ITAT) [Page No.722 to 723 of case laws paper book — IV]** wherein it was held that even if the crystallisation of the expenses is in the earlier assessment year, the expense is to be allowed in the year in which tax is deducted at source and the same is deposited.

S.No.	Particulars	AY 2010-11	AY 2011-12	AY 2012-13	AY 2013-14
9.	Short credit of TDS	-	66,59,674	-	11,19,969
<p><b><u>GIST OF ARGUMENTS</u></b></p> <p><b>AY 2011-12:</b> On certain payments received by the Petitioner from the parties, tax was deducted and the e-TDS return was uploaded belatedly by the deductor. The credit of the TDS was not given by the AO and upheld by the DRP despite the fact that the same was reflected in Form 26AS for the reason that the Petitioner ought to approach CBDT to claim relief in the matter.</p> <p>It is submitted that the TDS, once deducted by the deductor, ought to be allowed as credit by the AO. There is no dispute with regard to the non-furnishing of any TDS certificate [<b>Page No. 360 to 364 of stay paper book - 1</b>] nor the sum not being reflected in Form 26AS.</p> <p><b>AY 2013-14:</b> The TDS credit claimed by the applicant in its return of income amounted to Rs. 1,58,29,023 and the same was substantiated with the latest downloaded Form 26AS [<b>Page No. 741 of stay paper book - II</b>]. The AO, in his order, has given TDS credit only to the extent of Rs. 1,47,09,054 instead of Rs. 1,58,29,023, and no reason was given for granting such short credit. It is submitted that the TDS, to the extent of the shortfall for Rs.11,19,969 ought to be allowed as credit.</p>					
	Levy of interest u/s. 234B / 234D	12,23,22,522	18,72,86,283	5,64,58,876	18,65,02,901
<p><b><u>GIST OF ARGUMENTS</u></b></p> <p>Consequential</p>					

7. The Ld A.R furnished copies of two intimations dated 28-08-2019 given by the AO u/s 245 of the Act and submitted that the AO has proposed to adjust the refund arising to the assessee in AY 2006-07 and 2007-08 against the outstanding demands pertaining to AY 2005-06, 2009-10, 2010-11 and 2012-13. He submitted that, if such adjustment is done, then the assessee shall be put to hardship badly affecting its working capital position. The Ld A.R also placed a copy of decision rendered by Hon'ble Delhi High Court in the case of Maruti Suzuki Ltd (347 ITR 47)(Delhi). In

the above said case, the facts were that against an order passed u/s 144C/143(3), the assessee filed a stay application before the AO u/s 220(6) and also filed a stay application before the Tribunal. The Tribunal passed an interim order directing "*status quo*". Despite the interim order, the AO passed an order u/s 245 (*without giving prior notice*) and adjusted refunds against the demand. Before the Tribunal, the department accepted that the 245 refund adjustment was not proper and said a proper order would be passed. The AO then passed an order u/s 220(6) in which he held that the adjustment of refunds was in order on the ground that (i) *an adjustment of refunds was not a "recovery"* and (ii) *though some issues were covered in favour of the assessee, the decision had not become final as the department was in appeal*. The Tribunal then passed a stay order in which it accepted the AO's stand that *an adjustment of refund was not a "recovery"*. It was also held that action u/s 245 was not "mala fide". The assessee filed a writ petition to challenge the adjustment of refunds. The Hon'ble High Court laid down the following principles to be followed in such cases:-

- (i) **S. 220(6) has no application to a case where an appeal is filed before the Tribunal** though the Tribunal has inherent power to grant stay. The order passed u/s 220(6) is null and void. The Tribunal should have decided the stay application instead of calling upon the AO to dispose of the application u/s 220(6);
- (ii) **It is wrong to say that an adjustment of refund u/s 245 is not a "recovery"** only on the ground that s. 245 is placed in the Chapter of "Refunds". **The term "recovery" is comprehensive and includes adjustment thereby reducing the demand.** In Circular No. 1914 dated 2.12.1993, even the CBDT did not regard 'recovery' as excluding 'adjustment' u/s 245. However, different parameters may apply in considering a request for stay against coercive measures to recover the demand and a stay against refund adjustment. It is

permissible for the authority to direct stay of recovery by coercive methods but not grant stay of adjustment of refund. **However, when a simple & absolute order of stay of recovery is passed, it bars recover of the demand by way of adjustment of demand.** The revenue must be obedient and respect the stay order and not over-reach or circumvent the stay order. No deviancy or breach should be made;

(iii) **It will be specious & illogical for the Revenue to contend that if an issue is decided in favour of the assessee giving rise to a refund in an earlier year, that refund can be adjusted u/s 245, on account of the demand on the same issue in a subsequent year.** While the AO can made an addition on the ground that the appellate order for an earlier year has not been accepted, he cannot make an adjustment towards a demand on an issue decided in favour of the assessee.

(iv) The argument that as the assessment order has been passed u/s 144C after reference to the DRP, the orders passed by the CIT(A) and Tribunal in favour of the assessee have **lost significance and do not justify stay of demand** in covered matters is not acceptable. **The decisions of the CIT (A) & Tribunal in favour of the assessee should not be ignored and have not become inconsequential.** This is not a valid ground to ignore the decisions of the appellate authorities and is also not a good ground to not to stay demand or to allow adjustment u/s 245;

(v) The respondents are officers of the State and the Law requires that they perform their duties with utmost objectivity and fairness, while keeping in mind the sanctity of the role and function assigned to them which at times requires tough steps. On facts, **the conduct and action of the Revenue in recovering the disputed tax in respect of additions on issues which are already covered against them by the earlier orders of the ITAT or CIT (A) is unjustified and contrary to law.** Directions issued to refund the tax.

8. The above decision lays down two propositions which are relevant in the present case, viz., (i) **The term “recovery” is comprehensive and includes adjustment thereby reducing the demand;** (ii) **It will be specious & illogical for the Revenue to contend that if an issue is decided in favour of the assessee giving rise to a refund in an earlier year, that refund can be adjusted u/s 245, on account of the demand on the same issue in a subsequent year.**

9. The Ld A.R thus submitted that the assessee has a prima facie case, the balance of convenience is in favour of granting the stay. Otherwise the assessee would be put to great hardship. He, therefore, prayed that the recovery of outstanding demand for assessment years 2010-11 to 2013-14, which are subject matter of appeals before the Tribunal should be stayed.

10. The Ld D.R submitted that the assessee should be directed to pay atleast 50% of the outstanding demand as a condition for granting stay and that there cannot be any stay on adjustment of refund against outstanding demand as it is a statutory right conferred on the revenue u/s.245 of the Act.

11. We have given careful consideration to the rival submissions. The facts brought to our notice show the existence of a *prima facie* case in favour of the assessee. The facts also show that the balance of convenience is in favour of the assessee, considering the facts brought to our notice on the financial hardship. If an order of stay is not granted, we are of the view that the assessee may be put to hardship. Even if adjustment of refund due to the assessee for earlier assessment years is against the outstanding demand for the aforesaid assessment years, which are subject matter of appeals before the Tribunal, that would also amount

to recovery of outstanding demand as held by Hon'ble Delhi High Court in the case of *Maruti Suzuki Ltd (supra)*. In coming to the conclusion that the assessee has a *prima facie* case, we have also kept in mind the observations of Hon'ble Delhi High Court that outstanding demand arising out of issues already decided in favour of the assessee by the Tribunal in the earlier assessment years cannot be recovered. We also notice from the chart of outstanding demand filed by the assessee before us, which has been extracted in the earlier part of the order, that more than 50% of the tax portion of the outstanding demand has been paid by the assessee in AY 2010-11 to 2012-13. We therefore grant stay of recovery of outstanding demand for these years for a period of six months from the date of this order; or till the disposal of appeals of these years, whichever period expires earlier.

12. As far as AY 2013-14 is concerned, we find that only 35.48% of the outstanding tax portion has been paid by the assessee till date. We are of the view that it would meet the ends of justice, if the revenue is permitted to adjust a sum of Rs.5.00 crores towards outstanding demand for AY 2013-14 out of the refund arising to the assessee. Subject to the payment of tax by way of adjustment as aforesaid, there will be stay of recovery of outstanding demand for AY 2013-14 for a period of six months from the date of this order; or till the disposal of appeals of the Assessee, whichever period expires earlier. We order accordingly.

13. All the appeals of the assessee, referred above, are fixed on out of turn basis for hearing on 27.01.2020. We make it clear that the assessee should not seek adjournment without reasonable cause, failing which the present stay order is liable to be vacated. Notice of hearing is dispensed with since the date of hearing of appeals is given in this order.

14. The stay applications are allowed in the terms indicated above.

Pronounced in the open court on this 14<sup>th</sup> day of October, 2019.

Sd/-

( B R BASKARAN )  
ACCOUNTANT MEMBER

Sd/-

( N V VASUDEVAN )  
VICE PRESIDENT

Bangalore,  
Dated, the 14<sup>th</sup> October, 2019.

/ Desai Smurthy /

Copy to:

1. Applicant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,  
ITAT, Bangalore.