

आयकर अपीलीय अधिकरण 'डी' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH: CHENNAI

श्री मनु कुमार गिरि, न्यायिक सदस्य एवं श्री एस. आर. रघुनाथा, लेखा सदस्य के समक्ष
BEFORE SHRI MANU KUMAR GIRI, JUDICIAL MEMBER AND
SHRI S.R.RAGHUNATHA, ACCOUNTANT MEMBER
आयकर अपील सं./ITA No 320/Chny/2025

निर्धारण वर्ष/**Assessment Year: 2018-19**

Vestas Wind Technology India
Private Limited,
Tower 1, 9th Floor, Radial IT Park,
Survey No. 141/14a 200 Feet Radial
Road, Zamin Pallavaram,
Chennai-600117

[**PAN: AAACA9274F**]

(अपीलार्थी/**Appellant**)

v. The ITO,
Corporate Circle 3(1),
Chennai-600034

(प्रत्यर्थी/**Respondent**)

अपीलार्थी की ओर से//Assessee by : Mr. Sriram Seshadri, CA
प्रत्यर्थी की ओर से /Respondent by : Mr. Karthik Desari, JCIT
सुनवाई की तारीख/Date of Hearing : 13.02.2026
घोषणाकीतारीख /Date of Pronouncement : 09.03.2026

आदेश / ORDER

PER MANU KUMAR GIRI, Judicial Member:

This appeal by the assessee is directed against the order dated 27.11.2024 passed by the Ld. Commissioner of Income Tax (Appeals) u/s. 250 of the Income-tax Act, 1961 ("the Act") for Assessment Year 2018-19, arising out of the final assessment order dated 15.11.2021 passed u/s. 143(3) read with sections 144C(3) and 144B of the Act. The sole issue involved in the present appeal pertains to the disallowance u/s. 94B of the Act.



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2. Briefly stated, Vestas Wind Technology India Private Limited ("the Appellant") is a wholly owned subsidiary of Vestas India Holdings A/s, which in turn is a subsidiary of Vestas Wind Systems A/s ("Vestas Denmark"). The Appellant is engaged in manufacturing blades, assembling, installing, selling, and maintaining wind turbine generators (WTGs) in India, and in supplying WTG components to the Vestas group. Beginning in FY 2015-16, the Appellant availed multiple tranches of External Commercial Borrowings (ECBs) from Vestas Denmark under separate agreements. In Assessment Year (AY) 2018-19 ("the Impugned AY"), it incurred ECB interest expenditure of Rs.55.83 crore relating to four tranches. For the Impugned AY, the Appellant filed its return of income on 30.11.2018 declaring total income of Rs.71.26 crore under the normal provisions of the Act, after making a suomotu disallowance of Rs.9.34 crore u/s. 94B in respect of ECB interest. Section 94B, introduced by the Finance Act, 2017 with effect from 01.04.2018, restricts interest deductions in specified cases (Pg.82 P.B.). As this was the first year of its applicability, the disallowance was made conservatively and without prejudice to the Appellant's right to contest its applicability. The return was selected for complete scrutiny, and the international transactions were referred to the Transfer Pricing Officer (TPO) for arm's length determination. By order dated 21.07.2021 u/s. 92CA(3), the TPO made no transfer pricing adjustment but recomputed the disallowance u/s. 94B at Rs.18.47 crore, thereby enhancing it by Rs.9.13 crore, without issuing a show-cause notice explaining the basis for such enhancement. Further, the Appellant executed a Bilateral Advance Pricing Agreement (BAPA) dated 22.01.2024 with the Central Board



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of Direct Taxes u/s. 92CC of the Act. The ECB interest payable to Vestas Denmark is a covered transaction under the BAPA for FY 2011-12 to FY 2019-20, which includes the Impugned AY. Subsequently, the Assessing Officer passed the final assessment order dated 15.11.2021 u/s. 143(3), 144C(3), and 144B, adopting the enhanced disallowance u/s. 94B of the Act. The Appellant appealed before the Commissioner of Income Tax (Appeals). By order dated 27.11.2024 u/s. 250, the CIT(A) rejected the Appellant's grounds and upheld the disallowance u/s. 94B.

3. During the scrutiny proceedings, the TPO determined an additional disallowance u/s. 94B of the Act amounting to Rs.9.13 crore. The detailed working of the disallowance, as computed by the TPO, is provided in the tabular statement at page 132 of the paper book / page 26 of the TP Order, and is reproduced below for ready reference:

S.No.	Particulars	Formula	Amount (RS. Crs)
1.	Profit before tax	A	(2.72)
2.	Interest expenses	B	66.26
3.	Depreciation and amortization	C	66.60
4.	Earnings before interest, taxes, depreciation and amortization (" <i>EBITDA</i> ")	(D = A+B+C)	130.13
5.	30% of EBITDA	E = D * 30%	39.04
6.	Interest paid/payable to AE	F	57.51
7.	Amount disallowed u/s. 94B	G = F - E	18.47
8.	Amount already disallowed by the Appellant	H	9.34
9.	Additional disallowance by the Ld. TPO	I = G - H	9.13

In re-computing the disallowance under Section 94B, the learned TPO revised the Appellant's calculation and enhanced the disallowance from Rs.9.34 crore to Rs.18.47 crore. The increase was



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attributed to two alleged computational errors: (i) adoption of an incorrect depreciation figure while determining EBITDA, and (ii) inclusion of interest already suomotu disallowed as non-deductible, while computing "excess interest" under Section 94B(2). The Appellant's detailed submissions on these aspects are set out below.

Aggrieved by the enhanced disallowance of Rs.18.47 crore under Section 94B, the Appellant preferred an appeal against the Final Order before the learned CIT(A), challenging both the applicability of Section 94B to its case and, without prejudice, the correctness of the TPO's computation. In contesting applicability, the Appellant relied on Article 24 (Non-Discrimination) of the India-Denmark Double Taxation Avoidance Agreement (DTAA).

The Id. CIT(A), by order dated 27.11.2024 u/s.250, rejected all grounds raised by the Appellant and upheld the TP Order. The findings may be summarised as follows:

- a. On the legal issue: The CIT(A) held that the non-discrimination protection under Article 24(4) of the DTAA was unavailable since the transaction was between associated enterprises (AEs), referring to the exception contemplated under Article 12(7) of the DTAA.
- b. On the computational issue: The CIT(A) observed that the TPO's workings were based on the figures disclosed in the financial statements and found the recomputation to be correct.

The Appellant has therefore filed the present appeal before this Tribunal, confined to the sole issue of the disallowance u/s. 94B both in terms of its applicability and, without prejudice, the manner of its quantification.

4. The assessee has raised grounds challenging the applicability of section 94B in light of Article 24(4) (Non-Discrimination) of the



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India-Denmark DTAA. Also challenged the applicability of Article 12(7) as invoked by the Revenue. And further questioned, without prejudice, the computational errors in determining EBITDA and "total interest paid or payable". Assessee also filed admission of an additional ground seeking deletion of entire disallowance including the suomotu amount.

5. The additional ground seeks deletion of the entire disallowance u/s. 94B including the suomotu disallowance, on the basis that the provision is discriminatory in light of Article 24(4) of the India-Denmark DTAA.

The issue being purely legal and all material facts being on record, we admit the additional ground in view of the ratio laid down by the Hon'ble Supreme Court in *National Thermal Power Co. Ltd. v. CIT* [229 ITR 383 SC]/(1997)7SCC489 and further supported by *Wipro Finance Ltd. v. CIT* (2022) 443 ITR 250 (SC).

6. The Id. AR Mr. Sriram Seshadri, CA for the assessee has referred the relevant provisions as under:

EXTRACTS OF RELEVANT SECTIONS AND ARTICLES OF THE DTAA

The relevant portion of Section 94B(2) of the Act is extracted below:

"94B. (1) Notwithstanding anything contained in this Act, where an Indian company, or a permanent establishment of a foreign company in India, being the borrower, incurs any expenditure by way of interest or of similar nature exceeding one crore rupees which is deductible in computing income chargeable under the head "Profits and gains of business or profession" in respect of any debt issued by a non-resident, being an associated enterprise of such borrower, the interest shall not be deductible in computation of income under the said head to the extent that it arises from excess interest, as specified in sub-section (2) :



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Provided that where the debt is issued by a lender which is not associated but an associated enterprise either provides an implicit or explicit guarantee to such lender or deposits a corresponding and matching amount of funds with the lender, such debt shall be deemed to have been issued by an associated enterprise.

.....

(2) For the purposes of sub-section (1), the excess interest shall mean an amount of total interest paid or payable in excess of thirty per cent of earnings before interest, taxes, depreciation and amortisation of the borrower in the previous year or interest paid or payable to associated enterprises for that previous year, whichever is less.

.....

(4) Where for any assessment year, the interest expenditure is not wholly deducted against income under the head "Profits and gains of business or profession", so much of the interest expenditure as has not been so deducted, shall be carried forward to the following assessment year or assessment years, and it shall be allowed as a deduction against the profits and gains, if any, of any business or profession carried on by it and assessable for that assessment year to the extent of maximum allowable interest expenditure in accordance with sub-section (2):

Provided that no interest expenditure shall be carried forward under this sub-section for more than eight assessment years immediately succeeding the assessment year for which the excess interest expenditure was first computed."

(Emphasis Supplied)

Article 24(4) of the India – Denmark DTAA is extracted below:

"4. Except where the provisions of paragraph 1 of Article 10, paragraph 7 of Article 12, or paragraph 7 of Article 13, apply, interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State. Similarly, any debts of an enterprise of a Contracting



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State to a resident of the other Contracting State shall, for the purpose of determining the taxable capital of such enterprise, be deductible under the same conditions as if they had been contracted to a resident of the first-mentioned State.”

(Emphasis Supplied)

Article 12(7) of the India – Denmark DTAA is extracted below:

“7. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.”

(Emphasis Supplied)

7. The Id.AR Mr. Sriram Seshadri, CA also argued in detail and filed written submissions. The relevant submissions are as under:

1. Ground No. 1 – General Ground – The Appellant relies on all the submissions summarised in the ensuing paragraphs.
2. Ground No. 2 - Jurisdictional Grounds – *Not Pressed*
3. Ground No. 3 read with the Additional Ground - Disallowance u/s. 94B of the Act
A. *Additional Ground filed out of abundant caution – Clarificatory in nature*
4. The Appellant’s challenge in the present appeal is against the disallowance u/s. 94B of the Act, determined at RS. 18.49 Crores by the Ld. TPO. The disallowance of RS. 9.13 Crores reflected in the Final Order in this regard, corresponds to the net amount of adjustment after deducting the Appellant’s suomotu disallowance made in the ITR. The Appellant *clarifies* in this regard, *that Ground No. 3.2, on the non-applicability of Section 94B* (in light of Article 24 of the India–Denmark DTAA) *pertains to the entire determination of RS. 18.47 Crores u/s. 94B of the Act* and is not limited to the net adjustment of RS. 9.13 Crores reflected in the Final Order.
5. *Without prejudice, and to avoid ambiguity*, an additional ground has been raised through a petition dated 26.08.2025, seeking deletion of the entire disallowance



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including the suomotu disallowance, on the basis that *Section 94B read with Article 24(4) of the India-Denmark DTAA is discriminatory. The said 'additional ground' is therefore not a new ground but a clarification/revision of a ground raised before the Ld. CIT(A), which was considered and adjudicated in Para 5.3.4-5.3.6 of the CIT(A) Order.*

6. Without prejudice, the Appellant submits that all the relevant facts are on record, and the consideration of the additional ground, which is purely legal in nature, does not require calling for and/or further investigation of records. The Hon'ble Tribunal has *wide powers* to admit and adjudicate such additional grounds, as per the position of law fortified by the decision of the Hon'ble Supreme Court in *National Thermal Power Co. Ltd* [229 ITR 383]. The Appellant further relies upon the decision of the Hon'ble Supreme Court in *Wipro Finance Ltd.* [443 ITR 250], followed by the coordinate bench of the Hon'ble Tribunal at Delhi in *Samast Vikas Ltd.* [175 taxmann.com 145], in support of the position that the Hon'ble Tribunal has the powers to consider claims to the effect that the income declared in the ITR is not taxable under the Act.
- B. *No disallowance warranted u/s. 94B of the Act in light of the non-discrimination clause under Article 24(4) of the India – Denmark DTAA*
7. Section 94B of the Act was introduced by the Finance Act, 2017, applicable *with effect from AY 18-19*. The provisions of section 94B of the Act were enacted *to implement thin-capitalization rules in India*, in line with the recommendations of the Organisation for Economic Co-operation and Development (“*OECD*”) under Base Erosion and Profit Shifting (“*BEPS*”) Action Plan 4. It was designed to *counter excessive interest deductions* claimed by entities as a result of *disproportionately high levels of debt from non-residents*, thereby preventing erosion of the Indian tax base through interest payments.
8. Section 94B of the Act places a *statutory limit on the quantum of the interest eligible for deduction* under the provisions of the Act, where such interest is *paid by an Indian company to a non-resident AE*. Sub-section (1) and sub-section (2) provide the computation mechanism in this regard. Broadly, the provisions place a limitation on interest deduction if the same is in excess of 30% of the EBITDA.
9. In the present case, the Appellant incurred interest expenditure on ECBs raised from its non-resident AE (i.e., Vestas Denmark), and hence, the extent of permissible deduction is subject to the provisions of Section 94B of the Act, which in-turn is subject to the beneficial provisions of the applicable DTAA, in terms of Section 90 of



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the Act. Hence, the interest on ECB incurred by the Appellant towards Vestas Denmark is governed by the India-Denmark Tax Treaty, and therefore, the provisions of the Tax Treaty shall apply to the extent that they are more beneficial.

10. According to Article 24(4) of the India – Denmark DTAA, the interest paid by the resident of a contracting state (i.e., India) to the resident of the other contracting state (i.e., Denmark) shall be deductible while computing the total income of such enterprise (i.e., the Indian entity), on the same conditions as if the interest is payable to an Indian tax resident. In other words, in the hands of the payer, there should not be any additional conditionalities posed for deductibility of interest payable to a tax resident of Denmark, in comparison with deductibility of interest payable to an Indian tax resident.
11. Article 24(4) of the India – Denmark DTAA embodies the *principle of non-discrimination* and ensures that payments made by an Indian resident to a resident of Denmark are not placed at a disadvantageous position vis-à-vis payments made to another Indian resident. In other words, the deductibility of interest expenditure cannot be curtailed merely on account of the fact that the recipient of the interest is a resident of Denmark.
12. The provisions of Section 94B of the Act are therefore discriminatory in so far as they limit the deductibility of interest only where the same is paid to a non-resident AE, and not in cases where it is paid/ payable to a resident AE. In other words, the *interest-limitation u/s. 94B of the Act restricts deduction when the payee is a non-resident (AE), whereas the same deduction remains fully available when the payee is a resident, under the same conditions, i.e., the existence of AE-relationship in both cases*. Hence, the beneficial provisions of Article 24 of the India-Denmark DTAA squarely apply to the present case, to rectify the discrimination caused by the provisions of Section 94B of the Act.
13. The Appellant also places reliance on the *OECD Commentary on Article 24* of the model convention, specifically *paragraph 73 and 74*, which expressly recognises that States are free to formulate their own domestic thin-capitalisation rules, however, that any thin-capitalisation provision which applies only to non-residents creditors, to the exclusion of resident creditors, would fall foul of the non-discrimination mandate contained in Article 24(4). The relevant portion of the OECD commentary is extracted below for ease of reference [*refer pg. 50 and 51 of the case law compilation*]:



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“73. This paragraph is designed to end a particular form of discrimination resulting from the fact that in certain countries the deduction of interest, royalties and other disbursements allowed without restriction when the recipient is resident, is restricted or even prohibited when he is a non-resident. The same situation may also be found in the sphere of capital taxation, as regards debts contracted to a non-resident. It is however open to Contracting States to modify this provision in bilateral conventions to avoid its use for tax avoidance purposes.

74. Paragraph 4 does not prohibit the country of the borrower from applying its domestic rules on thin capitalisation insofar as these are compatible with paragraph 1 of Article 9 or paragraph 6 of Article 11. However, if such treatment results from rules which are not compatible with the said Articles and which only apply to non-resident creditors (to the exclusion of resident creditors), then such treatment is prohibited by paragraph 4.”

(Emphasis Supplied)

14. Paragraph 73 of the OECD commentary clearly states that differentiation based on the payee's residential status constitutes discrimination. Moreover, paragraph 74 of the OECD commentary stipulates that the Revenue authorities may limit interest deductions if the interest is "excessive" as it fails to meet arm's length criteria pursuant to Article 9. Nonetheless, interest deductions cannot be restricted solely on the basis that the lender is a non-resident. Where both a domestic and a non-resident lender offer equivalent arm's length loans, disallowing interest for the non-resident lender constitutes a breach of Article 24.
15. This interpretative guidance directly supports the Appellant's position and further strengthens the Appellants argument that the provisions of section 94B of the Act are inherently discriminatory and therefore violative of Article 24(4) of the India-Denmark DTAA.
16. The Appellant further relies on the judicial precedents of Hon'ble Madras High Court in the case of Cognizant Technology Solutions India Pvt Ltd [180 taxmann.com 822] [refer pg. 118 of the case law compilation] and also on the Hon'ble Delhi Tribunal's decision in the case of and LinkedIn Technology Information Pvt Ltd [ITA No. 2492/DEL/2024] [refer pg. 157 of the case law compilation] which has followed the decisions of the Hon'ble Delhi High Court in the case of Herbalife International India Pvt Ltd [384 ITR 276] [refer pg. 54 of the case law compilation] and Mitsubishi Corporation India Pvt Ltd [463 ITR 335] [refer pg. 73 of the case law



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compilation]. All these decisions are concerned with and uphold the invocation of non-discrimination clause under the respective DTAA's, i.e., USA and Japan, to delete the disallowances made under the Act. The principles laid down by these rulings apply in full force for all payments made by an Indian tax resident where a discriminatory disallowance arises.

17. The relevant paragraphs of the decision of the Hon'ble Madras High Court in the case of Cognizant Technology Solutions India Pvt Ltd (supra) are reproduced below [refer pg. 152 and 153 of the case law compilation]:

"17.19. There is another angle from which the taxability aspect can be looked into. Learned counsel for the assessee has rightly relied upon non-discrimination clause in Article 26(3) of the DTAA between India and USA, which reads as below:...

17.20. If we look into the provisions contained in Section 40 of the Act along with Article 26(3) of the India-USA DTAA, it is clear that deduction in the hands of the resident on payment to a USA resident shall be on the same conditions as that of a payment made to Indian resident. In the present case, the disallowance was only in respect of payment made to non-resident. On this score, the assessee has correctly placed reliance upon the decisions in the Herbalife International India (P) Ltd (supra), and Mitsubishi Corporation India (P) Ltd. case (supra).

17.21. In the decision in Herbalife International India (P) Ltd (supra), identical issue was considered by the Delhi High Court and it was held that Section 40(a)(i) of the Act is discriminatory and not applicable in terms of Article 26(3) of the India-USA DTAA. It was held as below:

17.22. Similar is the decision in the case of Mitsubishi Corporation India (P) Ltd (supra).

17.23. The submission of the revenue that until 13.07.2006 there was no requirement to deduct tax on royalty payments made to a resident in India and only by way of amendment u/s. 194J Act with effect from 13.07.2006 royalty was also included, does not alter the legal position in the light of the above decision.

18. This question of law is answered in favour of the assessee and against the revenue."

(Emphasis added)



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18. In the above context, reliance is also placed on the decision of the Hon'ble Delhi High Court in the case of Herbalife International India Pvt Ltd (supra). The relevant paragraphs of the decision are reproduced below for ease of reference [refer pg. 70 of the case law compilation]:

“56. The argument of the Revenue also overlooks the fact that the condition under which deductibility is disallowed in respect of payments to non-residents, is plainly different from that when made to a resident. U/s. 40 (a) (i), as it then stood, the allowability of the deduction of the payment to a non-resident mandatorily required deduction of TDS at the time of payment. On the other hand, payments to residents were neither subject to the condition of deduction of TDS nor, naturally, to the further consequence of disallowance of the payment as deduction. The expression 'under the same conditions' in Article 26 (3) of the DTAA clarifies the nature of the receipt and conditions of its deductibility. It is relatable not merely to the compliance requirement of deduction of TDS. The lack of parity in the allowing of the payment as deduction is what brings about the discrimination. The tested party is another resident Indian who transacts with a resident making payment and does not deduct TDS and therefore in whose case there would be no disallowance of the payment as deduction because TDS was not deducted. Therefore, the consequence of non-deduction of TDS when the payment is to a non-resident has an adverse consequence to the payer. Since it is mandatory in terms of Section 40(a)(i) for the payer to deduct TDS from the payment to the non-resident, the latter receives the payment net of TDS. The object of Article 26 (3) DTAA was to ensure non-discrimination in the condition of deductibility of the payment in the hands of the payer where the payee is either a resident or a non-resident. That object would get defeated as a result of the discrimination brought about qua nonresident by requiring the TDS to be deducted while making payment of FTS in terms of Section 40 (a) (i) of the Act.”

(Emphasis Supplied)

19. The decision of the Hon'ble Delhi High Court in the case of Herbalife International India Pvt Ltd (supra) has been followed by the Delhi Bench of the Hon'ble Tribunal in a recent judgement in the case of LinkedIn Technology Information Pvt Ltd (supra). The relevant paragraphs of the decision are reproduced below for ease of reference [refer pg. 166 to 171 of the case law compilation]:



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“... 14. In this context, we do not agree with the contention of Revenue that the scope of non-discrimination article is restricted to differential treatment of expenses incurred towards residents and non-residents and it does not refer to the quantum of expense which can be disallowed. We are of the considered view that Section 40(a)(i), in its present form, is violative of non-discrimination Article 26(3) of India-USA DTAA as far as quantum of disallowance is concerned. In the relevant assessment year of AY 2018-19, in the instant case, Section 40(a)(i) imposed a stringent condition of 100% disallowance for payments to non-residents as compared to disallowance of 30% for payments to residents for the same default of not deducting TDS. The substantive law laid down in the decision of the hon'ble Delhi High Court in Herbalife India (P.) Ltd. (supra), which pertained to AY 2001-02, holding that Section 40(a)(i) was discriminatory and violated the non-discrimination article 26(3) of DTAA, as there was no disallowance for similar payments to residents, and negating the Revenue action of disallowance u/s 40(a)(i) for payments to non-resident without making TDS, still holds relevance. The hon'ble jurisdictional Delhi High Court in the case of Herbalife India (P.) Ltd (supra) held in favour of the Assessee as under:...

15. Though for AY 2018-19, the provision of law provides for disallowance of payments of FTS made to non-resident as well as resident, to that extent section 40(a)(i) is no longer discriminatory. In view of the hon'ble Delhi High Court in the Herbalife (supra) as above however, the application of disallowance @100% u/s 40(a)(i) is held as discriminatory in so far as quantum of disallowance is concerned. The quantum of disallowance for resident is restricted to 30% u/s 40(a)(ia), and therefore to meet the requirement of discriminatory clause of Article 26(3) of DTAA, the disallowance for payment made to nonresident, without deducting TDS, should as well be restricted to 30% u/s 40(a)(i) of the Act. We have seen that the AO has made a disallowance @ 30% of remittance which is similar to the rate of disallowance @30% under the non-discriminatory clause of Article 26(3) of the DTAA, therefore there is no occasion to say that the revenue is prejudiced as far as quantum of disallowance is concerned. We are therefore of the considered view that the second condition of action of the AO, being prejudicial to the interest of the Revenue, is not satisfied. Since both the ingredients of provisions of section 263 of the Act i.e., the order of the AO being erroneous and prejudicial to the interest



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of the Revenue, is not satisfied, the assumption of jurisdiction by the PCIT u/s 263 cannot be held as valid under the law. We accordingly quash the order of PCIT u/s 263 as being invalid in law. The ground 2.2 and 2.4 of the assessee is accordingly allowed.”

(Emphasis Supplied)

20. It is additionally clarified that *it is not the Appellant’s case that section 94B of the Act is rendered completely otiose or entirely inapplicable to any of the assessees.* The challenge is narrowly confined and arises only on account of the specific language employed in the India–Denmark DTAA. To that limited extent, and only in the context of the India–Denmark DTAA, the application of section 94B of the Act results in discrimination and is therefore violative of Article 24(4) of the said DTAA.
21. It is also submitted that DTAA’s are independently negotiated bilateral instruments, and the scope and the language of the non-discrimination provisions vary from country to country. The different types of provisions under the DTAA can be evidenced from the below table:

S.No.	Tax treaties with various countries	Position under the Non-Discrimination Article
1.	Singapore, New Zealand, Belgium, United Kingdom [refer pg. 22 to 25 of the case law compilation]	These Tax Treaties have the Non-Discrimination Article but do not contain a similar clause wherein an equal treatment is envisaged in respect of an expenditure/ disbursements paid by an Indian company to non-residents.
2.	Saudi Arabia [refer pg. 29 to 45 of the case law compilation]	This Tax Treaty does not have a non-discrimination Article in its entirety.
3.	Australia [refer pg. 28 of the case law compilation]	This Tax Treaty contains a non-discrimination article, and a specific clause therein on the treatment of an expenditure incurred towards a non-resident, but Article 24(6) expressly provides that application of thin-capitalisation rules shall not be regarded as discriminatory.

22. The relevant portion of the Article 24(6) of the India – Australia DTAA is extracted below [refer pg. 28 of the case law compilation]:

“(6) This Article shall not apply to any provision of the laws of a Contracting State which:

(a) is designed to prevent the avoidance or evasion of taxes, including measures designed to address thin capitalization or to ensure that taxes can be effectively collected or recovered; or



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(b) provides tax incentives to eligible taxpayers for expenditure on research or development, provided that a company that is a resident of one Contracting State and is wholly or partly owned by residents of the other State can access such incentives on the same terms and conditions as any other company that is a resident of the first-mentioned State; or

(c) is agreed between the Contracting States through an Exchange of Notes.”

(Emphasis Supplied)

23. The Appellant submits that the provisions of Article 24(6) of the India – Australia DTAA are imperative in understanding the intention and the scope of the India – Denmark DTAA. The Appellant submits that the carve-out for thin capitalization under the India-Australia DTAA serves as a decisive indicator regarding the applicability of the non-discrimination clause in the absence of the exception. If thin capitalization regulations were not governed by the non-discrimination clause, such an exception would not have been necessary within the India-Australia DTAA.
24. Examples of departure in treaty language are plenty and some examples are definitions in taxation of fees for technical services (example – Make available clause in a few treaties), Presence or absence of service PE clauses in tax treaties; Absence of fees for technical services article as in India – UAE DTAA etc.
25. These numerous examples demonstrate how the judiciary has applied treaties according to the presence or absence of specific clauses. In this context, the exception found in the India-Australia treaty cannot be extended to other treaties and is relevant only for its own interpretation. Unless such exceptions are expressly stated, any discrimination due to thin capitalization provisions must make way to application of non-discrimination clause under Article 24(4) of the India-Denmark DTAA.
26. Given these materially different treaty formulations, a disallowance u/s. 94B of the Act would continue to operate under the aforesaid treaties without any conflict. The Appellant’s plea is therefore treaty-specific and context-specific, limited strictly to the India–Denmark DTAA, where Article 24(4) of the India–Denmark DTAA prohibits differential treatment in respect of deductibility of expenditure based solely on the residence of the payee.
27. Accordingly, the Appellant submits that section 94B of the Act is neither invalid per se nor rendered redundant or generally inapplicable. However, insofar as the provisions of Article 24(4) of the India–Denmark DTAA are concerned, the application of section 94B of the Act results in discrimination. Therefore, any



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disallowance made u/s. 94B of the Act in respect of India Denmark DTAA cannot to be sustained.

C. WITHOUT PREJUDICE - Computational error in the disallowance determined by the Ld. TPO

28. Without prejudice to the above contentions, section 94B of the Act applies where an Indian company incurs interest on a debt issued by a non-resident, the aggregate interest exceeds RS. 1 crore, and such interest is *otherwise allowable as a deduction* in computing income under the head “Profits and Gains of Business or Profession.” Under these circumstances, section 94B of the Act restricts the deduction of interest to the extent it constitutes “excess interest” as defined in section 94B(2) of the Act.
29. U/s. 94B(2) of the Act, the lower of (a) and (b) constitutes the “*excess interest*” for the purposes of section 94B(1) of the Act, which is computed as follows:
- The amount by which the total interest paid or payable exceeds 30% of EBITDA of the assessee for the relevant previous year; or
 - The total interest paid or payable to non-resident during the relevant previous year;
30. The interest corresponding to such “excess interest” is not allowable as a deduction in computing total income, though any disallowed amount may be carried forward for deduction in subsequent years in accordance with the proviso to section 94B of the Act.

EBITDA computation – TPO’s consideration of incorrect Depreciation

31. For the purposes of section 94B of the Act, the Ld. TPO considered *depreciation of RS. 66.60 Crores* directly from the face of the Profit and Loss Statement [refer pg. 4 of the paperbook], where depreciation is *presented on a net basis*, instead of the *actual gross depreciation of RS. 89.74 Crores* debited to the Profit and Loss statement for the relevant year, as considered by the Appellant [refer pg. 29 of the paperbook]. *The difference of RS. 23.14 Crores represents a transfer pricing adjustment in the form of subvention receipt* from the Appellant’s holding company, towards compensation for discontinuation of a specific WTG model, which is a separate revenue item *merely netted off against depreciation in the Profit and Loss statement* for presentation purposes and does not reduce the underlying depreciation expense.
32. The said *year-end transfer pricing adjustment is a cash revenue item, invoiced to the AE and actually received in the Appellant’s bank account*, and has been shown as a deduction from depreciation only for accounting presentation rather than as a



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separate income line [refer pg. 76 of the paperbook]. Since depreciation is a non-cash expenditure and the TP/subvention receipt of RS. 23.14 Crores is a cash revenue item, *netting the two for EBITDA computation distorts the true operating performance*. EBITDA must be computed with reference to the actual depreciation of RS. 89.74 Crores and not the reduced net amount.

33. This approach is in line with the principle laid down by the *Hon'ble Supreme Court in Kedarnath Jute Mfg. Co. Ltd. [82 ITR 363]*, that entries in the books do not determine tax liability, and therefore the presentation of the TP adjustment as a deduction from depreciation cannot be used to suppress the depreciation for section 94B purposes. *In the return of income, the Appellant has correctly offered the TP/subvention amount of RS. 23.14 Crores as "Other Income", and the standalone book depreciation continues to be RS. 89.74 Crores as per the return and supporting schedules [pg. 16 and 29 of the paperbook]*, evidencing that the netting-off in the audited financials is only an accounting disclosure and does not affect the correct EBITDA computation. The relevant paragraph of the decision of the *Hon'ble Supreme Court in the case of Kedarnath Jute Mfg. Co. Ltd (supra)* is extracted below:

"The main contention of the learned Solicitor-General is that the assessee failed to debit the liability in its books of accounts and, therefore, it was debarred from claiming the same as deduction either u/s.10(1) or u/s. 10(2)(xv) of the Act. We are wholly unable to appreciate the suggestion that if an assessee under some misapprehension or mistake fails to make an entry in the books of account and although, under the law, a deduction must be allowed by the Income-tax Officer, the assessee will lose the right of claiming or will be debarred from being allowed that deduction. Whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights nor can the existence or absence of entries in the books of account be decisive or conclusive in the matter. The assessee who was maintaining accounts on the mercantile system was fully justified in claiming deduction of the sum of Rs. 1,49,776 being the amount of sales tax which it was liable under the law to pay during the relevant accounting year. It may be added that the liability remained intact even after the assessee had taken appeals to higher authorities or courts which failed. The appeal is consequently allowed and the judgment of the High Court is set aside. The question which was referred is answered in



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favour of the assessee and against the revenue. The assessee will be entitled to costs in this court and in the High Court.”

(Emphasis Supplied)

34. Accordingly, the Ld. TPO's reliance on the net depreciation of RS. 66.60 Crores is computationally and conceptually incorrect, and the Appellant prays that EBITDA be recomputed by restoring depreciation to its true amount of RS. 89.74 Crores for the purposes of section 94B of the Act.
- “Excess Interest” to be computed only with reference to “deductible interest”
35. In arriving at “total interest paid or payable” u/s. 94B(2), the Ld. TPO has adopted RS. 57.51 Crores (*refer S. No. 6 of the computation table in para 8 of this submission*), comprising (i) RS. 55.83 Crores of actual interest and (ii) RS. 1.67 Crores representing unwinding of discount on ECBs (Ind AS adjustment).
36. Unwinding of discount on ECB interest – notional and already disallowed - The component of RS. 1.67 Crores represents unwinding of discount, a purely Ind AS driven accounting adjustment arising from discounting long-term liabilities and recognising notional accretion as finance cost. It is neither an expenditure “paid” nor an amount that has “become payable” under any contractual obligation. Section 94B(2) explicitly requires consideration of “total interest paid or payable” for the purpose of determining the disallowance. A notional accretion that is neither paid nor payable in reality and does not fall within this expression and therefore cannot be included in the 94B computation.
37. Further, the Appellant has already suo motu disallowed this unwinding charge of RS. 1.67 Crores in its return of income as an Ind AS adjustment while computing the total income [*refer pg. 80, 83 and 101 of the paperbook*]. This evidences that the amount is not considered an allowable interest expenditure and does not represent an actual outgoing. Including this again in the “total interest” for section 94B would amount to double disallowance of the same item, which is contrary to law. The unwinding charge must therefore be excluded from the computation of total interest u/s. 94B of the Act.
38. Interest of RS. 9.67 Crores – capital in nature and already disallowed - Out of the RS. 55.83 Crores of actual interest paid to Vestas Denmark, RS. 9.67 Crores pertains to ECBs availed for acquisition of machinery and other capital expenditure and is capital in nature. The Appellant has not claimed this amount as a deduction in computing its business income; instead, it has suo-motu disallowed the same in the



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return of income, as evident from the Statement of Total Income and supporting schedules [Pg. 80 and 93 of the paperbook].

39. Section 94B of the Act applies only where interest expenditure is “claimed as a deduction” in computing income under the head “Profits and Gains of Business or Profession.” Interest which has already been disallowed – whether as capital in nature, or otherwise – and is not claimed as an allowable deduction, cannot again be subjected to limitation u/s. 94B of the Act. This position flows from the plain language of the statute and is fortified by the ruling of the Mumbai Bench of Hon’ble Tribunal in Beauty Etoile Pvt. Ltd. [TS-312-ITAT-2025(Mum)-TP]. The relevant excerpts of the said decision in the case of Beauty Etoile Pvt Ltd (supra) are reproduced below [refer pg. 102 of the case law compilation]:

“9.2. From the above, it is noted that unless and until the expenditure on interest is deductible in computing the income chargeable under the head ‘profits and gains of business or profession’, the said expenditure cannot be disallowed u/s.94B of the Act. What has not been claimed as deduction under the profit and loss account but has been capitalized, cannot be brought into the provisions of section 94B for the purpose of making disallowance. The word ‘deductible’ is not defined under the Act. However, in taxation, an item which may be subtracted from gross income or adjusted in gross income for determination of taxable income can be said to ‘deductible’. In other words, where the said expenditure is not claimed in first place, the same cannot be disallowed. Interest cost which has been allocated to WIP and does not form part of expenditure in the profit and loss account cannot be considered for the purpose of section 94B.”

(Emphasis Supplied)

40. Accordingly, inclusion of RS. 9.67 Crores in “total interest paid or payable” for section 94B of the Act, is both factually and legally untenable. Both the notional unwinding charge of RS. 1.67 Crores and the capital-nature interest of RS. 9.67 Crores must be excluded. The correct figure of “interest paid or payable” for section 94B(2) should therefore be computed *only after reducing these amounts* from RS. 57.51 Crores considered by the Ld. TPO.
41. Without prejudice Prayer on computation - Without prejudice to the Appellant’s broader contention that section 94B of the Act is discriminatory and violative of Article 24(4) of the India–Denmark DTAA, it is submitted that, if Your Honours are



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still inclined to uphold a disallowance u/s. 94B of the Act, such disallowance ought to be computed in accordance with the foregoing submissions, by:

- a. Adopting the actual depreciation of RS. 89.74 Crores (and not the net figure of RS. 66.60 Crores) while computing EBITDA; and
- b. Excluding both (i) the unwinding charge of RS. 1.67 Crores (notional and already disallowed), and (ii) the capital interest of RS. 9.67 Crores (already disallowed and not “deductible”) from “total interest paid or payable” for the purpose of section 94B(2) of the Act.

42. The Appellant accordingly prays that the errors in the Ld. TPO’s computation be rectified and the disallowance u/s. 94B of the Act, if any, be recomputed on the above corrected basis.

8. Per contra, Id.DR Mr. Karthik Seshadri, JCIT supported the impugned order. The Ld. DR relied upon Article 12(7) of the India-Denmark DTAA. He submitted that Article 12(7) of the India-Denmark DTAA which stipulates that where, owing to a special relationship between the payer and the beneficial owner, the interest paid exceeds the amount that would have been agreed between independent parties, such excess shall be disregarded. In this context, the Ld. DR contended that the disallowance u/s. 94B of the Act constitutes such excess interest arising from the special relationship between associated enterprises, thereby attracting Article 12(7) in the present case. It was further argued that under the scheme of the India-Denmark DTAA, once Article 12(7) is invoked, the benefit of Article 24(4) relating to non-discrimination would not be available. Accordingly, since a disallowance u/s. 94B has been made in the instant case, Article 12(7) stands triggered and, as a result, Article 24(4) becomes wholly inapplicable.

On the issue of computation, the Ld. DR submitted that the disallowance determined by the Ld. TPO is accurate and requires no modification. Specifically, with regard to EBITDA computation, it



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was contended that depreciation of INR 66.60 crores, as reflected in the Profit and Loss Account (refer page 4 of the paper-book), alone should be considered for the purpose of computing disallowance u/s. 94B. The higher depreciation figure of INR 89.74 crores proposed by the Appellant, according to the Ld. DR, is not supported by the financial statements and therefore cannot be adopted in determining EBITDA.

The Ld. DR further submitted that for benchmarking its international transactions, the Appellant adopted Return on Assets (ROA) as the Profit Level Indicator, calculated as Operating Profit divided by Operating Assets. While computing total operating assets, the Appellant added back subvention income of INR 23.14 crores to the net block of assets, thereby enlarging the asset base used as the denominator in the PLI computation.

In this regard, the Ld. DR argued that the Appellant's approach is inconsistent. On one hand, the Appellant claims that the subvention income is a separate income item and therefore should not reduce depreciation while computing EBITDA for section 94B purposes. On the other hand, the Appellant enhances the net block of assets by the same subvention amount of INR 23.14 crores, which could potentially result in higher depreciation claims in subsequent years. According to the Ld. DR, such treatment confers an undue benefit on the Appellant and is not legally sustainable. Therefore, the methodology adopted by the Ld. TPO was stated to be correct and not warranting interference.

Addressing the Appellant's arguments regarding computation of deductible interest, the Ld. DR submitted that section 94B contains



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a non-obstante clause and thus has an overriding effect. Consequently, interest that has been disallowed under other provisions of the Act cannot be excluded or reduced while computing deductible interest for the purposes of section 94B. On this basis, it was argued that the disallowance u/s. 94B must be determined independently of any disallowances made under other provisions, and accordingly, the computation carried out by the Ld. TPO was justified.

9. In rebuttal to counter arguments of revenue, ld. AR Mr. Sriram Seshadri, CA vehemently argued and submitted below (relevant paras):

A. Inapplicability of Article 12(7) of the India – Denmark DTAA

43. Rebutting to the Ld. DR's contentions on the applicability of Article 12(7) of the India – Denmark DTAA, the Appellant submits that *the only exception to the provision of Article 24(4) of the India – Denmark DTAA is the arm's length pricing requirement provided for in Paragraph 7 of Article 12 of the India – Denmark DTAA. Article 12(7) of the India–Denmark DTAA applies only where the excessive portion of interest arises where the interest rate in light of the other terms of the loan deviate from what independent parties would have agreed under arm's-length conditions, due to a special relationship between the payer and the payee.* The Appellant relies on Para 32 and 33 of the OECD Commentary (enclosed as *Annexure 2 – Pg. 28 and 29*) on Article 11 of the Model Convention (*enclosed as Annexure 3 – Pg. 30*), dealing with 'Interest', in this regard, which categorically clarifies the said position. The relevant extracts are reproduced below:

“...32. The purpose of this paragraph is to restrict the operation of the provisions concerning the taxation of interest in cases where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest paid exceeds the amount which would have been agreed upon by the payer and the beneficial owner had they stipulated at arm's length.



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33. *It is clear from the text that for this clause to apply the interest held excessive must be due to a special relationship between the payer and the beneficial owner or between both of them and some other person. There may be cited as examples cases where interest is paid to an individual or legal person who directly or indirectly controls the payer, or who is directly or indirectly controlled by him or is subordinate to a group having common interest with him. These examples, moreover, are similar or analogous to the cases contemplated by Article 9.”*

(Emphasis Supplied)

44. It is further evident from the language adopted in Article 12(7) of the India-Denmark DTAA that such excess interest, if any, shall be determined *‘having regard to the debt claim for which it is paid’*. This further clarifies that the determination of excess interest is *specific to each case*, and ought to be determined having regard to the specific characteristics of the debt-claim in question, to evaluate if there are differences arising on account of a special relationship between the parties. It therefore requires an economic and functional analysis of the instrument and the transaction, to determine if the interest rate, when viewed in light of the characteristics, terms and conditions, is aligned to that agreed between independent parties, i.e., uninfluenced by a special relationship.
45. *The said exception under Article 12(7)*, therefore, effectively excludes from the protection of the non-discrimination provisions, *those situations* where excess interest payments arise solely because *the interest rate fails to satisfy the arm’s-length standard*. *Consequently, the non-discrimination clause under Article 24(4) of the India-Denmark DTAA cannot shield such excess interest limitations under domestic law only where the same is attributable to arms’ length deficiencies*, notwithstanding the less favourable treatment to non-resident payments. These provisions are *directed at situations analogous to those addressed in ‘Article 10 - Associated Enterprises’ of the India-Denmark DTAA, i.e., where the pricing is influenced by the relationship between the parties*.
46. In light of the above discussion, it may be concluded that the *exception provisions under Article 12(7) of the India-Denmark DTAA do not deal with the thin capitalization rules and merely permit/restrict treaty protection based on the satisfaction or otherwise of the arm’s-length criteria*. Hence, *the said provisions cannot be extended to cover the adjustments prescribed under the domestic thin-capitalisation provisions of Section 94B of the Act*.



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47. The domestic law provisions of Section 94B of the Act operate as a *general limitation* on interest deductibility *by referencing it solely to the resident payer's level of EBITDA*, and not based on any deviation from arm's-length conditions. Consequently, the disallowance arising u/s. 94B of the Act is *not attributable to a special relationship* between the payer and the payee, *which is the specific trigger* envisaged in Article 12(7) of the India-Denmark DTAA. Further, considering such domestic law-based interest restrictions as covered by said exception under Article 12(7) of the DTAA *which will render the non-discrimination clause under Article 24(4) of the India-Denmark DTAA otiose*.
48. The Appellant relies on para 35 of the OECD Commentary on Article 11 (enclosed as *Annexure 2 – Pg. 29*), dealing with 'Interest', in this regard, which categorically clarifies the said position. The relevant extracts are reproduced below:

“35. With regard to the taxation treatment to be applied to the excess part of the interest, the exact nature of such excess will need to be ascertained according to the circumstances of each case, in order to determine the category of income in which it should be classified for the purposes of applying the provisions of the tax laws of the States concerned and the provisions of the Convention. This paragraph permits only the adjustment of the rate at which interest is charged and not the reclassification of the loan in such a way as to give it the character of a contribution to equity capital. For such an adjustment to be possible under paragraph 6 of Article 11 it would be necessary as a minimum to remove the limiting phrase “having regard to the debt claim for which it is paid”. If greater clarity of intent is felt appropriate, a phrase such as “for whatever reason” might be added after “exceeds”. Either of these alternative versions would apply where some or all of an interest payment is excessive because the amount of the loan or the terms relating to it (including the rate of interest) are not what would have been agreed upon in the absence of the special relationship. Nevertheless, this paragraph can affect not only the recipient but also the payer of excessive interest and if the law of the State of source permits, the excess amount can be disallowed as a deduction, due regard being had to other applicable provisions of the Convention. If two Contracting States should have difficulty in determining the other provisions of the Convention applicable, as cases require, to the excess part of the interest, there would be nothing to prevent them from introducing additional clarifications in the last sentence of paragraph 6, as long as they do not alter its general purport.”



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(Emphasis Supplied)

49. The Appellant therefore humbly submits that, in the absence of any arms' length price adjustment being made in respect of such interest, Article 12(7) of the DTAA cannot be invoked. It should be highlighted that the Ld.TPO's order did not include any adjustment for the arm's length price.
50. In the present case, the Appellant's ECB-interest incurred towards Vestas Denmark is determined to be at an arm's length rate of interest, pursuant to a benchmarking exercise undertaken using comparable uncontrolled transactions, applying the Comparable Uncontrolled Price ('CUP') method [*refer pg. 59 and 60 of the paperbook*]. *The Ld. TPO, vide the TP Order dated 21.07.2021, has accepted the interest on ECB to be at arm's length [refer pg. 59 and 60 of the paperbook].* Instead, only the provisions of section 94B of the Act have been applied, with no further adjustments made regarding the arm's length price.
51. In this regard, the Mumbai bench of the Hon'ble Tribunal categorically held that section 94B does not constitute a benchmarking method in the case of Beauty Etoile Pvt Ltd [TS-312-ITAT-2025Mum-TP] (see case law compilation, page 89). This matter is specifically addressed in paragraph 8 (page 99) and paragraph 8.2 (page 100). The relevant paragraphs of the decision of the Mumbai bench of the Hon'ble Tribunal are reproduced below:

"8. On the contention of the assessee that restrictive provisions, of section 94B cannot be used for benchmarking exercise to arrive at ALP of an international transaction under the "other method", reference is made to Rule 10AB of the Income-tax Rules, 1961 (The Rules) which provides that the other method for determination of ALP shall be any method which takes into account the price which has been charged or paid or would have been charged or paid for the same or similar uncontrolled transactions, with or between non-associated enterprises under similar circumstances, considering all the relevant facts. Important here is to note that while applying this method to arrive at ALP the price has to be with or between non-associated enterprises. Restrictive conditions prescribed u/s.94B do not satisfy the requirements of Rule 10AB, since there is no price which has been charged or paid or would have been charged or paid with or between non-associated enterprises. Section 94B deals with deduction in relation to interest payable to AE providing for limitation on the interest paid to AE in excess of 30% of EBIDTA for



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making the disallowance. Disallowance prescribed u/s. 94B, thus cannot be considered a method for the purpose of Rule 10AB. Furthermore, it is important to note that section 94B is applicable on transactions between two AEs. For the purpose of Rule 10 AB, the price for determining ALP has to be with or between non-AEs. Thus, when the other method is applied requiring a price of an uncontrolled transaction with or between non-AEs, provision of section 94B cannot be imputed into it as it deals with a transaction between two AEs.

8.2. In the given set of facts and the provisions of law, we note that ld. TPO has erred in taking section 94B restrictions as other method for benchmarking the impugned transaction and thus the adjustment so proposed is bad in law. Accordingly, the adjustment so made in the final order is deleted.”

(Emphasis added)

52. The Appellant further submits that the provisions of *Section 94B* of the Act are not a disallowance provisions but are rather limitation provisions. This is demonstrated by both, the section's heading and the limitation mechanism outlined in section 94B(4) of the Act, which permits carry forward of any excess deduction over and above the prescribed limitation, to the subsequent years for future deduction. In essence, this provision restricts the amount of deductible interest for a given year while *permitting any remaining interest to be carried forward and adjusted against future profits*. Accordingly, the domestic thin capitalization provisions envisaged and introduced u/s. 94B of the Act do not result in permanent disallowance, *whereas the application of TP provisions prescribing arms' length standards for international transactions result in a permanent disallowance*.
53. Reference is also drawn to the *Memorandum explaining the provisions of the Finance Bill 2017*(refer Pg 48 of the *Case Law Compilation*), wherein the legislative intent for the introduction of Section 94B of the Act is discussed. The said provisions are stated to have been introduced as a domestic thin capitalisation measure, in view of and in line with, the recommendations of the OECD's BEPS Action Plan 4 Report of 2015 (*enclosed as Annexure 4 – Pg. 31*). It is equally pertinent to note that the India-Denmark DTAA was signed on September 25, 1989, and was subsequently amended in 2015 to include provisions related to the exchange of information, through the protocol dated May 25, 2015 (*enclosed as Annexure 5 – Pg. 33*). Against this backdrop, it would be an overreach to contend that Article 12(7) of the India-



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Denmark DTAA concluded in 1989 could have contemplated or anticipated an excess-interest limitation based on thin-capitalization standards that were formulated decades later, more so, in the absence of any amendments/ clarifications in this regard, despite other changes being carried out in 2015.

54. Without prejudice to the above, the Appellant submits that it subsequently executed a BAPA dated 22.01.2024 (submitted during the course of hearing – enclosed as *Annexure 1 – Pg. 22, relevant pg. 25*) with the CBDT entered pursuant to section 92CC of the Act. The ECB interest payable by the Appellant to Vestas Denmark is a ‘covered transaction’ under the BAPA, and the impugned ECB interest is agreed by the CBDT to be at arms’ length without warranting any further adjustment, for the block period of FY 2011-12 to 2019-20 (*which includes the Impugned AY*).
55. The BAPA, therefore, substantiates and conclusively establishes the Appellant’s position that the ECB-interest incurred towards Vestas Denmark is at arm’s length, and further that the said position has been accepted by the CBDT.
56. The Appellant therefore submits that the provisions of Article 12(7) of the India – Denmark DTAA are not applicable to the facts of the present case, as summarised below:
 - a. Article 24(4) of the India-Denmark DTAA mandates parity in interest deductions between payments made to residents and non-residents, under the same conditions thereby eliminating discrimination, except in cases where Article 12(7), dealing with non-arms’ length transactions, is applicable.
 - b. Where the interest is demonstrated and accepted to be at arms’ length, the provisions of Article 12(7) are not applicable, and consequently the non-discrimination clause under Article 24(4) remains fully operative without restrictions.
 - c. The question of applicability of Article 12(7) of the India-Denmark DTAA does not arise in the present case for the following reasons:
 - i. No arms’ length adjustments were made in the Appellant’s TP Order for the Impugned Year
 - ii. The disallowance made u/s. 94B of the Act in the TP Order for the Impugned AY is merely a limitation on the deductible interest for the Impugned AY, and is neither solely attributable to special relationship between the Appellant and Vestas Denmark nor is determined to be in deviation with the arms’ length interest rate in the specific facts and circumstances of the case. Hence, the



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same is *not covered by the exceptions* provided under the non-discrimination clause under Article 24(4) of the India-Denmark DTAA.

- iii. The interest limitation u/s. 94B of the Act is discriminatory in nature, in so far as it limits the deduction of interest payments to a non-resident AE, while permitting deductions for the entire interest paid to a resident AE. Hence, the same is covered by the beneficial provisions of Article 24(4) of the India-Denmark DTAA read with Section 90 of the Act.
 - iv. The Appellant's ECB-interest for the Impugned AY was subsequently agreed to be arms' length by the Revenue, under the Appellant's BAPA.
57. It is a settled position of law that the provisions the tax treaty are applicable over the provisions of the Act, to the extent that they are more beneficial to the Assessee, in terms of Section 90(2) of the Act. Reliance is placed on circular 333, Engineering Analysis Center of Excellence [432 ITR 471 -SC] and Azadi Bachao Andolan[263 ITR 706 - SC].
58. Based on the above, the disallowance of RS. 18.47 Crores u/s. 94B of the Act is discriminatory in nature and violative of Article 24(4) of the India–Denmark DTAA and accordingly the entire disallowance should be deleted.

B. Subvention income

59. The Appellant respectfully submits that, the Ld. DR's contention that the addition of subvention income to the net block of assets would inflate depreciation in subsequent years is wholly misconceived. The inclusion of the subvention income amounting to RS. 23.14 Crores in the net block of assets is solely for the limited purpose of transfer pricing benchmarking while computing the profit level indicator and does not entail any addition to the gross block of assets as recognized under the Income-tax Act or in the books of account. The said treatment is confined to the transfer pricing analysis and has no bearing on the computation of depreciation either under the Act or in the financial statements. Consequently, there is no question of any enhanced or inflated depreciation being claimed in subsequent years, and accordingly this contention of the Ld. DR is factually and legally untenable.

C. Deductible interest

60. Placing reliance on the decision of the Mumbai Bench of Hon'ble Tribunal in Beauty Etoile Pvt. Ltd. (supra), theAppellant submits that the interest once disallowed cannot again be counted in determining the limitation of interest u/s. 94B of the Act. If, hypothetically, where the entire interest is already disallowed in the Statement of



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Total Income, it would be wholly illogical for the Revenue to still invoke section 94B of the Act to “further” disallow the same interest, as the same would result into a double disallowance which is legally unsustainable.

61. Allowing such interpretation by the Revenue would *also create anomalous and revenue-adverse consequences*. It would permit taxpayers to route various disallowed interests (*capitalised interest, interest not related to business, interest disallowed for TDS or TP reasons, etc.*) through section 94B of the Act, thereby availing the carry-forward mechanism u/s. 94B(4) of the Act, and setting them off in subsequent years. *Such an outcome would, paradoxically, convert presently disallowed interest into a future deductible item*, which is neither intended by the provision nor consistent with sound tax policy.
62. Accordingly, the Appellant prays that the errors in the Ld. TPO’s computation be rectified and the disallowance u/s. 94B of the Act, if any, be recomputed on the above corrected basis.

10. We have heard the rival submissions and perused the record, paper books and case laws relied upon. The Id.AR for the assessee, with regard to the ‘Non-Discrimination under Article 24(4)’, submitted that Article 24(4) of the India–Denmark DTAA mandates that interest paid by an Indian enterprise to a Danish resident shall be deductible under the same conditions as if paid to an Indian resident. Section 94B restricts deductibility only where interest is paid to a non-resident AE and does not apply where interest is paid to a resident AE. Hence, it discriminates solely on the basis of residential status. Reliance was placed on OECD Commentary on Article 24 and judicial precedents including Herbalife International India Pvt. Ltd, Mitsubishi Corporation India Pvt. Ltd, Cognizant Technology Solutions India Pvt. Ltd and LinkedIn Technology Information Pvt. Ltd referred supra. It was contended that thin capitalization rules applying only to non-resident creditors fall foul of non-discrimination clauses unless specifically carved out (as in India-Australia DTAA)(Pg. 28 of Paper Book).



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11. With regard to the 'Inapplicability of Article 12(7)' the Id.AR for the assessee argued that Article 12(7) applies only where interest exceeds arm's length due to special relationship. In the present case the TPO accepted the arm's length nature of ECB interest.No transfer pricing adjustment was made.Section 94B operates as a mechanical EBITDA-based limitation, not as an arm's length adjustment.Further reliance was placed on the decision of the Mumbai Tribunal in Beauty Etoile Pvt Ltd (referred supra) (Pg. 89 of Paper Book) holding that section 94B is not a benchmarking method.It was also submitted that a Bilateral Advance Pricing Agreement (BAPA) dated 22.01.2024 covering the relevant year confirmed the arm's length nature of ECB interest.

12. With regard to 'Without Prejudice - Computational Errors', the assessee contended that TPO adopted net depreciation of Rs. 66.60 crores instead of actual gross depreciation of Rs. 89.74 crores. Netting off subvention income distorted EBITDA. Reliance placed on Kedarnath Jute Mfg. Co. Ltd.

Regarding Interest Inclusion Error,Rs. 1.67 crores (Ind AS unwinding) is not "paid or payable".Rs. 9.67 crores capital interest already disallowed.

Section 94B applies only to deductible interest. Reliance again placed on Beauty Etoile Pvt. Ltd.

The Ld. DR contended Article 12(7) overrides Article 24(4) where special relationship exists. Section 94B disallowance represents "excess interest". Depreciation figure should be as per P&L (RS. 66.60 crores).Section 94B begins with a non-obstante clause hence other disallowances cannot reduce total interest.



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13. Our adjudication:

A. Whether Section 94B is overridden by Article 24(4)?

Article 24(4) clearly mandates parity in deductibility of interest paid to residents and non-residents, except where Article 12(7) applies. Section 94B applies only when debt is from a non-resident AE. No corresponding restriction exists for resident AE borrowings. Thus, prima facie, differential treatment arises based on residence. Judicial precedents in Herbalife, Mitsubishi and Cognizant (supra) have consistently held that domestic provisions resulting in adverse deductibility conditions for payments to non-residents violate non-discrimination clauses.

Further we note that the Revenue's reliance on Article 12(7) is misplaced. Article 12(7) addresses excess interest due to arm's length deviation. In the present case TPO accepted arm's length nature of interest. No TP adjustment was made. Disallowance arises solely due to EBITDA threshold. Therefore, Article 12(7) is not attracted. In absence of specific treaty carve-out (as in India-Australia DTAA), thin capitalization rules that apply exclusively to non-residents violate Article 24(4). Accordingly, we hold that disallowance u/s. 94B in the present case is discriminatory and cannot be sustained in view of Article 24(4) read with section 90(2) of the Act. The entire disallowance of Rs.18.47 crores is directed to be deleted.

Since we have allowed the legal ground, adjudication on computation becomes academic. However, briefly EBITDA must reflect actual depreciation and not accounting netting. Only deductible interest can enter section 94B computation. Notional Ind



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AS adjustments and capitalized interest already disallowed cannot be again considered. The assessee's alternative plea also merits acceptance.

14. The appeal of the assessee is allowed.

Order pronounced in open court on the day of 09th March 2026, in Chennai

Sd/-
(एस. आर. रघुनाथा)
(S.R.RAGHUNATHA)

लेखा सदस्य/**ACCOUNTANT MEMBER**

Sd/-
(मनु कुमार गिरि)
(MANU KUMAR GIRI)

न्यायिक सदस्य/**JUDICIAL MEMBER**

चेन्नई/Chennai,

दिनांक/Dated: 09th March 2026.

SNDP, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT, Chennai / Madurai / Salem / Coimbatore.
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF