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of a participation' and 'alienation' are not defined therein, the same will have the meaning under the Act.

21. In the facts and in the circumstances of the case, the learned Assessing Officer has erred in law in interpreting the word 'participation' to mean 'indirect participation' by referring to the provisions of article 3(2) without considering the context in which it was used under the India-Belgium Tax Treaty.

22. In the facts and in the circumstances of the case, the learned Assessing Officer has erred in law in referring to article 3 of the India-Belgium Tax Treaty, without taking into consideration that article 3 only suggests that the terms not defined under the tax treaty shall have the same meaning under the Act and does not suggest incorporating the deeming fictions under the Act into the tax treaty.

23. In the facts and in the circumstances of the case, the learned Assessing Officer erred in relying on the provisions of section 2(18), 2(22)(e), 2(32) and 2(47) of the Act for the purposes of the meaning of the undefined terms in the tax treaty, i. e., 'forming part of a participation' and 'alienation'.

No valid distinction between the present facts and Sanofi

24. In the facts and in the circumstances of the case, the hon'ble Dispute Resolution Panel erred in law confirming the dissimilarities as pointed out by the Assessing Officer between the facts of the present case and the judgment of the hon'ble Andhra High Court in the case of *Sanofi Pasteur Holding SA*. Without considering the principle which has been laid down by the hon'ble High Court and the manner in which the ratio of the judgment can be made applicable to the facts of the present case.

25. In the facts and in the circumstances of the case, the hon'ble Dispute Resolution Panel erred in law in observing the reasons as to why the judgment of the hon'ble Andhra High Court in the case of *Sanofi Pasteur Holding SA* cannot be applied to the facts of the present case by stating that in that case the company whose shares were sold was a French company whereas in the present case was a Singapore company cannot be the reasoning to reject the binding nature of the applicability of the judgment of the hon'ble High Court.

Substantive provision cannot be implemented without the procedural provisions

26. In the facts and in the circumstances of the case, the learned Assessing Officer and the hon'ble Dispute Resolution Panel erred in

holding that explanations are clarificatory in nature and they aid and support the main section, i. e., section 9(1) and the absence of an explanation, will not render the existing section void or incapable of being administered, without taking into account that if the provision cannot be implemented in the absence of computation provisions, the income cannot be computed and charged to tax under that provision and without having regard to the settled law in this regard as laid down by the hon'ble Supreme Court.

27. In the facts and in the circumstances of the case, the learned Assessing Officer and the hon'ble Dispute Resolution Panel erred in rejecting the appellant's plea that due to the absence of computation mechanism for deriving the value of shares or interest referred to in *Explanation 5* to section 9(1)(i) of the Act for the assessment year 2015-16, the computation mechanism fails and the capital gains cannot be determined.

28. In the facts and in the circumstances of the case, the hon'ble Dispute Resolution Panel has erred in observing that 'The purchase value and the sale value of these shares are already available with the Assessing Officer. The entire purchase and sale value was clearly related to asset situated in India. Therefore, there as no difficulty in arriving at the value of sale and purchase consideration' on the issue being argued that the capital gains cannot be computed, without having to regard to the fact that the general computation mechanism cannot be applied to a provision which specifically intends to prescribe a computation mechanism and in the absence of such computation mechanism, the provision cannot be given effect.

29. Without prejudice, the learned Assessing Officer erred in concluding that the entire short-term capital gains income of Rs. 163,97,61,840 arising from the indirect transfer of shares of Accelyst India is deemed to be accruing and arising in India under section 9(1)(i) read with *Explanation 5* thereto, without giving due consideration to actual income which could have been taxable in India."

2 Briefly stated, the assessee-company which is a tax resident of Belgium is a venture capital investor listed on Euronext, Brussels and had invested into start ups of India like Myntra, Freecharge, etc. As per the records, the assessee-company had invested across nine countries in two continents. The assessee-company had e-filed its return of income for the assessment year 2015-16 on September 25, 2015, wherein it had declared its total income at Rs. nil and claimed a refund of Rs. 70,93,60,000. Subsequently,

the case of the assessee was selected for scrutiny assessment under section 143(2) of the Act.

In the course of the assessment proceedings it was observed by the Assessing Officer that the assessee had vide a share subscription agreement dated June 9, 2014 agreed to subscribe to 82,41,285 (Nos.) of Series B Preference shares of Accelyst Pte Ltd., a company which was a tax resident of Singapore. Further, the assessee-company had vide a share subscription agreement dated December 12, 2014 agreed to subscribe to 31,34,624 (Nos.) of Series C Preference shares of Accelyst Pte. Ltd. Post-subscription of Series C Preference shares the assessee had a stake holding of 11.34 per cent. in Accelyst Pte. Ltd., Singapore. On a perusal of the records, it was noticed by the Assessing Officer that Accelyst Pte Ltd., Singapore was holding 99.99 per cent. of the shares of M/s. Accelyst Solutions Pvt. Ltd., an Indian company. 3

During the year under consideration the assessee had sold its entire 11.34 per cent. stake holding in Accelyst Pte. Ltd., Singapore to M/s. Jasper Infotech Pvt. Ltd., an Indian company, for a total consideration of USD 4,73,62,724. M/s. Jasper Infotech Pvt. Ltd. while making the payment of the consideration for acquiring the shares of Accelyst Pte Ltd., Singapore to the assessee-company had deducted TDS of Rs. 70,93,60,990 under section 195 of the Act. It was observed by the Assessing Officer that the assessee-company had returned its income for the year under consideration at Rs. nil and had claimed a refund of the entire amount of TDS of Rs. 70,93,60,990. Being of the view, that the assessee by transferring the shares of the aforesaid company, viz., Accelyst Pte Ltd., Singapore, had in fact carried out an indirect transfer of the shares of its subsidiary Indian company viz. M/s. Accelyst Solutions Pvt. Ltd., the Assessing Officer worked out the "short-term capital gain" (for short "STCG") at Rs. 163,97,61,840, which as per him was liable to be assessed in the hands of the assessee in India, as under : 4

Sr. No.	*Name of Co. and particulars of shares*	*Date of acquisition*	*No. of shares*	*Date of transfer/ sale*	*No. of shares*	*STCG (Rs.)*
Accelyst Singapore Pte. Ltd.						
1						
1.1	Series B Preference Shares	9-6-14	82,41,285	26-3-15	82,41,285	145,00,03,918
1.2	Series C Preference Shares	23-12-14	31,34,624	26-3-15	31,34,624	18,97,57,921
Total						163,97,61,840

In the backdrop of his aforesaid observations the Assessing Officer called upon the assessee to explain as to why it had failed to offer the aforesaid amount of income from short-term capital gain on alienation of shares for tax in its return of income for the year under consideration. In reply, it was the claim of the assessee that as per article 13(6) of the India-Belgium Tax Treaty which was applicable to the current fact pattern of the transaction under consideration, the gains arising from the alienation of the aforesaid shares of Accelyst Pte. Ltd., Singapore were to be taxed in the contracting State of which the alienator was a resident. As such, it was submitted by the assessee that as it was a resident of Belgium, therefore, the taxability under article 13(6) did arise in Belgium and not in India. In order to fortify its aforesaid claim the assessee had also relied upon the judgment of the hon'ble High Court of Andhra Pradesh in the case of *Sanofi Pasteur Holding SA* v. *Department of Revenue* [2013] 354 ITR 316 (AP) ; [2013] 30 taxmann.com 222 (AP).

5 The Assessing Officer after deliberating on the facts of the case was however not persuaded to subscribe to the claim of the assessee that the gain on the alienation of the shares was not exigible to tax in India. The Assessing Officer was of the view that article 13(6) of the India-Belgium Tax Treaty did not give a blanket exemption to all types of capital gains arising in India, and was in fact conditional and applicable only where the other sub-clauses of article 13 were not attracted. Observing that the gains from the alienation of the shares under consideration were liable to be assessed in India as per article 13(5) of the India-Belgium Tax Treaty, the Assessing Officer called upon the assessee to put forth an explanation as regards the same. Also, the Assessing Officer observed that Accelyst Pte Ltd., Singapore did not have any other asset except for its investments in Accelyst Solutions Pvt. Ltd. whose businesses were located and carried out in India. As such, the Assessing Officer was of the view that as the shares of Accelyst Pte Ltd., Singapore derived their value substantially from the assets of Accelyst Solutions Pvt. Ltd., therefore, as per "*Explanation 5*" to section 9(1)(i) of the Act, the preference shares of Accelyst Pte Ltd., Singapore sold by the assessee were to be deemed to be situated in India. It was observed by the Assessing Officer that transfer/alienation of the preference shares of Accelyst Pte. Ltd., Singapore was an indirect transfer of shares of Accelyst Solutions Pvt. Ltd. Also, the Assessing Officer was of the view that though Accelyst Pte. Ltd., Singapore may be a resident of Singapore, yet for the purposes of the Income-tax Act, 1961, as well as the India-Belgium Tax Treaty, and by virtue of *Explanation 5* to section 9(1)(i) of the Act the preference shares of Accelyst Pte. Ltd., Singapore were to be deemed to be located in India and the short-term capital gain arising from transfer of the same to M/s. Jasper Infotech Pvt. Ltd. was income deemed to accrue or arise, and also chargeable to tax in India. As regards the reliance that was placed by the assessee on the judgment of the hon'ble High Court of Andhra Pradesh in the case of *Sanofi Pasteur Holding SA* v. *Department of Revenue* [2013] 354 ITR 316 (AP) ; [2013] 30 taxmann.com 222 (AP), the Assessing Officer was of the view that the Revenue had not accepted the said decision and had preferred a "special leave petition" (SLP) before the hon'ble Supreme Court which was pending disposal. On the basis of his aforesaid observations, the Assessing Officer called upon the assessee to explain as to why the short-term capital gain from transfer of the preference shares of Accelyst Pte. Ltd., Singapore to M/s. Jasper Infotech Pvt. Ltd. may not be brought to tax at 40 per cent.

The assessee in its reply submitted before the Assessing Officer that two 6
fold conditions were cumulatively required to be satisfied for applicability of article 13(5) of the India-Belgium Tax Treaty, viz., (i) that, the transfer of shares should represent participation of at least 10 per cent. in the capital stock of the company ; and (ii) that, the company whose shares are proposed to be transferred should be a resident of a contracting State. It was submitted by the assessee that for applicability of article 13(5) of the India-Belgium Tax Treaty and taxability of the transaction of transfer of shares in India, the foremost condition was that the company whose shares were transferred should be a resident of India, and such shares should represent at least 10 per cent. of participation in the capital stock of the company. In the backdrop of the facts involved in its case, it was submitted by the assessee that as Accelyst Pte. Ltd., Singapore was not a resident of either of the contracting States, viz., India or Belgium, therefore, article 13(5) of the India-Belgium Tax Treaty in the absence of satisfaction of the said condition would not be applicable to the current fact pattern of the transaction of transfer of shares under consideration. Accordingly, it was submitted by the assessee that the taxability of the gains, if any, on transfer of shares of Accelyst Pte. Ltd., Singapore by the assessee-company would be regulated by the residuary provision, viz., article 13(6) of the India-Belgium Tax Treaty. Adverting to article 13(6) of the India-Belgium Tax Treaty, it was submitted by the assessee that the same provided that the gains derived from alienation of any property would be taxed in the contracting State of which the alienator was a resident. As such, it was submitted by the assessee that as the assessee-company, i. e., the alienator was a resident of Belgium, therefore, the taxability of the gains on the transfer of the shares, if any, would arise only in Belgium and not in India.

In order to buttress its aforesaid claim, the assessee once again relied on the judgment of the hon'ble High Court of Andhra Pradesh in *Sanofi Pasteur Holding SA* v. *Department of Revenue* [2013] 354 ITR 316 (AP) ; [2013] 30 taxmann.com 222 (AP). It was submitted by the assessee that the hon'ble High Court in its aforesaid judgment while interpreting article 14(5) of the India-France Tax Treaty which was similarly worded as article 13(5) of the India-Belgium Tax Treaty, had observed, that the same did not permit a "see-through" approach, whereby if the shares of a holding company were transferred, such transfer could not be regarded as a transfer of shares of its subsidiary entity. In fact, the hon'ble High Court had observed that accommodating a "see-through" approach in article 14(5) of the India-France Tax Treaty would transgress the negotiated terms of the Double Taxation Avoidance Agreement.

7 However, the Assessing Officer after deliberating on the reply of the assessee did not find favour with the same. The Assessing Officer was of the view that though Accelyst Pte. Ltd., Singapore was not a resident of India, yet its shares were deemed to be situated in India by virtue of *Explanation 5* to section 9(1)(i) of the Act, and were deemed to be the shares of a company resident in India. On the basis of his aforesaid observations, the Assessing Officer was of the view that as the transfer of the shares of Accelyst Pte. Ltd., Singapore was an indirect transfer of assets situated in India, the same was to be deemed to be the "transfer of capital stock of a company resident of India". Accordingly, the Assessing Officer was of the view that the transaction of transfer of shares under the current fact pattern was taxable as per the *Explanation 5* to section 9(1)(i) of the Income-tax Act, 1961. As regards the taxability of the short-term capital gain on transfer of shares under consideration as per the India-Belgium Tax Treaty, the Assessing Officer referring to article 13(5) of the Tax Treaty, observed that the term "forming part of a participation" therein used was not defined in the treaty. Accordingly, drawing support from article 3 of the India-Belgium Tax Treaty the Assessing Officer interpreted the same by borrowing the meaning of the term "participate" as was used in section 2(18), section 2(22)(e) and section 2(32) of the Income-tax Act, 1961. Observing, that the term "participate" had been used in the context of participation in the profits of a company, the Assessing Officer held a conviction that the term "participate" or "participation" was used in the Income-tax Act, 1961 in respect of shares or any interest in a company. Accordingly, on the basis of his aforesaid observations the Assessing Officer was of the view that the term "forming part of a participation" must be understood to be referring only to the share capital of a company. Further, observing that the term

"alienation" had also not been defined in the India-Belgium Tax Treaty, the Assessing Officer for the purpose of construing the same transposed the meaning of the term "transfer" as envisaged in *Explanation* to section 2(47) of the Act (as was inserted by the Finance Act, 2012 with retrospective effect from April 1, 1962). On the basis of his aforesaid deliberations, the Assessing Officer concluded that the right to tax the transaction of transfer of shares under consideration was allocated to India under article 13(5) of the India-Belgium Tax Treaty Accordingly, the Assessing Officer observed that by reading article 3 of the India-Belgium Tax Treaty with *Explanation 5* of section 9(1)(i) of the Act, even for the purposes of the India-Belgium Tax Treaty the shares of Accelyst Pte. Ltd., Singapore were to be deemed to be the shares of a company resident in India. It was thus observed by the Assessing Officer that as the transfer transaction of 11.34 per cent. shares of Accelyst Pte. Ltd., Singapore by the assessee-company formed (indirectly) part of a participation of the capital stock of Accelyst Solutions Pvt. Ltd., therefore, the same was taxable in India as per article 13(5) of the India-Belgium Tax Treaty. Also, the Assessing Officer as per his observations recorded in the assessment order declined to subscribe to the reliance placed by the assessee on the judgment of the hon'ble High Court of Andhra Pradesh in *Sanofi Pasteur Holding SA* v. *Department of Revenue* [2013] 354 ITR 316 (AP), for the reason, that the same was distinguishable on facts. Accordingly, the Assessing Officer on the basis of his aforesaid deliberations, vide his draft assessment order passed under section143(3) read with section 144C(1), dated December 28, 2017 proposed to assess the short-term capital gain of Rs. 163,97,61,840 on transfer of the shares of Accelyst Pte. Ltd., Singapore as per article 13(5) of the India-Belgium Tax Treaty in the hands of the assessee-company.

Aggrieved, the assessee filed objections before the Dispute Resolution Panel-2, Mumbai (for short, "DRP"). However, the Dispute Resolution Panel did not find any infirmity in the view taken by the Assessing Officer as regards assessing of the short-term capital gain of Rs. 163,97,61,840 on the transfer of shares of Accelyst Pte. Ltd., Singapore by the assessee-company and rejected the objections filed by the assessee. **8**

The Assessing Officer after receiving the order passed by the Dispute Resolution Panel under section 144C(5) of the Act dated September 27, 2018, therein gave effect to the same and vide his order passed under section 143(3) read with section 144C(13) dated October 15, 2018 brought the short-term capital gain of Rs. 163,97,61,840 on the transfer of shares of Acelyst Pte. Ltd., Singapore to tax in the hands of the assessee-company at 43.26 per cent. **9**

10 The assessee being aggrieved with the assessment framed by the Assessing Officer under section 143(3) read with section 144C(13) dated October 15, 2018, has carried the matter in appeal before us. The learned authorised representative (for short, "AR") for the assessee Shri Porus Kaka, senior advocate took us through the facts of the case. It was submitted by the learned authorised representative that the assessee-company which was a venture capital investor listed on Euronext, Brussels was admittedly a tax resident of Belgium. In order to buttress the claim of residency of the assessee the learned authorised representative took us through the tax residency certificate (TRC) of the assessee-company at page 479 of the "assessee's paper book" (for short, "APB"). It was submitted by the learned authorised representative, that the assessee had subscribed to the shares of Accelyst Pte Ltd., a company which was a tax resident of Singapore, on two occasions, viz., (i) vide a share subscription agreement dated June 9, 2014 the assessee had subscribed to 82,41,285 (Nos.) of Series B Preference shares ; and (ii) vide a share subscription agreement dated December 23, 2014 the assessee had subscribed to 31,34,624 (Nos.) of Series C Preference shares. It was submitted by the learned authorised representative that the assessee had acquired a total stake holding of 11.34 per cent. in Accelyst Pte. Ltd., Singapore. It was submitted by the learned authorised representative that the fact that Accelyst Pte. Ltd. was a resident of Singapore was admitted by the Assessing Officer at page 22, para 5.4.7 of the assessment order. Also, the Dispute Resolution Panel at page 20-para 12.13 of its order had accepted that Accelyst Pte. Ltd. was a Singapore based company. It was submitted by the learned authorised representative that the assessee had vide an agreement dated March 26, 2015 transferred its entire 11.34 per cent. share-holding of Accelyst Pte. Ltd., Singapore to M/s. Jasper Infotech Pvt. Ltd., New Delhi for a total consideration of USD 4,73,62,724. It was averred by the learned authorised representative, that as in view of article 13(6) of the India-Belgium Tax Treaty the aforesaid transaction of sale of shares of Accelyst Pte. Ltd., Singapore by the assessee to M/s. Jasper Infotech Pvt. Ltd. was not taxable in India, therefore, the assessee had filed its return of income for the year under consideration declaring a nil income and had claimed the refund of the entire amount of TDS of Rs. 70,93,60,990 that was deducted under section 195 of the Act by M/s. Jasper Infotech Pvt. Ltd. while making the payment of consideration for acquiring the shares of Accelyst Pte Ltd., Singapore to the assessee-company. It was submitted by the learned authorised representative that in view of the fact that Accelyst Pte. Ltd., Singapore was having a shareholding of 99.99 per cent. in Accelyst Solutions Pvt. Ltd., the Assessing Officer/Dispute Resolution

Panel had pursuant to *Explanation 5* to section 9(1)(i) of the Act treated the sale of shares of Accelyst Pte. Ltd., Singapore as an indirect transfer of shares of Accelyst Solutions Pvt. Ltd. and had therein brought the short-term capital gain of Rs. 163,97,61,840 to tax at 43.26 per cent. in the hands of the assessee. It was submitted by the learned authorised representative that though the Assessing Officer/Dispute Resolution Panel had accepted that Accelyst Pte. Ltd., Singapore was not a resident of India, yet its shares were deemed to be situated in India by virtue of *Explanation 5* to section 9(1)(i) of the Act despite the fact that there was no corresponding provision to so infer either in the India-Belgium Tax Treaty or India-Singapore Tax Treaty. Apart from that, it was the claim of the learned authorised representative that the Assessing Officer/Dispute Resolution Panel had erroneously extended the applicability of the deeming *Explanation 5* to section 9(1)(i) of the Act and had arrived at an absolutely baseless conclusion that Accelyst Pte. Ltd., Singapore was to be deemed to be a company resident in India, despite accepting that it was a resident of Singapore. Objecting to the view taken by the lower authorities, it was submitted by the learned authorised representative that both of the lower authorities had failed to appreciate that a unilateral amendment in the domestic law could not override the provisions of the Double Taxation Avoidance Agreement. As such, it was the claim of the learned authorised representative, that the Assessing Officer/Dispute Resolution Panel by drawing support from *Explanation 5* to section 9(1)(i) of the Act had most whimsically treated Accelyst Pte. Ltd., a Singapore based company as a resident of India, despite the fact that there was no provision to the said effect either under the India-Belgium Double Taxation Avoidance Agreement or the India-Singapore Double Taxation Avoidance Agreement. It was submitted by the learned authorised representative that *Explanation 5* to section 9(1)(i) was made available in the Income-tax Act, 1961 by the Legislature for the limited purpose of creating a deeming fiction, whereby for the purposes of taxation of capital gains under the Income-tax Act the shares of a foreign company were to be deemed to be situated in India, if it derived substantial value from India but the same by no means could be stretched beyond comprehension for treating a foreign company itself as a resident of India. In fact, it was averred by the learned authorised representative, that despite *Explanation 5* to section 9(1)(i) of the Act a foreign company could not be treated as a company resident in India even under the Income-tax Act, leave alone the tax treaty It was submitted by the learned authorised representative that backed by his aforesaid erroneous and illogical interpretation the Assessing Officer had wrongly concluded that since 11.34 per cent. shares of Accelyst Pte. Ltd., Singapore being transferred (which were more than 10 per cent. shares prescribed in the Tax Treaty) were forming (indirectly) part of a participation of capital stock of Accelyst Solutions Pvt. Ltd., i. e., the Indian company, therefore, the alienation of such shares would be taxable as per article 13(5) of the India-Belgium Tax Treaty. It was submitted by the learned authorised representative, that the Assessing Officer had in effect erroneously read the deeming provisions of the Income-tax Act pertaining to indirect transfer of shares into the India-Belgium Tax Treaty, and had failed to appreciate that in the absence of any amendment to the provisions of the said tax treaty, an amendment in the Income-tax Act could not have been read into the same. As such, it was averred by the learned authorised representative that the Assessing Officer by adopting the aforesaid interpretation had intended to treat the amendment of the domestic law as overriding the India-Belgium Tax Treaty, despite the fact, that there was no specific provision to the said effect in the treaty. Accordingly, it was submitted by the learned authorised representative that as per the settled position of law amendments made either retrospective or prospective to the provisions of the Income-tax Act could not be read into the provisions of the tax treaties, unless specific provisions had been made to the said effect in the Double Taxation Avoidance Agreement. In order to buttress his aforesaid claim the learned authorised representative relied on the judgment of the hon'ble High Court of Delhi in *DIT* v. *New Skies Satellite BV* [2016] 382 ITR 114 (Delhi) and that of the hon'ble High Court of Bombay in *CIT* v. *Siemens Aktiongesellschaft* [2009] 310 ITR 320 (Bom). Apart from that, the learned authorised representative in order to fortify his claim that *Explanation 5* to section 9(1)(i) of the Act cannot override the provisions of the Double Taxation Avoidance Agreement, therein drew support from the speech of the Finance Minister, dated May 7, 2012, as regards the introduction of the provisions relating to indirect transfer of shares that was made available on the statute vide the Finance Bill, 2012. The learned authorised representative took us through the relevant extract of the aforesaid speech of the Finance Minister, wherein the latter explaining the intent and the reasoning behind introducing the indirect transfer provisions in the statute had stated that the same would not override the provisions of the Double Taxation Avoidance Agreement which India had with 82 countries. The learned authorised representative by placing reliance on the judgment of the hon'ble Supreme Court in the case of *K. P. Varghese* v. *ITO* [1981] 131 ITR 597 (SC) ; [1981] 7 Taxman 13 (SC) submitted that the hon'ble apex court had observed that the speech made by the mover of the Bill explaining the reason for introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief that was sought to be remedied by the legislation and the object and purpose for which the legislation was enacted. Adverting to article 13(5) of the India-Belgium Tax Treaty, it was submitted by the learned authorised representative that as Accelyst Pte. Ltd. was admittedly a company resident of Singapore, therefore, article 13(5) of the India-Belgium Tax Treaty in the absence of any provision that would permit Accelyst Pte. Ltd., Singapore to be treated as a resident of India under the Income-tax Act or the Double Taxation Avoidance Agreement could not have been applied to the transaction of transfer of shares of the said company. It was vehemently submitted by the learned authorised representative that the claim of the Revenue that the investments outside India of Belgium companies are taxable in India was absurd, illogical and contrary to the India-Belgium Tax Treaty Further, it was submitted by the learned authorised representative, that in case the aforesaid view of the Revenue was to be accepted, then the same would render article 13(5) and article 13(6) of the India-Belgium Tax Treaty as infructuous. Also, it was averred by the learned authorised representative that subscribing to the aforesaid view of the Revenue would also render the Double Taxation Avoidance Agreement between Singapore and Belgium as infructuous. In order to drive home his aforesaid claim, it was submitted by the learned authorised representative that if the claim of the Revenue deeming Accelyst Pte. Ltd., Singapore to be a resident of India or deeming its shares to be situated in India was accepted, then the protocol signed with respect to India-Singapore Tax Treaty on articles relating to capital gains would be rendered as redundant. Elaborating on his aforesaid contention, it was submitted by the learned authorised representative that under the protocol between India and Singapore, it was specifically provided to the contrary, that all capital gains investments made prior to 2017 in India of Singapore residents would be taxable only in Singapore. As such, it was the claim of the learned authorised representative that the India-Singapore Tax Treaty prior to April 1, 2017 allocated such rights to tax capital gains on sale of shares only to Singapore. On the basis of his aforesaid contention, it was averred by the learned authorised representative that Singapore residents prior to April 1, 2017 despite directly holding shares in Indian companies were not permitted to be taxed in India. It was thus submitted by the learned authorised representative that the action of the Assessing Officer in taxing the transfer transaction of shares of Accelyst Pte. Ltd., Singapore clearly militated against the India-Singapore Tax Treaty As regards the support drawn by the Assessing Officer/Dispute Resolution Panel from *Explanation*

5 to section 9(1)(i) of the Income-tax Act to conclude that Accelyst Pte. Ltd., Singapore was a resident of India, it was submitted by the learned authorised representative that though *Explanation 5* to section 9(1)(i) of the Income-tax Act only deemed the shares to be situated in India, if such company derives its value substantially from the assets located in India, but the same did not deem a foreign company to become a resident in India, which was a pre-condition for invoking article 13(5) of the India-Belgium Tax Treaty. It was vehemently submitted by the learned authorised representative that *Explanation 5* to section 9(1)(i) of the Income-tax Act did not define the residence of a person but only deemed shares to be located in India. It was submitted by the learned authorised representative that if a foreign company was to be deemed to be a resident in India on the basis of its underlying assets situated in India, then an amendment was required to the definition of "resident" in section 6(3) of the Income-tax Act and article 4 of the India-Belgium Tax Treaty, neither of which was however made available. It was submitted by the learned authorised representative that neither of the lower authorities had explained as to how the word "resident" defined under both the domestic laws and the India-Belgium Double Taxation Avoidance Agreement gets amended by *Explanation 5* to section 9(1)(i) of the Income-tax Act. It was vehemently submitted by the learned authorised representative that if the version of the Revenue was to be accepted then all the foreign companies having one asset out of the many, namely, a share deriving value substantially from India and despite being located outside India and carrying on business outside India would become resident pursuant to *Explanation 5* to section 9(1)(i), that would result to taxability of their global income, which being extra territorial operation of the Income-tax Act and contrary to the provisions of law would render the provision itself unconstitutional. It was the claim of the learned authorised representative that as the applicability of article 13(5) stood clearly excluded to the current fact pattern of the transaction of transfer of shares under consideration, therefore, the taxation of the capital gains under the India-Belgium Tax Treaty, as rightly claimed by the assessee was regulated by article 13(6), i. e., the residuary provisions of the tax treaty. It was further averred by the learned authorised representative that unlike article 13(4) of the India-Belgium Tax Treaty no "see-through" approach was provided for in article 13(5). Also, the learned authorised representative stressed on the fact that though the hon'ble High Court of Andhra Pradesh in the case of *Sanofi Pasteur Holding SA* v. *Department of Revenue* [2013] 354 ITR 316 (AP) ; [2013] 30 taxmann.com 222 (AP), had observed, in the context of a similarly worded article 14(5) of the India-France Double Taxation

Avoidance Agreement that the same did not permit a "see-through" approach, whereby if the shares of a holding company are transferred, such transfer cannot be regarded as a transfer of shares of its subsidiary entity, but the Assessing Officer/Dispute Resolution Panel had declined to follow the same, for the reason, that the special leave petition of the Revenue in the said case was pending before the hon'ble Supreme Court.

Per contra, the learned Departmental representative (for short, "DR") 11 relied on the orders of the lower authorities. It was submitted by the learned Departmental representative that the assessee-company, viz., Sofina S. A, a Belgium based company was holding 11.34 per cent. shareholding in Accelyst Pte. Ltd., Singapore, which in turn held 99.99 per cent. shareholding of its Indian subsidiary, i. e., Accelyst Solutions Pvt. Ltd. It was submitted by the learned Departmental representative that on transfer by the assessee-company of its entire 11.34 per cent. shareholding of Accelyst Pte Ltd., Singapore to M/s. Jasper Infotech Pvt. Ltd., the Assessing Officer taking cognizance of the fact that the shares derived their value substantially from the shares of its Indian subsidiary, i. e., Accelyst Solutions Pvt. Ltd. had invoked *Explanation 5* to section 9(1)(i) of the Act and taxed the short-term capital gain arising from the sale of such shares in India. It was averred by the learned Departmental representative that the gain on transfer of the shares of Accelyst Pte. Ltd., Singapore had rightly been brought to tax as per article 13(5) of the India-Belgium Tax Treaty. In order to drive home his aforesaid claim, it was submitted by the learned Departmental representative that the current fact pattern of the transaction of transfer of shares by the assessee-company clearly brought the taxability of the gains arising therefrom to tax as per article 13(5) of the India-Belgium Tax Treaty. Adverting to the term "forming part of a participation" used in article 13(5) of the India-Belgium Tax Treaty, it was submitted by the learned Departmental representative that the term "participation" was to be construed as the interest that one company enjoyed by way of share in another company or any interest in the other company. It was submitted by the learned Departmental representative that as the term "participation" was not defined in the India-Belgium Tax Treaty, therefore, the Assessing Officer with the aid of article 3(1) of the Tax Treaty had rightly interpreted the same by borrowing the meaning given to the said term in section 2(18), section 2(22)(e) and section 2(32) of the Income-tax Act, 1961. On the basis of the aforesaid interpretative exercise, it was submitted by the learned Departmental representative that the Assessing Officer had rightly concluded that the word "participation" was the interest that one company enjoyed by way of shares in the other company. As regards the reliance placed by the assessee on the judgment of the hon'ble High Court of Andhra Pradesh in the case of *Sanofi Pasteur Holding SA* v. *Department of Revenue* [2013] 354 ITR 316 (AP), it was averred by the learned Departmental representative that as the same was distinguishable on facts, therefore, the Assessing Officer had rightly declined to follow the same. Apart from that, it was submitted by the learned Departmental representative that the Revenue had not accepted the aforesaid judgment of the hon'ble High Court and had preferred a special leave petition with the hon'ble Supreme Court. The learned Departmental representative had also placed on our record his "written submissions" dated September 20, 2019.

12 We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. As observed by us at length hereinabove, the assessee-company which is a tax resident of Belgium is a venture capital investor listed on Euronext, Brussels and had invested into start ups of India like Myntra, freecharge, etc. As is discernible from the records, the assessee-company had vide a share subscription agreement, dated June 9,2014 agreed to subscribe to 82,41,285 (Nos.) of Series B Preference shares of Accelyst Pte Ltd., a company which was a tax resident of Singapore. Further, the assessee-company had vide a share subscription agreement, dated December 23, 2014 agreed to subscribe to 31,34,624 (Nos.) of Series C Preference shares of Accelyst Pte. Ltd. Post-subscription of Series C Preference shares the assessee had a stake holding of 11.34 per cent. in Accelyst Pte. Ltd., Singapore. As observed by us hereinabove, Accelyst Pte Ltd., Singapore was holding 99.99 per cent. of the shares of M/s. Accelyst Solutions Pvt. Ltd., an Indian company. The assessee-company had during the year under consideration sold its entire 11.34 per cent. stake holding in Accelyst Pte. Ltd., Singapore to M/s. Jasper Infotech Pvt. Ltd., an Indian company, for a total consideration of USD 4,73,62,724. M/s. Jasper Infotech Pvt. Ltd. while making the payment of the consideration for acquiring the shares of Accelyst Pte. Ltd., Singapore to the assessee-company had deducted TDS of Rs. 70,93,60,990 under section 195 of the Act. As the assessee-company was of the view that as per article 13(6) of the India-Belgium Tax Treaty which was applicable to the current fact pattern of the transaction of transfer of shares under consideration, the gains, if any, arising therefrom were exigible to tax only in Belgium, had thus filed its return of income declaring nil income and claimed the refund of the entire amount of TDS of Rs. 70,93,60,990. On the contrary, the Assessing Officer held a conviction that as the assessee by transferring the shares of the aforesaid company,

viz., Accelyst Pte Ltd, Singapore, had indirectly transferred the shares of its subsidiary Indian company viz. M/s. Accelyst Solutions Pvt. Ltd., therefore, the gain arising from the said fact pattern of transaction of transfer of shares was exigible to tax in India, both as per *Explanation 5* to section 9(1)(i) of the Act and also article 13(5) of the India-Belgium Tax Treaty. Accordingly, in the backdrop of his aforesaid deliberations the Assessing Officer had brought to tax short-term capital gain of Rs. 163,97,61,840 in the hands of the assessee.

As can be gathered from a perusal of the aforesaid facts, we find that the **13** controversy involved in the present case lies in a narrow compass, viz., that as to whether the gain arising from the current fact pattern of the transaction of transfer of shares of Accelyst Pte. Ltd., Singapore by the assessee to M/s. Jasper Infotech Pvt. Ltd. is exigible to tax in India as per article 13(5) of India-Belgium Tax Treaty and *Explanation 5* to section 9(1)(i) of the Act as claimed by the Revenue, or is regulated by article 13(6) of the Tax Treaty and is chargeable to tax only in Belgium, as is the claim of the assessee.

Before proceeding any further, it would be relevant to cull out article 13 **14** of the India-Belgium Tax Treaty, which reads as under :

> "13. *Capital gains*.—1. Gains derived by a resident of a contracting State from the alienation of immovable property referred to in article 6 and situated in the other contracting State may be fixed in that other State.
>
> 2. Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a contracting State has in the other contracting State or of movable property pertaining to a fixed base available to a resident of a contracting State in the other contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or together with the whole enterprise) or of such fixed base, may be taxed in that other State.
>
> 3. Gains from the alienation of ships or aircraft operated in international traffic or movable property pertaining to the operation of such ships or aircraft shall be taxable only in the Contracting State of which the alienator is a resident.
>
> 4. Gains from the alienation of shares of the capital stock of a company the property of which consists directly or indirectly principally of immovable property situated in a contracting State may be taxed in that State.

> 5. Gains from the alienation of shares other than those mentioned in paragraph (4,) forming part of a participation of at least 10 per cent. of the capital stock of a company which is a resident of a contracting State may be taxed in that State.
>
> 6. Gains from the alienation of any property other than that mentioned in paragraphs (1), (2), (3), (4) and (5) shall be taxable only in the contracting State of which the alienator is a resident."

Admittedly, the provisions of article 13(1), article 13(2) and article 13(3) of the India-Belgium Tax Treaty have no relevance to the facts of the present case, as the issue herein involved pertains to gains from alienation of shares. Article 13(4) is also not applicable, as the gains in the present case are from the alienation of preference shares of a company which is a tax resident of Singapore, viz., Accelyst Pte. Ltd., the property of which does not consists directly or indirectly principally of immovable property situated in India. At this stage, we may herein observe that article 13(4) envisages a "see-through" provision, which however, is limited only in relation to immovable property. Controversy involved in the present case hinges around the applicability of article 13(5) vis-a-vis article 13(6) of the India-Belgium Tax Treaty to the current fact pattern of the transaction of transfer of shares of Accelyst Pte. Ltd., Singapore by the assessee-company. Article 13(5) of the India-Belgium Tax Treaty deals with alienation of shares (excluding those covered by the provisions of article 13(4)) representing a participation of at least 10 per cent. of the capital stock of a company which is a resident of a contracting State. In such a case, the right to tax is allocated to that contracting State in which the company is a resident. Now, this takes us to the definition of the term "contracting State", which is defined under article 3(1)(c) of the India-Belgium Tax Treaty, and reads as under :

> "In this Agreement, unless the context otherwise requires : . . .
>
> (c) the terms 'a contracting State' and 'the other contracting State' mean India or Belgium as the context requires."

On a perusal of the aforesaid definition of the term "contracting State", it can safely or rather inescapably be gathered that the same in the context of India-Belgium Tax Treaty would take within the sweep of its meaning either "India" or "Belgium".

15 For the purpose of applying article 13(5) of the India-Belgium Tax Treaty two fold conditions are required to be cumulatively satisfied, viz., (i) that, the transfer of shares should represent participation of at least 10 per cent. in the capital stock of company ; and (ii) that the company whose shares are transferred should be a resident of a contracting State. Accordingly, for the purpose of applying article 13(5) of the Tax Treaty, one of the pre-condition that has to be satisfied is that the company whose shares are transferred should be a resident of a contracting State, viz., India or Belgium. As such, it is only if the shares transferred are of a company which is a resident of India and the same forms part of a participation of at least 10 per cent. of the capital stock of the company, that the gains arising from alienation of such shares would be taxable in India as per article 13(5) of the Tax Treaty However, as the shares transferred by the assessee in the present case are of Accelyst Pte. Ltd., i. e., a Singapore based company, therefore, in the absence of satisfaction of the pre-condition that the shares transferred should form part of the capital stock of a company which is a resident of a contracting State, the application of article 13(5) stands excluded to the current fact pattern of the transaction of transfer of shares under consideration. At this stage, it would be relevant to point out that as per the indirect transfer of shares provisions contemplated in *Explanation 5* to section 9(1)(i) of the Act a see-through approach has been incorporated, i. e., if a person holds shares outside India, which derives its value substantially from the assets located in India, the legislation allows a see-through approach to deem such shares outside India to be located in India. On the contrary, the article 13(5) of the India-Belgium Tax Treaty does not permit a see-through approach. Unlike article 13(4) which is the only provision in article 13 of India-Belgium Tax Treaty that provides for a see-through approach, article 13(5) of the Tax Treaty in the absence of usage of words "directly or indirectly" does not provide for a see-through approach. Accordingly, in the absence of a see-through approach in article 13(5), the transfer of shares of Accelyst Pte. Ltd., Singapore cannot be regarded as a transfer of shares of its Indian subsidiary viz. Accelyst Solutions Pvt. Ltd. Our aforesaid view is supported by the judgment of the hon'ble High Court of Andhra Pradesh in the case of *Sanofi Pasteur Holding SA* v. *Department of Revenue* [2013] 354 ITR 316 (AP) ; [2013] 30 taxmann.com 222 (AP). In the aforesaid case, the hon'ble High Court of Andhra Pradesh while adjudicating upon the scope of applicability of article 14(5) of India-France Tax Treaty (similarly worded as article 13(5) of the India-Belgium Tax Treaty), had ruled out a see-through approach in article 14(5) of the India-France Tax Treaty, and had concluded that transfer of shares of the holding company could not be regarded as a transfer of shares of its subsidiary entity, observing as under :

> "Qua article 14(5), where shares of a company which is a resident of France are transferred, representing a participation (shareholding - see Vodafone) of more than 10 per cent. in such entity, the resultant

capital gain is taxable only in France. Even where the underlying value of such shares is located in the jurisdiction of the other contracting State (India), this fact is irrelevant under the Double Taxation Avoidance Agreement provisions ; except where the alienation is of shares of a company the property of which consists principally (whether directly or indirectly) of immovable property and in the later circumstance the entitlement to tax stands allocated under article 14(4) to the contracting State within whose jurisdiction such property is situate. To reiterate, the fact that the value of the shares alienated comprise underlying assets located in the other contracting State is irrelevant in the context of article 14(5)."

Apart from that, the hon'ble High Court in its aforesaid order had observed that under article 14(5) of the India-France Tax Treaty, a transfer of shares of the holding company cannot be construed as a deemed alienation of shares of its Indian subsidiary. It was observed by the High Court as under (page 435) :

"It therefore cannot be, that the transaction in issue is permitted (under the Double Taxation Avoidance Agreement regime) to be taxed in India on the basis that there is a deemed alienation of SBL shares ; and in France on the basis that there is actual alienation of Shan H shares. Neither the text nor the context of article 14(5) legitimise such interpretation."

16 We shall now advert to the observations of the lower authorities on the basis of which they had concluded that the gain arising from the transfer of shares of Accelyst Pte. Ltd., Singapore by the assessee would be taxable in India as per article 13(5) of the India-Belgium Tax Treaty and *Explanation 5* to section 9(1)(i) of the Act. On a perusal of the orders of the lower authorities, we find that the Assessing Officer/Dispute Resolution Panel had concluded that though Accelyst Pte. Ltd. is a company resident in Singapore, yet its shares were to be deemed to be situated in India by virtue of *Explanation 5* to section 9(1)(i) of the Act. Apart from that, they had further extended the deeming *Explanation 5* to section 9(1)(i) of the Act to conclude that Accelyst Pte. Ltd., Singapore was to be deemed to be a company resident in India. We have given a thoughtful consideration to the aforesaid observations of the lower authorities and are unable to persuade ourselves to subscribe to the same. Admittedly, *Explanation 5* to section 9(1)(i) had been made available in the Income-tax Act, 1961 by the Legislature vide the Finance Act, 2012 with retrospective effect from April 1, 1962 for creating a deeming fiction, whereby for the purposes of taxation of capital gains under the Income-tax Act the shares of a foreign company

were to be deemed to be situated in India, if it derived substantial value from India. However, in the absence of any such corresponding provision in the India-Belgium Tax Treaty or India-Singapore Tax Treaty, the said deeming explanation cannot be read into the aforesaid tax treaties. Before adverting any further on the issue that as to whether or not the aforesaid observations of the Assessing Officer/Dispute Resolution Panel are sustainable, it would be relevant and pertinent to point out that a unilateral amendment in the domestic law cannot be allowed to override the provisions of a tax treaty. As per the settled position of law, amendments made either retrospectively or prospectively to the provisions of the Income-tax Act cannot be read into the provisions of a tax treaty Also, the provisions of the Income-tax Act do not operate to modify or subject the provisions of the tax treaty to the provisions of the Income-tax Act. Our aforesaid view is fortified by the judgment of the hon'ble High Court of Delhi in *DIT* v. *New Skies Satellite BV* [2016] 382 ITR 114 (Delhi) and that of the hon'ble High Court of Bombay in *CIT* v. *Siemens Aktiongesellschaft* [2009] 310 ITR 320 (Bom). Be that as it may, drawing force from the judgment of the hon'ble apex court in the case of *K. P. Varghese* v. *ITO* [1981] 131 ITR 597 (SC) ; [1981] 7 Taxman 13 (SC) that the speech of the mover of the bill can certainly be used as a tool for understanding the legislative intent and also the mischief sought to be rectified by the legislation, the fact that the aforesaid clarificatory amendment made available in the Income-tax Act as *Explanation 5* to section 9(1)(i) would not override the provisions of Double Taxation Avoidance Agreement (DTAA) which India has with 82 countries can safely be gathered from the speech of the Finance Minister, dated May 7, 2012 while introducing the Finance Bill, 2012, the relevant extract of which reads as under :

> "The hon'ble Members are aware that a provision in the Finance Bill which seeks to retrospectively clarify the provisions of the Income-tax Act relating to capital gains on sale of assets located in India through indirect transfers abroad, has been intensely debated in the country and outside. I would like to confirm that clarificatory amendments do not override the provisions of the Double Taxation Avoidance Agreement (DTAA) which India has with 82 countries. It would impact those cases where the transaction has been routed through low tax or no tax countries with whom India does not have a Double Taxation Avoidance Agreement."

On the basis of our aforesaid observations, we are of the considered view that the unilateral amendment made available in the Income-tax Act as *Explanation 5* to section 9(1)(i) of the Act, cannot be read into the

India-Belgium Tax Treaty. Accordingly, in the absence of any such corresponding provision in the India-Belgium Tax Treaty, both the Assessing Officer/Dispute Resolution Panel were in error in concluding that the shares of Accelyst Pte. Ltd., Singapore were to be deemed to be situated in India.

17 We shall now advert to the observations of the lower authorities, wherein despite accepting that Accelyst Pte. Ltd. was a company resident in Singapore, they had on the basis of *Explanation 5* to section 9(1)(i) of the Income-tax Act concluded that it was to be deemed to be a company resident in India. We have deliberated at length on the issue under consideration and find that the aforesaid view taken by the Revenue is absolutely incorrect and fallacious. As observed by us hereinabove, *Explanation 5* to section 9(1)(i) had been made available in the Income-tax Act, 1961 by the Legislature vide the Finance Act, 2012 with retrospective effect from April 1, 1962 for creating a deeming fiction, whereby for the purposes of taxation of capital gains under the Income-tax Act the shares of a foreign company were to be deemed to be situated in India, if it derived substantial value from India. As such, the purpose of incorporating *Explanation 5* to section 9(1)(i) in the Income-tax Act was to deem the shares or interest of a foreign company to be situated in India, if it derived substantial value from India, for the purpose of taxation of capital gains under the Income-tax Act and not for treating the foreign company itself as a resident of India. In our considered view, even under the Income-tax Act a foreign company despite *Explanation 5* to section 9(1)(i) of the Income-tax Act is not to be treated as a company resident in India. As observed by us hereinabove, the limited purpose of incorporating the deeming fiction, i. e., *Explanation 5* to section 9(1)(i) in the Income-tax Act is to deem the shares of a foreign company to be situated in India, if it derived substantial value from India, for the purpose of taxation of capital gains. In sum and substance, *Explanation 5* to section 9(1)(i) of the Income-tax Act does not define residence of a person and only deems shares of a foreign company to be located in India. We are in agreement with the claim of the learned authorised representative that if the view taken by the Assessing Officer/Dispute Resolution Panel was to be accepted and a foreign company was to be deemed to be a resident in India on the basis of its underlying assets situated in India, then an amendment to section 6(3) of the Income-tax Act and article 4 of the Tax Treaty would have been undertaken, which however had not been carried out. Be that as it may, in the absence of any provision for deeming a company resident of Singapore as a resident of India either in the Double Taxation Avoidance Agreement between India and Singapore or in the Double Taxation Avoidance Agreement between

India and Belgium, Accelyst Pte. Ltd., Singapore due to its holding of shares in an Indian company could by no means be held to be a company that was resident of India. In fact, we find that as per article 4 of the India-Singapore Tax Treaty which deals with the provisions relating to residence, there is no such provision which deems a company incorporated in Singapore to be a resident of India on the basis of its underlying assets. Although, a standalone amendment in the Income-tax Act would have no bearing on the provisions of a tax treaty, but independent of that we still find it to be quite strange and absolutely beyond comprehension that neither of the lower authorities had explained, as to how the word "resident" which is defined under both domestic laws and the Double Taxation Avoidance Agreement gets amended by *Explanation 5* to section 9(1)(i) of the Act. On the basis of our aforesaid deliberations, we are of the considered view that as the assessee had transferred the shares of Accelyst Pte. Ltd., a company which is a resident of Singapore, therefore, one of the preconditions for applying article 13(5) of the India-Belgium Tax Treaty, i. e., the company whose shares are transferred should be a resident of a contracting State, i. e., India or Belgium, is not found to have been satisfied.

We shall now advert to the interpretative exercise carried out by the Assessing Officer/Dispute Resolution Panel for construing the term "forming part of participation" as is envisaged in article 13(5) of the India-Belgium Tax Treaty. On a perusal of the assessment order, we find that as the term "forming part of a participation" used in article 13(5) of the India-Belgium Tax Treaty was not defined in the tax treaty, therefore, the Assessing Officer with the aid of article 3(1) of the Tax Treaty had attempted to interpret the same by borrowing the meaning given to the said term in section 2(18), section 2(22)(e) and section 2(32) of the Income-tax Act, 1961. As such, it is observed by the Assessing Officer/Dispute Resolution Panel that the term "participation" was to be construed as the interest that one company enjoyed by way of share in another company or any interest in the other company. We have given a thoughtful consideration to the aforesaid observations of the Assessing Officer/Dispute Resolution Panel and are unable to subscribe to the same. Admittedly, as per article 3(1) of the India-Belgium Tax Treaty, any term not defined shall, unless the context otherwise requires, have the meaning which it has under the law of the State concerning the taxes to which the agreement applies. As such, the domestic law interpretation cannot be resorted to "unless the context otherwise requires", which means that neither the same can be resorted to in the first instance nor to tax contrary to the provisions of the tax treaty. In sum and substance, if a term is not defined in the tax treaty, the meaning of 18 the same can be borrowed from the domestic law, only if the same is defined in the same context as that of the tax treaty and not otherwise. Article 13(5) of the India-Belgium Tax Treaty is applicable only if the company is resident of either of the contracting States. As the term "resident" and "contracting State" are defined in the India-Belgium Tax Treaty, therefore, reference to the domestic law under article 3(1) of the Tax Treaty did not arise. As such, now when the term "forming part of participation" had been used in context of a company which is resident of either of the contracting State, i. e., India or Belgium, and the term "resident" is a defined term, hence there was no requirement for reference to the domestic law. Apart from that, we find that as the term "participation" used in section 2(18), section 2(22)(e) and section 2(32) of the Income-tax Act, 1961 are in context of participation in "profits of the company" and not in context to the shareholding of a company, therefore, the said interpretative exercise resorted to by the Assessing Officer defies the fundamental requirement contemplated in article 3(1) of the India-Belgium Tax Treaty. In fact, we are in agreement with the claim of the learned authorised representative, that both the Assessing Officer and the Dispute Resolution Panel had interpreted the term "participate" which is used in context of profits of the company in order to override the tax treaty, and to allow a see-through approach for rendering article 13(5) workable in the current fact pattern of the transaction of transfer of shares under consideration. We are unable to accept the aforesaid approach adopted by the Assessing Officer/Dispute Resolution Panel. Accordingly, as observed by us hereinabove, as the term "forming part of participation" had been used in the context of a company which is resident of either of the contracting State, and the term "resident" is a defined term, hence there was no requirement on the part of the Assessing Officer for reference to the domestic law.

19 In the backdrop of our aforesaid observations, we are of the considered view that article 13(5) of the India-Belgium Tax Treaty would also not be workable to the current pattern of the transaction of transfer of shares of Accelyst Pte. Ltd., Singapore by the assessee-company. Accordingly, the gain, if any, from the transfer of the aforesaid shares would be taxable under the residuary provisions, i. e., article 13(6) of the India-Belgium Tax Treaty, which reads as under :

> "6. Gains from the alienation of any property other than that mentioned in paragraphs (1), (2), (3), (4) and (5) shall be taxable only in the contracting State of which the alienator is a resident."

As per article 13(6) of the India-Belgium Tax Treaty, gains derived from alienation of any property falling within its realm, would be taxable only in the contracting State of which the alienator is a resident. As the transferor of the shares, viz., Sofina S. A. (assessee) is a resident of Belgium, therefore, the gain from the transfer of the shares would be taxable in Belgium, and not in India. At this stage, we may herein observe that involving identical facts the hon'ble High Court of Andhra Pradesh in the case of *Sanofi Pasteur Holding SA* v. *Department of Revenue* [2013] 354 ITR 316 (AP) ; [2013] 30 taxmann.com 222 (AP), had concluded that the transfer transaction of shares was exigible to tax as per article 14(6) of the India-France Tax Treaty (similarly worded as article 13(6) of the India-Belgium Tax Treaty). It was observed by the hon'ble High Court, as under (page 439) :

> "On the above analyses, considering the interplay between article 14(4) and (5), gain from alienation of Shan H shares (by MA/GIMD) to Sanofi, if construed as falling beyond the contours of paragraphs (4) and (5) (paragraphs (1), (2) and (3) being admittedly and clearly inapplicable) would fall within the provisions of the residuary article 14(6) and be clearly taxable only in France, where at MA/GIMD is (are) resident."

At this stage, we may herein observe that we are unable to persuade ourselves to subscribe to the view taken by the lower authorities that the order of the hon'ble High Court of Andhra Pradesh in the case of *Sanofi Pasteur Holding SA* v. *Department of Revenue* [2013] 354 ITR 316 (AP) ; [2013] 30 taxmann.com 222 (AP) is distinguishable on facts. As a matter of fact, the Assessing Officer and the Dispute Resolution Panel had failed to appreciate the principle which has been laid down by the hon'ble High Court, and also the manner in which ratio of the judgment was applicable to the facts of the present case. Apart from that, the view taken by the Assessing Officer that the aforesaid judgment of the hon'ble High Court was not to be followed because the special leave petition filed by the Revenue against the order of the hon'ble High Court is pending before the hon'ble Supreme Court, also does not find favour with us. On the basis of our aforesaid observations, we are of the considered view that both the Assessing Officer and the Dispute Resolution Panel are in error in concluding that the gains on the transfer of the shares of Accelyst Pte. Ltd., Singapore by the assessee-company would be exigible to tax in India as per article 13(5) of the India-Belgium Tax Treaty. As observed by us herein-above, as the current fact pattern of the transaction of transfer of shares is assessable under the residuary provisions, i. e., article 13(6) of the India-Belgium Tax Treaty, therefore, the gain, if any arising therefrom would only be taxable in Belgium, i. e., the contracting State of which the alienator of the shares, i. e., the assessee-company is a resident of. Before parting, we may herein observe that as we have concluded that the gains arising from the transaction of transfer of shares of Accelyst Pte. Ltd., Singapore by the assessee-company are not chargeable to tax in India as per the India-Belgium Tax Treaty, therefore, we refrain from adverting to chargeability of the same under the provisions of the Income-tax Act, 1961, which having been rendered as academic in nature are thus left open. Accordingly, we "set aside" the order passed by the Assessing Officer under section 143(3) read with section 144C(13), dated October 15, 2018 and vacate the addition of short-term capital gain of Rs. 163,97,61,840 made in the hands of the assessee.

20 Resultantly, the appeal filed by the assessee is allowed in terms of our aforesaid observations.

21 Order pronounced in the open court on March 5, 2020.

[2020] 79 ITR (Trib) 520 (Visakhapatnam)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — VISAKHAPATNAM BENCH]

SUDHA AGRO OIL AND CHEMICAL INDUSTRIES LTD.

v.

ADDITIONAL COMMISSIONER OF INCOME-TAX

V. DURGA RAO *(Judicial Member)* and
D. S. SUNDER SINGH *(Accountant Member)*

March 18, 2020.

SS ▸ ITA 1961, s 271E
AY ▸ 2013-14
HF ▸ Assessee

Penalty—Repayment of loan otherwise than in prescribed mode—Exceptions—Reasonable cause—Transactions between mutually or closely associated persons—Loans taken by company from directors—Transactions genuine duly reflected in books of account—Interest paid allowed by Assessing Officer—Mere technical violation and no loss to Revenue—Penalty not justified—Income-tax Act, 1961, s. 271E.

The assessee frequently borrowed monies from directors and shareholders, and generally repaid them by crossed cheque except on one occasion when it made the payment by self-cheque, withdrew the cash and paid it to the *creditors.The Additional Commissioner levied penalty of Rs. 94,04,690 under section 271E of the Income-tax Act, 1961 against the assessee. The Commissioner (Appeals) confirmed the penalty levied to the extent of Rs. 80,64,690, i. e., the amount over and above the sum of Rs. 20,000 repaid otherwise than by crossed cheque and cancelled the penalty on the remaining amount. On appeal :*

Held, *that the transactions were between mutually and closely associated persons, i. e., a company, and the directors and shareholders of the company. The amount was repaid otherwise than by crossed cheque. The transactions were genuine and were duly reflected in the books of account. The interest paid was also allowed by the Assessing Officer. The assessee had demonstrated that the transactions were genuine with relevant documents. It was a mere technical violation and there was no loss to the Revenue. Therefore, there was sufficient and reasonable cause for repayment of the loan to the directors and shareholders and the penalty was set aside.*

The Additional Commissioner had levied the penalty for non-producing the evidence for payment through demand drafts.

Held, *that the assessment was completed and the Assessing Officer had completed the assessment after verification of the books of account and had made no adverse comment with regard to payment of loan through demand drafts. The assessee also furnished the demand draft number in the account copy. Therefore, there was no reason to disbelieve the submission of the assessee that the repayment was made through demand drafts as furnished in the account copies and there was no case for levy of penalty under section 271E with respect to the payments made to the depositors. Accordingly, the penalty was set aside.*

SUDHA AGRO OIL AND CHEMICAL INDUSTRIES LTD. *v.* ADDL. CIT (I. T.A. Nos. 191 and 196/Vizag/2013 dated March 24, 2016) *followed.*

CIT *v.* SUNIL KUMAR GOEL [2009] 315 ITR 163 (P&H) *distinguished.*

Cases referred to :

CIT *v.* Sunil Kumar Goel [2009] 315 ITR 163 (P&H) (para 4)

OMEC Engineers *v.* CIT [2007] 294 ITR 599 (Jharkhand) (paras 4, 6)

Sudha Agro Oil and Chemical Industries Ltd. *v.* Addl. CIT (I. T. A. Nos. 191 and 196/Vizag/2013 dated March 24, 2016) (paras 5, 6)

I. T. A. No. 317/Vizag/2019 (assessment year 2013-14).

G. V. N. Hari, authorised representative, for the assessee.

Rama Krishna Bandi for the Department.

ORDER

The order of the Bench was pronounced by

1 D. S. SUNDER SINGH ***(Accountant Member)***.—This appeal is filed by the assessee against the order of the Commissioner of Income-tax (Appeals) (CIT(A))-9, Hyderabad in I. T. A. No. 10195/CIT(A)-9/Hyd/2017-18 dated March 22, 2019 for the assessment year (A. Y.) 2013-14.

2 All the grounds of appeal are related to the penalty sustained by the learned Commissioner of Income-tax (Appeals) under section 271E of the Income-tax Act, 1961 (in short, "the Act") to the extent of Rs. 80,64,690. The assessee has repaid the loans and advances received from various creditors to the extent of Rs. 94,04,690 otherwise than by crossed cheque as per the details given under :

Date of repayment of loan amount by assessee-company	*Name of the person to whom loan was repaid*	*Amount in Rs.*	*Mode of payment*	*Remarks*
21-4-2012	E. Rajeev	20,61,600	Self-withdrawal cheque	Cash was withdrawn from the bank account of the assessee-company
21-4-2012	E. Padmapriya	13,77,800	Self-withdrawal cheque	Cash was withdrawn from the bank account of the assessee-company
25-3-2013	E. Lakshmi	2,58,690	Self-withdrawal cheque	Cash was withdrawn from the bank account of the assessee-company
21-4-2012	E. V. Sudhakar	20,61,600	Self-withdrawal cheque	Cash was withdrawn from the bank account of the assessee-company

On different dates	A. V. V. Subahmanyeswara Swamy and 62 others	36,45,000	Repayment of loan in cash	Assessee failed to produce that the above payments were made through DDs.

In the case of Sri E. Rajeev, Smt. E. Padmapriya, Smt. E. Lakshmi and Sri E. V. Sudhakar, the assessee has withdrawn cash from the bank account and repaid the amount to the creditors. In the case of Sri A. V. V. Subrahmanyeswara Swamy and others, the assessee has repaid the amount by way of crossed demand drafts. The Additional Commissioner of Income-tax (in short, "Addl. CIT") initiated proceedings under section 271E and called for the explanation for violation of the provisions of section 269T of the Act. The assessee explained before the Additional Commissioner of Income-tax that the payments were genuine and all the recipients of the amounts have accounted the loan as well as the repayments in their books of account and filed the returns of income. The assessee further submitted before the Additional Commissioner of Income-tax that the payment was made to the creditors on their request. In the case of A. V. V. Subramanyeswara Swamy and 62 others, the assessee explained that all the payments were made through demand drafts, therefore, requested to drop the penalty under section 271E of the Act. Not being convinced with the explanation of the assessee, the Additional Commissioner of Income-tax levied penalty of Rs. 94,04,690 under section 271E of the Act.

Against which the assessee went on appeal before the Commissioner of Income-tax (Appeals) and the learned Commissioner of Income-tax (Appeals) confirmed the penalty levied by the Additional Commissioner of Income-tax to the extent of Rs. 80,64,690, i. e., the amount representing the over and above the sum of Rs. 20,000 repaid otherwise than by crossed cheque and cancelled the penalty on the remaining amount. Thus, the learned Commissioner of Income-tax (Appeals) allowed part relief. 3

Against which the assessee is in appeal before this Tribunal. During the appeal hearing, the learned authorised representative submitted that Sri E. V. Rajeev and E. V. Sudhakar are directors and shareholders of the company. E. Padmapriya and E. Lakshmi are also shareholders of the company. All the four creditors, i. e., E. Rajeev, E. Padmapriya, E. Lakshmi and E. V. Sudhakar are closely associated with the company since the major investment was made by the above four shareholders. Therefore, as and when the company was in need of the money, the company is taking advances from the shareholders and the directors and repaying the same. 4

In the course of business transactions, the company had borrowed monies from the above creditors and repaid the same. Except on one occasion in each case, in the remaining occasions, the company has repaid the loan by way of crossed cheque and there was no violation in respect of repayment of the loan. In the case of E. Rajeev, the company was obliged to make the payment by way of cash on April 21, 2012 and in the case of E. Padmapriya on the same date. In the case of E. Lakshmi, on March 25, 2013, the amount was paid through self-withdrawal. Similarly in the case of E. V. Sudhakar on April 21, 2012, the company has made the repayment by way of self-withdrawal cheque. The learned authorised representative submitted that in exceptional circumstances and on the request made by the creditor, the company has made the repayment of loans to the above four persons by way of self-withdrawal cheque. The above repayment was accounted in the books of account of the creditor. The company has to make the payment to meet the urgent needs of the directors and shareholders who has given the timely advances. The learned authorised representative further submitted that all the above repayments were duly accounted in the respective accounts of the directors and shareholders. The assessee filed a paper book and enclosed capital account copies of E. Rajeev, in page No. 12 and the repayment was accounted in the account. Similarly, in the case of E. Padmapriya, the account copy was enclosed in page No. 13 and the payment of Rs. 13,77,880 was duly accounted in her account. In the case of E. Lakshmi and E. V. Sudhakar also, the amounts paid was duly recorded in the respective accounts of the creditors. Apart from the above, the assessee also paid the interest on the amounts borrowed from the above individuals which was duly credited in the respective accounts of the creditors, which is appearing in the account copy placed in paper book in page Nos. 12 to 15. The learned authorised representative further enclosed the copies of income-tax returns filed by the creditors, in page No. 87 in respect of E. Rajeev with the statement of computation showing balance-sheet and profit and loss account, in page No. 94, the income-tax return filed by E. Padmapriya, in page No. 101, the income-tax return filed by E. Lakshmi, in page No. 108, the income-tax return filed by E. Venkata Sudhakar (HUF). In the respective accounts, the creditors have admitted the interest received from the company, which was taxed in their hands. Similarly, the learned authorised representative argued that for the assessment year under consideration, the Assessing Officer has completed the assessment under section 143(3) and examined all the above issues and completed the scrutiny assessments and allowed the interest payment made to the respective parties. Therefore, argued that the repayment of loan is genuine. There is no mala fide intention and the assessee has made the payment in exceptional circumstances, therefore, argued that repayment made by the assessee to be considered in exceptional circumstances, hence requested to take a lenient view and cancel the penalty. The assessee also relied on the decision of the hon'ble High Court of Jharkhand in *OMEC Engineers* v. *CIT* [2007] 294 ITR 599 (Jharkhand) ; [2008] 169 Taxman 158 (Jharkhand) and argued that in the case of repayment of loan, in exceptional circumstances is considered to be a reasonable cause. Similarly, placing reliance on the decision of *CIT* v. *Sunil Kumar Goel* [2009] 315 ITR 163 (P&H) ; [2009] 183 Taxman 53, the learned authorised representative argued that in closely connected family transactions, the penalty is not leviable if the transaction proves to be genuine.

On the other hand, the learned Departmental representative argued that levy of penalty under section 271E is for violation of the specific provisions under section 269SS and it is purely for technical evaluation and there is no case for considering the case on genuineness or otherwise of the transaction. The genuineness of the transaction has nothing to do with the levy of penalty. If the assessee has failed to comply with the provisions of section 271D, penalty is leviable under section 271E of the Act. Therefore, argued that the learned Commissioner of Income-tax (Appeals) has rightly confirmed the penalty levied by the Assessing Officer and no interference is called for. The learned Departmental representative relied on the order of this Tribunal in the assessee's own case in *Sudha Agro Oil and Chemical Industries Ltd.* v. *Addl. CIT* (I. T. A. Nos. 191 and 196/Vizag/2013 dated March 24, 2016). Thus, requested to uphold the order of the learned Commissioner of Income-tax (Appeals) and dismiss the appeal of the assessee. 5

We have heard both the parties and perused the material placed on record. In the instant case, the assessee has repaid the loans borrowed from E. Rajeev and E. V. Sudhakar by way of self-cheque withdrawal and in the case of E. Lakshmi and E. Padmapriya also, the amounts were paid, otherwise than by crossed cheque. As verified from the order of the Additional Commissioner of Income-tax, the assessee has frequently borrowed monies from directors and shareholders, mostly repaid by crossed cheque as per the details given by the Assessing Officer, except on one occasion in each case. In all the remaining occasions, the assessee has paid the amounts by way of crossed cheque. The assessee has made the payment by self-cheque and drawn the cash and paid the same to the creditors. Prima facie, the assessee has violated the provisions of section 269T of the Act. Further as observed from the penalty order, out of 20 occasions, the 6 assessee has violated the provision on four occasions at the rate of one event in the case of each lender. Thus, we observe that the assessee has mostly repaid the loans by way of crossed cheque and complied with the statute. The reason explained by the assessee was that it has made the payment on the request of the creditor in exceptional circumstances. Further the assessee also explained that E. Rajeev, E. Padmapriya, E. Lakshmi and E. V. Sudhakar are the shareholders of the company. The repayment was made on the demand of the creditor. The learned authorised representative further explained and taken us to the account copies of the every creditor, from which we observe that the transactions were duly accounted in the respective accounts. The assessee also paid the interest on the borrowings and claimed the same as expenditure which was allowed as deduction at the time of passing the order under section 143(3) in the case of the assessee. The assessee also enclosed income-tax returns of the creditors, wherein, it is observed that the interest payment was duly accounted and admitted as income in their hands. From the above information, we find that the transactions are genuine and duly accounted in the books of account of the respective persons. There is no reason to suspect the transaction. Apart from the above, all four of them are closely associated with the company, who are supporting the company frequently by advancing monies to the company. Therefore, we find that the transactions are closely associated in respect of day-to-day affairs as well as the financial transactions of the company. The learned authorised representative relied on the decision of the hon'ble High Court of Punjab and Haryana wherein the hon'ble High Court held that in the case of transactions with sister concerns and between the family due to business exigencies, it is to be considered as reasonable cause under section 273B of the Act. For the sake of clarity, we extract para No. 14 of the decision of the hon'ble Punjab and Haryana High Court which reads as under (page 171) :

> "14. The Tribunal was right in recording its conclusion that a 'reasonable cause' had been shown by the respondent-assessee. The Tribunal relied on the fact that the respondent-assessee had produced his cash books, depicting loans taken by him unilaterally before the Revenue. Another fact taken into consideration was that no prejudice was caused to the Revenue in the instant action of the respondent assessee inasmuch as the respondent-assessee did not attempt by the impugned act to avoid any tax liability. Furthermore, there was no dispute about the fact that the instant cash transactions of the respondent-assessee were with the sister concern and that these transactions were between the family, and due to business exigency.

A family transaction, between two independent assessees, based on an act of casualness, specially in a case where the disclosure thereof is contained in the compilation of accounts, and which has no tax effect, in our view establishes 'reasonable cause' under section 273B of the Act. Since the respondent-assessee had satisfactorily established 'reasonable cause' under section 273B of the Act, he must be deemed to have established sufficient cause for not invoking the penal provisions (as sections 271D and 271E of the Act) against him."

6.1. The learned authorised representative also relied on the decision of the hon'ble High Court of Jharkhand in the case of *OMEC Engineers* v. *CIT* (supra) wherein the hon'ble High Court held that the penalty is not exigible, if there exists a reasonable cause. For the sake of clarity and convenience, we extract para Nos. 21 and 22 of the decision of the hon'ble High Court of Jharkhand which reads as under (page 609) :

"21. The words 'reasonable cause' have not been defined under the Act but they could receive the same interpretation which is given to the expression 'sufficient cause'. Therefore, in the context of the penalty provisions, the words reasonable cause would mean a cause which is beyond the control of the assessee. 'Reasonable cause' obviously means a cause which prevents a reasonable man of ordinary prudence acting under normal circumstances, without negligence or inaction or want of bona fides. Before imposition of penalty under section 271, the Assessing Officer must be satisfied, not arbitrarily but judiciously, that the assessee has without reasonable cause failed to comply with the provisions.

22. In the instant case, as noticed above, there is no finding of the assessing authority, the appellate authority or the Tribunal that the transaction made by the assessee in breach of the provisions of section 269SS was not a genuine transaction. On the contrary, the return filed by the assessee was accepted after scrutiny under section 143(3) of the Act. Further, there is no finding of the appellate authority that the transaction in breach of the aforesaid provisions made by the assessee was mala fide and with the sole object to disclose the concealed or undisclosed money. The authorities have proceeded on the basis that breach of condition provided under section 269SS of the Act shall lead to penal consequences. In our view, in the facts and circumstances of the case, the imposition of penalty merely on technical mistake committed by the assessee, which has not resulted in any loss of revenue, shall be harsh and cannot be sustained in law."

6.2. In the instant case, there is no dispute that the transactions are between mutually/closely associated with the persons, i. e., company, directors and shareholders of the company. The amount was repaid otherwise than by crossed cheque. The transactions are genuine which were duly reflected in the books of account. The interest paid was also allowed by the Assessing Officer in the assessment made under section 143(3) of the Act. The learned Departmental representative relied on the decision of this Tribunal in *Sudha Agro Oil and Chemical Industries Ltd.* v. *Addl. CIT* (I. T. A. Nos. 191 and 196/Viz/2013 dated March 24, 2016) in the assessee's own case. We have gone through the decision relied upon by the Revenue and observed that the Tribunal has rendered the decision in respect of acceptance of loans but not repayment of loans. In the case relied upon by the Revenue, penalty was imposed under section 271D of the Act. In the instant case, the assessee has demonstrated that transactions were genuine with relevant documents. It is a mere technical violation and there is no loss to the Revenue. Hence, we are of the view that facts of the present case are distinguishable from the facts of the case relied upon by the Revenue. Therefore, we hold that there is sufficient and reasonable cause for repayment of the loan to the directors and shareholders i. e., E. Rajeev, E. Padmapriya, E. Lakshmi and E. V. Sudhakar and hence we set aside the order of the learned Commissioner of Income-tax (Appeals) and cancel the penalty levied by the Additional Commissioner of Income-tax. Accordingly, appeal of the assessee on this ground is allowed.

7 The next issue in this appeal is repayment of deposit to A. V. V. Surahmanyeswara Swamy and 62 persons amounting to Rs. 36,45,000. The Assessing Officer made the addition though the assessee stated that the deposits were repaid through account payee demand draft since the assessee failed to produce the copies of demand drafts or counterfoils of the demand drafts. On appeal, the learned Commissioner of Income-tax (Appeals) allowed relief to the extent of Rs. 20,000 on each deposit, thus allowed Rs. 12,60,000 and the balance penalty was confirmed.

8 Against which the assessee is in appeal before us. During the appeal hearing, the learned authorised representative submitted that all the deposits were repaid by way of demand draft but not by cheque. Therefore, argued that there is no case for levying penalty under section 271E of the Act. The assessee enclosed account copies of the each depositor and as per page No. 86 of the paper book, the assessee also furnished the demand draft number in the account copy. The learned authorised representative argued that since the amount was paid through demand draft, the learned

Commissioner of Income-tax (Appeals) erred in sustaining the addition, hence requested to cancel the penalty and allow the appeal of the assessee.

On the other hand, the learned Departmental representative supported the orders of the lower authorities and requested to confirm the order of the learned Commissioner of Income-tax. **9**

We have heard both the parties and perused the material placed on record. The Additional Commissioner of Income-tax has levied the penalty for non-producing the evidence for payment through demand drafts. In the instant case, the assessment was completed under section 143(3) and the Assessing Officer has completed the assessment after verification of the books of account and we find no adverse comment with regard to payment of loan through demand drafts. The assessee also furnished the demand draft number in the account copy. Therefore, we do not see any reason to disbelieve the submission of the assessee that the repayment was made through demand drafts as furnished in the account copies, hence, we hold that there is no case for levy of penalty under section 271E with respect to the payments made to the depositors in the case of Sri A. V. V. Subrahmanyeswara Swamy and others and accordingly, we set aside the order of the learned Commissioner of Income-tax (Appeals) and delete the penalty. **10**

In the result, the appeal of the assessee is allowed. **11**

Order pronounced in the open court on March 18, 2020.

[2020] 79 ITR (Trib) 529 (Visakhapatnam)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — VISAKHAPATNAM BENCH]

SRI PARAMESWARI PROJECTS P. LTD.

v.

INCOME-TAX OFFICER

V. DURGA RAO *(Judicial Member)* and
D. S. SUNDER SINGH *(Accountant Member)*

March 4, 2020.

SS ▸ ITA 1961, s 40(a)(ia)
AY ▸ 2013-14
HF ▸ Assessee

BUSINESS EXPENDITURE—DISALLOWANCE—PAYMENTS LIABLE TO DEDUCTION OF TAX AT SOURCE—ASSESSEE EXHIBITING FILMS AND MAKING PAYMENTS TO DISTRIBUTOR—REVENUE SHARED BETWEEN THEATRE OWNER and film distributor—Neither contractual payment nor rent payment—Tax deduction at source provisions not applicable—Income-tax Act, 1961, s. 40(a)(ia).

During the assessment proceedings for the year 2013-14, the Assessing Officer found that the assessee had made the payment of Rs. 26,79,887 under the head "distributor hire charges". He took the view that the payment was in the nature of contractual obligation and on which the assessee was liable to deduct tax at source under section 194C of the Income-tax Act, 1961. Since the assessee had failed to deduct the tax at source, the Assessing Officer held that the expenditure was not allowable as provided under section 40(a)(ia). The Assessing Officer also observed that the payment was either rental payment or contract payment, thus the provisions of deduction of tax at source was applicable on both the events. The Commissioner (Appeals) confirmed the addition. On appeal :

Held, *that the assessee was exhibiting films and making payments to the distributor. The revenue was shared between the theatre owner and the film distributor and it was neither a contractual payment nor a rent payment. The assessee relied on Circular No. 681, dated March 8, 1994[1] and Circular No. 736 dated February 13, 1996[2] to support the contention that the payment was neither in the nature of contractual payment nor rental payment but towards its share for screening the film. The assessee placed reliance on earlier assessments and subsequent assessments made by the Assessing Officer. In the earlier assessments, on identical facts, the Commissioner (Appeals) had deleted the addition and Department had not filed appeals. In the subsequent year, though the assessment was made on identical facts, no such addition was made by the Assessing Officer. The Assessing Officer did not dispute that the payment was the sharing of revenue between the theatre owner and the assessee. The payment was made by the theatre owner who was exhibiting the films, and could not be held as rental payment. Similarly, the assessee was screening the films being the theatre owner, and it could not be held that the payment was a contract payment. Therefore, the Assessing Officer had not made out the case of either contractual payment or rental payment for holding that it attracted the tax deduction at source. The Department also did not make out a case that the assessee was in default for non-deduction of tax at source under section 201(1). Hence, the disallowance was unsustainable and accordingly, the addition was deleted.*

I. T. A. No. 374/Vizag/2018 (assessment year 2013-14).

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1. see [1994] 206 ITR (St.) 299.
2. see [1996] 218 ITR (St.) 97.

Y. A. Rao, authorised representative, for the assessee.

V. Rama Mohan, Departmental representative, for the Department.

ORDER

The order of the Bench was pronounced by

D. S. SUNDER SINGH ***(Accountant Member)***.—This appeal is filed by the assessee against the order of the Commissioner of Income-tax (Appeals) (CIT(A))-9, Hyderabad in I. T. A. No. 10502/ITO-3, Srikakulam/ 2017-18 dated April 5, 2018 for the assessment year (A. Y.) 2013-14. 1

All the grounds of appeal are related to the addition of Rs. 26,79,887 under section 40(a)(ia) of the Income-tax Act, 1961 (in short, "the Act"). Brief facts of the case are that during the assessment proceedings, the Assessing Officer (AO) found that the assessee has made the payment of Rs. 26,79,887 under the head "distributor hire charges" and the Assessing Officer was under the impression that the said payment was in the nature of contractual obligation, therefore viewed that the assessee is liable for deduction of tax at source under section 194C of the Act. Since the assessee has failed to deduct the tax at source, the Assessing Officer held that the expenditure is not allowable as provided under section 40(a)(ia) of the Act. The Assessing Officer also observed that the payment was either rental payment or the contract payment, thus the provisions of deduction of tax at source is applicable on both the events. 2

Against which the assessee filed appeal before the Commissioner of Income-tax (Appeals) and the learned Commissioner of Income-tax (Appeals) confirmed the addition made by the Assessing Officer. 3

Against the order of the learned Commissioner of Income-tax (Appeals) the assessee is in appeal before us. During the appeal hearing, the learned authorised representative argued that the assessee is in the activity of exhibiting films and it has made the payment to the film distributors. The revenue is shared between the film distributor as well as the theatre owner, therefore, the same cannot be treated as contractual payment and consequently TDS provisions are not applicable. The learned authorised representative further argued that the payment was neither contractual payment nor is the rent payments and it was sharing of the revenue for exhibiting the films between the distributor and the theatre owner. The learned authorised representative further submitted that identical issue has come up before the Assessing Officer for the assessment years 2011-12, 2012-13 and the Assessing Officer considered the disallowance, whereas the learned Commissioner of Income-tax (Appeals) deleted the addition. The learned authorised representative further submitted that in the subsequent 4 years also, the identical issue has come up before the Assessing Officer and the Assessing Officer allowed the relief and did not make the addition following the Board Circular No. 681 dated March 8, 1994[1] and 736 dated February 13, 1996[2]. Therefore, requested to set aside the order of the learned Commissioner of Income-tax (Appeals) and delete the addition made by the Assessing Officer and allow the appeal of the assessee.

5 On the other hand, the learned Departmental representative strongly supported the orders of the lower authorities.

6 We have heard both the parties and perused the material placed on record. In the instant case, the assessee is exhibiting the films and making payments to the distributor. The assessee argued that the revenue was shared between the theatre owner and the film distributor and it is neither a contractual payment nor a rent payment. The assessee relied on Circular No. 681 dated March 8, 1994 and Circular No. 736 dated June 13, 1996 to support that the payment was neither in the nature of contractual payment nor rental payment and for the payments were made to the film distributor towards it's share for screening the film, therefore submitted that the TDS provisions are not covered. The assessee also placed reliance on earlier assessments and subsequent assessments made by the Assessing Officer. In the earlier assessments, on identical facts, the learned Commissioner of Income-tax (Appeals) deleted the addition and it appeared that the Department has not filed the appeal. In the subsequent year, though the assessment was made on identical facts, no such addition was made by the Assessing Officer. The Assessing Officer did not dispute that the payment is the sharing of revenue between the theatre owner and the assessee. The Assessing Officer also has not made out a case, to establish that the payment was either in the nature of contract payment or in the nature of rental payment. In the instant case, the payment was made by the theatre owner who is exhibiting the films, therefore, it cannot be held as rental payment. In the case of rent, the assessee ought to have received the payment, but in the instant case, the assessee is making the payment to film distributor. Similarly, the assessee is screening the films being the theatre owner, it cannot be held that the same is contract payment. Therefore, we are of the view that the Assessing Officer has not made out the case of either contractual payment or rental payment for holding that it attracts the TDS. Department also did not make out a case of the assessee in default for non-deduction of tax at source under section 201(1) of the Act. Hence, the order of the learned Commissioner of Income-tax (Appeals) is unsustainable

1. see [1994] 206 ITR (St.) 299.
2. see [1996] 218 ITR (St.) 97.

and accordingly, we set aside the order of the learned Commissioner of Income-tax (Appeals) and delete the addition made by the Assessing Officer.

In the result, the appeal of the assessee is allowed 7

Order pronounced in the open court on 4th March, 2020.

[2020] 79 ITR (Trib) 533 (Mumbai)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — MUMBAI "C" BENCH]

PIK STUDIOS P. LTD.

(formerly known as PIK Pens P. Ltd.)

v.

DEPUTY COMMISSIONER OF INCOME-TAX

SHAMIM YAHYA *(Accountant Member)* and **AMARJIT SINGH *(Judicial Member)***

March 5, 2020.

SS ▸ ITA 1961, ss 32, 43(1), *Expln 3*
AY ▸ 1999-2000 to 2006-07, 2008-09 to 2012-13
HF ▸ Assessee/Department

DEPRECIATION—ACTUAL COST—ACQUISITION OF TRADE MARK—REVALUATION OF TRADE MARK—DEPARTMENT NOT PRODUCING APPROVAL FROM JOINT COMMISSIONER—*Explanation 3* TO SECTION 43(1) NOT ATTRACTED—INCOME-TAX ACT, 1961, s. 43(1), *Expln. 3*.

DEPRECIATION—TRADE MARK—REVALUATION—DEPRECIATION TO BE CLAIMED ON COST INCURRED AND NOT ON REVALUATION FIGURE—RATE AND AMOUNT OF DEPRECIATION APPLICABLE FOR PREDECESSOR WOULD BE AMOUNT OF DEPRECIATION ALLOWABLE ON ITEM—TOTAL AMOUNT OF DEPRECIATION CANNOT EXCEED DEPRECIATION TO WHICH ASSESSEE WOULD BE ENTITLED IF SUCCESSION HAD NOT TAKEN PLACE—INCOME-TAX ACT, 1961, s. 32.

On April 1, 1992 a trade mark PIK which was originally registered by B was purchased by a firm V for a sum of Rs. 100. The trade mark was valued by an approved valuer who quantified the value of the trade mark at Rs. 5.52 crores for the assessment year 1999-2000. The amount was credited to the investment reserve account in the books of account of the firm on January 31, 1999. The firm was then succeeded by the assessee-company. The assessee claimed depreciation under section 32 of the Income-tax Act, 1961. The

Assessing Officer disallowed the claim on the revalued trade marks in the case of the assessee . The Commissioner (Appeals) held that the Department had not been able to produce the copy of approval from the Joint Commissioner for invocation of Explanation 3 *to section 43(1). On appeal :*

Held, *that there was a categorical finding in this regard, the invocation of* Explanation 3 *to section 43(1) failed. Accordingly the disallowance of depreciation by invocation of* Explanation 3 *to section 43(1) was not sustainable on account of lack of jurisdiction.*

Where the firm is succeeded by a company falling under section 47(xiii), the Act mandates that the aggregate deduction in respect of the asset shall not exceed in any previous year, the deduction calculated at the prescribed rates as if the succession had not taken place and such deduction shall be apportioned between the predecessor and the successor in the ratio of the number of days for which the assets were used by them.

Held accordingly, *that the predecessor was the firm V. The trade mark in its books had a cost of Rs. 100. It was revalued at a figure of Rs. 5.52 crores and the amount of revaluation was transferred to the reserve account. According to the provisions of law, the firm could not claim depreciation on any revaluation figure. The depreciation had to be claimed on the cost incurred by it. Rs. 5.52 crores less Rs. 100 was not the cost incurred by the assessee. Hence, the assessee was not entitled to depreciation on the revalued figure of Rs. 5.52 crores. The predecessor had been succeeded by the assessee on February 1, 1999 and the company had claimed depreciation on the value of trade mark in its books at Rs. 5.52 crores. The fifth proviso provides that depreciation in such case is to be computed at the prescribed rates as if the succession had not taken place. This means that the rate and amount of depreciation which was applicable for the predecessor would be the amount of depreciation allowable on the item. The total amount of depreciation could not also exceed the depreciation which the assessee would be entitled to if the succession had not taken place. If the succession had not taken place, there would not have been any depreciation allowance on the revaluation figure. In other words, the revaluation of Rs. 5.52 crores (less Rs. 100) could not be taken into account for granting depreciation to the successor, i. e., the assessee. Once the assessee was not entitled to any depreciation on the revalued figure, the written down value for subsequent years had to be computed accordingly. In other words, it had to be the value represented by the cost of the trade mark of the predecessor firm in its books without any addition in the revaluation. Hence, as the facts indicated that the trade mark was acquired at* *a cost of Rs. 100, no further addition on account of revaluation for the purpose of depreciation was allowable in the hands of the assessee.*

UNITED BREWERIES LTD *v.* ADDL. CIT [2016] 76 taxmann.com 103 (Bang) (Trib) *followed*.

Cases referred to :

Ashwin Vanaspati Industries *v.* CIT [2002] 255 ITR 26 (Guj) (paras 6, 7, 8, 12)

Chitra Publicity Co. P. Ltd. *v.* Asst. CIT [2010] 4 ITR (Trib) 738 (Ahd) (TM) (para 8)

CIT *v.* Alagappa Cotton Mills [1984] 149 ITR 640 (Mad) (para 8)

CIT *v.* Messers. Harveys Ltd. [1940] 8 ITR 307 (Mad) (para 8)

CIT *v.* Manipal Universal Learning Pvt. Ltd. [2013] 359 ITR 369 (Karn) (para 8)

CIT *v.* Mira Exim Ltd. [2013] 359 ITR 70 (Delhi) (para 8)

CIT *v.* Sun Engineering Works P. Ltd. [1992] 198 ITR 297 (SC) (para 8)

CIT (Dy.) *v.* Suyash Laboratories Ltd. [2016] 65 taxmann.com 217 (Mum) (Trib) (para 8)

CIT *v.* The Mazagaon Dock Co. Ltd. [1938] 6 ITR 124 (Bom) (para 8)

De Nora India Ltd. *v.* CIT [2015] 370 ITR 391 (Delhi) (para 8)

Dhadda Exports *v.* ITO [2015] 377 ITR 347 (Raj) (para 8)

Jaswant Sugar Mills Ltd. *v.* ITO [1973] Tax LR 1336 (All) (para 8)

Jogta Coal Co. Ltd. *v.* CIT [1965] 55 ITR 89 (Cal) (para 8)

Kamlapat Moti Lal, *In re* [1939] 7 ITR 374 (All) (para 8)

Kungundi Industrial Works (Pvt.) Ltd. *v.* CIT [1965] 57 ITR 540 (AP) (para 8)

Mascot (India) Tools and Forgings (P.) Ltd. *v.* ITO [1987] 23 ITD 274 (Delhi) (para 8)

Modular Infotech (P.) Ltd. *v.* Dy. CIT [2010] 131 TTJ (Pune) (Trib) 243 (para 8)

Nagammal Cotton Mills (Pvt.) Ltd. *v.* CIT [2002] 258 ITR 390 (Mad) (para 8)

Reliable Finhold Ltd. *v.* Union of India [2014] 369 ITR 419 (All) (para 8)

United Breweries Ltd *v.* Addl. CIT [2016] 76 taxmann.com 103 (Bang) (Trib) (paras 7, 8, 20)

Unimed Technologies Ltd. *v.* Dy. CIT [2000] 73 ITD 150 (Ahd) (paras 6, 8)

I. T. A. Nos. 6681 to 6692/Mumbai/2018 and 2470/Mumbai/2017 (assessment years 1999-2000 to 2006-07, 2008-09 to 2012-13).

Dr. Shivram, *Rahul Hakani* and *Saurabh Mehta*, authorised representatives, for the assessee.

Somnath Wajale, Departmental representative, for the Department.

ORDER

The order of the Bench was pronounced by

1 SHAMIM YAHYA ***(Accountant Member)***.—These are the appeals by the assessee against the orders of the learned Commissioner of Income-tax (Appeals) pertaining to the relevant assessment years.

2 In the case of I. T. A. No. 2470/Mum/2017, there is a delay of 1336 days. The reasonable cause for the delay has been attributed to the fact that the company is a sick company and to save time and cost of litigation it was advised to pursue a rectification petition under section 154 of the Act for the assessment year 2010-11 based on the order of the Income-tax Appellate Tribunal if it was in its favour. However, since the final order from the Tribunal did not come and the statutory period of rectification of the assessment order as per the provision of section 154 expired on March 31, 2017 it was decided by the assessee-company to file appeals for the concerned assessment years.

3 On consideration of the reasonable cause of delay, we condone the said delay.

4 Since the issues are common and connected, the appeals were heard together. These are being consolidated and hence disposed of together by this common order.

5 We note that for the assessment years 1999-2000 to 2009-10 (except the assessment year 2007-08) are appeals which were already adjudicated by the Tribunal vide order dated December 11, 2015 and the matter was remanded. The Tribunal had noted that the core issue raised in all these appeals related to the allowability of depreciation on the actual cost of the assets arrived at by virtue of revaluation of the trade mark. The Tribunal had referred to the facts of 1999-2000 which was the first year. The Tribunal had also noted that these matters had also travelled to the Income-tax Appellate Tribunal earlier also.

6 In this regard it may be gainful to refer to the said order of the Income-tax Appellate Tribunal dated December 11, 2015 which dealt with the issue as under :

"3. Firstly, we shall take up the issues raised in appeal I. T. A. No. 7230/Mumbai/2012 for the assessment year 1999-2000. Briefly stated the relevant facts of the case are that the assessee came into existence in the form of a firm named 'Veekay Industries' and the same is succeeded by the assessee-company and the trade mark 'PIK' was acquired by the assessee for a sum of Rs. 5.25 crores. The said trade mark was originally registered by M/s. Balaji Pen Pvt. Ltd. Subsequently, on April 1, 1992, the said trade mark was purchased by the firm M/s. Veekay Industries for a sum of Rs. 100. The said trade mark was valued by an approved valuer, who quantified the value of the trade mark at Rs. 5.52 crores vide its valuation report dated November 17, 1998, relevant for the assessment year 1999-2000. The said amount was credited to the investment reserve account in the books of account of the said firm on January 31, 1999. The firm is then succeeded by the assessee-company on February 1, 1999. The assessee started claimed depreciation under section 32 of the Act on the said revalued trade mark worth of Rs. 5.25 crores.

4. In the background of these facts, during the scrutiny assessment proceedings, the Assessing Officer did not allow the claim of depreciation on the said revalued trade mark amounting to Rs. 5.25 crores. In the process, the Assessing Officer invoked the provisions of *Explanation 3* to section 43(1) of the Act. This issue travelled to the Income-tax Appellate Tribunal in the first round of the second appellate proceedings. Before the Tribunal, the assessee raised additional legal grounds and the same are extracted in page 3 of the order of the Tribunal in I. T. A. No. 2218/Mumbai/2006 (assessment year 1999-2000), dated July 29, 2009 and the said additional grounds read as under :

'1. The learned Assessing Officer erred on the facts and in law in not obtaining the approval of the Joint Commissioner of Income-tax before substituting the value of brand acquired by the appellant while applying *Explanation 3* to section 43(1).

2. The learned Assessing Officer failed to appreciate that without obtaining the approval of the Joint Commissioner of Income-tax, he could not have substituted the value of brand as per *Explanation 3* to section 43(1) as the mandatory condition of approval not being complied with the order passed by the Assessing Officer substituting the cost is bad in law.'

4. After considering the said additional grounds as well as the original grounds, the Tribunal set aside the issue relating to the

allowability of the depreciation on the revalued cost of the trade mark to the file of the Commissioner of Income-tax (Appeals). Para 7 of the said Tribunal's order (supra) is relevant in this regard. In the additional grounds, extracted above, it is evident that the assessee questioned the applicability of *Explanation 3* to section 43(1) of the Act. It is the claim of the assessee that the Assessing Officer has not obtained the approval of the Joint Commissioner of Income-tax, which is the statutory requirement specified in the said *Explanation 3* the consequence of the same is that the assessee's claim of depreciation should be allowed without any substitution on the cost. In the set aside proceedings, the Commissioner of Income-tax (Appeals) considered the above additional grounds raised by the assessee and called for the relevant records for ascertaining the fact of obtaining the approval of the Joint Commissioner of Income-tax. It appears that the relevant records are not available for his perusal. Consequently, the Commissioner of Income-tax (Appeals) decided the issue by inference and the relevant lines from para 1.7 of his order are extracted as follows :

'1.7. . . . In the instant case, the Assessing Officer has clearly mentioned in the last sentence of the first para on page 8 that the main purpose of such valuation was for reduction of liability to tax. However, in the absence of complete records it cannot be said that the Assessing Officer had obtained the prior approval of the Joint Commissioner of Income-tax. Hence, the disallowance of claim of depreciation under this section is also not correct.'

5. Basing on the above conclusion drawn by the Commissioner of Income-tax (Appeals), Shri Dr. K. Shivram, the learned counsel for the assessee submitted that the Assessing Officer failed to obtain the prior approval of the Joint Commissioner of Income-tax before the revalued cost is substituted. In such circumstances, the order of the Assessing Officer on this issue becomes nullity. In this regard, the learned counsel for the assessee brought our attention to ground No. 2 of the original grounds of appeal which reads as under :

'2. The learned Commissioner of Income-tax (Appeals) failed to appreciate that when he has given finding that there was no approval of the Joint Commissioner of Income-tax, he ought to have allowed the depreciation as claimed by the assessee.'

6. Improving the said ground No. 2, the learned counsel for the assessee also filed an additional ground and the same reads as under :

'6. The learned Commissioner of Income-tax (Appeals) failed to appreciate that when he has given a finding that there was no approval of the Joint Commissioner of Income-tax, he ought to have held that *Explanation 3* to section 43(1) cannot be invoked as adjustment being nullity in law, disallowance of depreciation by the Assessing Officer is bad in law and may be deleted.'

7. Further, Dr. Shivram submitted that having given a finding on the absence of approval of the Joint Commissioner of Income-tax as specified in *Explanation 3* to section 43(1) of the Act disallowing the claim of depreciation on the revalued cost of asset, as claimed by the assessee, is bad in law. Further, bringing our attention to the order of the Tribunal in the first round of the proceedings (supra), the learned counsel for the assessee submitted that the Commissioner of Income-tax (Appeals) failed to adjudicate ground No. 2 by passing a speaking order as to how the claim of depreciation is validly substituted by the Assessing Officer without having taken the approval of the Joint Commissioner of Income-tax. On this issue, the learned representatives of both the parties in the litigation submitted that this issue requires remanding of the matter to the file of the Commissioner of Income-tax (Appeals) for the second time for fresh adjudication by passing a speaking order.

8. Further, the learned counsel for the assessee submitted that the Assessing Officer merely rejected the valuation report dated November 17, 1998 furnished by the assessee without referring the asset to the DVO for his valuation, if any, on the trade mark. The Assessing Officer is not an expert on this issue and therefore, the rejection of the valuation report furnished by the assessee is not correct. For this proposition, the learned counsel for the assessee relied on the decision of the Income-tax Appellate Tribunal, Ahmedabad in the case of *Unimed Technologies Ltd.* v. *Dy. CIT* [2000] 73 ITD 150 (Ahd) and the judgment of the hon'ble Gujarat High Court in the case of *Ashwin Vanaspati Industries* v. *CIT* [2002] 255 ITR 26 (Guj). These decisions suggest for accepting the valuation report furnished by the assessee and depreciation should be granted on the enhanced cost of the asset.

9. Further, the learned counsel for the assessee brought our attention to the fact that the Commissioner of Income-tax (Appeals) erroneously invoked the fifth proviso to section 32(1) of the Act, when such proviso came into statute only from the assessment year 2000-01. The amended provision do not apply to the trade mark valued vide the valuation report dated November 17, 1998.

10. On hearing the learned representatives of both the parties on the issues raised before us for the assessment year 1999-2000, we find the Commissioner of Income-tax (Appeals) in the second round has left so many gaps with regard to the fact of the Assessing Officer's failure to obtain prior approval of the Joint Commissioner of Income-tax and the consequences of not obtaining such approval on the claim of the assessee. The Commissioner of Income-tax (Appeals) did not consider the fact whether the provisions of *Explanation 3* to section 43(1) of the Act actually apply to the facts of the present case ; whether the Assessing Officer merely ignored the claim of depreciation on the revalued cost of the trade mark. Further, the Commissioner of Income-tax (Appeals) has also not considered whether there is any substitution of valuation at all when the Assessing Officer considered the value of the trade mark at 'zero'. The Commissioner of Income-tax (Appeals) is directed to pass a speaking order as to how *Explanation 3* to section 43(1) of the Act applies to the facts of the present case from all angles if the conditions specified in the said *Explanation 3* are fully satisfied or not. He is also directed to pass an order on how the Assessing Officer is permitted to reject the valuation report furnished by the assessee when the Assessing Officer does not have any other report on hand from the DVO or otherwise. Further, the Commissioner of Income-tax (Appeals) is also directed to examine the applicability of the cited judgment of the hon'ble Gujarat High Court in the case of *Ashwin Vanaspati Industries* (supra) and others. Further also, the Commissioner of Income-tax (Appeals) should examine the applicability of the fifth proviso to section 32(1) of the Act and give reasons in writing on how the amended provisions apply to the facts of the present case. Thus, we remand the whole of the issue relating to the claim of depreciation on the trade mark to the file of the Commissioner of Income-tax (Appeals) for third round of the proceedings before him. This time, the Commissioner of Income-tax (Appeals) is directed to examine each of the issues discussed above in a time bound manner attending to all the arguments raised by the learned counsel for the assessee before him in the set aside proceedings. It is needless to mention that the assessee shall be granted reasonable opportunity of being heard to the assessee as per the set principles of natural justice. Accordingly, all the issues raised in the original grounds as well as additional grounds are allowed for statistical purposes.

11. In the result, the appeal of the assessee for the assessment year 1999-2000 is allowed for statistical purposes.

II

I. T. A. No. 7231/Mumbai/2012 (assessment year 2000-01).

I. T. A. No. 7232/Mumbai/2012 (assessment year 2001-02).

I. T. A. No. 7233/Mumbai/2012 (assessment year 2002-03).

I. T. A. No. 7234/Mumbai/2012 (assessment year 2003-04).

I. T. A. No. 7235/Mumbai/2012 (assessment year 2004-05)

I. T. A. No. 7236/Mumbai/2012 (assessment year 2005-06).

I. T. A. No. 4385/Mumbai/2013 (assessment year 2008-09).

I. T. A. No. 4384/Mumbai/2013 (assessment year 2006-07).

I. T. A. No. 4386/Mumbai/2013 (assessment year 2009-10).

12. These nine appeals are filed by the assessee and the common issue is raised in all the appeals relates to the quantification of allowable depreciation under section 32 of the Act. The same is dependent on the written down value of the asset, therefore, block of asset. If the value of the asset varies in the year of acquisition and in amount, the consequence shall be there in all the subsequent years. It is an admitted fact that the issue raised in the allowability of depreciation is always with reference to the written down value of the trade mark at the end of each of the assessment year Accordingly, considering the commonality of the issues involved in all the nine appeals with that of the one adjudicated by us in the above paragraphs of this order (appeal for the assessment year 1999-2000), our decision given therein squarely applies to the present nine appeals too. Accordingly, all the grounds as well as the additional grounds raised in all the 9 appeals are allowed for statistical purposes.

13. In the result, the nine appeals of the assessee are allowed for statistical purposes.

14. Conclusively, all the ten appeals of the assessee are allowed for statistical purposes."

In the set aside assessment the learned Commissioner of Income-tax (Appeals) referred to the remand report obtained. The learned Commissioner of Income-tax (Appeals) noted that the appeal is to be strictly decided within the boundary earmarked by the Income-tax Appellate Tribunal vide order dated December 11, 2015. He noted the following aspects : 7

1. Approval of the Joint Commissioner of Income-tax which is required under *Explanation 3* to section 43(1) of the Act.

2. Can the Assessing Officer reject the valuation report without any further report from the DVO and the applicability of the judgement of the hon'ble Gujarat High Court in the case of *Ashwin Vanaspati* (supra).

3. Applicability of the fifth proviso to section 32(1) of the Act with the reasons, should be amended provision apply to the facts of the present case.

The learned Commissioner of Income-tax (Appeals) concluded as under :

"*Final conclusion*

From the above analysis of facts and circumstances of the assessment years related to core issue, i. e., disallowance of depreciation on revalued trade mark, following conclusions can be summarised.

(i) The issue of approval of the Joint Commissioner of Income-tax for invocation of *Explanation 3* to section 43(1) of the Act was raised for the first time before the hon'ble Income-tax Appellate Tribunal in the first round of appeal. It has been submitted by the Assessing Officer through the remand report dated October 17, 2011 that disallowance has not been done under *Explanation 3* to section 43, rather it has been done under the main provision of section 32(1) of the Act.

(ii) The hon'ble Income-tax Appellate Tribunal has admitted the plea of the appellant and directed the Revenue to submit the copy of approval received from the Joint Commissioner of Income-tax. From the remand report, it is clear that the crucial assessment folder for the assessment year 1999-2000 was missing whereas, the folders of all other assessment years are available with the Department.

(iii) The Revenue has not been able to produce the copy of approval from the Joint Commissioner of Income-tax for invocation of *Explanation 3* to section 43(1) of the Act. However, at no point of time, it has been conceded that the approval has not been taken from the Joint Commissioner of Income-tax if at all *Explanation 3* to section 43(1) has been invoked to disallow the depreciation on the enhanced value of trade mark.

(iv) On the issue of applicability of the judgment of the hon'ble Gujarat High Court in the case of *Ashwin Vanaspati Industries* (supra), it has been distinguished by the Commissioner of Income-tax

(Appeals) as well as the Assessing Officer during earlier appellate proceedings or remand report. Thus, it does not have universal application.

(v) There is no requirement of the law that enhanced value of an asset during business reorganisation can be altered only by bringing another valuation report. The Assessing Officer has elaborately examined and discussed the reasons for not accepting the valuation done by the appellant-company in the order of the assessment year 2001-02.

(vi) The fifth proviso to section 32(1)(ii) is clearly applicable in the instant case. This provision includes clause (xiii) of section 47, i. e., conversion of a partnership firm into a company, which is the issue in the instant appeal.

(vii) The fifth proviso to section 32(1)(ii) has to two limbs. Firstly, it explicitly makes clear that depreciation in the hands of the transferee and the transferor should be computed as if there is no succession. The second limb is with respect to apportionment of the claim of depreciation depending on the number of days, the transferred assets have been utilised by the transferor/transferee entity.

(viii) From the background and the expert committee report, before amendment of section 43(xiii), it is clear that tax incentive given for corporatisation was limited to exemption from the capital gain under section 45 of the Act. Allowance of depreciation on revalued assets will tantamount to tax abuse.

(ix) The appellant's case is squarely covered by the decision of the hon'ble Income-tax Appellate Tribunal, Bangalore, in the case of *United Breveries* (supra). In this case, the disallowance was made under *Explanation 3* to section 43(1) of the Act. The rejection of revaluation was the dispute before the hon'ble Tribunal. The hon'ble Tribunal has elaborated the various provisions and held that even without invoking *Explanation 3* to section 43(1), the depreciation on the enhanced value of assets due to revaluation is prohibited expressly by the fifth proviso to section 32(1)(ii) of the Act.

(x) The other alternative arguments such as cost paid by the transferee or allowance of depreciation on the enhanced value in the succeeding years are fallacious in the background of threadbare analysis given under respective paras.

Thus, in view of the above discussion and analysis in the background of directions of the hon'ble Income-tax Appellate Tribunal, relevant case law, relevant sections/sub-sections/proviso/clauses, it is clear beyond doubt that depreciation shall be calculated at the prescribed rate, as if no succession has taken place. As per the fifth proviso to section 32(1), depreciation allowable in the case of transferee company on business organisation from the firm cannot exceed the depreciation allowable, had the succession not taken place. In other words, the allowance of depreciation to the appellant company in the year of succession and subsequent years would be on the written down value of the assets in the books of the appellant firm and not the cost recorded in the books of the appellant company. The case of the appellant company is not regarded as a transfer for the purpose of capital gain under section 47(xiii). Thus, the claim of depreciation on assets acquired under such transfer is restricted only to the extent as if no transfer has taken place, it is absolutely clear that under the fifth proviso to section 32(1)(ii), the appellant-company is not eligible for depreciation on the enhanced value of trade mark. Once the claim of depreciation is restricted under the fifth proviso to section 32(1)(ii) of the Act, then the valuation as per the *Explanation* to section 43(1) becomes irrelevant.

It is therefore, held that the Assessing Officer have justifiably disallowed the claim of depreciation on the revalued trade marks in the assessment years 1999-2000 to 2006-07 and 2008-09 and 2009-10 and thus the disallowances are confirmed and the appeals filed by the appellant company on this ground are dismissed."

Similar orders by the learned Commissioner of Income-tax (Appeals) for other assessment years are also in appeal before us.

8 Against the above order the assessee has filed the appeals before us. The submissions of the learned counsel of the assessee in this regard are as under :

"Proposition and case law :

1) Circular No. 762 dated February 18, 1998 [1998] 230 ITR (St.) 26 explaining the amendment specifies in paragraph 23.2 as under (refer page 109 of the paper book) :

'23.2 *The third proviso to sub-section (1) of section 32 provides that the depreciation allowance will be restricted to fifty per cent. of the amount calculated at the prescribed rates in cases where assets acquired by an assessee during the previous year are put to use for the purpose of business or profession for a period of less than one hundred and eighty days in that previous year.* Thus, in the cases of succession in business and amalgamation of companies, the predecessor in business and the successor or amalgamating company and amalgamated company, as the case may be, are entitled to depreciation allowance on the same assets which in the aggregate may exceed the depreciation allowance admissible for a previous year at the rates prescribed in Appendix I of the Income-tax Rules, 1962. An amendment has, therefore, been made to restrict the aggregate deduction for this allowance in a year in such cases to the amount computed at the prescribed rates. It has also been provided that the allowance shall be apportioned in the ratio of the number of days in which the asset is put to use in such cases.'

(2) From the underlined portion it is clear that the Legislature wanted to address the issue/mischief of depreciation claim being made of more than 100 per cent. This is happen where one company uses the asset for say 181 days then it will claim 100 per cent. depreciation and the successor company having used the asset for less than 180 days will claim depreciation of 50 per cent. Thus ,the total depreciation claim will exceed 100 per cent.

(3) Thus, if the bold portion is read in the context of underlined portion then it becomes clear that the fifth proviso has got no role in determination of actual cost but its purpose is to only allocate the depreciation between two companies on the basis of actual days for which the asset is held by them and not on the basis of holding assets for more or less than 180 days which could result in granting of depreciation more than 100 per cent.

(4) The above view is further fortified by the scheme of section 43(1) as under :

"(i) *Explanations 7 and 7A* to section 43(1) specify that the "actual cost" in the case of amalgamation or demerger would be the cost in the hands of the transferee company or the demerged company. In the absence of a similar provision for succession under section 47(xiii), the firm could revalue the assets before conversion and the company would be entitled to depreciation on the revalued figures.

(ii) Similarly, *Explanation 2B* to section 43(6) provides that the written down value of the assets in the hands of the resulting company would be the same as that would have been in the hands of the demerged company. In the absence of similar provisions in the case of conversion of a firm into a company under section 47(xiii), the firm can revalue its assets and the company would be entitled to depreciation on the revalued figures.

(iii) *Explanation 12* to section 43(1) provides that where a capital asset is acquired under a scheme of corporatisation of the recognised stock exchange, the actual cost shall be deemed to be the amount which would have been regarded as actual cost had there been no such corporatisation. In the absence of a similar provision in the case of conversion under section 47(xiii), the value at which the asset is taken over would be the actual cost.

(5) Thus, if the fifth proviso to section 32(1) provided for determination of actual cost then there was no need of *Explanations 7, 7A, 2B and 12* to section 43(1).

(6) Hence, if the Assessing Officer disputes the actual cost being the revalued amount of the asset then the only option available with the Assessing Officer is to dispute the value by invoking *Explanation 3* to section 43(1).

(7) Thus, as per the fifth proviso the Assessing Officer can allow depreciation on actual cost (i. e., revalued amount) to the successor company, i. e., the assessee but only for the number of days for which it is held by the assessee. As far as the predecessor firm is concerned it will get.

(B) Without prejudice to the above, the fifth proviso to section 32(1) is not applicable in the facts of the present case.

(1) The fifth proviso states "Provided also that the aggregate deduction in respect of depreciation . . . allowable to the predecessor and the successor in the case of succession refereed to in clause (xiii) . . ."

(2) Thus, for the fifth proviso to be applicable both the predecessor and the successor company should be capable/eligible for claiming depreciation. In the facts of the present case, predecessor company could not have claimed depreciation on the revalued amount. Hence, the fifth proviso to section 32(1) cannot apply.

(C) In the facts of the present case, actual cost cannot be altered by invoking *Explanation 3* to section 43(1).

(1) It is an undisputed fact that even in the third round, the Revenue has not been able to produce the copy of sanction granted by the Joint Commissioner. Hence, invocation of *Explanation 3* to section 43(1) is not in accordance with law. Sanction is mandatory

(i) *Reliable Finhold Ltd.* v. *Union of India* [2014] 369 ITR 419 (All), 423. No Sanction was obtained order was bad in law.

(ii) *Dhadda Exports* v. *ITO* [2015] 377 ITR 347 (Raj), 353.

Failure to obtain sanction is not a curable defect under section 292B, hence notice is invalid.

(iii) *Jaswant Sugar Mills Ltd.* v. *ITO* [1973] Tax LR 1336 (All).

Brief note (C) unless the Income-tax Officer after giving the assessee an opportunity to establish the genuineness of the transfer, was objectively satisfied that the acquisition of assets involved a transfer for the purpose of reduction of tax liability, depreciation on the acquired assets has to be allowed on the actual price paid for it be the assessee. Such objective satisfaction should not be inferred from the mere fact that the Income-tax Officer had obtained the approval of the Inspecting Assistant Commissioner to have recourse to the proviso to section 10(5)(a) of the Act.

(2) There is no evidence to prove that the main object of transfer was reduction of tax liability as the assessee had losses.

(3) No alternate valuation has been given by the Assessing Officer.

(4) *Unimed Technologies Ltd.* v. *Dy. CIT* [2000] 73 ITD 150 (Ahd). Valuation report submitted by the assessee must be accepted.

(5) *Ashwin Vanaspati Industries* v. *CIT* [2002] 255 ITR 26 (Guj), 37 page Nos. 93-99.

Valuation was on the basis of the approved valuer. Entitled to depreciation on enhanced value.

(D) Case law :

(1) In the following cases of succession of firm by a company as per section 47(xiii), depreciation has been allowed on the revalued amount :

(a) *Dy. CIT* v. *Suyash Laboratories Ltd.* [2016] 65 taxmann.com 217 (Mum) (Trib) follow the Gujarat High Court in *Ashwin Vanaspati Industries* v. *CIT* [2002] 255 ITR 26 (Guj) page Nos. 100-105

(b) *Modular Infotech (P.) Ltd.* v. *Dy. CIT* [2010] 131 TTJ (Pune) (Trib) 243 page Nos. 106-112.

(c) *Chitra Publicity Co (P.) Ltd.* v. *Asst. CIT* [2010] 4 ITR (Trib) 738 (Ahd) ; [2010] 127 TTJ 1 (Ahd) (Trib) (TM) (page Nos 113-144 (120) para 6.1

(d) *Ashwin Vanaspati Industries* v. *CIT* [2002] 255 ITR 26 (Guj).

(2) In the following cases, it has been held that depreciation is allowable on revalued figures :

(a) *CIT* v. *Mira Exim Ltd.* [2013] 359 ITR 70 (Delhi)—there is transfer on amalgamation. Hence, the assessee entitled to depreciation on asset acquired under amalgamation, though depreciation was not allowable to the amalgamating company.

(b) *CIT* v. *Manipal Universal Learning Pvt. Ltd.* [2013] 359 ITR 369 (Karn)—the assessee entitled to depreciation on the revalued amount.

(c) In *De Nora India Ltd.* v. *CIT* [2015] 370 ITR 391 (Delhi). Acquisition of the entire business including assets and liabilities for a lump sum amount. Depreciation is allowable on the basis of valuation.

(3) The decision relied upon by the Commissioner of Income-tax (Appeals) in *United Breweries Ltd.* v. *Addl. CIT* [2016] 76 taxmann.com 103 (Bang) (Trib) is not applicable for the following reasons :

(i) The decision dealt with the issue of amalgamation. In the case of amalgamation *Explanation 7* to section 43(1) defines actual cost. Whereas the present case deals with succession of firm by company for which no separate *Explanation* is provided under section 43(1).

(ii) It is contrary to the following decisions of the Mumbai, Pune and Ahmedabad Tribunal Which have been passed after considering decision of the Gujarat High Court in *Ashwin Vanaspati Industries* v. *CIT* [2002] 255 ITR 26 (Guj) :

(a) *Dy. CIT* v. *Suyash Laboratories Ltd.* [2016] 65 taxmann.com 217(Mum)(Trib).

(b) *Modular Infotech (P.) Ltd.* v. *Dy. CIT* [2010] 131 TTJ (Pune) (Trib) 243.

(c) *Chitra Publicity Co (P.) Ltd.* v. *Asst. CIT* [2010] 4 ITR (Trib) 738 (Ahd) ; [2010] 127 TTJ (Ahd) (Trib) 1.

(iii) *CIT* v. *Sun Engineering Works P. Ltd.* [1992] 198 ITR 297 (SC), 320.

The judgment to be read on the basis of the question before the court.

(4) The decisions relied on by the Assessing Officer are not applicable to the facts of the case. This is dealt with hereunder :

(a) In *CIT* v. *Messers. Harveys Ltd.* [1940] 8 ITR 307 (Mad) the value of assets were inflated at the time of transfer. It was in the said circumstances, it was held that the income-tax authorities could go behind sale deed and ascertain real value. In the present case, there is no allegation of inflated valuation. Hence, this decision is not applicable.

(b) *Kungundi Industrial Works (Pvt.) Ltd.* v. *CIT* [1965] 57 ITR 540 (AP) — this decision is in the context of the proviso to section 10(5)(a) which is similar to *Explanation 3* to section 43(1). As the hon'ble Commissioner of Income-tax (Appeals) has stated that the Assessing Officer was not justified in disallowing the appellant's claim as per *Explanation 3,* this decision is not applicable in the present situation.

(c) In *Nagammal Cotton Mills (Pvt.) Ltd.* v. *CIT* [2002] 258 ITR 390 (Mad) the firm had valued the assets at the time of takeover at much higher value than its market value. It was in these circumstances, *Explanation 3* to section 43(1) was applied. As the hon'ble Commissioner of Income-tax (Appeals) has held that the Assessing Officer was not justified in disallowing depreciation applying *Explanation 3* to section 43(1), this decision has not relevance to the facts of the appellant's case.

(d) In *Jogta Coal Co. Ltd.* v. *CIT* [1965] 55 ITR 89 (Cal) the assets transferred were inflated. It was in this circumstances the hon'ble court held that income-tax authorities could look into the value. In the present case, there is no allegation that the trade mark does not exist or its value is inflated. Hence, this decision does not apply to the facts of the case.

(e) The decision in *CIT* v. *The Mazagaon Dock Co. Ltd.* [1938] 6 ITR 124 (Bom) was in the context of entirely different facts. In the said case, the Mazagaon Dock Ltd. was assessed on the income of the predecessor as successor. While assessing the income of the predecessor, it was held that depreciation had to be valued on the value in the hands of the predecessor. As the facts of this case are totally different, the said case does not apply to the present case.

(f) The facts of *Kamlapat Moti Lal, In re* [1939] 7 ITR 374 (All) was also in context of income of the predecessor, i. e., similar to that of *Mazagaon* (supra). Hence, the said case is not applicable to the facts of the present case.

(g) In *CIT* v. *Alagappa Cotton Mills* [1984] 149 ITR 640 (Mad) there was a change in constitution of the firm. It was in this context, the hon'ble High Court held that the assessee is not entitled to claim depreciation on revalued figure. As there is no change in constitution but a succession of a firm by a company, the said decision is not applicable to the facts of the case.

(iv) The decision in the case of *Mascot (India) Tools and Forgings (P.) Ltd.* v. *ITO* [1987] 23 ITD 274 (Delhi) is in the context of

Explanation 3 to section 43(1). The hon'ble Commissioner of Income-tax (Appeals) having held that the disallowance of depreciation as per *Explanation 3* to section 43(1) was not justified, erred in relying on the said decision. In view of the above, the appellant prays that the Assessing Officer may be directed to allow depreciation claimed.

5. Without prejudice to the above, when a specific direction is given by the Tribunal. It is binding on the lower authorities. As the Commissioner of Income-tax (Appeals) has not followed the direction the Tribunal. The disallowance of depreciation confirmed by the Commissioner of Income-tax (Appeals) may be directed to be deleted.

9 The learned Departmental representative has submitted that valuation was done in a very inflated manner showing very inflated sales and the same has been dealt with by the Assessing Officer in the assessment year 2010-11.

10 In the rejoinder, the learned counsel of the assessee submitted that valuation has not been challenged by asking for remand to the DVO. The learned counsel further submitted that the decision of the Income-tax Appellate Tribunal, Bangalore is not applicable.

11 Regarding the case law referred by the learned counsel of the assessee, the learned Departmental representative objected as to how they are applicable when this is a set aside assessment pursuant to remand of the Tribunal and the matter is confined to the remand.

12 We have carefully considered the submissions and perused the records. We find that the main issue in these appeals relate to the disallowance of depreciation on the value of trade mark. Originally it was a firm in the name of Veeky Industries. On April 1, 1992 a trade mark "PIK" which was originally registered by M/s. Balaji Paints P. Ltd. was purchased by the firm, i. e., M/s. Veeky Industries for a sum of Rs. 100. The said trade mark was valued by an approved valuer who quantified the value of a trade mark at Rs. 5.52 crores vide its valuation report dated November 17, 1998 relevant for the assessment year 1999-2000. The said amount was credited to the investment reserve account in the books of account of the said firm on January 31, 1999. The firm was then succeeded by this assessee-company on February 1, 1999. The assessee-company claimed depreciation under section 32 of the Act on the said revalued the trade mark worth Rs. 5.52 crores. The Assessing Officer had denied the claim of depreciation on this figure. The matter had proceeded twice to the Income-tax Appellate Tribunal. In the latest remand by the Income-tax Appellate Tribunal, the matter was remanded for the following purposes :

"(1) Approval of the Joint Commissioner of Income-tax which was required under *Explanation 3* to section 43(1) of the Act.

(2) Can the Assessing Officer reject the valuation report without any further report from the DVO and the applicability of the judgment of the hon'ble Gujarat High Court in the case of *Ashwin Vanaspati Industries* (supra).

(3) Applicability of the fifth proviso to section 32 of the Act."

The learned Commissioner of Income-tax (Appeals) has given a finding that the Revenue has not been able to produce the copy of approval from the Joint Commissioner of Income-tax for invocation of *Explanation 3* to section 43(1) of the Act. **13**

In our considered opinion, once there is a categorical finding in this regard, the invocation of *Explanation 3* to section 43(1) fails. Accordingly we hold that the disallowance of depreciation by invocation of *Explanation 3* to section 43(1) in this regard fails on account of lack of jurisdiction. **14**

The other issue which remains for adjudication is the applicability of the fifth proviso to section 32(1). In this regard we may gainfully refer to the said proviso : **15**

"Provided also that the aggregate deduction, in respect of depreciation of buildings, machinery, plant or furniture, being tangible assets or know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets allowable to the predecessor and the successor in the case of succession referred to in clause (xiii), clause (xiiib) and clause (xiv) of section 47 or section 170 or to the amalgamating company and the amalgamated company in the case of amalgamation, or to the demerged company and the resulting company in the case of demerger, as the case may be, shall not exceed in any previous year the deduction calculated at the prescribed rates as if the succession or the amalgamation or the demerger, as the case may be, had not taken place, and such deduction shall be apportioned between the predecessor and the successor, or the amalgamating company and the amalgamated company, or the demerged company and the resulting company, as the case may be, in the ratio of the number of days for which the assets were used by them."

A bare reading of the above proviso reveals that even in the case as the present one where the firm is succeeded by a company falling under section 47(xiii), the Act mandates that the aggregate deduction in respect of the concern asset shall not exceed in any previous year, the deduction calculated at the prescribed rates as if the succession has not taken place and such deduction shall be apportioned between the predecessor and the successor in the ratio of the number of days for which the assets were used by them.

16 Now, we examine the present issue on the touchstone of the abovesaid provision of law. In the present case, the predecessor is the firm M/s. Veeky Industries. The trade mark "PIK" standing in its books had a cost of Rs. 100. It had a revaluation figure of Rs. 5.52 crores and the amount of revaluation was transferred to the reserve account. As per the provisions of law, the firm cannot claim depreciation on any revaluation figure. The depreciation has to be claimed on the cost incurred by it. By no stretch of imagination Rs. 5.52 crores less Rs. 100 was the cost incurred by the assessee firm. Hence, the assessee-firm was not entitled to depreciation on the revaluation figure of Rs. 5.52 crores. Now, the firm, i. e., the predecessor has been succeeded by the assessee-company on February 1, 1999 and the company has claimed depreciation on the value of trade mark in its books at Rs. 5.52 crores. Now, the abovesaid fifth proviso provides that depreciation in such case is to be computed at the prescribed rates as if the succession had not taken place. This means that the rate and amount of depreciation which was applicable for the predecessor be the amount of depreciation allowable on the said item. That it also means that the total amount of depreciation cannot exceed the depreciation which the assessee-firm would be entitled as if the succession had not taken place. If the succession had not taken place, there would not have been any depreciation allowance on the revaluation figure. In other words, the revaluation of Rs. 5.52 crores (less Rs. 100) cannot be taken into account for granting depreciation to the successor, i. e., the assessee-company.

17 In this view of the matter, as per the plain reading of the law, the fifth proviso to section 32(1) debars the assessee-company to claim depreciation on the amount which was represented by revaluation in the books of the predecessor. The various arguments given by the learned counsel of the assessee are not at all sustainable on the plain meaning of the provision of the statute. It is settled law that when the language of the Act is simple and clear, the same should be applied. As evident from the above, the Act clearly provides that the total depreciation shall be limited to the depreciation that would have occurred to the predecessor as if the transfer has not taken place. Even at the cost of repetition, we may state that the predecessor, i. e., the firm was not entitled to depreciation on the revaluation figure. In view of the specific fifth proviso to section 32, the succeeding entity cannot take advantage of the figure of revaluation which

was done in the books of the predecessor. Since the predecessor could not have claimed depreciation on the revaluation figure, this proviso specifically debars successor also to that effect. The various interpretation submitted by the learned counsel of the assessee are not at all applicable as the provision of law is very clear. The language of the Act is simple. No further extrapolation is required. Accordingly on the invocation of the fifth proviso to section 32 the depreciation claimed on the value of trade mark represented by revaluation figure is not permissible and accordingly we uphold the order of the learned Commissioner of Income-tax (Appeals). The submission of the learned counsel of the assessee with regard to amalgamation and demerger are clearly irrelevant as the present case is the succession of the firm by a company. This by no stretch of imagination can be equated with amalgamation of companies and demerger thereof. The submission that the said fifth proviso deals with depreciation in the hands of the assessee company at revalued figure for the number of days, it has been used by the assessee-company, is totally unsustainable in view of our discussion as above. A provision of law has to be considered in its entirety. As already explained that in situation such as in the present case where a firm has been successed by the company the depreciation is to be provided as if the succession has not taken place. As the depreciation is to be allowed in the same manner as it would have been allowed in the hands of the predecessor firm. Since the predecessor firm was not entitled to depreciation on the amount of trade mark presented by revaluation reserve, depreciation to that extent is also not available in the hands of the assessee-company also. The scheme of the Act in this regard does not require any valuation report to be obtained by the Revenue. As a matter of fact, the learned counsel of the assessee in his submissions in item No. B above is mentioning that "Thus for the fifth proviso to be applicable both the predecessor and the successor company should be capable/eligible for claiming depreciation. In the facts of the present case, the predecessor company could not have claimed depreciation on the revalued amount. Hence, the fifth proviso to section 32(1) cannot apply". We find that the above is a distortion of the proviso. Nowhere the proviso mentions that the predecessor has always to be a company. It specifically covers transfer under section 47(xiii). This section deals with succession of a firm by a company. When the learned counsel of the assessee is himself admitting that the predecessor could not have claimed on the revalued amount, there is no question of the assessee-company getting depreciation on the revalued amount.

18 In this view of the matter, in our considered opinion, the submissions of the learned counsel of the assessee are not at all sustainable.

19 The reliance by the learned counsel of the assessee on *Ashwin Vanaspati Industries* (supra) is not at all applicable as the said case was not with respect to the fifth proviso to section 32(1).

20 As regards the case law wherein revaluation by professionals have been found to be in order are in the context of invocation of section 43(6), hence they are inapplicable in the facts of the present case. The case law in the case of the Income-tax Appellate Tribunal, Bangalore Bench in the case of *United Breveries* v. *Addl. CIT* [2016] 77 taxmann.com 103 (Bang) supports the proposition as in that case it is found that by virtue of the fifth proviso to section 32(1), the assessee being amalgamated company, could not claim or be allowed to claim, depreciation on assets acquire in a scheme of amalgamation more than depreciation that was allowable to the amalgamating company. This ratio duly applies to the present case inasmuch as here we have a succession of firm by the assessee-company and hence the claim of depreciation by the assessee-company has to be the same as would have been in the hands of the predecessor firm.

21 Once it is clear that the assessee-company was not entitled to any depreciation on the revaluation figure, the written down value of subsequent years have to be computed accordingly. In other words, it has to be the value represented by the cost of the trade mark of the predecessor firm in its books without any addition in the revaluation. Hence, in the present case, as the facts indicated that the said trade mark was acquired at a cost of Rs. 100, no further addition on account of revaluation for the purpose of depreciation is allowable in the hands of the assessee.

22 Since the issue raised in all the subsequent appeals are common, our abovesaid adjudication applies protanto to all these appeals.

23 The issues raised in all the appeals are similar. The adjudication as above applies protanto.

24 In the result, these appeals by the assessee stand dismissed.

Order pronounced in the open court on March 5, 2020.

[2020] 79 ITR (Trib) 555 (Mumbai)

[Before the Income-tax Appellate Tribunal — Mumbai "K" Bench]

ESSAR SHIPPING LTD.

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

R. C. Sharma ***(Accountant Member)*** and
Vikas Awasthy ***(Judicial Member)***

March 6, 2020.

SS ▸ ITA 1961, ss 36(1)(iii), 37, 115VE
AY ▸ 2013-14
HF ▸ Assessee/Department

International transactions—Transfer pricing—Arm's length price—Shipping business—Tonnage taxation scheme—Interest on purchase of two ships—No application of transfer pricing provisions to income covered under tonnage tax scheme—Income-tax Act, 1961, Chap. XII-G.

International transactions—Transfer pricing—Arm's length price—Shipping business—Assessee's parent company taking loan from bank—Assessee agreeing not to sell 49 per cent. of its stake in subsidiary without prior consent from bank—Guarantee commission—Assessing Officer to make adjustment by applying 0.25 per cent. to transaction instead of 0.5 per cent.—Income-tax Act, 1961.

International transactions—Transfer pricing—Arm's length price—Assessee advancing sum towards share application money to its wholly owned subsidiary—No shares allotted and full money refunded to assessee—Transaction a loan and interest chargeable on loan—Rate of interest to be applied on amount at LIBOR—Income-tax Act, 1961.

International transactions—Transfer pricing—Arm's length price—Assessee entering into service agreement with its associated enterprises—Interest on outstanding receivables—Transfer Pricing Officer justified in making adjustment by charging interest for delay in receipt of payment for services rendered—Assessing Officer to recalculate chargeable interest—Interest to be confined up to end of year and not thereafter—Income-tax Act, 1961.

International transactions—Transfer pricing—Arm's length price—Assessee carrying out business of drilling oil rigs through subsidiary and advancing borrowed funds as intercorporate deposits to its subsidiary to carry out drilling business—Income on such intercorporate deposits be treated as business income and not income from other sources—Money kept with bank as margin money out of business compulsion—Interest earned on such margin money taxable as business income—Income-tax Act, 1961.

Business expenditure—Interest on borrowed capital—Interest expenses on amount borrowed for purpose of giving intercorporate deposit to its subsidiary—Investment in group company for strategic purpose and not for earning dividend—Interest expenses allowable—Income-tax Act, 1961, s. 36(1)(iii).

Business expenditure—Shipping business—Tonnage tax scheme—Tonnage and non-tonnage activity—Common interest expenditure—To be apportioned on basis of cost of financing and not on basis of turnover—Income-tax Act, 1961, s. 37.

Business income—Shipping business—Tonnage tax scheme—Tonnage income not form part of normal business income—Income-tax Act, 1961.

The assessee carried out the business of shipping operations, crude oil transportation, drilling oil rigs, transportation management services and integrated dry bulk transportation services. During the year 2013-14 the assessee purchased two ships under a bare boat charter-cum-demise agreement from a Cyprus company. The purchase price was agreed at USD 75 million and USD 73 million. The Transfer Pricing Officer determined the arm's length price of the transactions at USD 73.75 million and USD 71.75 million respectively. He treated the excess payment as advance given to the associated enterprises and made an adjustment on account of interest receivable from the associated enterprises on purchase price of the ships. On appeal :

Held, *that the assessee was offering its income as per the tonnage taxation scheme under Chapter XII-G of the Income-tax Act, 1961. The ships purchased were qualifying ships as per the tonnage tax provision, income from which had been offered and accepted accordingly. The manner of computing income under the tonnage tax scheme has been prescribed under section 115VE. According to this section the profits of tonnage taxation shall be computed separately from profits and gains of any other business. The* *formulae for calculating the tonnage income had been prescribed and was dependent on the presumptive rate of daily tonnage income and number of days of operation. Once the assessee opts for the tonnage tax scheme, the income of the assessee had to be computed in terms of the provisions prescribed in the Chapter XII-G which is a complete code in itself and income had to be computed strictly under the provision.*

ESSAR PORTS LTD. *v.* ASST. CIT (I. T. A. No. 4444/Mum/2017 dated June 26, 2019) *followed*.

During the assessment year 2013-14, EGL, the parent company of the assessee took loan from the Hong Kong and Singapore branches of an Indian bank. In a letter to the bank, the assessee had undertaken not to transfer, assign or dispose of 49 per cent. of the equity shares in ELL, a wholly owned Indian subsidiary of the assessee, without the prior written approval of the lenders during pendency of loan, i. e., a lien was provided on transfer of shares. The Assessing Officer held that the assessee ought to have charged guarantee commission at 0.5 per cent. and accordingly worked out an adjustment of Rs. 36,50,000, which was confirmed by the Dispute Resolution Panel. On appeal :

Held, *that in view the nature of the lien letter given by the assessee and the totality of facts and circumstances of the case and the terms of letter of the lien given by the assessee, the Assessing Officer was directed to make adjustment by applying 0.25 per cent. to the transaction instead of 0.5 per cent. applied by the Assessing Officer.*

During the previous year relevant to year 2013-14, the assessee gave an advance of Rs. 52.97 crores towards share application money to its wholly owned subsidiary for issue of preference shares. Since ultimately no shares were allotted, the subsidiary refunded the full money to the assessee. The Transfer Pricing Officer treated the transaction as a loan and charged interest on the loan. The Dispute Resolution Panel confirmed the action of the Assessing Officer. On appeal :

Held, *that the Assessing Officer had correctly charged interest treating the advance for share application money as loans and advances since the shares were not finally allotted and money was refunded to the assessee, the Assessing Officer had correctly made the adjustment. However, the rate of interest to be applied on the amount ought to be at the LIBOR, since the transaction was in the foreign currency.*

CIT *v.* AURIONPRO SOLUTIONS LTD. (I. T. A. No. 1869 of 2014—Bombay), CIT *v.* COTTON NATURALS (I.) (P.) LTD. [2015] 5 ITR-OL 1 (Delhi), HINDUJA GLOBAL SOLUTIONS LTD. *v.* ADDL. CIT [2013] 145 ITD

361 (Mum), Siva Industries and Holding Ltd. *v.* Asst. CIT [2012] 145 TTJ 497 (Chennai), 3F Industries Ltd. *v.* Jt. CIT [2014] 63 SOT 314 (Vizag) *and* Everest Kanto Cylinder Ltd. *v.* Asst. CIT (LTU) (I. T. A. No. 7073/Mum/2012 dated September 25, 2014) *followed*.

The assessee entered into a service agreement with its associated enterprises to provide business support services. This agreement was entered into with effect from April 1, 2011. Under the agreement, the associated enterprise was to pay the consideration within 30 days of receipt of invoice and delay in payment would attract interest at one per cent. per month. During the year 2013-14, there was a delay in receiving payment from the associated enterprise but the assessee did not charge any interest on account of the delay. Accordingly, the Assessing Officer worked out the interest on the outstanding dues beyond the stipulated period and made an adjustment of Rs. 9,12,541.

Held, *that the Transfer Pricing Officer was justified in making the adjustment charging interest with regard to the delay in receipt of payment for the services rendered. However, the working of interest as determined by the Transfer Pricing Officer was incorrect. The Transfer Pricing Officer had charged interest beyond the previous year relevant to assessment year 2013-14. Accordingly, the Assessing Officer was to recalculate the chargeable interest and confine for the period to the end of the year 2013-14, i. e., March 31, 2013 and not thereafter.*

The assessee was in the business of operation of ships, logistics and drilling oil rigs. The shipping and logistics business was carried out by the assessee itself whereas the oilfield business was carried out by the assessee through its subsidiary. The assessee had given intercorporate deposits to its subsidiaries to develop the oilfiled services business of the company. During the year 2013-14 the assessee borrowed money from the LIC and the bank to give as intercorporate deposits to its wholly owned subsidiary and other subsidiary oil drilling operations. In the earlier years 2011-12 and 2012-13, the assessee had given similar intercorporate deposits to its subsidiary. The income earned on such intercorporate deposits was offered by the assessee for taxation as business income. The Assessing Officer had accepted the assessee's contention and assessed the interest income as "Income from business". However, during the year 2013-14, the interest income offered by the assessee as business income was not accepted by the Assessing Officer, the Assessing Officer was of the view that the assessee had advanced money to the subsidiaries for earning interest therefore, taxed the interest as income from other sources. The Assessing Officer observed that the assessee had not proved that the *borrowed money was used for giving intercorporate deposits, and the interest expenditure could not be allowed as deduction even if the interest income was held taxable under the head "Income from other sources". On appeal :*

Held, *that the assessee was carrying out business of drilling oil rigs through its subsidiary and for this purpose the assessee had borrowed money and advanced the money as intercorporate deposits to its subsidiary to carry out the drilling business. Thus, the business so carried out by the subsidiary was in terms with the main objects of the assessee. The assessee had not given intercorporate deposits to its subsidiary for the purpose of earning interest income. Accordingly, the income on such intercorporate deposits had to be treated as business income since it had been earned in the course of the business of the assessee and formed part of the business of the company. The Assessing Officer had not brought any material on record to suggest that the assessee had given intercorporate deposit to its subsidiaries for earning interest. It was also not his case that the assessee had given its surplus funds to its subsidiary for earning interest. Thus, the income on intercorporate deposit was to be assessed under the head "business income".*

TOLANI P. LTD. *v.* ADDL. CIT (I. T. A. No. 5562/Mum/2013 dated January 4, 2018) *followed.*

During the year 2013-14, interest of Rs. 136,82,29,020 was directly incurred for non-tonnage activity and common interest of Rs. 37,75,64,523 was allocated towards non-tonnage activity. Thus, the total interest expenditure of Rs. 174,57,93,543 was claimed under section 36(1)(iii) as business expenditure. It contended before the Assessing Officer that the assessee was involved in the business of oil drilling and the interest expenditure incurred was on account of loan taken from the bank and the LIC. The money taken from the bank and the LIC was used for providing intercorporate deposits to its subsidiaries, as the business of oil drilling was carried out by the assessee through its subsidiary. It also contended that similar interest expenditure had been allowed under section 36(1)(iii) in the assessment year 2011-12. The Assessing Officer held that oil drilling was not the business of the assessee. He further held that interest earned from intercorporate deposits had been taxed under the head "Income from other sources" and hence interest expenditure could not be allowed under section 36(1)(iii). The Assessing Officer further held that out of the total interest an amount of Rs. 1,56,83,680 had been paid for aircraft taken on lease and the assessee had not explained the nexus between the expenses claimed against receipt of non-tonnage activities. Accordingly, he disallowed the interest expenditure under section 36(1)(iii). On appeal :

Held, *that one of the objects in the objects clause of the memorandum of the assessee was to carry out oil drilling business. Since the oil drilling business was carried out by the assessee through its subsidiary, the loan was taken for giving as intercorporate deposit to its subsidiary and the assessee invested in the subsidiary to acquire complete control over it since the assessee was to carry out its business of oil drilling through its subsidiaries. The investment was made in the group company for strategic purpose and not for earning dividend. The interest expenditure was effectively incurred for oil drilling business of the assessee and hence the interest was on account of business and allowable under section 36(1)(iii). If the investment is made in subsidiary for the purpose of business, the loss or expenditure incurred by the assessee would be allowable as business expenditure. With respect to the interest on aircraft taken on lease, the assessee had offered the income earned from the operation of aircraft as business income, and the interest paid for aircraft taken on lease was essentially allowable as business expense under section 36(1)(iii). Even otherwise the interest expenditure incurred on the loans given to its subsidiaries as intercorporate deposit on which interest was received by the assessee was eligible to be allowed under section 57(iii) while computing the net interest income. This was without prejudice to interest on loan was eligible for deduction under section 36(1)(iii).*

CIT *v.* Phil Corporation Ltd. [2011] 244 CTR 226 (Bom), CIT *v.* Colgate Palmolive (India) Ltd. [2015] 370 ITR 728 (Bom), CIT *v.* Investa Industrial Corpn. Ltd. [1979] 119 ITR 380 (Bom), CIT *v.* RPG Transmissions Ltd. [2013] 359 ITR 673 (Mad) *and* Raptakos Brett and Co. Ltd *v.* Pr. CIT (I. T. A. No. 2251/Mum/2015 dated December 22, 2016) *followed*.

The assessee claimed common interest expenditure of Rs. 48,82,67,263 which had been apportioned to tonnage and non-tonnage activity. The assessee allocated the expenditure in the ratio of assets employed between tonnage and non-tonnage activities. The Assessing Officer apportioned the expenditure on the basis of turnover between tonnage and non-tonnage activities.

Held, *that the interest expenditure was periodic cost of borrowing incurred for the purpose of financing business activities. Therefore it had to be apportioned on basis of cost of financing, i. e., value of assets and not on basis of turnover since the turnover of the business had no relation with the interest expenditure so incurred by the assessee. The issue was remanded to the Assessing Officer for recomputation by allocating interest expenditure in the ratio of assets employed between the tonnage and non-tonnage activities.*

The assessee contended that once the income was treated as income under the tonnage tax income, the same income should not again be taxed as part of normal income offered by the assessee. On appeal :

Held, *that the Assessing Officer was justified in treating the income of Rs. 7,07,52,924 as tonnage tax income and the income should not again form the part of normal business income. The Assessing Officer had inadvertently again added the same income under the head "normal business income" which amounted to double taxation of the same income. Accordingly, the Assessing Officer was directed to reduce the income from the normal business income after due verification.*

Cases referred to :

3F Industries Ltd. *v.* Jt. CIT [2014] 63 SOT 314 (Vizag) (para 20)

Aegis Ltd *v.* Addl. CIT (I. T. A. No. 1213/Mum/2014 dated July 27, 2015) (para 17)

Bharti Airtel Ltd. *v.* Addl. CIT [2014] 2 ITR (Trib)-OL 475 (Delhi) (paras 12, 17)

CGU Logistics Ltd. *v.* ITO (I. T. A. No. 1053/Mum/2014) (para 7)

CIT *v.* Abhinandan Investment Ltd. [2016] 6 ITR-OL 139 (Delhi) (para 17)

CIT *v.* Aurionpro Solutions Ltd. (I. T. A. No. 1869 of 2014—Bombay) (para 20)

CIT *v.* Colgate Palmolive (India) Ltd. [2015] 370 ITR 728 (Bom) (para 34)

CIT *v.* Cotton Naturals (I.) (P.) Ltd. [2015] 5 ITR-OL 1 (Delhi) (para 20)

CIT *v.* EKL Appliances Ltd. [2012] 345 ITR 241 (Delhi) (para 17)

CIT *v.* Excel Industries Ltd. [2013] 358 ITR 295 (SC) (para 43)

CIT *v.* Investa Industrial Corpn. Ltd. [1979] 119 ITR 380 (Bom) (para 34)

CIT *v.* Phil Corporation Ltd. [2011] 244 CTR 226 (Born) (para 34)

CIT (Pr.) *v.* Piramal Glass Ltd. (I. T. A. No 566 of 2017 dated June 11, 2019) (Bombay) (para 41)

CIT (Pr.) *v.* Reebok India Co. [2018] 409 ITR 587 (Delhi) (para 41)

CIT *v.* RPG Transmissions Ltd. [2013] 359 ITR 673 (Mad) (para 34)

CIT (Pr.) *v.* Sesa Resources Ltd. [2018] 404 ITR 707 (Bom) (para 41)

CIT (Asst.) *v.* Shreyas Shipping Logistics Ltd. (I. T. A. No. 7406/ Mum/2014 dated August 3, 2016) (para 7)

CIT *v.* Sridev Enterprises [1991] 192 ITR 165 (Karn) (para 37)

CIT *v.* Trans Asian Shipping Services (P.) Ltd. [2016] 385 ITR 637 (SC) (para 7)

DIT (I. T.) *v.* Besix Kier Dabhol SA [2012] 210 Taxman 151 (Bom) (para 17)

Escorts Ltd. *v.* Asst. CIT [2007] 104 ITD 427 (Delhi) (para 37)

Essar Ports Ltd. *v.* Asst. CIT (I. T. A. No. 4444/Mum/2017 dated June 26, 2019) (paras 4, 7)

Everest Kanto Cylinder Ltd. *v.* Asst. CIT (LTU) (I. T. A. No. 7073/Mum/2012 dated September 25, 2014) (para 20)

Hero Cycles P. Ltd. *v.* CIT [2015] 379 ITR 347 (SC) (para 41)

Hinduja Global Solutions Ltd. *v.* Addl. CIT [2013] 145 ITD 361 (Mum) (para 20)

ITO *v.* J. M. P. Enterprises [2006] 101 ITD 324 (Asr) (para 37)

Malwa Cotton Spinning Mills *v.* Asst. CIT [2004] 89 ITD 65 (Chd) (para 37)

Marico Ltd. *v.* Asst. CIT (I. T. A. No. 8858/Mum/2011 dated May 18, 2016) (para 12)

Micro Ink Ltd. *v.* Addl. CIT [2016] 157 ITD 132 (Ahd) (para 12)

Pan India Network Infravest Pvt. Ltd. *v.* Addl. CIT (I. T. A. No. 7026/Mum/2013 dated December 4, 2015) (para 17)

Raptakos Brett and Co. Ltd *v.* Pr. CIT (I. T. A. No. 2251/Mum/2015 dated December 22, 2016) (Mum-Trib.) (para 34)

S. A. Builders Ltd. *v.* CIT (Appeals) [2007] 288 ITR 1 (SC) (para 41)

Siro Clinpharm Pvt. Ltd. *v.* Dy. CIT (I. T. A. No. 2618/Mum/2014 dated March 31, 2016) (para 12)

Siva Industries and Holdings Ltd. *v.* Asst. CIT [2012] 145 TTJ 497 (Chennai) (para 20)

TAG Offshore Ltd. *v.* Asst. CIT (I. T. A. No. 710/Mum/2014 August 8, 2014) (para 7)

Tolani P. Ltd. *v.* Addl. CIT (I. T. A. No. 5562/Mum/2013 dated January 4, 2018) (para 29)

Van Oord India P. Ltd. *v.* Asst. CIT [2019] 72 ITR (Trib) (S.N.) 59 (Mum) (para 7)

Virendra R. Gandhi *v.* Asst. CIT (Tax Appeal Nos. 20 of 2004 and 124 of 2005 dated November 27, 2014)(Guj) (para 37)

Vodafone India Services P. Ltd. *v.* Union of India [2014] 361 ITR 531 (Bom) (para 7)

Vodafone India Services P. Ltd. *v.* Union of India [2014] 368 ITR 1 (Bom) (para 7)

I. T. A. No. 7371/Mum/2017 (assessment year 2013-14).

Vijay Mehta, authorised representative, for the assessee.

Ms. Nillu Jaggi, Joint Commissioner of Income-tax, for the Department.

ORDER

The order of the Bench was pronounced by

R. C. SHARMA ***(Accountant Member)***.—This is the appeal filed by the assessee against the direction of the Dispute Resolution Panel-1(WZ), Mumbai (in short, "the DRP") under section 144C(5) of the Income-tax Act, 1961 (in short, "the Act") dated September 29, 2017 for the assessment year 2013-14 by way of given effect by the order passed under section 143(3) read with section 144C(13) of the Act. 1

Rival contentions have been heard and record perused. The facts in brief are that the assessee-M/s. Essar Shipping Limited (ESL) is engaged in the business of shipping operations, crude oil transportation, drilling oil rigs, transportation management services and integrated dry bulk transportation services. The Assessing Officer passed draft assessment order comprising certain disallowances and additions to the total income declared by the assessee. The assessee has filed its objection against the draft assessment order before the Dispute Resolution Panel and vide order dated January 25, 2017, the Dispute Resolution Panel disposed of the objections raised by the assessee. Against the order passed by the Assessing Officer under section 144C(13) giving effect to the directions of the Dispute Resolution Panel, the assessee is in further appeal before the Income-tax Appellate Tribunal. 2

2.1 Ground No. 1 of the appeal was not pressed by the learned authorised representative, therefore, the same is dismissed as not pressed.

The second grievance of the assessee relates to transfer pricing adjustment of Rs. 55,48,550 in respect of interest on purchase price of two ships. 3

At the outset, the learned authorised representative of the assessee placed on record the order of the Tribunal dated June 26, 2019 in the assessee's own case (*Essar Ports Ltd.* v. *Asst. CIT* (I. T. A. No. 4444/Mum/2017)) for the assessment year 2011-12 wherein issue with regard to disallowance of interest was decided by the Tribunal in favour of the assessee. 4

We have considered the rival contentions and carefully gone through the orders of the authorities below and found from the record that during the year under consideration, the assessee had purchased two ships under the bare boat charter-cum-demise (BBCD) agreement from Essar Shipping and Logistics Limited, Cyprus. The purchase price was agreed at USD 75 million and USD 73 million. However, the Transfer Pricing Officer had 5 determined the arm's length price of the said transactions at USD 73.75 million and USD 71.75 million respectively. The Transfer Pricing Officer has treated the excess payment as advance given to the associated enterprises and adjustment has been made on account of interest receivable from the associated enterprises on purchase price of the said ships. Against which the assessee is in further appeal before the Income-tax Appellate Tribunal.

6 We have also gone through the orders of the Tribunal dated June 26, 2019 in the assessee's own case for the assessment year 2010-11. From the record, we found that the assessee is offering its income as per the tonnage taxation scheme under Chapter XII-G of the Act. The ships so purchased are qualifying ships as per the tonnage tax provision, income from which has been offered and accepted accordingly. The manner of computing income under the tonnage tax scheme has been prescribed under section 115VE of the Act. According to which profits of tonnage taxation shall be computed separately from profits and gains of any other business. The formulae for calculating the tonnage income has been prescribed and is dependent on the presumptive rate of daily tonnage income and number of days of operation. Once the assessee opts for the tonnage tax scheme, the income of the assessee has to be computed as per the provisions prescribed in the said Chapter. Chapter XII-G is a complete code in itself and income has to be computed strictly as per the said provisions.

7 From the record we found that the similar additions were made by the Transfer Pricing Officer in the assessee's own case in the assessment year 2011-12 and were confirmed by the Dispute Resolution Panel, the assessee has been demerged from Essar Ports Limited with effect from October 1, 2010, i. e., the assessment year 2011-12. From the record we also found that since earlier the activities of the assessee being carried on by Essar Ports Ltd., the assessment was made in the case of Essar Ports Ltd. up to September 30, 2010. For the similar disallowance, the assessee came in appeal before the Tribunal and the Tribunal *Essar Ports Ltd.* v. *Asst. CIT* (I. T. A. No. 4444/Mum/2017 vide its order dated June 26, 2019) for the assessment year 2011-12, deleted the similar addition so made by the Assessing Officer after observing as under :

> "10. We have considered the submission of the learned authorised representative (AR) of the assessee and the learned Departmental representative (DR) for the Revenue and perused the material available on record. The learned authorised representative of the assessee submits that the assessee has exercised the option of offering its income to tax on a presumptive basis under the tonnage tax scheme

covered under Chapter XII-G of the Act. The option was exercised since the assessment year 2005-06 till the assessment year 2014-15. This fact is not disputed by the learned Departmental representative for the Revenue as well as by the lower authorities. We have noted that on a similar set of facts the co-ordinate Bench of this Tribunal in *Van Oord India P. Ltd.* v. *Asst. CIT* [2019] 72 ITR (Trib) (S.N.) 59 (Mum) held as under :

'6. We have carefully considered the rival submissions, perused the relevant material, including the orders of the lower authorities as well as the case law referred at the time of hearing. Notably the controversy before us primarily revolves around the applicability of transfer pricing provisions to the income that is covered by Chapter XII-G of the Act, i. e., tonnage tax scheme. The tonnage tax scheme was introduced in the Finance (No. 2) Act, 2004 with the intention of increasing foreign direct investment in the Indian shipping industry and making it globally competitive. The income of a tonnage tax company depends on the tonnage capacity of the qualifying ships and the number of days for which it has been held. A reading of the provisions of the tonnage tax scheme in Chapter XII-G suggest that the tonnage tax scheme is a charging section for the income generated by carrying out business of operating ships. Further, it also prescribes the mechanism for computation of income which is to be brought to tax. Thus, the tonnage tax scheme is a presumptive basis of taxation, whereby the taxability of income from qualifying ships is restricted to the framework provided in the tonnage tax scheme. Further, the tonnage tax company is liable to pay taxes even in a case where the financial statements reveal a loss on actual operations. Further, all expenses, deduction, allowances or tax incentives are deemed to be allowed while computing the total income of a company as per the tonnage tax scheme. The income thus computed shall be deemed to be the income chargeable to tax under the head "Profits and gains of business or profession". Hence, it is clear from the above that actual receipts/revenues earned and expenses incurred are not taken into consideration for the purpose of determining the tonnage income of the company. The entire computation of the tonnage income depends on the tonnage capacity of qualifying ships and a number of days it has been held. At this stage, we may contrast the sphere in which the transfer pricing provisions of Chapter X operate. The transfer pricing provisions envisage computation of income from specified international transactions of receipt or expenditure, of course with reference to the stated price of such transactions. This is completely in contrast to Chapter XII-G, where the stated price of the transaction has no relevance to the computation of income of qualifying ships, which is based on the weight of the ship and the number of days it has been held. In other words, the determination of income/expense having regard to arm's length price as envisaged in Chapter X has no relevance, as it would not affect the computation of income liable for taxation in Chapter XII-G.

7. Section 115VA of the Act starts with "Notwithstanding any to the contrary contained in section 28 to section 43 . . .". tonnage tax scheme thus, provides for computation of income to the exclusion of section 28 of the Act. In the case of an assessee entering into international transactions with associated enterprise, the amount of allowable expenses is required to be determined as per the arm's length principle as per the machinery provisions of Chapter X (section 92 to section 92F). The amount of allowable expenses determined as per the arm's length principle under section 92(1) of the Act would thus be relevant to compute business profits as provided for in sections 28 to 43C of the Act. The assessee has opted to be governed by the tonnage tax scheme, thus the provisions of section 115VA would override section 28 to section 43C and hence income has to be calculated with reference to the registered tonnage of the ships and not on basis of net profits depicted in the financial statements or as per the profits adjusted in terms of Chapter X. In fact, the related party transactions are not relevant for computing income chargeable to tax as per Chapter XII-G of the Act and therefore, the arm's length price determined under the transfer pricing provisions would be of no relevance. In other words, determination of income/expense having regard to the arm's length price would not alter the computation of income and the taxability of tonnage income of an assessee covered by the tonnage tax scheme.

8. Further, the tonnage income is based on the weight of the vessel and not on "arm's length price". Section 92C prescribes methods for computation of arm's length price. None of the methods prescribed can have any application to computation of the tonnage income. In these circumstances, the computation provisions of Chapter X of the Act would fail and therefore, application of Chapter X of the Act in such circumstances has to fail. Tonnage tax provisions determine the entire chargeable income earned by the tonnage tax vessel including income from an international transaction with

associated enterprise. In contrast, transfer pricing provisions apply only to international transactions entered with associated enterprises. It is not possible to segregate what portion of the final taxable tonnage income is relatable to international transactions with associated enterprises and then apply transfer pricing provisions to such transactions, because the statutorily prescribed formula to compute income under Chapter XII-G is based on the weight of the qualifying ship and number of days it has been held, irrespective of whether the ship has been used for a related party or an unrelated party. Once again, therefore, the computation provisions of Chapter X of the Act fail and in such circumstances, the application of Chapter X of the Act fails.

9. In this context, the learned counsel pointed out that a similar situation has been considered by the co-ordinate Bench of this Tribunal in the case of *Shreyas Shipping Logistics Ltd.* I. T. A. No. 7406/Mum/2014 which has held as follows :

"5. Now we would like to discuss the tonnage tax scheme. Section 115VA of the Act is unique in the sense that it deals with the computation of income from the business of operating qualifying ships which opt for tonnage tax scheme (TTS).The method of computation of income under the scheme, as provided by the section, stipulates that income has to be assessed in a particular manner. In other words, no expenditure can be allowed or disallowance can be made, while computing the income under the tonnage tax scheme. The income of the assessee is computed at affixed rate and all other provisions of the Act are not to be applied, once an assessee opts for the scheme. In short, if the assessee cannot claim any expenditure after opting out of the scheme, then the Assessing Officer is also barred by making any disallowance for incurring of expenditure. The Legislature, in its wisdom, has allowed the assessee for opting for the said scheme and with a specific purpose. Therefore, while computing the income of the assessee under section 115VP, the Assessing Officer has to put on blinkers and assess the income as suggested by Parliament. There is no scope for tinkering with the provisions of section 115VP of the Act. He has to follow the simple rule that no deduction is to be allowed or no disallowance is to be made under any of the normal provisions of the Act once it is found that an assessee is to be assessed as per the provisions of Chapter XII-G of the Act. Section 14A is not an exception to the tonnage tax scheme. Rather the scheme is an exception to the normal computation provisions, including section 14A. Therefore,

it cannot be said that when the income of the assessee from the business of operating ships was computed under the special provisions of Chapter XII-G, expenditure other than the expenditure incurred for the purpose of the business had been allowed. Considering the twin factors, i. e., not claiming any expenditure against the non-shipping business income by the assessee and opting for tonnage tax scheme for shipping business, we are of the opinion that the order of the first appellate authority does not suffer from any legal or factual infirmity. Therefore, confirming his order, we decide the effective ground of appeal against the Assessing Officer." (underlined for emphasis[1] by us)

10. On yet another occasion, our co-ordinate Bench in the case of *TAG Offshore Ltd.* I. T. A. No. 710/Mum/2014 was concerned with a situation where the Revenue sought to make an addition by invoking the provisions of section 14A of the Act in case of a tonnage tax company, whose income was computed under the special provisions of Chapter XII-G. The Tribunal set aside the addition observing thus : No disallowance under section 14A is warranted in this case when the assessee has admittedly not claimed any expenditure, towards taxable income, i. e., it has not claimed any deduction of expenditure debited in the profit and loss account while computing the total income.

11. Further, the co-ordinate Bench of this Tribunal in the case of *CGU Logistics Ltd.* I. T. A. No. 1053/Mum/2014 while dealing on the issue under the tonnage tax scheme has held as under :

"10.a. We find that section 115VP deals method and time of opting for tonnage tax scheme, section 115VQ is about period for which tonnage tax option remains in force. Renewal of tonnage tax scheme is subject matter of section 115VR. Circumstances and conditions where in the tonnage tax scheme cannot be opted are the subject matter of section 115VS. As per the provisions of section 115VT every assessee has to transfer profits to tonnage tax reserve account at a fix rate and has to utilise it for specific purpose, once he opts of tonnage tax scheme. Companies opting for tonnage tax scheme have to comply with minimum training requirement as required by section 115VU. Limit for charter in of tonnage has been determined by section 115VV. Maintenance and audit of accounts of the tonnage tax scheme companies is governed by the provisions of section 115VW of the Act whereas section 115VX determines ton-

1. Here printed in italics.

nage. Amalgamation is subject matter of section 115VY. Next section, i. e., section 15VZB takes care of the tonnage tax companies which are found to be a party to any transaction or arrangement that amounts to an abuse of the scheme. Last section, section 115VZC, deals with exclusion from the tonnage tax scheme.

From the above it is clear that Chapter XII-G is a complete code in itself and it provides for non-applicability of sections 28 to 43C of the Act, i. e., Chapter IV of the Act, when income is to be computed as per the provisions of the said section. Chapter XII-G, was introduced by the Finance (No. 2) Act, 2004 with effect from April 1, 2005, and it provides for tonnage tax scheme, which is optional. The Notes on Clauses appended to the Finance (No. 2) Bill, 2004, referring to clause 28 as regards the introduction of section 115VA specifically states that the provision relates to the computation of profits and gains of the shipping business. Tonnage tax was intended to make the industry internationally competitive and also to induce more ships to fly the Indian flag. As the whole of FEFG is covered by the provisions of Chapter XII-G of the Act, there is no justification in computing it under a different chapter or section." (underlined[1] for emphasis by us)

12. Before parting, we also think it apposite to refer to the judgment rendered by the hon'ble Supreme Court in the case of *CIT* v. *Trans Asian Shipping Services (P.) Ltd.* [2016] 385 ITR 637 (SC). In the said case, the Supreme Court observed that ". . . . It may be stated in brief that in view of the stiff competition faced by the Indian shipping companies vis-a-vis foreign shipping lines, and in order to ensure an easily accessible, fixed rate, low tax regime for shipping companies, the Rakesh Mohan Committee in its report (of January, 2002) recommended the introduction of the tonnage tax scheme in India, which was similar to, and adopted some of the best global practices prevalent. The whole purpose of introduction of the scheme was to make the Indian shipping industry more competitive in the global space by rationalising its tax cost . . ."

The hon'ble Supreme Court further observed that, we would also like to refer to Circular No. 5 of 2005 dated July 15, 2005 explaining the need and essence of the introduction of these provisions which was issued contemporaneously by the Central Board of Direct Taxes (CBDT). The circular clarifies that the scheme is a "preferential regime of taxation". It also clarifies that "charging provision is under section 115VA read with section 115VF and section 115VG . . .".

1. Here printed in italics.

13. It has also been brought to our notice that an identical situation arose in the assessee's own case for the assessment year 2013-14 where the Dispute Resolution Panel ("DRP") vide its order dated September 18, 2017 held that transfer pricing regulations do not apply to the assessee to the extent of operations carried out through operating qualifying ships where the income is taxed under the tonnage tax scheme.

14. To sum up, tonnage tax scheme, as per Chapter XII-G of the Act is a separate code by itself inasmuch as it provides a self-contained changing provision as well as method of computation of income in the Chapter, and, the method of computation of income under the tonnage tax scheme is not dependent on receipt or expenditure of the assessee. Under the tonnage tax scheme, the income has to be computed as per the method prescribed in section 115VG. The income as per the tonnage tax scheme is computed on the basis of the weight of the vessel and a number of days it is held, irrespective of its revenue realisations and the expenditure incurred for the purpose of the business. Hence, neither the business receipts nor the business expenditure of the assessee has any bearing on the method prescribed for computation of income under the tonnage tax scheme as per section 115VG. The tonnage tax scheme, in that sense, is a presumptive method of computation of taxable income which is not dependent on actual receipts and expenditure of the assessee.

15. In fact, the fallacy in the approach of the Assessing Officer can be gauged from a perusal of the computation of taxable income made in para 11 of the assessment order. The Assessing Officer has sought to add Rs. 5,40,887 as a separate line item captioned as "proposed adjustment/addition" in view of the above discussion. Thus, as per the perception of the Assessing Officer, Chapter X of the Act creates an independent or a separate charge of income, an aspect which is contrary to the judgment of the hon'ble Bombay High Court in the case of *Vodafone India Services P. Ltd.* v. *Union of India* [2014] 361 ITR 531 (Bom) ; [2015] 53 taxmann.com 286 (Bom), wherein after referring to an earlier judgment dated October 10, 2014 in the case of the same assessee *Vodafone India Services P. Ltd.* v. *Union of India* reported in [2014] 368 ITR 1 (Bom) ; [2014] 50 taxmann.com 300 (Bom), inter alia, held that Chapter X does not contain any charging provision but is a machinery provision to arrive at an arm's length price of a transaction between associated enterprises.

16. In the final analysis, it is seen that in the instant case, the provisions of Chapter X have been invoked to alter an expenditure, namely, the mobilisation and demobilisation charges paid for a qualifying ship, an item which has no bearing on the income as computed under Chapter XII-G and accordingly the provisions of Chapter X have no application in computing the income of the assessee chargeable to tax as per Chapter XII-G of the Act.

17. In view of the aforesaid discussion, in our considered view, the transfer pricing regulations do not apply to the assessee to the extent of operations carried out through operating qualifying ships where the income is taxed under the tonnage tax scheme.'

11. Considering the decision of co-ordinate Bench of the Tribunal as referred to above, the provisions of transfer pricing regulations are not applicable to the assessee to the extent of operation carried by the assessee through qualifying ships which is covered by the tonnage tax scheme. Thus, we hold that the grounds of appeal Nos. 2 to 6 and 9 are covered in favour of the assessee and against the Revenue. In the result ground Nos. 2 to 6 and 9 are allowed."

As the facts and circumstances during the year under consideration are **8**
same, respectfully following the order of the Tribunal in the assessee's own case, we do not find any justification for the addition made by the Assessing Officer in respect of interest on purchase price of two ships. Accordingly, we direct the Assessing Officer to delete the same.

The next grievance of the assessee as contained in ground No. 3 relates **9**
to transfer pricing adjustment of Rs. 36,50,000 on account of fees receivable for providing negative lien.

Rival contentions have been heard and record perused. The facts in brief **10**
are that during the relevant assessment year under consideration, the Essar Global Limited (EGL), the ultimate parent company of the assessee had taken loan from ICICI Bank, Hong Kong branch and Singapore branch. As per the letter given by the assessee to ICICI Bank, the assessee has undertaken not to transfer, assign and dispose of 49 per cent. of equity shares in Essar Logistics Ltd. (ELL) without the prior written approval of the lenders during pendency of loan. Essar Logistics Ltd. is wholly owned Indian subsidiary of the assessee and as per the agreement 49 per cent. of the shareholding will not be transferred without the prior approval of the lender, i. e., a lien was provided on transfer of shares.

The Assessing Officer held that the assessee ought to have charged **11**
guarantee commission at 0.5 per cent. and accordingly worked out

adjustment of Rs. 36,50,000, which was confirmed by the Dispute Resolution Panel.

12 It was argued by the learned authorised representative of the assessee that the assessee has provided a negative lien, i. e., it has agreed not to sell 49 per cent. of its stake in Essar Logistics Ltd. without the prior consent from the bank. It is submitted that the negative lien provided by the assessee do not have a bearing on profit, income, losses, etc., of the assessee and hence it does not come within the purview of international transaction as defined under section 92B of the Act. Reliance was placed on the orders of the hon'ble Tribunal in the cases of :

(i) *Micro Ink* v. *Addl. CIT* [2016] 157 ITD 132 (Ahd)

(ii) *Siro Clinpharm Pvt. Ltd.* v. *Dy. CIT* (I. T. A. No. 2618/Mum/2014 dated March 31, 2016)

(iii) *Marico Ltd.* v. *Asst. CIT* (I. T. A. No. 8858/Mum/2011 dated May 18, 2016)

(iv) *Bharti Airtel Ltd.* v. *Addl. CIT* [2014] 2 ITR (Trib)-OL 475 (Delhi) ; [2014] 161 TTJ 483 (Mum).

13 On the other hand, the learned Departmental representative has relied on the order of the Dispute Resolution Panel.

14 We have considered the rival contentions and carefully gone through the orders of the authorities below and found from the record that the Transfer Pricing Officer/Assessing Officer has made adjustment for providing letter of negative lien by assessee to the bank. The Transfer Pricing Officer has equated the said transaction with that of guarantee given to bank. In case of guarantee there is a possibility of a liability arising to the guarantor on account of providing guarantee. However, in the present case, even if EGL defaults in payment of loan, there will be no liability on the assessee for paying any amount since the assessee is not a guarantor. Hence, there would never be any liability on the assessee even in the case of default. However, keeping in view the nature of negative lien letter given by the assessee and the totality of facts and circumstances of the case and the terms of letter of negative lien given by the assessee, we direct the Assessing Officer to make adjustment by applying 0.25 per cent. to the said transaction instead of 0.5 per cent. applied by the Assessing Officer. We direct accordingly.

15 The next grievance of the assessee as contained in ground No. 4 relates to transfer pricing adjustment in respect of interest on advance given for allotment of preference shares.

Rival contentions have been heard and record perused. The facts in brief are that during the previous year relevant to year under consideration, the assessee gave advance of Rs. 52.97 crores towards share application money to its wholly owned subsidiary, i. e., Essar Oilfield Services Limited (EOSL) for issue of preference shares. Since ultimately no shares were allotted, Essar Oilfield Services Limited has refunded full money to the assessee. The Transfer Pricing Officer treated the above transaction as a loan and charged interest on the said loan. By the impugned order, the Dispute Resolution Panel confirmed the action of the Assessing Officer, against which the assessee is in further appeal before the Income-tax Appellate Tribunal. **16**

It was argued by the learned authorised representative of the assessee that the money was advanced towards share application money. The assessee submitted ODI forms filed before the Reserve Bank of India wherein the purpose for remittance has been stated to be for investment in preference shares. It was submitted that when the said advance was returned by Essar Oilfield Services Limited, it was clearly mentioned in FIRC to be refund of advance given for investment in preference shares. It was further submitted that the Transfer Pricing Officer has no power to recharacterise the transaction in the absence of any documentary evidence. The Transfer Pricing Officer did not agree with the contention of the assessee and held that it was an arrangement as per section 92F(v) of the Act between Essar Oilfield Services Limited and the assessee. He relied on the decision of the hon'ble Delhi High Court in the case of *CIT* v. *EKL Appliances Ltd.* [2012] 345 ITR 241 (Delhi) and *CIT* v. *Abhinandan Investment Ltd.* (I. T. A. No. 130 of 2001 dated November 19, 2015). He further held that the assessee has not received dividend at one per cent. on investments which it should have received. The learned authorised representative has further submitted that the Transfer Pricing Officer cannot recharacterise the transaction without bringing any material on record. In order to support the said contention reliance is placed on the following decisions : **17**

(a) *Aegis Ltd.* v. *Addl. CIT* being I. T. A. No. 1213/Mum/2014 dated July 27, 2015

(b) *Bharti Airtel Ltd.* v. *Addl. CIT* being I. T. A. No. 5816/Delhi/2012 dated March 11, 2014

(c) *DIT* v. *Besix Kier Dabhol SA* [2014] 2 ITR (Trib)-OL 475 (Delhi) ; [2012] 210 Taxman 151 (Bom) (headnote)

(d) *Pan India Network Infravest Pvt. Ltd.* v. *Addl. CIT* (I. T. A. No. 7026/Mum/2013 dated December 4, 2015).

On the other hand, the learned Departmental representative has relied on the order passed by the Dispute Resolution Panel. **18**

19 We have considered the rival contentions and carefully gone through the orders of the authorities below. From the record, we found that the Transfer Pricing Officer has charged interest on advance for share application money to the associated enterprises treating the same as a loan.

20 We have considered the judicial pronouncements referred by the learned authorised representative and the learned Departmental representative during the course before us as well as the judicial pronouncements referred by the lower authorities in their respective orders. As per our considered view the Assessing Officer has correctly charged interest by treating the advance for share application money as loans and advances since the shares were not finally allotted and money was refunded back to the assessee, the Assessing Officer has correctly made adjustment. However, the rate of interest to be applied on the said amount ought to be at LIBOR, since the transaction is in the foreign currency, our view is supported by the following decisions :

(i) *CIT* v. *Aurionpro Solutions Ltd.* (I. T. A. No. 1869 of 2014—Bombay)

(ii) *CIT* v. *Cotton Naturals (I.) (P.) Ltd.* [2015] 5 ITR-OL 1 (Delhi) ; [2015] 276 CTR 445 (Delhi)

(iii) *Hinduja Global Solutions Ltd.* v. *Addl. CIT* [2013] 145 ITD 361 (Mum)

(iv) *Siva Industries and Holdings Ltd.* v. *Asst. CIT* [2012] 145 TTJ 497 (Chennai)

(v) *3F Industries Ltd.* v. *Jt. CIT* [2014] 63 SOT 314 (Vizag)

(vi) *Everest Kanto Cylinder Ltd.* v. *Asst. CIT (LTU)* being I. T. A. No. 7073/Mum/2012 for 2008-09 dated September 25, 2014.

21 Respectfully following the proposition laid down in the above judicial pronouncements, we direct the Transfer Pricing Officer/Assessing Officer to restrict the adjustment by taking LIBOR rate. We direct accordingly. This ground of appeal is allowed in part.

22 The next grievance of the assessee as contained in ground No. 5 relates to adjustment of Rs. 9,12,541 in respect of interest on outstanding receivables. In this respect, facts of the case are that the assessee has entered into a service agreement with its associated enterprises Essar Shipping and Logistics Limited (ESSL) dated January 16, 2012 to provide business support services. This agreement was entered with effect from April 1, 2011. As per the said agreement, Essar Shipping and Logistics Limited shall pay the consideration within 30 days of receipt of invoice and delay in payment would attract interest at one per cent. per month. During the

year, there was delay in receiving payment from Essar Shipping and Logistics Limited, however, the assessee had not charged any interest on account of delay. Accordingly, the Assessing Officer worked out interest on the outstanding dues beyond the stipulated period and made adjustment of Rs. 9,12,541.

It was argued by the learned authorised representative of the assessee that the interest on outstanding receivables is not an independent international transaction since the international transaction entered into by the assessee is accepted to be at the arm's length wherein the assessee is charging its associated enterprises a profit margin of 29.71 per cent. as against 5.79 per cent. which is average margin of comparable cases providing similar services. It is submitted that when the assessee is charging such huge margins from its associated enterprises, the assessee would have taken into account all the factors such as delay in receipt of payment and hence there is no justification for the Transfer Pricing Officer to suggest adjustment in respect of interest on outstanding receivables. It is submitted that no separate adjustment can be made by treating the extension of credit period to associated enterprises as a separate international transaction. 23

On the other hand, the learned Departmental representative has relied on the order of the Dispute Resolution Panel and contended that since the payment was not made within the period of 30 days of receipt of invoice, the assessee should have charged interest at one per cent. per month which he failed to charge, accordingly, the Transfer Pricing Officer was justified in making the adjustment. 24

We have considered the rival contentions and carefully gone through the orders of the authorities below and found that the Transfer Pricing Officer has made adjustment by charging interest with regard to delay in receipt of payment for the services so rendered, accordingly, the Transfer Pricing Officer was justified in making the said adjustment. However, from the record, we found that the working of interest as determined by the Transfer Pricing Officer is incorrect. The Transfer Pricing Officer has charged interest beyond the previous year relevant to assessment year under consideration. Accordingly, we restore the matter back to the file of the Transfer Pricing Officer/Assessing Officer to recalculate the chargeable interest and confine the same only up to the end of the year under consideration, i. e., March 31, 2013 and not thereafter. We direct accordingly. 25

The next grievance of the assessee as contained in ground No. 6 relates to taxing the interest income on loans/intercorporate deposit given to 26 subsidiaries and group concerns under the head "Income from other sources" as against "income from business" as claimed by the assessee. In ground No. 7, the assessee has challenged the Assessing Officer's action for declining claim of interest expenditure under section 36(1)(iii) of the Income-tax Act. As an alternate in ground No. 8, the assessee has requested to allow interest expenses under section 57(iii). All these three grounds are interrelated, therefore, disposed by us as under.

27 Rival contentions have been heard and record perused. The facts in brief are that the assessee is in the business of operation of ships, logistics and drilling oil rigs. One of the main objects of the assessee as per the memorandum of association of the company is to enter into and conduct the business of owning and/or leasing and/or hiring and/or operating all types of onshore and offshore drilling rigs. The shipping and logistics business is being carried out by the assessee itself whereas the oilfield business is being carried out by the assessee through its subsidiary. For the purpose of carrying oil field business, the assessee had given intercorporate deposits to its subsidiaries. Thus, the funds given to its subsidiary company engaged in oil drilling business represents the business activity of the company and forms part of the oilfields services business of the assessee. It is evident from the record that the assessee has given the intercorporate deposits to its subsidiary company to develop the oilfiled services business of the company which is one of main objects of the company and thus forms part of the business of the assessee. During the year the assessee has borrowed money from LIC and bank which had been given as intercorporate deposits (intercorporate deposits) to its wholly owned subsidiary M/s. Essar Oilfield Services India Ltd. (EOSIL) and other subsidiary who is carrying out the business of oil drilling operations. We also found that in the earlier years, i. e., the assessment years 2011-12 and 2012-13, the assessee has given similar intercorporate deposits to Essar Oilfield Services India Ltd. The income earned on such inter corporate deposits was offered by the assessee for taxation as business income. The Assessing Officer has accepted the assessee's contention and assessed the interest income as "income from business". However, during the year under consideration, i. e., the assessment year 2013-14, the interest income offered by the assessee as business income was not accepted by the Assessing Officer, the Assessing Officer was of the view that the assessee had advanced money to the subsidiaries for earning interest income, therefore, taxed the same as income from other sources. The Assessing Officer had discussed this ground at page Nos. 3 to 4 of his order. The Assessing Officer also observed that the assessee has not proved that the borrowed money was

used for giving intercorporate deposits, hence, the interest expenditure cannot be allowed as deduction even if the interest income is held taxable under the head "Income from other sources".

From the record, we found that the business activities of the assessee comprises of shipping business, logistics business and oilfield business. The shipping and logistics business is being carried out by the assessee itself whereas the oilfield business is being carried out by the assessee through its subsidiary. We had also gone through the memorandum of association of the assessee and found that the main object of the assessee is "to enter into and conduct the business of owning and/or leasing and/or hiring and/or operating all types of onshore and offshore drilling rings". Thus, it is clear that even as per the memorandum, it was main objection of the assessee. The assessee was carrying out business of drilling oil rigs through its subsidiary for this purpose the assessee borrowed money and advanced the same as intercorporate deposits to its subsidiary to carry out the drilling business. Thus, the business so carried out by the subsidiary was as per the main objects of the assessee-company. The assessee had not given inter-corporate deposits to its subsidiary for the purpose of earning interest income. Accordingly, the income on such intercorporate deposits has to be treated as business income only since it has been earned in the course of the business of the assessee and forms part of the business of the company. 28

From the record, we found that during the previous year relevant to the assessment year under consideration, the assessee has earned interest income from intercorporate deposits of Rs. 60.16 crores and from banks of Rs. 1.81 crores. The break up of the interest income is as under : 29

Sl. No.	*Name*	*Amount of interest*	*Remarks*
1.	Essar oilfield Services India Ltd.	53,97,05,043	This company is step down subsidiary of the assessee
2.	Essar Steel India Ltd.	5,57,23,697	This company is group company of the assessee.
3.	Essar Oilfield Services Ltd Mauritius	53,45,802	This company is wholly owned subsidiary of the assessee
4.	Energy Transportation International Ltd.	7,80,763	This company is wholly owned subsidiary of the assessee
5.	Interest from banks	1,81,44,909	Interest on margin money given to bank

The money advanced to companies at Sr. Nos. 1 to 4 are group/subsidiary companies and the money has been given for business purpose of assessee. The Assessing Officer has not brought any material on record to suggest that the assessee had given intercorporate deposit to subsidiaries for earning interest income. It is also not the case of the Assessing Officer that the assessee had given its surplus funds to subsidiary for earning interest income. Thus, the income on intercorporate deposit is to be assessed under the head "business income". Similar view has been taken by the co-ordinate Bench of the Income-tax Appellate Tribunal, Mumbai in the case of *Tolani P. Ltd.* in I. T. A. No. 5562/Mum/2013, order dated January 4, 2018 wherein the assessee was engaged in operation of ships had advanced loan/intercorporate deposit to its subsidiary for acquiring ship, it was held that even on the basis of commercial expediency, the assessee was bound to assist its subsidiary, the interest income earned on such loans/inter corporate deposit is liable to be assessed as income under the head "business income" and not under the head "Income from other sources".

30 With regard to bank interest income amounting to Rs. 1,81,44,909, the same has been received on margin money which the assessee was required to keep with banks as per the terms of sanction, hence the same is also for the purpose of business. The money so kept with the bank as margin money was out of business compulsion and not as per the sweet will of the assessee, therefore, the interest earned on such margin money is also liable to be taxed as business income.

31 The assessee is also aggrieved for disallowance of interest expenditure. The Assessing Officer has dealt with the issue at page Nos. 9 to 14. From the record we found that during the year, interest of Rs. 136,82,29,020 was directly incurred for non-tonnage activity and common interest of Rs. 37,75,64,523 was allocated towards non-tonnage activity. Thus, the total interest expenditure of Rs. 174,57,93,543 was claimed under section 36(1)(iii) of the Act as business expenditure. It was contended before the Assessing Officer that the assessee is involved in business of oil drilling and the interest expenditure incurred was on account of loan taken from bank and LIC. The amount of money taken from bank and LIC was used for providing intercorporate deposits to its subsidiaries, as the business of oil drilling was carried out by the assessee through its subsidiary. It was also contended that similar interest expenditure has been allowed under section 36(1)(iii) in the assessment year 2011-12. The Assessing Officer held that oil drilling is not the business of the assessee. He further held that interest income earned from intercorporate deposits has been taxed under the head income from other sources and hence interest expenditure cannot be allowed under section 36(1)(iii) of the Act. The Assessing Officer further held that out of the total interest an amount of Rs. 1,56,83,680 has been paid for aircraft taken on lease and the assessee has not explained the nexus between the expenses claimed with the receipt of non-tonnage activities. Accordingly, he disallowed the said interest expenditure under section 36(1)(iii) of the Act.

We had carefully gone through the entire details placed on record and found that the interest expenditure of Rs. 136,82,29,021 (174,57,93,544 – 37,75,64,523) is as under : 32

Sl. No.	*Particulars*	*Amount (Rs)*	*Purpose of loan*
1.	Interest paid to Yes Bank	19,91,29,094	Amount borrowed in the assessment year 2012-13 and used for investment in shares of Essar Oilfields Services Limited, Mauritius which is wholly owned subsidiary of the assessee established for purpose of carrying out oilfield business.
2.	Interest paid on NCS from LIC	48,03,11,032	Amount received from LIC in the assessment year 2010-11 was utilised for giving intercorporate deposit to the subsidiary company for carrying out oilfield business. The income from intercorporate deposit has been offered as business income under non-tonnage activity.
3.	Interest on FCCB	67,31,05,2015	Amount borrowed in the assessment year 2011-12 and used for investment in preference shares in wholly owned subsidiary for carrying out oilfield business.
4.	Interest on aircraft taken on lease	1,56,83,680	Income earned from operation of aircraft has been offered as business income under non-tonnage activity.
5.	Total	136,82,29,021	

It is evident from the above chart that interest expenditure of Rs. 135,25,45,341 has been incurred on amount borrowed for the purpose of giving intercorporate deposit to its subsidiary and interest of Rs. 1,56,83,680 has been incurred on aircraft taken on lease. 33

As discussed hereinabove, the assessee derives business income from tonnage activity and non-tonnage activity. One of the activities, income from which is offered as business income under non-tonnage, is oilfield business. As per the objects clause of the memorandum, one of the main objects of the assessee was to carry out oil drilling business, which is also evident from the director's report placed on record. Since the oil drilling business was carried out by the assessee through its subsidiary, loan was taken for giving as intercorporate deposit to its subsidiary and the assessee invested in the subsidiary to acquire complete control over it since the 34 assessee was to carry out its business of oil drilling through its subsidiaries. Therefore, the interest expenditure should be allowed as business expenditure under section 36(1)(iii) of the Act. Since the investment was made in the group company for strategic purpose and not for earning dividend. Thus, the interest expenditure is allowable under section 36(1)(iii) of the Act in so far as we have already held that the income on intercorporate deposit earned from subsidiaries was liable to be taxed under the head "Income from business". From the record we found that the said interest expenditure was effectively incurred for oil drilling business of assessee and hence the same is on account of business and allowable under section 36(1)(iii) of the Act. In order to support our proposition, reliance is placed on the following decisions :

(a) *CIT* v. *Phil Corporation Ltd.* [2011] 244 CTR 226 (Bom)

(b) *CIT* v. *Colgate Palmolive (India) Ltd.* [2015] 370 ITR 728 (Bom)

(c) *CIT* v. *Investa Industrial Corpn. Ltd.* [1979] 119 ITR 380 (Bom)

(d) *CIT* v. *RPG Transmissions Ltd.* [2013] 359 ITR 673 (Mad)

(e) *Raptakos Brett and Co. Ltd.* v. *Pr. CIT* (I. T. A. No. 2251/Mum/2015) (Mum-Trib.)

35 In all the above cases, it has been held that if the investment is made in the subsidiary for the purpose of business, the loss or expenditure incurred by the assessee would be allowable as business expenditure.

With respect to interest on aircraft taken on lease, we observe that the assessee had offered income earned from operation of aircraft as business income, the interest paid for aircraft taken on lease is essentially allowable as business expense under section 36(1)(iii) of the Income-tax Act.

36 We also observe that even otherwise the interest expenditure incurred on the loans which are given to its subsidiaries as intercorporate deposit on which interest was received by the assessee, such interest expenditure is eligible to be allowed under section 57(iii) of the Act while computing the net interest income, this observation is without prejudice to our above observation that interest on loan is eligible for deduction under section 36(1)(iii) of the Act.

37 It was also argued by the learned authorised representative that no interest disallowance on old/outstanding loan can be made in the current year, if the same was allowed in earlier year. It was submitted that the said interest expenditure pertaining to the amount borrowed from LIC has been allowed in the assessment year 2010-11 in the case of Essar Ports Limited and the assessment year 2011-12 in the case of the assessee by the Assessing Officer in the scrutiny assessment order passed under section 143(3) of

the Act. In order to support this proposition, reliance was placed on the following decisions :

(a) *CIT* v. *Sridev Enterprises* [1991] 192 ITR 165 (Karn)

(b) *Escorts Ltd.* v. *Asst. CIT* [2007] 104 ITD 427 (Delhi)

(c) *Malwa Cotton Spinning Mills* v. *Asst. CIT* [2004] 89 ITD 65 (Chd)

(d) *ITO* v. *J. M. P. Enterprises* [2006] 101 ITD 324 (Asr)

(e) *Virendra R. Gandhi* v. *Asst. CIT* (Tax Appeal Nos. 20 of 2004 and 124 of 2005 dated November 27, 2014 (Gujarat High Court)

Since we have already directed the Assessing Officer to allow deduction of interest expenditure under section 36(1)(iii) of the Act even following the rule of consistency, the Assessing Officer should have allowed the same as per the treatment given by him in earlier years since there is no change in facts and circumstances of the case during the year under consideration. Thus, even on the doctrine of consistency, we find sufficient force in the argument of the learned authorised representative that the interest expenditure which have already been allowed under business head of income in earlier year, the same should be allowed in the similar manner even during the year since there is no change in the facts and circumstances of the case. **38**

We had also carefully perused the bank statement demonstrating the said nexus which is placed on record. It is evident from the said bank statement and ledger account that there is a direct nexus between the borrowed funds and the funds advanced to the subsidiary and hence the interest expenditure should otherwise be allowed as deduction under section 57(iii) of the Act. **39**

We are also of the view that even if the interest income is taxed as income from other sources, then the interest expenditure so incurred for earning the same should be allowed as deduction under section 57(iii) of the Act. Since there was a direct nexus between the funds borrowed from the LIC and the money advanced to the subsidiary company and hence the interest expenditure of Rs. 48,03,11,032 is otherwise liable to be allowed under section 57(iii) of the Act. We direct accordingly. **40**

From the record we found that the Assessing Officer had disallowed the interest paid on the funds borrowed which was given to subsidiaries/group companies. Since the intercorporate deposits were given to subsidiary in order to promote the business since an amount advanced to the subsidiary would ultimately benefit the assessee, the interest paid is allowable as business expenditure. In order to support the said contention reliance is placed on the decision of the hon'ble Supreme Court in the case of *S. A. Builders* **41**

Ltd. v. *CIT (Appeals)* [2007] 288 ITR 1 (SC). In the said decision the hon'ble Supreme Court has held that if the assessee has borrowed funds and advanced the same to its subsidiary in order to promote the business of its subsidiary, then the interest paid by the assessee on borrowed funds is a business expenditure and no interest disallowance can be made under section 36(1)(iii) of the Act. In the present case, the assessee has advanced intercorporate deposit to its subsidiary in order to promote their business and charged interest thereon. Applying the ratio laid down by the hon'ble Supreme Court in the case of *S. A. Builders Ltd.* v. *CIT* (supra), wherein it has been held that interest expenditure incurred by the assessee is allowable as business expenditure, the interest income earned by the assessee on intercorporate deposit given to the subsidiary to promote their business would be taxable as business income. The said decision of the hon'ble Supreme Court in the case of *S. A. Builders Ltd.* v. *CIT* (supra) was followed by the hon'ble Supreme Court in the case of *Hero Cycles P. Ltd.* v. *CIT* [2015] 379 ITR 347 (SC). Further reliance is also placed on the decisions of the hon'ble Bombay High Court in the case of *Pr. CIT* v. *Piramal Glass Limited* in Income-tax Appeal No. 566 of 2017 dated June 11, 2019, *Pr. CIT* v. *Sesa Resources Ltd.* [2018] 404 ITR 707 (Bom) and *Pr. CIT* v. *Reebok India Company* [2018] 409 ITR 587 (Delhi) ; 98 taxmann.com 413 in order to support our contention that interest expenditure is to be allowed under section 36(1)(iii) while computing the income under head of "business and profession". Corresponding interest income is to be assessed under the head of business income.

42 The interest expenditure of INR 48.03 crores was incurred during the year on the loan taken from LIC for giving the same as intercorporate deposit to Essar Oilfield Services India Ltd. on which interest income of INR 53.97 crores was earned. As per the bank statement, there is a direct nexus between the loan received from LIC and the intercorporate deposit given, therefore, without prejudice to our conclusion that the income from intercorporate deposit forms part of the business income of the assessee, corresponding interest expense has to be allowed against interest income earned by the assessee irrespective of the head of the income under which it is assessed. Thus, we observe that interest expenditure is otherwise allowable under section 57(iii) since there is a direct nexus between the interest expenditure and interest income earned by the assessee.

43 From the record we also found that the money was borrowed from LIC and advanced to its wholly owned subsidiary Essar Oilfield Services India Ltd. as intercorporate deposit in the earlier assessment year 2010-11. The assessee was demerged from Essar Port Limited with effect from October

1, 2010, i. e., in the assessment year 2011-12. The money was advanced by Essar Ports Limited to Essar Oilfield Services India Ltd. in the assessment year 2010-11 and Essar Ports Ltd. received interest which was offered as business income. The same has been accepted by the Assessing Officer in the assessment year 2010-11 as business income in the assessment order passed in the case of Essar Ports Limited. Subsequently also in the assessment proceedings for the assessment year 2011-12, the same has been accepted by the Assessing Officer as business income in the case of Essar Ports Limited and in the case of the assessee also as business income in scrutiny assessment framed under section 143(3) of the Act. The relevant assessment order so passed under section 143(3) of the Act for the assessment years 2010-11 and 2011-12 are placed on record. However, during the year under consideration, the assessee continued to receive similar interest income on the intercorporate deposit from Essar Oilfield Services India Ltd. which was given out of money borrowed from LIC. The assessee offered the same as business income but the Assessing Officer treated the same as income from other sources. There is no change in the facts and circumstances of the case during the year under consideration as compared to earlier years wherein the Assessing Officer had assessed the very same income under the head of business income. Hence, even on the principles of consistency, the interest income received by the assessee should be taxed as business income. In order to support the said contention reliance is placed on the decision of the hon'ble Supreme Court in the case of *CIT* v. *Excel Industries Ltd.* [2013] 358 ITR 295 (SC). Accordingly, we do not find any justification in the order of the Assessing Officer for treating interest income as "income from other sources".

In view of the above discussion, we direct the Assessing Officer to treat interest income as "income from business" and to allow interest expenditure under section 36(1)(iii) of the Income-tax Act. We direct accordingly. **44**

The last grievance of the assessee relates to disallowance of common interest expenditure of Rs. 35,98,89,248. The Assessing Officer has dealt with the issue at page Nos. 11 and 12. From the record we found that the assessee had claimed common interest expenditure of Rs. 48,82,67,263 which has been apportioned to tonnage and non-tonnage activity. The assessee allocated the said expenditure in the ratio of assets employed between tonnage and non-tonnage activities. The Assessing Officer apportioned the said expenditure on the basis of turnover between tonnage and non-tonnage activities. We do not find any merit in the order of the Assessing Officer in so far as the interest expenditure is periodic cost of borrowing incurred for the purpose of financing business activities. Therefore **45** it has to be apportioned on basis of cost of financing, i. e., value of assets and not on basis of turnover, since the turnover of the business has got no relation with the interest expenditure so incurred by the assessee. We, accordingly, restore this issue to the file of the Assessing Officer to recompute the same by allocating interest expenditure in the ratio of assets employed between the tonnage and non-tonnage activities. We direct accordingly.

46 The next grievance of the assessee as contained at ground No. 9 relates to assessing the supervision management fees of Rs. 7,07,52,924, as belonging to tonnage business. This ground was not pressed by the learned authorised representative, we therefore, dismiss this ground as not pressed. Accordingly, this ground of appeal is dismissed.

47 Ground No. 10 is consequential to ground No. 9, wherein it was the contention of the learned authorised representative that once the income is treated as income under the tonnage tax income, the same should not again be taxed as part of normal income offered by the assessee. It was pointed out by the learned authorised representative that the Assessing Officer has inadvertently added the same income in normal business income shown by the assessee which amount to double taxation of the same income. From the record we found that the Assessing Officer was justified in treating the income of Rs. 7,07,52,924 as tonnage tax income, however, the same should not again form the part of normal business income. We found that the Assessing Officer has inadvertently again added the same income under the head normal business income, which amount to double taxation of same income, accordingly, we direct the Assessing Officer to reduce the same from normal business income after due verification. We direct accordingly.

48 In the result, ground No. 10 is allowed for statistical purposes.

49 In the result, this appeal of the assessee is allowed in part, in terms indicated hereinabove.

50 Order pronounced in the open court on 6th March, 2020.

[2020] 79 ITR (Trib) 585 (Mumbai)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — MUMBAI "F" BENCH]

DEPUTY COMMISSIONER OF INCOME-TAX

v.

JSW LTD.

(and vice versa)

P. P. BHAT *(President)* and **PRAMOD KUMAR *(Vice-President)***

May 14, 2020.

SS ▸ ITA 1961, s 14A ; ITR 1962, r 8D(2)(ii) ; IT (AT) R 1963, r 34(5)
AY ▸ 2013-14
HF ▸ Assessee

INCOME—DISALLOWANCE OF EXPENDITURE IN RELATION TO EXEMPT INCOME—NO TAX EXEMPT INCOME IN RELEVANT PREVIOUS YEAR—NO DISALLOWANCE—INCOME-TAX ACT, 1961, S. 14A—INCOME-TAX RULES, 1962, R. 8D(2)(ii).

APPEAL TO APPELLATE TRIBUNAL—PRONOUNCEMENT OF ORDERS—TIME LIMIT FOR—EXCEPTIONAL CIRCUMSTANCES CREATED OWING TO SPREAD OF CORONAVIRUS—ORDER PASSED AFTER TIME LIMIT PRESCRIBED—INCOME-TAX (APPELLATE TRIBUNAL) RULES, 1963, R. 34(5).

The assessee did not have any exempt income in the relevant previous year. The Assessing Officer made a disallowance under section 14A of the Income-tax Act, 1961 which pertains to disallowance in respect of expenditure incurred by the assessee in relation to income which did not form part of the total income under the Act. The Commissioner (Appeals) confirmed the disallowance. On appeal :

Held, *that there was no tax exempt income in the relevant previous year, no disallowance under section 14A could have been made, on the facts of this case and in the year 2013-14. Disallowance of Rs. 80,51,200 sustained by the Commissioner (Appeals) was deleted.*

CHEMINVEST LTD. *v.* CIT [2015] 378 ITR 33 (Delhi) *relied on.*

The period of lockdown ordered owing to the spread of the Coronavirus cannot be treated as an ordinary period during which the normal time limits are to remain in force. Even without the word "ordinarily", in the light of the analysis of the legal position, the period during which the lockdown was in force is to be excluded for the purpose of the time limits set out in rule 34(5) of the Income-tax (Appellate Tribunal) Rules, 1963.

Cases referred to :

Anil Rai *v.* State of Bihar [2002] 3 BCR 360 (SC) (para 8)
Cheminvest Ltd. *v.* CIT [2015] 378 ITR 33 (Delhi) (paras 5)
Cheminvest Ltd. *v.* CIT [2009] 317 ITR (AT) 86 (Mumbai) [SB] (para 5)
CIT (Pr.) *v.* Ballarpur Industries Ltd. (I. T. A. No 51 of 2016 dated October 13, 2016) (para 4)
CIT *v.* Corrtech Energy (P.) Ltd. [2015] 372 ITR 97 (Guj) (para 5)
CIT *v.* Hero Cycles Ltd. [2010] 323 ITR 518 (P&H) (para 5)
CIT *v.* Holcim India (P.) Ltd. [2015] 57 taxmann.com 28 (Delhi) (para 5)
CIT *v.* Lakhani Marketing Inc. [2015] 4 ITR-OL 246 (P&H) (para 5)
CIT *v.* Rajendra Prasad Moody [1978] 115 ITR 519 (SC) (para 5)
CIT *v.* Shivam Motors (P.) Ltd. [2015] 230 Taxman 63 (All) (para 5)
CIT (Dy.) *v.* Viraj Profiles Ltd. [2016] 46 ITR (Trib) 626 (Mum) (para 2)
CIT *v.* Winsome Textile Industries Ltd. [2009] 319 ITR 204 (P&H) (para 5)
Maxopp Investment Ltd. *v.* CIT [2018] 402 ITR 640 (SC) (paras 2, 5)
Otters Club *v.* DIT (E) [2017] 392 ITR 244 (Bom) (para 10)
Shivsagar Veg. Restaurant *v.* Asst. CIT [2009] 317 ITR 433 (Bom) (Para 8)

I. T. A. Nos. 6103 and 6264/Mumbai/2018 (assessment year 2013-14).

Jascinta Zimik Vashai for the Department.

Gaurav Kabra for the assessee.

ORDER

1 These cross-appeals, filed by the assessee and the Assessing Officer, are directed against the order dated August 1, 2018 passed by the Commissioner of Income-tax (Appeals) in the matter of assessment under section 143(3) of the Income-tax Act, 1961, for the assessment year 2013-14.

2 Grievances raised by the parties are as under :

Grievance of the assessee

> "On the facts and in the circumstances of the case and in law, the learned Assessing Officer has erred in restricting the disallowance to Rs. 80,51,200 under section 14A of the Income-tax Act, 1961, without appreciating the fact that the appellant company has not earned any tax exempt income during the relevant assessment year."

Grievances of the Assessing Officer

"1. On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) erred in deleting the disallowance of Rs. 3,35,40,340 under rule 8D(2)(ii) without appreciating the fact that the assessee could not link its investments with its own funds.

2. On the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) erred in deleting the disallowance of part of interest under section 14A by not following the decision of the hon'ble Supreme Court in the case of *Maxopp Investment Ltd.* v. *CIT* [2018] 402 ITR 640 (SC) ; (Civil Appeal Nos. 104-109 of 2015) wherein it is held that when funds utilised by the assessee are mixed funds, then the principles of apportionment is applicable.

3. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) erred in holding that the disallowance made under section 14A cannot be considered while computing the book profit under section 115JB, without appreciating the fact that this issue is squarely covered in favour of the Revenue by the decision of "F" Bench of the Income-tax Appellate Tribunal in the case of *Dy. CIT* v. *Viraj Profiles Ltd.* [2016] 46 ITR (Trib) 626 (Mum) ; [2016] 156 ITD 72 (Mum)."

To adjudicate on these appeals, it is sufficient to take note of the fact that 3
admittedly the assessee did not have any exempt income in the relevant previous year, and yet the Assessing Officer proceeded to make the disallowance under section 14A of the Act which pertains to disallowance "in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act". The learned Departmental representative does not fairly dispute this factual position.

The learned representatives fairly agree that the question as to whether 4
a disallowance under section 14A can be made even in a situation in which the assessee has not earned any tax exempt income is no longer res integra inasmuch as the hon'ble jurisdictional High Court, in the case of *Pr. CIT* v. *Ballarpur Industries Ltd.* (I. T. A. No. 51 of 2016 judgment dated October 13, 2016), has confirmed the findings of the Tribunal and declined to admit the question of law, and observed, inter alia, as follows :

". . . On hearing the learned counsel for the Department and on a perusal of the impugned orders, it appears that both the authorities have recorded a clear finding of fact that there was no exempt income earned by the assessee. While holding so, the authorities relied on the judgment of the Delhi High Court in Income-tax Appeal No. 749 of 2014 which holds that the expression 'does not form part of the total income' in section 14A of the Income-tax Act, 1961 envisages that there should be an actual receipt of the income, which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. The Income-tax Appellate Tribunal held that the provisions of section 14A of the Income-tax Act, 1961 would not apply to the facts of this case as no exempt income was received or receivable during the relevant previous year. It is not the case of the Assessing Officer that any actual income was received by the assessee and the same was includible in the total income. . .

The findings of facts recorded by both the authorities below do not give rise to any substantial question of law.

Since no substantial question of law arises in this income-tax appeal, the income-tax appeal is dismissed with no order as to costs."

In the case of *Cheminvest Ltd.* v. *CIT* [2015] 378 ITR 33 (Delhi), the hon'ble Delhi High Court has, on this issue, observed as follows (page 37) :

"Turning to the central question that arises for consideration, the court finds that the complete answer is provided by the decision of this court in *CIT* v. *Holcim India (P.) Ltd.* [2015] 57 taxmann.com 28 (Delhi). In that case a similar question arose, viz., whether the Income-tax Appellate Tribunal was justified in deleting the disallowance under section 14A of the Act when no dividend income had been earned by the assessee in the relevant assessment year ? The court referred to the decision of this court in *Maxopp Investment Ltd.*'s case (supra) and to the decision of the Special Bench of the Income-tax Appellate Tribunal in this very case, i. e., *Cheminvest Ltd.* v. *CIT* [2009] 317 ITR (AT) 86 (Mumbai) [SB] ; [2009] 121 ITD 318 (Delhi) [SB]. The court also referred to three decisions of different High Courts which have decided the issue against the Revenue. The first was the decision in *CIT* v. *Lakhani Marketing Inc.* [2015] 4 ITR-OL 246 (P&H) of the High Court of Punjab and Haryana which in turn referred to two earlier decisions of the same court in *CIT* v. *Hero Cycles Ltd.* [2010] 323 ITR 518 (P&H) ; 189 Taxman 50 and *CIT* v. *Winsome Textile Industries Ltd.* [2009] 319 ITR 204 (P&H). The second was of the Gujarat High Court in *CIT* v. *Corrtech Energy (P.) Ltd.* [2015] 372 ITR 97 (Guj) ; [2014] 223 Taxman 130 (Guj) ; 45 taxmann.com 116 and the third of the Allahabad High Court in *CIT* v. *Shivam Motors (P.) Ltd.* [2015] 230 Taxman 63 (All) ; 55

taxmann.com 262. These three decisions reiterated the position that when an assessee had not earned any taxable income in the relevant assessment years in question 'corresponding expenditure could not be worked out for disallowance'.

In *Holcim India (P.) Ltd.*'s. case (supra), the court further explained as under :

'15. Income exempt under section 10 in a particular assessment year, may not have been exempt earlier and can become taxable in future years. Further, whether income earned in a subsequent year would or would not be taxable, may depend upon the nature of transaction entered into in the subsequent assessment year. For example, long-term capital gain on sale of shares is presently not taxable where security transaction tax has been paid, but a private sale of shares in an off market transaction attracts capital gains tax. It is an undisputed position that respondent-assessee is an investment company and had invested by purchasing a substantial number of shares and thereby securing right to management. Possibility of sale of shares by private placement, etc., cannot be ruled out and is not an improbability. Dividend may or may not be declared. Dividend is declared by the company and strictly in legal sense, a shareholder has no control and cannot insist on payment of dividend. When declared, it is subjected to dividend distribution tax.'

On facts, it was noticed in *CIT* v. *Holcim India (P.) Ltd.* [2015] 57 taxmann.com 28 (Delhi) that the Revenue had accepted the genuineness of the expenditure incurred by the assessee in that case and that the expenditure had been incurred to protect investment made.

In the present case, the factual position that has not been disputed is that the investment by the assessee in the shares of Max India Ltd. is in the form of a strategic investment. Since the business of the assessee is of holding investments, the interest expenditure must be held to have been incurred for holding and maintaining such investment. The interest expenditure incurred by the assessee is in relation to such investments which gives rise to income which does not form part of total income.

In the light of the clear exposition of the law in *Holcim India (P.) Ltd.*'s. case (supra) and in view of the admitted factual position in this case that the assessee has made strategic investment in shares of Max India Ltd. that no exempted income was earned by the assessee in the relevant assessment year and since the genuineness of the expenditure incurred by the assessee is not in doubt, the question framed is required to be answered in favour of the assessee and against the Revenue.

Since the Special Bench has relied upon the decision of the Supreme Court in *Rajendra Prasad Moody*'s case [1978] 115 ITR 519 (SC), it is considered necessary to discuss the true purport of the said decision. It is noticed to begin with that the issue before the Supreme Court in the said case was whether the expenditure under section 57(iii) of the Act could be allowed as a deduction against dividend income assessable under the head "Income from other sources". Under section 57(iii) of the Act deduction is allowed in respect of any expenditure laid out or expended wholly or exclusively for the purpose of making or earning such income. The Supreme Court explained that the expression "incurred for making or earning such income" did not mean that any income should in fact have been earned as a condition precedent for claiming the expenditure. The court explained (page 522 of 115 ITR) :

'What section 57(iii) requires is that the expenditure must be laid out or expended wholly and exclusively for the purpose of making or earning income. It is the purpose of the expenditure that is relevant in determining the applicability of section 57(iii) and that purpose must be making or earning of income. Section 57(iii) does not require that this purpose must be fulfilled in order to qualify the expenditure for deduction. It does not say that the expenditure shall be deductible only if any income is made or earned. There is in fact nothing in the language of section 57(iii) to suggest that the purpose for which the expenditure is made should fructify into any benefit by way of return in the shape of income. The plain natural construction of the language of section 57(iii) irresistibly leads to the conclusion that to bring a case within the section, it is not necessary that any income should in fact have been earned as a result of the expenditure.'

There is merit in the contention of Mr. Vohra that the decision of the Supreme Court in *Rajendra Prasad Moody*'s case (supra) was rendered in the context of allowability of deduction under section 57(iii) of the Act, where the expression used is 'for the purpose of making or earning such income'. Section 14A of the Act on the other hand contains the expression 'in relation to income which does not form part of the total income'. The decision in *Maxopp Investment Ltd.*'s case (supra) cannot be used in the reverse to contend that even if no income has been received, the expenditure incurred can be disallowed under section 14A of the Act.

In the impugned order, the Income-tax Appellate Tribunal has referred to the decision in *Maxopp Investment Ltd.*'s. case (supra) and remanded the matter to the Assessing Officer for reconsideration of the issue afresh. The issue in *Maxopp Investment Ltd.*'s. case (supra) was whether the expenditure (including interest on borrowed funds) in respect of investment in shares of operating companies for acquiring and retaining a controlling interest therein was disallowable under section 14A of the Act. In the said case admittedly there was dividend earned on such investment. In other words, it was not a case, as the present, where no exempt income was earned in the year in question. Consequently, the said decision was not relevant and did not apply in the context of the issue projected in the present case.

In the context of the facts enumerated hereinbefore the court answers the question framed by holding that the expression 'does not form part of the total income' in section 14A of the envisages that there should be an actual receipt of income, which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. In other words, section 14A will not apply if no exempt income is received or receivable during the relevant previous year."

In view of the above discussions, and in the light of undisputed facts of this case that there was no tax exempt income in the relevant previous year, we hold that no disallowance under section 14A could have been made, on the facts of this case and in the year before us. We, therefore, uphold the plea of the assessee and delete the disallowance of Rs. 80,51,200 sustained by the Commissioner of Income-tax (Appeals). Once we uphold the plea of the assessee that no disallowance under section 14A could have been made on the facts of this case, grievances of the Assessing Officer, against the learned Commissioner of Income-tax (Appeals)'s partially deleting the disallowance under section 14A become infructuous. Grievance of the assessee is thus upheld and grievances of the Assessing Officer are dismissed as infructuous. 6

However, before we part with the matter, we must deal with one procedural issue as well. While hearing of these appeals was concluded on January 7, 2020, this order thereon is being pronounced today on 14th day of May, 2020, much after the expiry of 90 days from the date of conclusion of hearing. We are also alive to the fact that rule 34(5) of the Income-tax (Appellate Tribunal) Rules 1963, which deals with pronouncement of orders, provides as follows : 7

"(5) The pronouncement may be in any of the following manners :—

(a) The Bench may pronounce the order immediately upon the conclusion of the hearing.

(b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement.

(c) In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not *ordinarily* (emphasis[1] supplied by us now) be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board."

8 Quite clearly, "ordinarily" the order on an appeal should be pronounced by the Bench within no more than 90 days from the date of concluding the hearing. It is, however, important to note that the expression "ordinarily" has been used in the said rule itself. This rule was inserted as a result of directions of the hon'ble jurisdictional High Court in the case of *Shivsagar Veg. Restaurant* v. *Asst. CIT* [2009] 317 ITR 433 (Bom) wherein their Lordships had, inter alia, directed that "*We, therefore, direct the President of the Appellate Tribunal to frame and lay down the guidelines in the similar lines as are laid down by the apex court in the case of* Anil Rai *v.* State of Bihar [2002] 3 BCR 360 (SC) *(and to issue appropriate administrative directions to all the Benches of the Tribunal in that behalf*. We hope and trust that suitable guidelines shall be framed and issued by the President of the Appellate Tribunal within shortest reasonable time and followed strictly by all the Benches of the Tribunal. *In the meanwhile (emphasis, by underlining, supplied by us now), all the revisional and the appellate authorities under the Income-tax Act are directed to decide matters heard by them within a period of three months from the date case is closed for judgment*". In the rule so framed, as a result of these directions, the expression "ordinarily" has been inserted in the requirement to pronounce the order within a period of 90 days. The question then arises whether the passing of this order, beyond ninety days, was necessitated by any "extraordinary" circumstances.

9 Let us in this light revert to the prevailing situation in the country. On March 24, 2020, the hon'ble Prime Minister of India took the bold step of imposing a nationwide lockdown, for 21 days, to prevent the spread of

1. Here printed in italics.

Covid 19 epidemic, and this lockdown was extended from time to time. As a matter of fact, even before this formal nationwide lockdown, the functioning of the Income-tax (Appellate Tribunal at Mumbai was severely restricted on account of lockdown by the Maharashtra Government, and on account of strict enforcement of health advisories with a view of checking spread of Covid 19. The epidemic situation in Mumbai being grave, there was not much of a relaxation in subsequent lockdowns also. In any case, there was unprecedented disruption of judicial wok all over the country. As a matter of fact, it has been such an unprecedented situation, causing disruption in the functioning of judicial machinery, that the hon'ble Supreme Court of India, in an unprecedented order in the history of India and vide order dated May 6, 2020 read with order dated March 23, 2020, extended the limitation to exclude not only this lockdown period but also a few more days prior to, and after, the lockdown by observing that "In case the limitation has expired after March 15, 2020 then the period from March 15, 2020 till the date on which the lockdown is lifted in the jurisdictional area where the dispute lies or where the cause of action arises shall be extended for a period of 15 days after the lifting of lockdown". The hon'ble Bombay High Court, in an order dated April 15, 2020, has, besides extending the validity of all interim orders, has also observed that, "It is also clarified that while calculating time for disposal of matters made time-bound by this court, the period for which the order dated March 26, 2020 continues to operate shall be added and time shall stand extended accordingly", and also observed that "arrangement continued by an order dated March 26, 2020 till April 30, 2020 shall continue further till June 15, 2020". It has been an unprecedented situation not only in India but all over the world. Government of India has, vide notification dated February 19, 2020, taken the stand that, the coronavirus "should be considered a case of natural calamity and FMC (i. e., force majeure clause) may be invoked, wherever considered appropriate, following the due procedure . . . .". The term 'force majeure' has been defined in *Black's Law Dictionary*, as 'an event or effect that can be neither anticipated nor controlled' When such is the position, and it is officially so notified by the Government of India and the Covid-19 epidemic has been notified as a disaster under the National Disaster Management Act, 2005, and also in the light of the discussions above, the period during which lockdown was in force can be anything but an "ordinary" period.

In the light of the above discussions, we are of the considered view that **10**
rather than taking a pedantic view of the rule requiring pronouncement of orders within 90 days, disregarding the important fact that the entire

country was in lockdown, we should compute the period of 90 days by excluding at least the period during which the lockdown was in force. We must factor ground realities in mind while interpreting the time limit for the pronouncement of the order. Law is not brooding omnipotence in the sky. It is a pragmatic tool of the social order. The tenets of law being enacted on the basis of pragmatism, and that is how the law is required to be interpreted. The interpretation so assigned by us is not only in consonance with the letter and spirit of rule 34(5) but is also a pragmatic approach at a time when a disaster, notified under the Disaster Management Act 2005, is causing unprecedented disruption in the functioning of our justice delivery system. Undoubtedly, in the case of *Otters Club* v. *DIT (Exemptions)* [2017] 392 ITR 244 (Bom) the hon'ble Bombay High Court did not approve an order being passed by the Tribunal beyond a period of 90 days, but then in the present situation the hon'ble Bombay High Court itself has, vide judgment dated April 15, 2020, held that directed "while calculating the time for disposal of matters made time bound by this court, the period for which the order dated March 26, 2020 continues to operate shall be added and time shall stand extended accordingly". The extraordinary steps taken suo motu by the hon'ble jurisdictional High Court and the hon'ble Supreme Court also indicate that this period of lockdown cannot be treated as an ordinary period during which the normal time limits are to remain in force. In our considered view, even without the word "ordinarily", in the light of the above analysis of the legal position, the period during which lockdown was in force is to be excluded for the purpose of time limits set out in rule 34(5) of the Income-tax (Appellate Tribunal) Rules, 1963. Viewed thus, the exception, to 90-day time-limit for pronouncement of orders, inherent in rule 34(5)(c), with respect to the pronouncement of orders within ninety days, clearly comes into play in the present case. Of course, there is no, and there cannot be any, bar on the discretion of the Benches to refix the matters for clarifications because of considerable time lag between the point of time when the hearing is concluded and the point of time when the order thereon is being finalised, but then, in our considered view, no such exercise was required to be carried out on the facts of this case.

11 To sum up, the appeal of the assessee is allowed and the appeal of the Assessing Officer is dismissed. Order pronounced under rule 34(4) of the Income-tax (Appellate Tribunal) Rules, 1963, by placing the details on the notice board.

[2020] 79 ITR (Trib) 595 (Kolkata)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL —
KOLKATA "SMC" BENCH]

BHAGWANT MERCHANTS P. LTD.

v.

INCOME-TAX OFFICER

J. SUDHAKAR REDDY *(Accountant Member)*

May 29, 2020.

SS ▸ ITA 1961, ss 147, 148
AY ▸ 2011-12
HF ▸ Assessee

REASSESSMENT—VALIDITY—REASSESSMENT ON BASIS OF WRONG FACTS AND FIGURES AND NON-APPLICATION OF MIND—ASSESSEE DISCLOSING SALE OF SHARES IN ITS BOOKS—SAME AMOUNT CANNOT BE TREATED AS A CASH CREDIT—GROSS RECEIPT COULD NOT BE BROUGHT TO TAX, SPECIFICALLY WHEN ASSESSEE ACQUIRED SHARES PURSUANT TO ALLOTMENT AS EVIDENCED BY LETTER OF ALLOTMENT AND PAYMENT DETAILS—REASSESSMENT NOT VALID—INCOME-TAX ACT, 1961, ss. 147, 148.

The assessee for the assessment year 2011-12 declared income of Rs. 39,020. The assessment was reopened under section 147 of the Income-tax Act, 1961 by issue of notice under section 148. In response, the assessee filed the return. The Assessing Officer issued notice under section 143(2) and also supplied a copy of the reasons recorded for reopening of assessment under section 147 to the assessee. The assessee objected to the reopening of assessment. The Assessing Officer disposed of the objections. Thereafter, the Assessing Officer issued a letter to the assessee replying to the objections raised by the assessee to the reopening of assessment under section 147. In this letter, the Assessing Officer asked the assessee to ignore his reply. Thereafter the Assessing Officer passed an order under section 143(3) read with section 147 determining the total income of the assessee at Rs. 50,39,020. The Commissioner (Appeals) upheld the order of the Assessing Officer. On appeal :

Held, *that the reopening of assessment based on wrong facts and figures was bad in law. The reopening was also bad in law as it proved non-application of mind by the Assessing Officer. The assessee had disclosed the sale of shares in its books of account. Once the sale was declared as income by the assessee, the question of treating the amount as a cash credit under section 68 resulted in double addition. Moreover, the gross receipt could not be brought* *to tax, specifically when the assessee had acquired the shares pursuant to an allotment as evidenced by the letter of allotment, payment details, etc. Thus, the addition was also bad on the merits.*

CYGNUS INVESTMENTS AND FINANCE PVT. LTD. *v.* ASST. CIT (I. T. A. No. 117/Kolkata/2018 dated May 18, 2018) *followed*.

Cases referred to :

CIT *v.* Atul Jain [2008] 299 ITR 383 (Delhi) (para 16)

CIT (Pr.) *v.* G and G Pharma India Ltd. [2016] 384 ITR 147 (Delhi) (para 16)

CIT *v.* Insecticides (India) Ltd. [2013] 357 ITR 330 (Delhi) (para 16)

CIT (Dy.) *v.* JSW Ltd. [2020] 79 ITR (Trib) 585 (Mumbai) (para 20)

Cygnus Investments and Finance Pvt. Ltd. *v.* Asst. CIT (I. T. A. No. 117/Kolkata/2018 dated May 18, 2018) (para 16)

Mumtaz Haji Mohmad Memon *v.* ITO [2018] 408 ITR 268 (Guj) (para 17)

Signature Hotels (P.) Ltd. *v.* ITO [2011] 338 ITR 51 (Delhi) (para 16)

I. T. A. No. 2614/Kolkata/2019 (assessment year 2011-12).

Sunil Surana, authorised representative, for the assessee.

Jayanta Khanra, Joint Commissioner of Income-tax-Senior Departmental representative, for the Department.

ORDER

1 J. SUDHDHAKAR REDDY ***(Accountant Member)***.—This is an appeal filed by the assessee directed against the order of the Commissioner of Income-tax (Appeals)-5, Kolkata ("CIT(A)" for short) dated October 14, 2019 under section 250 of the Income-tax Act, 1961 ("the Act" for short) for the assessment year 2011-12.

2 The assessee is a company and has filed its return of income for the assessment year 2011-12 on September 22, 2011 declaring an income of Rs. 39,020. The assessment was reopened under section 147 of the Act by issue of notice under section 148 of the Act dated March 30, 2015. In response, the assessee filed the return of income on April 16, 2018. The Assessing Officer issued notice under section 143(2) of the Act and has also supplied a copy of the reasons recorded for reopening of assessment under section 147 of the Act to the assessee. On July 27, 2018 the assessee objected to the reopening of assessment by a letter dated August 21, 2018. The Assessing Officer disposed of these objections on August 27, 2018.

3 Thereafter, the Assessing Officer issued a letter to the assessee dated August 28, 2018, replying to the objections raised by the assessee to the

reopening of assessment under section 147 of the Act. In this letter, the Assessing Officer asked the assessee to ignore his reply dated August 27, 2018. Thereafter the Assessing Officer passed an order under section 143(3) read with section 147 of the Act on December 11, 2018 determining the total income of the assessee at Rs. 50,39,020.

Aggrieved, the assessee carried the matter in appeal challenging both the reopening of assessment as well as the addition on grounds of merit. The first appellate authority upheld the order of the Assessing Officer. Further, aggrieved, the assessee is in appeal before me on both the issue of validity of reopening of assessment as well as the validity of the addition on Rs. 15 lakhs made in support of transaction related to sale of 15 thousand shares of M/s. Mogra Commerce Pvt. Ltd. to M/s. Medimix Sales Pvt. Ltd. 4

The learned counsel for the assessee challenges the reopening of assessment on the ground that (a) the information based on which the reopening was initiated, that the assessee receives Rs. 12 lakhs from one M/s. Medimix Sales Pvt. Ltd. is factually incorrect information. Thus, he submits that reopening was made based on wrong information. (b) Nowhere in the information received, it is alleged that there is escapement of income. (c) The Assessing Officer has not applied his mind to the information received and hence it is a case of non-application of mind by the Assessing Officer to the material that came into his possession, prior to forming of a belief that income subject to tax has escaped assessment. (d) A copy of approval from the competent authority permitting reopening of assessment was not provided to the assessee despite specific request and hence the assessment was invalid. (e) The reason for reopening was that an amount of Rs. 12 lakhs was received by the assessee was income which escaped assessment and as no addition whatsoever was made of this amount in the final assessment order passed under section 143(3) read with section 147 of the Act no other addition can be made. (f) In reply to the objections made by the assessee for the reopening, the Assessing Officer stated that, the assessee has raised securities premium account Rs. 38,00,000 during the previous year which is not offered to taxation. This is factually wrong and shows non-application of mind by the Assessing Officer. 5

In his reply, the Assessing Officer states that reopening is not possible without approval from the Principal Commissioner of Income-tax/Commissioner of Income-tax but does not specify as to who has given the approval and hence, the reopening is bad in law. 6

In his reply, the Assessing Officer admits that the reassessment was on the basis of the report of the Investigation Wing. The information given by the Investigation Wing is factually wrong as the assessee did not receive 7 any amount of deposit of Rs. 57,48,996 that there is no figure of Rs. 3,35,16,000 or Rs. 1,77,06,230 in the balance-sheet of the assessee which can be said to be undisclosed and unaccounted for.

8 The report of the Investigation Wing only rises doubts and reopening cannot be made on mere suspicion.

9 On the merits, the learned counsel for the assessee submitted that the addition of Rs. 15 lakhs which is a receipt of an amount on sale of shares, is bad in law as the allotment of shares to the assessee-company for M/s. Mogra Commerce Pvt. Ltd. is evidenced by an allotment advice which is placed at page 33 of the paper book, the payment of which is made through cheques. The sale of shares of M/s. Mogra Commerce Pvt. Ltd. is placed at page 36 of the paper book. He pointed out that all these parties are assessed to income-tax and evidence regarding the same has been furnished. He submitted that the transaction of purchase and sale of shares are recorded in the books of account and disclosed to the Department, the addition of the sale proceeds under section 68 of the Act is arbitrary and illegal. He submitted that the assessee had already disclosed this amount as income as it was its sales and making an addition once again is bad in law.

10 The learned Departmental representative on the other hand, submitted that the assessee-company has no real business and it was a jama-kharchi company. He argued that all these companies were part of the chain of companies incorporated for circulating funds. He submitted that reopening was made, based on the specific information received from the Investigation Wing of the Department. He relied on the order of the learned Commissioner of Income-tax (Appeals) and submitted that the Assessing Officer has conducted verification, applied mind and thereafter recorded reasons and reopened the assessment. On the addition of Rs. 15 lakhs he submitted that the identity, creditworthiness of the party as well as the genuineness of the transaction was not proved by the assessee and hence he argued that the addition should be upheld.

11 Rival contentions heard. On a careful consideration of the facts and circumstances of the case, perusal of the papers on record and case law cited, I hold as follows.

12 The reasons recorded for reopening of the assessment are as follows :

> "The assessee-company filed its return of income for the assessment year 2011-12 on September 22, 2011 declaring a total income of Rs. 39,020 as business income. The assessee has not assessed on regular assessment. Information has been received from the Additional Director of Income-tax (Investigation), Unit-2(l), Kolkata vide

letter bearing No. ADIT(Inv.)/Kol/Unit. 2(1)/Joydeb Sarkar/2017-18/ 8530 dated March 9, 2018 regarding credible sources that large value cash were deposited into the bank accounts No. 063205500113 of Gupta Trading Co. account No. 063205500114 of Adarsh Marketing and account No. 134805500060 of Noresh Kr. Parekh respectively were followed by immediate transfer to the bank account of Hindusthan Hardware (accounts No. 62760525894) and Kazi Nachher Enterprises (A/c No 627605500226). Prima facie, it appears that funds are rotated through above bank accounts for the purpose of accommodation entry. Accordingly a 'cash trail' tracing several beneficiaries has been prepared. On perusal the cash trail and placed on the records wherein it has been found that alleged funds were deposited in cash into subject bank account, and after layering through 2-3 intermediates bank accounts, the same funds were transferred to the bank accounts of beneficiaries. 'Cash trail' tracing several beneficiaries has been prepared. On a perusal of the cash trail it is seen that the assessee-company M/s. Bhagwant Merchants (P.) Ltd. as a beneficiary received Rs. 12,00,000 from M/s. Medimix Sales (P.) Ltd. for the financial year 2010-11. I have gone through the records and return of the assessee it is seen that the assessee-company has no real business activities as no purchase and sales find during the financial year 2010-11. Therefore, there is no logic of received of Rs. 12,00,000 from M/s. Medimix Sales (P.) Ltd. which is a shell company. By this modus operandi actually the unaccounted money of the assessee has back to the books of the assessee. Thus, income to that extent of Rs. 12,00,000 as unaccounted income has escaped assessment in terms of section 147 of the Income-tax Act, 1961. By the reason of the failure on the part of the assessee to disclose fully and truly all material fact necessary for assessment and from this material on record, there is enough reason to believe that income has escaped assessment in the hands of M/s. Bhagwant Merchants (P.) Ltd. amounting to Rs. 12,00,000 for the assessment year 2011-12 as per the provisions of section 147 of the Income-tax Act, 1961. Since more than four years have elapsed form the end of the relevant assessment year 2011-12 the case is put up to the Principal Commissioner of Income-tax-5, Kolkata for his kind perusal and grant of sanction under section 151(1) of the Income-tax Act, if satisfied."

The allegation in the reasons that the assessee-company had received Rs. 12 lakhs from M/s. Medimix Sales Pvt. Ltd. is factually incorrect. No addition has been made on this basis also. In the reply rejecting, the 13 objections raised by the assessee to the reopening, the Assessing Officer stated that the assessee had advanced recoverable in cash or kind of Rs. 33,50,000 and that it raised deposits of Rs. 2,35,226. The Assessing Officer further, states that he has received tangible material and reliable information that the assessee has raised securities premium account of Rs. 38 lakhs during the previous year. He further states that the reopening was made after obtaining sanction of the Principal Commissioner of Income-tax, Kolkata 5. All the figures mentioned in this reply are factually incorrect. It is not clear from where the Assessing Officer picked up these figures. The learned Departmental representative could not prove the correctness of these figures. The Assessing Officer has mixed up the facts with some other case. Reopening made based on such incorrect facts or such wrong figures cannot be sustained.

14 The reopening in this case is beyond a period of 4 years from the end of the assessment year. The Assessing Officer states that approval for reopening of assessment was obtained from the Principal Commissioner of Income-tax, Kolkata 5. The original return file was processed under section 143(1) of the Act. Approval in such cases is to be obtained from Assistant Commissioner of Income-tax or Joint Commissioner of Income-tax under section 151 of the Act and not from the Principal Commissioner of Income-tax. In any event no proof of approval from any authority is produced before me.

15 There is non-application of mind by the Assessing Officer to the information received, prior the reopening of the assessment. This fact is clear from the facts and figures given in the reasons recorded are wrong. Such non-application of mind to the information received by the Assessing Officer prior to recording of reasons for reopening of assessment makes the reopening bad in law.

16 This Bench of the Tribunal in the case of *Cygnus Investments and Finance Pvt. Ltd.* v. *Asst. CIT* (I. T. A. No. 117/Kolkata/2018 order dated May 18, 2018) for the assessment year 2008-09 from para 7 onwards held as follows :

> "7. Further a perusal of the reasons recorded shows non-application of mind by the Assessing Officer. Directions have been given by the Deputy Director of Income-tax (Investigation) Unit-2(1), Kolkata, vide communication cited. The reasons recorded are only based on such directions. The reopening was done in compliance in such directions.
>
> 7.1. The hon'ble Delhi High Court in the case of *CIT* v. *Insecticides (India) Ltd.* [2013] 357 ITR 330 (Delhi) upheld the order of the

Income-tax Appellate Tribunal Delhi Bench in I. T. A. Nos. 2332-2333/Delhi/2010, holding as follows (page 333 of 357 ITR) :

'We may point out at this juncture itself that the Tribunal did not go into the question on the merits. It only examined the question of the validity of the proceedings under section 147 of the said Act. The Tribunal, in essence, held that the purported reasons for reopening the assessments were entirely vague and devoid of any material. As such, on the available material, no reasonable person could have any reason to believe that income had escaped assessment. Consequently, the Tribunal held that the proceedings under section 147 of the said Act were invalid.

The Tribunal gave detailed reasons for concluding that the proceedings under section 147 were invalid. Instead of adding anything to the said reasons, we think it would be appropriate if the same are reproduced :

"In the case at hand, as is seen from the reasons recorded by the Assessing Officer, we find that the Assessing Officer has merely stated that it has been informed by the Director of Income-tax (Investigation), New Delhi, vide letter dated June 16, 2006 that the above-named company was involved in giving and taking bogus entries/transactions during the relevant year, which is actually unexplained income of the assessee-company. The Assessing Officer has further stated that the assessee-company has failed to disclose fully and truly all material facts and source of these funds routed through bank account of the assessee-company. In the reasons recorded, it is nowhere mentioned as to who had given bogus entries/transactions to the assessee or to whom the assessee had given bogus entries or transactions. It is also nowhere mentioned as to on which dates and through which mode the bogus entries and transactions were made by the assessee. What was the information given by the Director of Income-tax (Investigation), New Delhi, vide letter dated June 16, 2006 has also not been mentioned. In other words, the contents of the letter dated June 16, 2006 of the Director of Income-tax (Investigation), New Delhi have not been given. The Assessing Officer has vaguely referred to certain communications that he had received from the Director of Income-tax (Investigation), New Delhi; the Assessing Officer did not mention the facts mentioned in the said communication except that from the informations gathered by the Director of Income-tax (Investigation), New Delhi that the assessee was involved in giving and taking accommodation entries only and represented unsecured money of the assessee-company is actually unexplained income of the assessee-company or that it has been informed by the Director of Income-tax (Investigation), New Delhi vide letter dated June 16, 2006 that the assessee-company was involved in giving and taking bogus entries/transactions during the relevant financial year. The Assessing Officer did not mention the details of transactions that represented unexplained income of the assessee-company. The information on the basis of which the Assessing Officer has initiated proceedings under section 147 of the Act are undoubtedly vague and uncertain and cannot be construed to be sufficient and relevant material on the basis of which a reasonable person could have formed a belief that income had escaped assessment. In other words, the reasons recorded by the Assessing Officer are totally vague, scanty and ambiguous. They are not clear and unambiguous but suffer from vagueness. The reasons recorded by the Assessing Officer do not disclose the Assessing Officer's mind as to what was the nature and amount of transaction or entries, which had been given or taken by the assessee in the relevant year. The reasons recorded by the Assessing Officer also do not disclose his mind as to when and in what mode or way the bogus entries or transactions were given or taken by the assessee. From the reasons recorded, nobody can know what was the amount and nature of bogus entries or transactions given and taken by the assessee in the relevant year and with whom the transaction had taken place. As already noted above, it is well-settled that only the reasons recorded by the Assessing Officer for initiating proceedings under section 147 of the Act are to be looked at or examined for sustaining or setting aside a notice issued under section 148 of the Act. The reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No addition can be made to those reasons. Therefore, the details of entries or amount mentioned in the assessment order and in respect of which ultimate addition has been made by the Assessing Officer, cannot be made a basis to say that the reasons recorded by the Assessing Officer were with reference to those amounts mentioned in the assessment order. The reasons recorded by the Assessing Officer are totally silent with regard to the amount and nature of bogus entries and transactions and the persons with whom the transactions had taken place. In this respect, we may rely upon the decision of the hon'ble jurisdictional Delhi High Court in the case of *CIT* v. *Atul Jain* [2008] 299 ITR 383 (Delhi) in which case the information relied upon by the

Assessing Officer for initiating proceedings under section 147 of the Act did indicate the source of the capital gain and nobody knew which shares were transacted and with whom the transaction has taken place and in that case there were absolutely no details available and the information supplied was extremely scanty and vague and in that light of those facts, the hon'ble jurisdictional Delhi High Court held that initiation of proceedings under section 147 of the Act by the Assessing Officer was not valid and justified in the eyes of law. The recent decision of the hon'ble jurisdictional High Court of Delhi in the case of *Signature Hotels (P.) Ltd.* v. *ITO* [2011] 338 ITR 51 (Delhi) also supports the view we have taken above."

We do not see any reason to differ with the view expressed by the Tribunal. No substantial question of law arises for our consideration. The appeals are dismissed. There shall be no order as to costs.'

7.2. The jurisdictional High Court in the case of *Pr. CIT* v. *G and G Pharma India Ltd.* [2016] 384 ITR 147 (Delhi) (I. T. A. No. 545 of 2015 vide order dated October 8, 2015) at paras 12 and 13 was held as follows (page 152 of 384 ITR) :

'In the present case, after setting out four entries, stated to have been received by the assessee on a single date, i. e., February 10, 2003, from four entries which were termed as accommodation entries, which information was given to him by the Director Investigation, the Assessing Officer stated : "I have also perused various materials and report from Investigation Wing and on that basis it is evident that the assessee-company has, introduced its own unaccounted money in its bank account by way of above accommodation entries". The above conclusion is unhelpful in understanding whether the Assessing Officer applied his mind to the materials that he talks about particularly since he did not describe what those materials were. Once the date on which the so called accommodation entries were provided is known, it would not have been difficult for the Assessing Officer, if he had in fact undertaken the exercise, to make a reference to the manner in which those very entries were provided in the accounts of the assessee, which must have been tendered along with the return, which was filed on November 14, 2004 and was processed under section 143(3) of the Act. Without forming a prima facie opinion, on the basis of such material, it was not possible for the Assessing Officer to have simply concluded : "it is evident that the assessee company has introduced its own unaccounted money in its bank by way of accommodation entries". In the considered view of the court, in light of the law explained with sufficient clarity by the Supreme Court in the decision discussed, the basic requirement that the Assessing Officer must apply his mind to the materials in order to have reasons to believe that the income of the assessee escaped assessment is missing in the present case.'

13. A perusal of the reasons recorded demonstrate total non application of mind by the Assessing Officer. Thus applying the proposition laid down by the jurisdictional High Court in *G and G Pharma India* (supra) we hold that the reopening of assessment is bad in law.

7.3. The hon'ble Delhi High Court in the case of *Signature Hotels (P.) Ltd.* v. *ITO* reported in [2011] 338 ITR 51 (Delhi) has under similar circumstances held as follows :

'For the assessment year 2003-04, the return of income of the assessee-company was accepted under section 143(1) of the Income-tax Act, 1961 and was not selected for scrutiny. Subsequently, the Assessing Officer issued notice under section 148 which was objected by the assessee. The Assessing Officer rejected the objections. The assessee-company filed writ petition and challenged the notice and the order on objections. The Delhi High Court allowed the writ petition and held as under : "(i) Section 147 of the Income-tax Act, 1961, is wide but not plenary. The Assessing Officer must have 'reasons to believe' that income chargeable to tax has escaped assessment. This is mandatory and the 'reason to believe' are required to be recorded in writing by the Assessing Officer. (ii) A notice under section 148 can be quashed if the 'belief' is not bona fide, or one based on vague, irrelevant and non-specific information. The basis of the belief should be discernible from the material on record, which was available with the Assessing Officer when he recorded the reasons. There should be a link between the reasons and the evidence material available with the Assessing Officer. (iii) The reassessment proceedings were initiated on the basis of information received from the Director of Income-tax (Investigation) that the petitioner had introduced money amounting to Rs. 5 lakhs during the financial year 2002-03 as stated in the annexure. According to the information, the amount received from a company, S, was nothing but an accommodation entry and the assessee was the beneficiary. The reasons did not satisfy the requirements of section 147 of the Act. There was no reference to any document or statement, except the annexure. The annexure could not be regarded as a material or evidence that prima facie showed or established nexus or link which disclosed escapement of income. The annexure was not a pointer and did not indicate escapement of income. (iv) Further, the Assessing Officer did not apply his own mind to the information and examine the basis and material of the information. There was no dispute that the company, S, had a paid up capital of Rs. 90 lakhs and was incorporated on January 4, 1989, and was also allotted a permanent account number in September 2001. Thus, it could not be held to be a fictitious person. The reassessment proceedings were not valid and were liable to the quashed."

7.4. In the case of *CIT v. Atul Jain* reported in [2008] 299 ITR 383 (Delhi) it has been held as follows (headnote) :

'*Held*, dismissing the appeals, that the only information was that the assessee had taken a bogus entry of capital gains by paying cash along with some premium for taking a cheque for that amount. The information did not indicate the source of the capital gains which in this case were shares. There was no information which shares had been transferred and with whom the transaction had taken place. The Assessing Officer did not verify the correctness of information received by him but merely accepted the truth of the vague information in a mechanical manner. The Assessing Officer had not even recorded his satisfaction about the correctness or otherwise of the information for issuing a notice under section 148. What had been recorded by the Assessing Officer as his "reasons to believe" was nothing more than a report given by him to the Commissioner. The submission of the report was not the same as recording of reasons to believe for issuing a notice. The Assessing Officer had clearly substituted form for substance and therefore the action of the Assessing Officer was not sustainable.'

8. Respectfully applying the propositions of law laid down in the judgments cited above to the facts of the case, we have no other alternative but to hold that the reopening of the assessments is bad in law. Hence we quash the reopening of amount."

The hon'ble Gujarat High Court in the case of *Mumtaz Haji Mohmad* 17
Memon v. *ITO* (dated March 21, 2018 [2018] 408 ITR 268 (Guj)) at paras 11 and 12 stated as follows (page 273 of 408 ITR) :

"In this context, we have noted that the reasons proceeded on two fundamental grounds. One, that the property in question was sold for a sum of Rs. 1,18,95,000 ; and two, that the assessee had not filed the return and that therefore his one-third share out of the sale proceeds was not offered to tax. Both these factual grounds are totally incorrect as is now virtually admitted by the Revenue. It is undisputed that the assessee had actually filed the return of income for the said assessment year and also offered his share of income of the declared sale consideration to tax as capital gain. The Assessing Officer may have dispute with respect to computation of such capital gain, he cannot simply dispute the fact that the assessee did file the return. Importantly, even the second factual assertion of the Assessing Officer in the reasons recorded is totally incorrect. He has referred to said sum of Rs. 1,18,95,000 as a sale price of the property. The assessee had produced before the Assessing Officer, the sale deed in which, the sale consideration disclosed was Rs. 50 lakhs.

The Assessing Officer may be correct in pointing out that when the sale consideration as per the sale deed is Rs. 50 lakhs but the registering authority has valued the property on the date of sale at Rs. 1,18,95,000 for stamp duty calculation, section 50C of the Act would apply, of course, subject to the riders contained therein. However, this is not the cited reason for reopening the assessment. The reasons cited are that the assessee filed no return and that one-third share of the assessee from the actual sale consideration of Rs. 1,18,95,000 therefore, was not brought to tax. These reasons are interconnected and interwoven. In fact, even if these reasons are seen as separate and severable grounds, both being factually incorrect, the Revenue simply cannot hope to salvage the impugned notice. Through the affidavit in reply a faint attempt has been made to entirely shift the center of the reasons to a completely new theory, viz., the possible applicability of section 50C of the Act. The reasons recorded nowhere mentioned this possibility. Reasons recorded, in fact, ignored the fact that the sale consideration as per the sale deed was Rs. 50 lakhs and that the assessee had by filing the return offered his share of such proceeds by way of capital gain."

18 Applying the propositions of law laid down in the above case to the facts of this case I have to necessarily hold that the reopening of assessment based on wrong facts and figures is bad in law. The reopening is also bad in law as it proves non-application of mind by the Assessing Officer.

19 Be it as it may the assessee has disclosed the sale of shares in its books of account. Once the sale is declared as income by the assessee, the question of treating the same amount as a cash credit under section 68 of the Act results in double addition. Moreover, the gross receipt cannot be brought to tax, specifically when the assessee had acquired the shares to an

allotment as evidenced by the letter of allotment payment details, etc. Thus, the addition is also bad on the merits.

Before parting, it is noted that the order is being pronounced after ninety (90) days of hearing. However, taking note of the extraordinary situation in the light of the COVID-19 pandemic and lockdown, the period of lock-down days need to be excluded. For coming to such a conclusion, I rely upon the decision of the co-ordinate Bench of the Mumbai Tribunal in the case of *Dy. CIT* v. *JSW Ltd.* [2020] 79 ITR (Trib) 585 (Mumbai) ; (I. T. A. Nos. 6264/Mum/2018 and 6103/Mum/2018, assessment year 2013-14, order dated May 14, 2020). 20

In the result, the appeal of the assessee is allowed. 21

[2020] 79 ITR (Trib) 607 (Delhi)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — DELHI "E" BENCH]

1. SUMMIT MITTAL

(I. T. A. No. 5182/Delhi/2014)

2. MADHUR MITTAL

(I. T. A. No. 5181/Delhi/2014)

v.

DEPUTY COMMISSIONER OF INCOME-TAX

BHAVNESH SAINI *(Judicial Member)* and
PRASHANT MAHARISHI *(Accountant Member)*

May 18, 2020.

SS ▸ ITA 1961, s 153A
AY ▸ 2010-11
HF ▸ Assessee

SEARCH AND SEIZURE—ASSESSMENT OF THIRD PERSON—SALE OF PROPERTY—COMMISSION—PART OF RECORDS FOUND DURING SEARCH USED AGAINST ASSESSEE FOR TAXING HIS INCOME BUT OTHER DOCUMENTS CLEARLY SUGGESTING NO SUCH INCOME ACCRUING TO ASSESSEE—ASSESSING OFFICER NOT EXAMINING BUYERS OF PROPERTY WITH RESPECT TO COMMISSION PAID BY THEM TO ASSESSEE—ADDITION UNSUSTAINABLE—INCOME-TAX ACT, 1961, s. 153A.

In an auction by the court of certain property, a company T made a bid to purchase the property for a sum of Rs. 117 crores and paid earnest money of Rs. 29.5 crores. Ultimately, in view of difficulties in completing the transaction, the property was transferred in favour of three different individuals *jointly at the same price plus a penalty of Rs. 5 crores. The Assessing Officer referred to the document where all the three purchasers agreed to pay commission of Rs. 17.5 crores to the assessees who were the owners and promoters of T. He asked the assessees to explain the letters written by the three individuals to the assessee where they have agreed to pay commission of Rs. 17.5 crores to them. As those documents were recovered from the laptop of the assessee which was subjected to search, in assessments under section 153A of the Income-tax Act, 1961, he made an addition of Rs. 8.75 crores each in the hands of the assessees. The Commissioner (Appeals confirmed the additions. On appeal :*

Held, *that part of the records found during the search could not be used against the assessee for taxing his income, where other documents clearly suggested that there was no such income accruing to the assessee. The assessee had also brought on record all possible evidence to show that there could not be any income in the hands of the assessee on that rejected offer. Thus, the assessee had rebutted the presumption available to the Department. If there was income element in those documents seized from the possession of the assessee, then there was no requirement of bringing any corroborative material on record. However, there had to be existence of income in the documents seized. If the documents seized did not show any income earned by the assessee, then the Assessing Officer could not rest on the provision of section 292C without bringing any corroborative material on record. Further, the Assessing Officer did not examine the buyers of the property with respect to the commission paid by them to the assessee. Even the assessee was also not questioned during the course of search with respect to these three letters. There was no income accrued to the assessee based on these three documents, without bringing any corroborative material, it could not have been taxed in the hands of the assessee. The Commissioner (Appeals) did not bring on record even the circle rate of the property to show that the market value of the property had increased so much. Alleged commission was only Rs. 17.50 crores. Had the property price would have gone up by assuming at the lowest estimate of the Commissioner (Appeals) of Rs. 200 crores then the property was appreciated by Rs. 83 crores (Rs. 200 -117) crores. Had the appreciation been so much, nobody would have forgone the profit of Rs. 83 crores for Rs. 17.50 crores. Therefore, such reason given by him could not be the basis for confirming the addition and the addition of commission income in the hands of the assessees of Rs. 8.75 crores was deleted.*

Cases referred to :

CIT *v.* Sonal Construction [2013] 359 ITR 532 (Delhi) (paras 12, 17)