CONTENTS OF SHORT NOTES CASES OF THIS PART

REPORTS OF CASES : 81—96 Page

SUBJECT INDEX TO SHORT NOTES CASES REPORTED IN THIS PART

Appeal to Appellate Tribunal—Rectification of mistake—Mistake apparent from record—Tribunal taking firm view following decisions of court including jurisdictional High Court—Decision of jurisdictional High Court binding on Tribunal—Failure to consider judgment in favour of Department of another High Court—Decision not cited by Department at time of hearing of appeal—Not a mistake apparent from record—Income-tax Act, 1961, s. 254(2)—ITO *v.* Kailash Chand Bangur (Jaipur) ... 88

Appeal to Commissioner (Appeals)—Educational institution—Exemption—Commissioner (Appeals) not mentioning in his order if any notice served upon assessee for hearing of appeal—Appellate order passed without giving sufficient opportunity to assessee—In penalty proceedings receipts shown at figure lower than prescribed limit which requires adjudication on merits—Commissioner (Appeals) to redecide appeal on merits—Income-tax Act, 1961—Maharishi Dayanand Educational Society *v.* ITO (Exemptions) (Delhi) ... 86

Business expenditure—Bogus purchases—Estimation of income—Once books of account rejected Assessing Officer required to estimate income of assessee on reasonable and proper basis—Past history can form basis for estimating current year's gross profit—Gross profit estimated at 10.22 per cent. as against gross profit declared by assessee at 10.04 per cent. for instant year—Addition equivalent to gross profit rate of 0.18 per cent.

Revision—Addition made pursuant to revisional order—Tribunal quashing revisional order—Resultant proceedings would not survive—Income-tax Act, 1961, s. 263—ASST. CIT *v.* OSCAR INVESTMENT LTD. (Delhi) . . . 81

Search and seizure—Assessment in search cases—Unexplained income—Purchase of shares and sale transactions through online mode, whereby identity of buyer of shares would not be known to assessee—Additions on basis of third party statement—Nothing on record to establish vital link between assessee group and third party or any of his group entities—Nothing to controvert denial by assessee of knowledge of thirty party and his associates and establish link between third party and assessee—Failure to provide assessee opportunity to cross-examine third party—Additions unsustainable—Income-tax Act, 1961, s. 153A—DIPESH RAMESH VARDHAN *v.* DEPUTY CIT (Mumbai) . . . 91

CASES JUDICIALLY NOTICED IN THIS PART

FedEx Express Transportation and Supply Chain Services (India) (P.) Ltd. *v.* Dy. CIT (I.T. A. No. 857/Mum/2016 dated July 11, 2019) **followed** in Boeing India Pvt. Ltd. *v.* Asst. CIT [2020] 81 ITR (Trib) (S.N.) 94 (Delhi)

Kedia Exports Pvt. Ltd. *v.* Asst. CIT [2020] 81 ITR (Trib) (S.N.) 83 (Jaipur) **followed** in Silburn Papers Pvt. Ltd. *v.* ITO [2020] 81 ITR (Trib) (S.N.) 85 (Delhi)

'CONTENTS OF THIS PART

REPORTS OF CASES : 545—656 PAGE

SUBJECT INDEX TO CASES REPORTED IN THIS PART

——Special deduction—Apportionment of expenses between eligible and non-eligible units—Allocation on basis of number of employees linked to factory operation divided by total number of employees in corporate office into sales of eligible units divided by total sales —Proper—Income-tax Act, 1961, s. 80-IB—RECKITT BENCKISER (I.) PVT. LTD. *v.* DEPUTY CIT (Kolkata) . . . 577

International transactions—Arm's length price—Associated enterprise—Royalty—Trade-marks for two products registered and owned by associated enterprise—Royalties paid not only in respect of patent but for basket of services—Transfer Pricing Officer not justified in determining arm's length price of royalty paid in case of two items as nil—Direction to delete arm's length price adjustment for payment of royalty—Income-tax Act, 1961, s. 92CA(2)—RECKITT BENCKISER (I.) PVT. LTD. *v.* DEPUTY CIT (Kolkata) . . . 577

——Transfer pricing—Arm's length price—Advertising, marketing and promotion of sales expenses—No undertaking between assessee and its associated enterprises to incur expenses for brand promotion according to any global or nation specific strategy—No proof of existence of international transaction—Arm's length price adjustment made in respect of advertising, marketing and promotion of sales expenses to be deleted—Income-tax Act, 1961, s. 92—RECKITT BENCKISER (I.) PVT. LTD. *v.* DEPUTY CIT (Kolkata) . . . 577

——Transfer pricing—Associated enterprises—Assessee providing service to associated enterprises and expenses reimbursed by associated enterprises—Upward transfer pricing adjustment without considering nature of expenses—Failure by Transfer Pricing Officer to adjudicate issue taking into account documents already submitted by assessee—Matter remanded—Income-tax Act, 1961—RECKITT BENCKISER (I.) PVT. LTD. *v.* DEPUTY CIT (Kolkata) . . . 577

Search and seizure—Assessment in search cases—Additions by Assessing Officer of items already disclosed in original return on which assessment completed on date of search—No material found during course of search—No addition could be made—Income-tax Act, 1961, ss. 68, 153A—ALANKAR SAPHIRE DEVELOPERS *v.* DEPUTY CIT (Delhi) . . . 549

SECTIONWISE INDEX TO CASES REPORTED IN THIS PART

Income-tax Act, 1961 :

S. 28—Business loss—Speculation business—Definition—Loss on forward booking of foreign exchange—Transaction not speculative in nature—To be allowed as business loss—ARVIND METALS AND MINERALS P. LTD. *v.* ASST. CIT (Kolkata) . . . 648

S. 37—Business expenditure—Travelling and conveyance expenses—Failure by assessee to submit few bills and vouchers before Assessing Officer for verification—Disallowance restricted to Rs. 50,000—Adjudication not to be treated as precedent—ARVIND METALS AND MINERALS P. LTD. *v.* ASST. CIT (Kolkata) . . . 648

S. 40(a)(ii)—Business expenditure—Disallowance—Tax on profits—Section 40(a)(ii) applies only to taxes and not to education cess—Education cess allowable—RECKITT BENCKISER (I.) PVT. LTD. *v.* DEPUTY CIT (Kolkata) . . . 577

S. 43(5)(a)—Business loss—Speculation business—Definition—Loss on forward booking of foreign exchange—Transaction not speculative in nature—To be allowed as business loss—ARVIND METALS AND MINERALS P. LTD. *v.* ASST. CIT (Kolkata) . . . 648

S. 43B—Business expenditure—Deduction only on actual payment—Prior period expenses—Assessee depositing employees' State insurance payment for earlier year and for relevant assessment year—Effect of section 43B—Amount allowable in year in which actually paid—ARVIND METALS AND MINERALS P. LTD. *v.* ASST. CIT (Kolkata) . . . 648

S. 68—Search and seizure—Assessment in search cases—Additions by Assessing Officer of items already disclosed in original return on which assessment completed on date of search—No material found during course of search—No addition could be made—ALANKAR SAPHIRE DEVELOPERS *v.* DEPUTY CIT (Delhi) . . . 549

S. 80-IB—Industrial undertaking—Special deduction under section 80-IC—Interest—Disallowance of interest allocated to eligible units—Assessee raising additional ground regarding quantification of disallowance—Matter remanded—RECKITT BENCKISER (I.) PVT. LTD. *v.* DEPUTY CIT (Kolkata) . . . 577

——Industrial undertaking—Special deduction—Apportionment of expenses between eligible and non-eligible units—Allocation on basis of number of employees linked to factory operation divided by total number of employees in corporate office into sales of eligible units divided by total sales —Proper—RECKITT BENCKISER (I.) PVT. LTD. *v.* DEPUTY CIT (Kolkata) . . . 577

S. 80-IC—Industrial undertaking—Special deduction under section 80-IC—Condition precedent—Manufacture or production of article eligible for special deduction—Sale of scrap—Scrap produced during manufacture—Profits and gains from sale of scrap materials eligible to deduction—RECKITT BENCKISER (I.) PVT. LTD. *v.* DEPUTY CIT (Kolkata) . . . 577

——Industrial undertaking—Special deduction under section 80-IC—Interest—Disallowance of interest allocated to eligible units—Assessee raising additional ground regarding quantification of disallowance—Matter remanded—RECKITT BENCKISER (I.) PVT. LTD. *v.* DEPUTY CIT (Kolkata) . . . 577

S. 92—International transactions—Transfer pricing—Arm's length price—Advertising, marketing and promotion of sales expenses—No undertaking between assessee and its associated enterprises to incur expenses for brand promotion according to any global or nation specific strategy—No proof of existence of international transaction—Arm's length price adjustment made in respect of advertising, marketing and promotion of sales expenses to be deleted—RECKITT BENCKISER (I.) PVT. LTD. *v.* DEPUTY CIT (Kolkata) . . . 577

S. 92CA(2)—International transactions—Arm's length price—Associated enterprise—Royalty—Trademarks for two products registered and owned by associated enterprise—Royalties paid not only in respect of patent but for basket of services—Transfer

CASES JUDICIALLY NOTICED IN THIS PART

Commissioner of Income-tax *v.* EKL Appliances Ltd. [2012] 345 ITR 241 (Delhi) **relied on** in Reckitt Benckiser (I.) Pvt. Ltd. *v.* Deputy CIT [2020] 81 ITR (Trib) 577 (Kolkata)

CIT (Dy.) *v.* JSW Ltd. [2020] 79 ITR (Trib) 585 (Mum) **relied on** in Arvind Metals and Minerals P. Ltd. *v.* Asst. CIT [2020] 81 ITR (Trib) 648 (Kolkata)

CIT *v.* Kabul Chawla [2016] 380 ITR 573 (Delhi) **relied on** in Alankar Saphire Developers *v.* Deputy CIT [2020] 81 ITR (Trib) 549 (Delhi)

CIT *v.* Soorajmull Nagarmull [1981] 129 ITR 169 (Cal) **relied on** in Arvind Metals and Minerals P. Ltd. *v.* Asst. CIT [2020] 81 ITR (Trib) 648 (Kolkata)

Frigoglas India P. Ltd. *v.* Dy. CIT [2016] 180 TTJ 401 (Delhi) **relied on** in Reckitt Benckiser (I.) Pvt. Ltd. *v.* Deputy CIT [2020] 81 ITR (Trib) 577 (Kolkata)

Maruti Suzuki India Ltd. *v.* CIT [2016] 381 ITR 117 (Delhi) **relied on** in Reckitt Benckiser (I.) Pvt. Ltd. *v.* Deputy CIT [2020] 81 ITR (Trib) 577 (Kolkata)

Radhasoami Satsang *v.* CIT [1992] 193 ITR 321 (SC) **applied** in Reckitt Benckiser (I.) Pvt. Ltd. *v.* Deputy CIT [2020] 81 ITR (Trib) 577 (Kolkata)

CUMULATIVE TABLE OF CASES REPORTED

PARTS 1 to 6

(*Cases reported in this part are marked with asterisks*)

(Contd. on Cover Page 3)

2. The learned Commissioner of Income-tax (Appeals) has erred in law to rely on the order of the Commissioner of Income-tax (Appeals) for the assessment year 2012-13 in the case of Shri Vasu Kalia ignoring the fact that both the cases have different facts. In the case of the assessee, the books of account were rejected for detailed reasons given in the assessment order whereas this was not so in the case of Shri Vasu Kalia for the assessment year 2012-13. Without prejudice the Department is in appeal in the assessment year 2012-13 before the hon'ble Income-tax Appellate Tribunal.

3. The learned Commissioner of Income-tax (Appeals), Ludhiana has erred in law to delete the addition of Rs. 28,19,74,500 on account of differences of balances in the parties accounts despite the fact that the assessee had failed to file any details before the Assessing Officer in spite of repeated opportunities. The accounts of the assessee wherein differences were noticed were duly audited and signed by the auditors. Without prejudice no independent enquiry was made through banks by the learned Commissioner of Income-ax (Appeals) to reconcile the accounts of the parties.

4. The appellant craves leave to add or amend the grounds of appeal on or before is heard and disposed of."

37 *Ground Nos. 1 and 2* : The Revenue vide ground Nos. 1 and 2 has agitated the action of the Commissioner of Income-tax (Appeals) in deleting the addition of Rs. 4,41,47,622 made by the Assessing Officer as commission income. The Assessing Officer has mentioned that from the facts it was clear that the assessee is merely an entry provider. As per the Assessing Officer, the books of account of the assessee were not reliable and hence rejected the same. The Assessing Officer then estimated the commission income from business of entry providing at 0.50 per cent. of the gross receipts of Rs. 882,95,24,543 and computed the commission income at Rs. 4,41,47,622.

38 The learned Commissioner of Income-tax (Appeals), however, deleted the addition so made by the Assessing Officer observing as under :

"The facts of the case, the basis of addition made by the Assessing Officer and the arguments of the authorised representative during the appellate proceedings have been considered. The authorised representative has argued that full details were provided in response to the letters issued by the Assessing Officer. The authorised representative argued that the assessee is in the business of trading of goods and no godown has been maintained by the assessee as the goods purchase from supplier directly deliver to the parties without bringing the

goods to the assessee's premises. The authorised representative further submitted that the assessee is carrying the same business since so many years and is a regular income-tax assessee and the returned income has been accepted by the Department in all these previous years. The authorised representative has filed the copy of assessment order dated January 30, 3013 for the assessment year 2012-13 passed under section 143(3) by the Deputy Commissioner of Income-tax, CC-III, Ludhiana. Where the income of the assessee from his proprietary concern M/s. Metro Synthetics has been assessed at Rs. 10,37,675 after making an agreed addition of Rs. 4,00,000 to the net profit Rs. 6,37,665 declared on gross receipts of Rs. 479,19,36,840. As per the authorised representative, all the parties with whom the assessee has transaction of sales and purchases have duly paid tax on their income after accounting for the sales and the purchases to and from the assessee. As per the authorised representative, the Assessing Officer failed to point out any defect or omission in the books of account which would indicate that the assessee has done only debit/credit entries with a view to earn commission on the same. As per the authorised representative, all the transactions are through banking channel, duly verifiable and the parties are existing assessees. It has been argued that the assessee has been carrying on the transactions on the principal-to-principal basis and is legal owner of goods and is liable for any loss/damage done to the goods. Under the facts and the circumstances of the case, the arguments of the authorised representative appear acceptable. The undisputed facts remains that the assessee has been consistently carrying the same business or the last many years in the same manner and the Assessing Officer has been accepting these facts without any demur in the past. For the current year the Assessing Officer did not point out specific mistake warranting application of the provisions of section 145(3) and while rejecting the books of account of the assessee, no reason or cogent material has been brought on record. There is a merit in the argument of the authorised representative that the Assessing Officer was having doubt in mind but never issued any notice or summon to any of the parties. Further it is not a case where any confessional statement has been recorded from any entry provider of accommodation entry. It is a case of doubt raised by the Assessing Officer but such doubt has not been converted into any evidence or material so as to substantiate the addition.

The authorised representative has also argued that the similar issue arose during the assessment of Shri Vasu Kalia for the assessment year 2012-13 and the addition made has been deleted by the Commissioner of Income-tax (Appeals)-3, Ludhiana in appeal No. 1007/IT/CIT(A)-3/LDH/2014-15 vide order dated September 27, 2016. The facts of the case under consideration are similar to the facts of the case, decided by the learned Commissioner of Income-tax (Appeals)-3, Ludhiana vide order dated September 27, 2016 in Appeal No. 1007/IT/CIT(A)-3/LDH/2014-15. Thus, for the reasons mentioned in the above order and the fact that for the assessment year 2012-13 in the case of the assessee himself the nature of business of the assessee has been accepted by the same Assessing Officer, she was not justified in holding during the year that the assessee was an entry provider since the nature of business has remained the same and no new facts have been brought on record. The Assessing Officer was therefore, not justified in making the addition of Rs. 4,41,47,622 on account of commission income without bringing any adverse material on record that the business of the assessee during the year was different from the preceding years. The addition of Rs. 4,41,47,622 is therefore, not found sustainable and hence directed to be deleted."

39 We have heard the rival contentions. The facts and issue involved are identical to that have been discussed vide ground Nos. 1 and 2 in the case of Vasu Kalia in I. T. A. No. 1118/Chd/2017 and other appeals as discussed above. Our findings given above will mutatis mutandis apply on this issue also. These grounds of the appeal of the Revenue are accordingly dismissed.

40 *Ground No. 3* : The Revenue through this ground has agitated the action of the learned Commissioner of Income-tax (Appeals) in deleting the addition of Rs. 28,19,74,500 made by the Assessing Officer on account of difference in balances. The Assessing Officer has mentioned that the details to various parties under the head "sundry debtors" shows that there are huge balances in the names of various parties and as per the Assessing Officer when compared with the balance-sheets of those parties, there were discrepancies noticed in the amounts. The difference was taken as undisclosed income of the assessee. The Assessing Officer accordingly made the impugned addition.

41 In appeal, the learned Commissioner of Income-tax (Appeals), however, deleted the addition so made by the Assessing Officer. The facts and issue involved are identical to that has been discussed in the case of Vasu Kalia vide ground No. 2 in I. T. A. No. 1118/Chd/2017. Since the differences in

figures duly explained and reconciled the source of funds proved and some of the balances being old balances, the learned Commissioner of Income-tax (Appeals) after duly verifying the accounts of the assessee and other concerns was justified in deleting the impugned additions made by the Assessing Officer on assumptions and presumptions. We do not find any merit in this ground and the same is accordingly dismissed.

42 *Ground No. 4* : Ground No. 4 is general in nature and needs no specific adjudication.

This appeal of the Revenue is accordingly dismissed.

I. T. A. No. 1506/Chd/2018 (assessment year 2014-15)

43 The Revenue in I. T. A. No. 1506/Chd/2017l has taken the following grounds :

> "1. Whether on the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals), has erred in law to delete the addition of Rs. 4,64,73,205 on account of commission income without considering the fact that the assessee is merely an entry provider and the books of account were rejected to tax the undisclosed income.
>
> 2. Whether on the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals), has erred in law while deciding the issue of on the basis of its own decision in the assessee's case for the assessment year 2013-14 ignoring the fact that no evidence was furnished before the Assessing Officer in support of business carried on by the assessee.
>
> 3. The appellant craves leave to add or amend the grounds of appeal on or before is heard and disposed of."

44 The sole issue raised by the Revenue in this appeal is regarding the action of the Commissioner of Income-tax (Appeals) in deleting the addition made by the Assessing Officer on account of commission income. These grounds are identical to that have been taken in the case of the assessee in I. T. A. No. 1200/Chd/2017 for the assessment year 2013-14. As observed above, the facts and issue involved are identical to that have been discussed vide ground Nos. 1 and 2 in the case of Vasu Kalia in I. T. A. No. 1118/Chd/2017 and other appeals as discussed above. Our findings given above will mutatis mutandis apply on this issue also. These grounds of the appeal of the Revenue are accordingly dismissed.

This appeal of the Revenue is accordingly dismissed.

In the result, all the appeals of the Revenue are hereby dismissed. Order could not be pronounced earlier due to non-functioning of the Bench on account of curfew/lockdown in the wake of Covid-19 Pandemic.

Order pronounced on June 10, 2020.

[2020] 81 ITR (Trib) 549 (Delhi)

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

ALANKAR SAPHIRE DEVELOPERS

v.

DEPUTY COMMISSIONER OF INCOME-TAX

(and other cases)

BHAVNESH SAINI *(Judicial Member)* and
O. P. KANT *(Accountant Member)*

April 27, 2020.

SS ▸ ITA 1961, ss 68, 153A
AY ▸ 2003-04 to 2006-07
HF ▸ Assessee

SEARCH AND SEIZURE—ASSESSMENT IN SEARCH CASES—ADDITIONS BY ASSESSING OFFICER OF ITEMS ALREADY DISCLOSED IN ORIGINAL RETURN ON WHICH ASSESSMENT COMPLETED ON DATE OF SEARCH—NO MATERIAL FOUND DURING COURSE OF SEARCH—NO ADDITION COULD BE MADE—INCOME-TAX ACT, 1961, SS. 68, 153A.

For the assessment year 2003-04, the assessee filed the original return declaring an income of Rs. 2,427. Search was conducted under section 132 of the Income-tax Act, 1961 at the business premises of a group of companies including the assessee. On the date of search, the assessment was concluded and no assessment was pending for the assessment year 2003-04. The Assessing Officer noted that the assessee in response to the notice under section 153A requested that the return filed originally may be treated as return filed in response to the notice under section 153A. He did not accept the contention of the assessee with regard to dropping of the proceedings. The Assessing Officer while making the additions on account of administrative and general expenses to the tune of Rs. 82,685 noted that the assessee during the course of assessment as well as reassessment proceedings had failed to furnish any evidence of the source from which this expenditure had been incurred. He found that during assessment year 2003-04 the assessee issued share capital of Rs. 2,13,70,020. The assessee during the course of assessment as well as

reassessment proceedings had failed to discharge the onus of providing identity of the share applicants, their creditworthiness and genuineness of the transaction. He made an addition under section 68. The Commissioner (Appeals) held that the Assessing Officer could not have proceeded to frame the assessment under section 153A in respect of the year 2003-04 as no incriminating documents or assets had been found during the course of search operation pertaining to the year. The Commissioner (Appeals) as regards the addition under section 68 of Rs. 2,13,70,020 confirmed the addition on the merits. He deleted the addition of Rs. 82,685 on account of disallowance of expenses. On appeal :

Held, *(i) that the order of the Commissioner (Appeals) did not show if he had considered any additional evidence. He confirmed the substantive addition under section 68. Therefore, the Department should not have any grievance. However, as regards a small addition of disallowances of administrative expenses, the Commissioner (Appeals) had referred to the assessment proceedings and proceedings under section 264 in which details of these expenses were referred to. Therefore, the Commissioner (Appeals) on the basis of the material on record, deleted the addition. He did not violate any of the conditions of rule 46A of the Income-tax Rules, 1962.*

(ii) That both the additions had been made by the Assessing Officer in respect of items already disclosed to the Department in the original return on the basis of which assessment had already been completed on the date of search. The finding of fact recorded by the Commissioner (Appeals) was that no incriminating material was found during the course of search so as to make these two additions. Incriminating material which was seized should pertain to the assessment year in question and the documents should have co-relation with these assessment years.

CIT *v.* KABUL CHAWLA [2016] 380 ITR 573 (Delhi) *relied on*.

Cases referred to :

CIT *v.* Darshan Talkies [1996] 217 ITR 744 (MP) (para 20)

CIT *v.* Kabul Chawla [2016] 380 ITR 573 (Delhi) (paras 7, 18, 20)

CIT (Pr.) *v.* Meeta Gutgutia prop. M/s. Ferns "N" Petals [2017] 395 ITR 526 (Delhi) (para 20)

CIT (Pr.) *v.* Meeta Gutgutia [2018] 405 ITR (St.) 28 (SC) (para 20)

CIT *v.* Sasikumar (Dr.) (P.) [2016] 387 ITR 8 (Ker) (para 18)

CIT *v.* Sinhgad Technical Education Society [2015] 378 ITR 84 (Bom) (para 7)

CIT *v.* Sinhgad Technical Education Society [2017] 397 ITR 344 (SC) (para 20)

CIT *v.* Ummer (K. P.), Prop. Star Rolling Mill [2019] 413 ITR 251 (Ker) (para 18)

Dayawanti (Smt.) *v.* CIT [2017] 390 ITR 496 (Delhi) (para 20)

Gopakumar (E. N.) *v.* CIT [2017] 390 ITR 131 (Ker) (para 18)

National Thermal Power Co. Ltd. *v.* CIT [1998] 229 ITR 383 (SC) (para 16)

Prabha (Smt.) *v.* Ramprakash Kalra [1987] Suppl. 339 (SC) (para 6)

Santhanam (T. S.) *v.* Expenditure-tax Officer [1973] 87 ITR 582 (Mad) (para 20)

VMT Spinning Co. Ltd. *v.* CIT [2016] 389 ITR 326 (P&H) (para 20)

Vedabai *alias* Vaijayanatabai Baburao Patil *v.* Shantaram Baburao Patil [2002] 253 ITR 798 (SC) (para 6)

I. T. A. Nos. 6444/Delhi/2015, 1589, 1971, 1972, 1975, 1980, 2274, 2277, 2278, 2279, 2280, 2601, 2603, 2606, 2607, 2608, 2610, 3081, 3449, 3456, 3460, 3501, 6353, 6354, 6356, 6358, 6431, 6432 and 6433/Delhi/ 2016 and 118, 119, 121, 122 and 675/Delhi/2017 and C. O. Nos. 193, 251 and 259/Delhi/2016 (assessment years **2003-04 to 2006-07**).

Gautam Jain, Advocate, for the assessees.

Smt. Sushma Singh, Commissioner of Income-tax-Departmental representative, for the Department.

ORDER

This order shall dispose of all the above 37 cross-appeals as the issues involved are common in all these appeals. According to the office, M/s. MDLR group of cases have 179 appeals listed for hearing which have been consolidated on the request of the Department having the common issues. **1**

We have heard the learned representative of both the parties, perused the material available on record and written submissions filed by both the parties. **2**

Both the parties initially argued in the case of the assessee-M/s. Alankar Saphire Developers, in which, three Departmental appeals and three appeals of the assessee have been filed by the parties. The issues in the remaining appeals are identical and arguments of the parties are also identical, therefore, for the purpose of disposal of all the above appeals, we proceed to decide the appeals in the case of M/s. Alankar Saphire Developers i. e., I. T. A. No. 2606/Delhi/2016 of the Revenue and I. T. A. No. 2277/ Delhi/2016 by the assessee for the assessment year 2003-04 are as under. **3**

The appeals I. T. A. No. 2606/Delhi/2016 by the Revenue and I. T. A. No. 2277/Delhi/2016 by the assessee are directed against the order of the **4**

learned Commissioner of Income-tax (Appeals)-XXVI, New Delhi, dated February 18, 2016, for the assessment year 2003-04.

5 Briefly the facts of the case that the assessee is a company dealing in real estate, land trading, trading and development. A search was conducted at the office premises of the company on January 31, 2008. Accordingly, notice under section 153A was issued on November 24, 2008 and July 15, 2009 further statutory notices were issued. The assessee on December 17, 2009 filed a letter with a printout of return for the assessment year 2003-04 and requested that return filed originally under section 139 of the Income-tax Act, 1961, should be treated as return filed under section 153A of the Income-tax Act, 1961. Thereafter, no details were furnished. Accordingly, proceedings were culminated by passing an order under section 153A/144 of the Income-tax Act on December 24, 2009 at Rs. 2,14,55,132. Thereafter, the assessee moved an application before the Commissioner of Income-tax, Central (2), New Delhi, under section 264 of the Income-tax Act, 1961, which was disposed of by order dated March 12, 2012 for the assessment year 2002-03 to the assessment year 2008-09 and the matter was restored back to the Assessing Officer with a direction to decide the matter as per law. The Assessing Officer, in pursuance of the order of the Commissioner of Income-tax, Central (2), New Delhi, took up the assessment afresh. Show-cause notice was issued to the assessee and objections of the assessee were dropped.

5.1. The Assessing Officer noted that in the assessment year under appeal, the assessee has claimed administrative and general expenses to the tune of Rs. 82,685. The assessee-company during the course of assessment as well as reassessment proceedings has failed to furnish any evidence of the source from which this expenditure was incurred. Therefore, in the absence of any evidence, i. e., source of the expenditure, the Assessing Officer made the addition of Rs. 82,685.

5.2. The Assessing Officer further noted that during the assessment year under appeal, the assessee-company has issued share capital of Rs. 2,13,70,020. The assessee-company during the course of assessment as well as reassessment proceedings has failed to discharge its onus of proving the identity, creditworthiness and genuineness of the transaction. Therefore, the same was considered as unexplained credit under section 68 of the Income-tax Act, 1961. The Assessing Officer accordingly made addition of Rs. 2,13,70,020. The assessment was completed under section 153A/144 of the Income-tax Act, 1961 dated March 15, 2013.

6 The assessee challenged both the additions on the merits as well as assumption of jurisdiction to proceed under section 153A of the Income-tax

Act, 1961, before the learned Commissioner of Income-tax (Appeals). The appeal of the assessee was late by 20 days. The assessee submitted before the learned Commissioner of Income-tax (Appeals) in the application for condonation of delay in filing the said appeal that the orders were suddenly passed in the last week of February 2013 and the assessee was under pressure of completing around 250 assessments for the block period and 50 + assessments of companies and individuals of the same group. The same were getting time barred on March 31, 2013. Further, various orders of the same group of the assessee were passed in a piecemeal manner from the last week of February 2013 to the last week of March 2013. Since all the issues were interrelated, therefore, the assessee was under tremendous mental pressure and stress and in a confused state of mind. The assessee due to the above facts was not able to defend its case properly and no opportunity were given before making the said additions. There was a gross contravention of the provisions of sections 264 and 153A of the Income-tax Act. Further, the assessee filed a writ petition before the hon'ble Delhi High Court for redressal of its grievance and to protect its rights and interest. The writ petition was schedule for hearing on April 23, 2013 which was deferred to the second week of May 2013, therefore, the appeal could be filed with a delay before the learned Commissioner of Income-tax (Appeals).

6.1. The learned Commissioner of Income-tax (Appeals) accepted the above contention of the assessee and the reasoning given about that various assessment orders were passed for group companies and the writ petition was pending in the High Court which got differed, therefore, 20 days was not considered abnormal and the delay was not attributable to the assessee and no negligence was found in the case of the assessee. The learned Commissioner of Income-tax (Appeals) relied upon the judgment of the hon'ble Supreme Court in the case of *Smt. Prabha* v. *Ramprakash Kalra* [1987] Suppl. 339 (SC) in which it was held that "courts should not adopt an injustice oriented approach in rejecting the application for condonation of delay". The learned Commissioner of Income-tax (Appeals) also relied upon the judgment of the hon'ble Supreme Court in the case of *Vedabai* alias *Vaijayanatabai Baburao Patil* v. *Shantaram Baburao Patil* [2002] 253 ITR 798 (SC) in which the hon'ble apex court made a distinction in delay and inordinate delay and it was held that "court should adopt a pragmatic approach where the delay is of a few days only". The learned Commissioner of Income-tax (Appeals) has also relied upon several other decisions and considering the nominal delay in filing the appeal before him and for cause of substantial justice, condoned the delay in filing the appeal.

7 The assessee further raised the issue of jurisdiction of the Assessing Officer to proceed under section 153A of the Income-tax Act in respect of the year under consideration as no incriminating documents, assets had been found as a result of search on the assessee. The assessee submitted before the learned Commissioner of Income-tax (Appeals) that the assessment proceedings under appeal had not abated inasmuch as the returns are accepted under section 143(1) of the Income-tax Act, 1961 and no notice under section 143(2) of the Income-tax Act, 1961, was issued and served upon the assessee. It was further submitted that the impugned additions made are without jurisdiction. The assessee relied upon several decisions of different Benches of the Tribunal and the judgments of the hon'ble Delhi High Court and the judgment of the hon'ble Bombay High Court in the case of *CIT* v. *Sinhgad Technical Education Society* [2015] 378 ITR 84 (Bom). It was submitted that both the additions are made without reference to any incriminating material. The perusal of the assessment order makes it clear that the assessment has been framed without reference to any incriminating documents or assets if found during the course of search. The learned Commissioner of Income-tax (Appeals) referred to several decisions in the appellate order including the judgment of the hon'ble Delhi High Court in the case of *CIT* v. *Kabul Chawla* [2016] 380 ITR 573 (Delhi), etc., and the summary of the legal position was noted at page 20 of the appellate order, in which, one of the relevant conditions for proceeding under section 153A have been mentioned at para (g), which reads as under :

> "(g) Completed assessments can be interfered with the Assessing Officer while making the assessment under section 153A only on the basis of some incriminating material unearthed during course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in course of original assessment."

8 The learned Commissioner of Income-tax (Appeals) considering the above facts and legal proposition supra held that "the Assessing Officer could not have proceeded to frame the assessment under section 153A in respect of the year under consideration as no incriminating documents/ assets have been found during the course of search operation pertaining to this year. This ground of appeal of the assessee was accordingly allowed.

9 The learned Commissioner of Income-tax (Appeals) as regards the addition under section 68 of the Income-tax Act, 1961 of Rs. 2,13,70,020 confirmed the addition on the merits. The learned Commissioner of Income-tax (Appeals), however, deleted the addition of Rs. 82,685 on

account of disallowance of expenses. The appeal of the assessee partly allowed.

10 The Revenue in its appeal has raised several grounds in which the Revenue has challenged the order of the learned Commissioner of Income-tax (Appeals) in condoning the delay in filing the appeal, in admitting the additional evidence under rule 46A, in holding that the Assessing Officer could not have proceeded to frame the assessment under section 153A, in the absence of any incriminating material and in deleting the addition of Rs. 82,685 on account of administrative and general expenses.

11 The assessee in its appeal has challenged the addition of Rs. 2,13,70,020 under section 68 of the Income-tax Act, 1961.

12 The learned Departmental representative contended that there was a delay of 20 days in filing the appeal before the learned Commissioner of Income-tax (Appeals). She has referred to the ground of appeal, in which it is contended that the learned Commissioner of Income-tax (Appeals) without considering the illegal conduct of the assessee and during the search operation including manhandling of the search officer, looting of seized material and registration of criminal cases against the protesters of the group and their associates due to the criminal action, should not have condoned the delay. The assessee was also non-co-operative at every stage, therefore, the delay should not be condoned.

13 On the other hand, the learned counsel for the assessee reiterated the submissions made before the learned Commissioner of Income-tax (Appeals) and submitted that delay was due to the above reasons and that penalty imposed under section 271(1)(b) of the Income-tax Act, 1961, is cancelled on the same reasons. He has submitted that the assessment order is appealable, therefore, nominal delay was rightly condoned.

14 After considering the rival submissions, we are of the view that the learned Commissioner of Income-tax (Appeals) was justified in condoning the nominal delay of 20 days in filing the appeal before him. The assessee has explained the reasons which are sufficient to hold that the assessee was prevented by sufficient cause in not filing the appeal within the period of limitation because a large number of assessments were pending before the authorities below of the group and the assessee has also filed a writ petition before the hon'ble High Court for redressal of their grievance but when it was deferred, the assessee filed an appeal before the learned Commissioner of Income-tax (Appeals). The decisions relied upon by the learned Commissioner of Income-tax (Appeals) in support of his findings squarely apply to the facts of the case that the court should adopt a pragmatic approach in condoning the delay where the delay is of a few days

only. The discretion exercised by the learned Commissioner of Income-tax (Appeals) in condoning the delay of 20 days in filing the appeal is just and proper, therefore, we do not find any merit in these grounds of appeal. These grounds in Departmental appeal are dismissed.

15 The learned Departmental representative also contended that the learned Commissioner of Income-tax (Appeals) should not have admitted the additional evidence under rule 46A because the case of the assessee would not fall within the four exceptions provided under rule 46A of the Income-tax Rules, 1962 because the assessee was non-co-operative before the Assessing Officer and conduct of the assessee was improper.

16 The learned counsel for the assessee however submitted that no additional evidence have been admitted by the learned Commissioner of Income-tax (Appeals) as substantive addition have been confirmed by the learned Commissioner of Income-tax (Appeals) and only a small addition on account of administrative expenses have been deleted by the learned Commissioner of Income-tax (Appeals). He has submitted that the issue of jurisdiction to frame assessment under section 153A is legal in nature which could be raised at any point of time and he rely upon the judgment of the hon'ble Supreme Court in the case of *National Thermal Power Co. Ltd.* v. *CIT* [1998] 229 ITR 383 (SC).

17 We have considered the rival submissions and do not find any justification to interfere on these grounds in the Departmental appeal. The order of the learned Commissioner of Income-tax (Appeals) did not show if he has considered any additional evidence. The learned Commissioner of Income-tax (Appeals) has confirmed the substantive addition under section 68 of the Income-tax Act, 1961. Therefore, the Revenue should not have any grievance. However, as regards small addition of disallowances of administrative expenses, the learned Commissioner of Income-tax (Appeals) has referred to the assessment proceedings and proceedings under section 264 of Income-tax Act, 1961, in which details of these expenses are referred to. Therefore, the learned Commissioner of Income-tax (Appeals) on the basis of the material on record, deleted the addition. The issue as regards the assumption of jurisdiction under section 153A of the Income-tax Act for deleting the addition is concerned, it is a legal issue and can be dealt by the authorities at any point of time based on the material on record. The learned Commissioner of Income-tax (Appeals), thus, did not violate any of the conditions of rule 46A of the Income-tax Rules, 1962, therefore, this issue has no relevance to the matter in issue. These grounds of appeal of the Revenue are dismissed.

The learned Departmental representative as regards the assumption of **18** jurisdiction under section 153A of the Income-tax Act, 1961, to delete the above two additions submitted that this issue was not raised before the Assessing Officer or before the Commissioner of Income-tax, Central-(2), New Delhi, under section 264 of the Income-tax Act, 1961, therefore, it cannot be raised before the learned Commissioner of Income-tax (Appeals). The brief synopsis filed in this case by the Department on record states that search and seizure operation under section 132 of the Act was conducted on January 31, 2008 in M/s. MDLR group of cases. The group has its business interest in trading of land, commercial and real estate development, hotels and operating a regional airline with the brand name of MDLR Airlines. The group is controlled by Shri Gopak Kumar Goyal and his brother and sons of Shri Muralidhar Goyal. Various assessments have been passed in the group cases under section 153A/144 of the Income-tax Act, 1961. On filing of the petition by the assessee, the learned Commissioner of Income-tax, Central-2, New Delhi passed the order under section 264 of the Income-tax Act, 1961, in respect of the orders passed under section 153A/144 of the Income-tax Act, 1961, for the assessment years 2002-03 to 2008-09 and the matter was set aside to the file of the Assessing Officer. The learned Departmental representative while concluding the arguments in the group cases and when the arguments were going on in the cases of M/s. Witness Builders Pvt. Ltd., M/s. Witness Construction Pvt. Ltd., M/s. Worldwide Realtors Pvt. Ltd., and M/s. Vinman Estate Pvt. Ltd., of the MDLR group appeals, have also submitted written submissions in which it is submitted that search material was found during the course of search and post-search investigation of the Investigation Wing, on which, assessments have been framed by the Assessing Officer. Copy of the relevant pages of the appraisal report and statement on oath recorded during search under section 132(4) are placed on record. Without prejudice to the above, it was submitted with regard to the plea of the assessee that no assessment under section 153A can be completed in the absence of any incriminating material found during the course of search, placing reliance on the decision of the hon'ble jurisdictional Delhi High Court in the case of *CIT* v. *Kabul Chawla* [2016] 380 ITR 573 (Delhi), the learned Commissioner of Income-tax-Departmental representative submitted that special leave petition filed by the Department in this case was also admitted by the hon'ble Supreme Court. Further, although the question of law was framed in the matter, it was subsequently dismissed due to low tax effect. It was further submitted that special leave petition has been admitted by the hon'ble Supreme Court in the case of *CIT* v. *APAR Industries* on the same issue. Therefore, in the light of the fact that the special

leave petition has been admitted and converted into civil appeal by framing the substantial question of law, the decisions of the hon'ble Supreme Court is not yet final. The learned Departmental representative, therefore, submitted that the decision of other High Courts are in favour of the Revenue on this legal issue that assessments can be framed even without incriminating material found during the course of search. The learned Departmental representative relied upon the judgment of the hon'ble Kerala High Court in the case of *E. N. Gopakumar* v. *CIT* [2017] 390 ITR 131 (Ker) in which it was held as under (page 136) :

> "Assessment proceedings generated by issuance of a notice under section 153A(1)(a) can be concluded against interest of the assessee including making additions even without any incriminating material being available against the assessee in search under section 132 on basis of which notice was issued under section 153A(1)(a)."

18.1. On the same proposition the learned Departmental representative relied upon the judgment of the hon'ble Kerala High Court in the cases of *CIT* v. *K. P. Ummer, Prop. Star Rolling Mill* vide order dated February 19, 2019 [2019] 413 ITR 251 (Ker) and *CIT* v. *Dr. P. Sasikumar* [2016] 387 ITR 8 (Ker) ; [2016] 73 taxmann.com 173 that when notice under section 153A is issued, which enables the Department to carryout reassessment or assessment with reference to six immediate prior years and the year in which search is carried out. This does not require any incriminating material recovered during the course of search to those prior years in which there is no time left on the date of the search for assessment under section 143 of the Income-tax Act.' The learned Departmental representative submitted that the Assessing Officer is a quasi-judicial authority and the rigour of the rules of evidence contained in the Evidence Act are not applicable. There is no presumption in law that the Assessing Officer has to discharge an impossible burden to assess the tax liability by direct evidence only and to establish the evasion beyond doubt as in criminal cases. The learned Departmental representative without prejudice to the above submission also submitted that the learned Commissioner of Income-tax (Appeals) exceeded his jurisdiction by deciding an issue which was not agitated by the assessee as per the grounds of appeals enclosed with form No. 35. In this case, the assessee was aggrieved by the order of the Assessing Officer, filed an appeal on various grounds which, however, did not include the issue of making assessment under section 153A of the Act without incriminating material being available on the said issue. This was, therefore, against the law. Copy of the panchanama in the group case and the statement of Shri Visesh Gupta are filed on record. The learned Departmental

representative therefore, submitted that the learned Commissioner of Income-tax (Appeals) should not have decide this issue of non-recovery of incriminating material against the Revenue. The learned Commissioner of Income-tax-Departmental representative further wanted to place on record the gist of written submissions by March 20, 2020, but, till date nothing is placed on record.

19 The learned counsel for the assessee reiterated the submissions made above that since it was a legal issue and sufficient material was available on record, therefore, it being a legal issue, was rightly considered by the learned Commissioner of Income-tax (Appeals) and similarly relied upon the judgment of the hon'ble Supreme Court in the case of *NTPC* (supra). The learned counsel for the assessee referred to the synopsis to pages 1 to 3 to show that the original return of income for the assessment year under appeal, i. e., 2003-04 was filed on November 28, 2003 declaring an income of Rs. 2,427. A search under section 132(1) of the Income-tax Act, 1961, had taken place at the business premises of the MDLR group of cases on January 31, 2018. Notice under section 153A of the Income-tax Act, 1961, was issued on July 15, 2009. The assessee submitted before the Assessing Officer that the original return may be treated as return having filed in response to the notice under section 153A of the Income-tax Act, 1961. He has submitted that no incriminating material was found during the course of search so as to make the above additions.

19.1. The learned counsel for the assessee apart from the above submissions also submitted that the assessee has filed the revised grounds of appeal before the learned Commissioner of Income-tax (Appeals) and as per the revised grounds of appeal, the learned Commissioner of Income-tax (Appeals) has decided the issue of non-recovery of incriminating material during the course of search and relied upon the judgment of the hon'ble jurisdictional Delhi High Court in the case of *CIT* v. *Kabul Chawla* (supra). Therefore, there is no illegality in the order of the learned Commissioner of Income-tax (Appeals) in deciding this issue in favour of the assessee. The learned counsel for the assessee submitted that both the additions have been made by the Assessing Officer based on the items already mentioned in the balance-sheet which were already disclosed to the Revenue Department in the original return of income. The original assessments were already completed. Therefore, in the absence of recovery of incriminating material during the course of search, the learned Commissioner of Income-tax (Appeals) rightly decided the issue in favour of the assessee. He has submitted that the learned Commissioner of Income-tax, Central (2), New Delhi directed the Assessing Officer to reframe the

assessment under section 153A as per law. Therefore, the learned Commissioner of Income-tax (Appeals) rightly decided the issue in favour of the assessee. The learned counsel for the assessee submitted that in case this issue is decided in favour of the assessee, then, the appeal of the assessee on the merits and other grounds on the merits of the Departmental appeal, would be left with academic discussion only and there is no need for adjudication of the same.

20 We have considered the rival submissions and perused the material available on record. Before proceeding to decide the issue, we may note that these are group appeals related to M/s. MDLR group of cases in which search and seizure action under section 132 were carried out on January 31, 2008. Notices under section 153A were issued in all the group cases. Original assessments were framed under section 153A/144 of the Income-tax Act, 1961. The assessees have preferred a petition under section 264 of the Income-tax Act, 1961, before the learned Commissioner of Income-tax, Central-2, New Delhi, who vide order dated March 12, 2010 disposed of the same setting aside the assessment orders for the assessment years 2002-03 to 2008-09 and restored the matter in issue to the file of the Assessing Officer with a direction to reframe the assessments as per law. The Assessing Officer in pursuance of the directions issued under section 264 of the Income-tax Act by the learned Commissioner of Income-tax, Central-2, New Delhi, reframed the assessment under section 153A of the Income-tax Act, 1961. These are 179 appeals which were listed before the Bench for hearing of the group cases as these were clubbed/consolidated on the request of the Department. Since the issues are the same in these appeals, therefore, the issue decided in the present appeals and the findings in this assessment year 2003-04, could be followed in the remaining appeals. Further submissions made by the learned Departmental representative in other cases will also be considered while considering the remaining appeals.

20.1. In the assessment year under appeal, i. e., 2003-04 the assessee filed the original return of income on November 28, 2003 declaring an income of Rs. 2,427. Search was conducted under section 132 of the Income-tax Act, 1961, at the business premises of M/s. MDLR group of companies including the assessee on January 31, 2008. Thus, on the date of search, the assessment was concluded and no assessment was pending for the assessment year under appeal. No assessment was found abated. The Assessing Officer noted in the impugned assessment order that the assessee in response to the notice under section 153A of the Income-tax Act requested that the return filed originally under section 139 of the Income-tax Act may

be treated as return having been filed in response to the notice under section 153A of the Income-tax Act, 1961. The Assessing Officer, however, did not accept the contention of the assessee with regard to dropping of the proceedings. The Assessing Officer in the impugned assessment order while making the additions on account of administrative and general expenses to the tune of Rs. 82,685 noted that the assessee-company during the course of assessment as well as reassessment proceedings has failed to furnish any evidence of source from which this expenditure have been incurred. The Assessing Officer further noted in the impugned assessment order that during assessment year under appeal the assessee-company issued share capital of Rs. 2,13,70,020. The assessee-company during the course of assessment as well as reassessment proceedings failed to discharge the onus of providing identity of the share applicants, their creditworthiness and genuineness of the transaction. The addition was, therefore, made under section 68 of the Income-tax Act, 1961. These facts clearly show that both these additions have been made by the Assessing Officer of the items which were already disclosed to the Revenue Department in the original return of income which was already completed on the date of search. Thus, no incriminating material was found during the course of search so as to make these additions against the assessee. Since the Assessing Officer specifically noted in the assessment order that no details were filed on these issues in the original assessment proceedings clearly supports the finding of fact recorded by the learned Commissioner of Income-tax (Appeals) that no incriminating material was found during the course of search so as to make these two additions. The perusal of the assessment order, therefore, makes it clear that assessment under section 153A/144 of the Income-tax Act, 1961 have been framed without reference to any incriminating documents/material relevant to assessment in appeal. The judgment of the hon'ble jurisdictional Delhi High Court in the case of *CIT* v. *Kabul Chawla* [2016] 380 ITR 573 (Delhi) held as under (page 590) :

> "Completed assessments can be interfered with by the Assessing Officer while making assessment under section 153A only on the basis of some incriminating material unearthed during course of search which was not produced or not already disclosed or made known in course of original assessment."

20.2. The hon'ble jurisdictional Delhi High Court in the case of *Pr. CIT* v. *Meeta Gutgutia, prop. M/s. Ferns "N" Petals* [2017] 395 ITR 526 (Delhi) in paras 69 to 72 considering the judgment in the case of *CIT* v. *Kabul Chawla* (supra), held as under (page 561) :

"What weighed with the court in the above decision as the 'habitual concealing of income and indulging in clandestine operations' and that a person indulging in such activities 'can hardly be accepted to maintain meticulous books or records for long'. These factors are absent in the present case. There was no justification at all for the Assessing Officer to proceed on surmises and estimates without there being any incriminating material qua the assessment year for which he sought to make additions of franchisee commission.

The above distinguishing factors in *Smt. Dayawanti* v. *CIT* [2017] 370 ITR 496 (Delhi), therefore, do not detract from the settled legal position in *Kabul Chawla* (supra) which has been followed not only by this court in its subsequent decisions but also by several other High Courts.

For all of the aforementioned reasons, the court is of the view that the Income-tax Appellate Tribunal was justified in holding that the invocation of section 153A by the Revenue for the assessment years 2000-01 to 2003-04 was without any legal basis as there was no incriminating material qua each of those assessment years.

Conclusion

To conclude :

(i) Question (i) is answered in the negative, i. e., in favour of the assessee and against the Revenue. It is held that in the facts and circumstances, the Revenue was not justified in invoking section 153 A of the Act against the assessee in relation to the assessment year 2000-01 to assessment year 2003-04."

20.3. The Revenue preferred a special leave petition before the hon'ble Supreme Court in the case of *Pr. CIT* v. *Meeta Gutgutia* (supra), which have been dismissed by the hon'ble Supreme Court reported in *Pr. CIT* v. *Meeta Gutgutia* [2018] 405 ITR (St.) 28 (SC) ; [2018] 96 taxmann.com 468 (SC). Thus, the legal proposition decided in the case of *Kabul Chawla* (supra) and *Meeta Gutgutia* (supra) have become confirmed as is decided by the hon'ble jurisdictional Delhi High Court. The hon'ble Supreme Court in the case of *CIT* v. *Sinhgad Technical Education Society* [2017] 397 ITR 344 (SC) considering the issue under section 153C of the Income-tax Act, 1961 held that "the incriminating material which was seized had to pertain to the assessment years in question". It is, therefore, clear from the above judgments that incriminating material which was seized should pertain to the assessment year in question and that documents should have co-relation with these assessment years. However, no incriminating material if found in search have been referred to in the

assessment order. The learned Departmental representative, however, contended that the judgment of the hon'ble Kerala High Court in the case of Shri *E. N. Gopakumar* v. *CIT* (supra), should be considered in favour of the Revenue in which it was held that "there is no requirement for recovery of any incriminating material during the course of search so as to make the assessment under section 153A of the Income-tax Act or to make the addition". It is well settled law that the judgments of the hon'ble jurisdictional High Court is binding on all the subordinate authorities and courts. No preference could be given to the decisions of other High Court as against the binding precedent of the jurisdictional High Court. In the cases of the assessee, the judgments of the hon'ble Delhi High Court being the jurisdictional High Court are binding on all the subordinate authorities as well as the Tribunal. Further, the decision of the hon'ble Delhi High Court in the cases of *Kabul Chawla* and *Meeta Gutgutia* (supra) have been confirmed by the hon'ble Supreme Court by dismissing the special leave petition of the Department. The learned Departmental representative however, contended that the Department appeal in the case of *Kabul Chawla* (supra) have been dismissed by the hon'ble Supreme Court because of the low tax effect. Further, in the case of *Meeta Gutgutia* (supra), the hon'ble Delhi High Court considered its earlier decision in the case of *Kabul Chawla* (supra). Therefore, while dismissing the special leave petition of the Department in the case of *Meeta Gutgutia* (supra), the legal proposition propounded by the hon'ble jurisdictional Delhi High Court in the case of *Kabul Chawla* (supra) have attained finality. Therefore, the submissions of the learned Departmental representative has no merit and is rejected. The learned Departmental representative further submitted that the hon'ble Supreme Court in the case of *APAR Industries* on the same issue has admitted the special leave petition by framing the substantial question of law, therefore, the decision of the hon'ble High Court is not yet final. The contention of the learned Departmental representative is answered by the hon'ble Madhya Pradesh High Court in the case of *CIT* v. *Darshan Talkies* [1996] 217 ITR 744 (MP) in which it is held as under (headnote) :

> "The decision of the High Court is binding and the pendency of a petition for special leave to appeal to the Supreme Court from such a decision cannot obliterate its impact. It is binding until it is reversed or overruled."

20.4. The hon'ble Madras High Court in the case of *T. S. Shantanam* v. *Expenditure-tax Officer* [1973] 87 ITR 582 (Mad) while considering the rule of finality held "the essential principle as to the rule of finality of an assessment is that the Assessing Officer cannot change his mood and try to

reopen the closed state of affairs". Thus, the rule of finality apply in this case clearly show that the legal proposition decided by the hon'ble jurisdictional Delhi High Court in the cases of *Kabul Chawla* and *Meeta Gutgutia* (supra), have reached finality that "completed assessment can be interfered with by the Assessing Officer while making the assessments under section 153A only on the basis of some incriminating material unearthed during the course of search which was not produced or not already disclosed or made known in the course of original assessment". Since both the additions made by the Assessing Officer in the impugned assessment order under section 153A of the Income-tax Act are based on the items already disclosed in the original return of income and balance-sheet to the Revenue Department and such assessment have completed prior to the date of search and no assessment was abated, therefore, in the absence of recovery of any incriminating material on both these additions, the Assessing Officer could not have made any additions against the assessee. The learned Departmental representative also argued that the learned Commissioner of Income-tax (Appeals) has exceeded his jurisdiction by deciding this issue which was not agitated by the assessee as per the grounds of appeals enclosed in form No. 35. The learned counsel for the assessee, however, produced the copy of the revised grounds of appeal which was submitted before the learned Commissioner of Income-tax (Appeals) before deciding the appeal in which such ground have been raised by the assessee. Therefore, there is no merit in the contention of the learned Departmental representative. Further, the learned Commissioner of Income-tax (Appeals) has decided this issue in detail based on the material already available on record. The hon'ble Punjab and Haryana High Court in the case of *VMT Spinning Co. Ltd.* v. *CIT* [2016] 389 ITR 326 (P&H) held as under (headnote) :

> "*Held*, that the Tribunal could decide the appeal on a ground neither taken in the memorandum of appeal nor by seeking its leave. The only requirement was that the Tribunal could not rest its decision on any other ground unless the party who might be affected had sufficient opportunity of being heard on that ground. Therefore, the Tribunal ought to have exercised its discretion in view of the fact that the assessee intended raising only a legal argument without reference to any disputed questions of fact. Since there were no additional evidence required for the decision on the new ground raised by the assessee and such question arose from the facts which were already on the record of the assessment proceedings and since a decision upon the new ground raised by the assessee would only help in determining the assessee's correct tax liability, the matter could be

remanded to the Tribunal for adjudicating upon the additional ground on its merits. (Matter remanded)."

20.5. The learned Commissioner of Income-tax (Appeals) while deciding this ground of appeal as per the revised grounds of appeal has also noted the arguments of the assessee and reproduced, meaning thereby, the submissions were made before the learned Commissioner of Income-tax (Appeals) that no addition could be made in the assessment year under appeal as there were no incriminating material was recovered during the course of search. Therefore, the contention of the learned Departmental representative cannot be accepted. The same is accordingly, rejected. In view of the above discussion and in the light of the decisions of the hon'ble jurisdictional Delhi High Court in the case of *Kabul Chawla* and *Meeta Gutgutia* (supra), we do not find any illegality or irregularity in the order of the learned Commissioner of Income-tax (Appeals) in deciding this issue in favour of the assessee finding that there were no incriminating material unearthed during the course of search so as to make these additions. These additions are, therefore, rightly deleted. The learned Commissioner of Income-tax (Appeals) was, therefore, justified in allowing this ground of appeal of the assessee. These grounds of appeal of the Revenue are, therefore, dismissed.

20.6. The other ground of appeal in the Departmental appeals is the deletion of the addition of Rs. 82,685 and in the appeal of the assessee, the assessee has agitated the addition on the merits under section 68 of the Income-tax Act, 1961 at Rs. 2,13,70,020 on several grounds of appeals. In view of the finding on the issue of assumption of jurisdiction under section 153A of the Income-tax Act and making the additions on the merits as decided in the Departmental appeal, the issues on the merits are left with academic discussion only and as such, we do not propose to decide the same.

In the result, for the assessment year 2003-04 I. T. A. No. 2606/Delhi/ **21**
2016 of the Department is dismissed and I. T. A. No. 2277/Delhi/2016 of the assessee is treated as allowed.

Remaining appeals **22**

I. T. A. No. 2278/Delhi/2016-Assessment year 2004-05
I. T. A. No. 2279/Delhi/2016-Assessment year 2005-06

M/s. Alankar Saphire Developers, (Appellant)	*v.*	The Dy. CIT, Central Circle-15 (Old), Central Circle-14 (New), New Delhi. (Respondent)

I. T. A. No. 2607/Delhi/2016-Assessment year 2004-05
I. T. A. No. 2608/Delhi/2016-Assessment year 2005-06

The ACIT, Central Circle-14, New Delhi-110 055 (Appellant) *v.* M/s. Alankar Saphire Developers, (Respondent)

I. T. A. No. 6358/Delhi/2016-Assessment year 2004-05

M/s. Ashutosh Developers P. Ltd. (Appellant) *v.* The Dy. CIT, Central Circle-15 (Old), Central Circle-14 (New), New Delhi. (Respondent)

I. T. A. No. 122/Delhi/2017-Assessment year 2004-05
I. T. A. No. 675/Delhi/2017-Assessment year 2006-07

The ACIT, Central Circle-14 (Appellant) *v.* M/s. Ashutosh Developers P. Ltd. (Respondent)

I. T. A. No. 6444/Delhi/2015-Assessment year 2005-06

The ACIT, Central Circle-14 (Appellant) *v.* M/s. Believe Developers and Promoters Pvt. Ltd. (Respondent)

I. T. A. No. 1975/Delhi/2015-Assessment year 2005-06

The ACIT, Central Circle-14 (Appellant) *v.* M/s. Gee Gee Buildtech (P.) Ltd. (Respondent)

I. T. A. No. 3501/Delhi/2016-Assessment year 2005-06
I. T. A. No. 3460/Delhi/2016-Assessment year 2006-07

The ACIT, Central Circle-14 (Appellant) *v.* M/s. King Buildcon Pvt. Ltd. (Respondent)

I. T. A. No. 3081/Delhi/2016-Assessment year 2005-06
and
C. O. No. 259/Delhi/2016 in I. T. A. No. 3460/Delhi/2016
(assessment year 2006-07

M/s. King Buildcon Pvt. Ltd. (Appellant/Cross Objector) *v.* The Dy. CIT, Central Circle-15 (Old), Central Circle-14 (New), New Delhi. (Respondent)

I. T. A. No. 643l/Delhi/2016-Assessment year 2003-04
I. T. A. No. 6432/Delhi/2016-Assessment year 2004-05
I. T. A. No. 6433/Delhi/2016-Assessment year 2006-07

The ACIT, Central Circle-14 (Appellant) *v.* M/s. Lakshya Consultants Pvt. Ltd. (Respondent)

I. T. A. No. 118/Delhi/2017-Assessment year 2003-04
I. T. A. No. 119/Delhi/2017-Assessment year 2004-05
I. T. A. No. 121/Delhi/2017-Assessment year 2006-07

The ACIT, Central Circle-14 *v.* M/s. LKG Builders Pvt. Ltd.
(Appellant) (Respondent)

I. T. A. No. 6353/Delhi/2016-Assessment year 2003-04
I. T. A. No. 6354/Delhi/2016-Assessment year 2004-05
I. T. A. No. 6356/Delhi/2016-Assessment year 2006-07

M/s. LKG Builders Pvt. Ltd. *v.* The Dy. CIT, Central Circle-15 (Old), Central Circle-14 (New), New Delhi.
(Appellant) (Respondent)

I. T. A. No. 3449/Delhi/2016-Assessment year 2006-07

The ACIT, Central Circle-14 *v.* M/s. M. M. Buildcon Pvt. Ltd.
(Appellant) (Respondent)

C. O. No. 251/Delhi/2016 in I. T. A. No. 3449/Delhi/2016
(Assessment year 2006-07)

M/s. M.M. Buildcon Pvt. Ltd. *v.* The ACIT, Central Circle-14
(Cross Objector) (Respondent)

I. T. A. No. 1972/Delhi/2016-Assessment year 2006-07

The ACIT, Central Circle-14 *v.* M/s. Nageshwar Realtors Pvt. Ltd.
(Appellant) (Respondent)

I. T. A. No. 2274/Delhi/2016-Assessment year 2005-06

M/s. Pegasus Softech (P.) Ltd. *v.* The Dy. CIT, Central Circle-15 (Old), Central Circle-14 (New), New Delhi.
(Appellant) (Respondent)

I. T. A. No. 2610/Delhi/2016-Assessment year 2005-06

The ACIT, Central Circle-14 *v.* M/s. Pegasus Softech (P.) Ltd.
(Appellant) (Respondent)

I. T. A. No. 3456/Delhi/2016-Assessment year 2005-06

The ACIT, Central Circle-14 *v.* M/s. Shine Star Buildcon Pvt. Ltd.
(Appellant) (Respondent)

I. T. A. No. 1971/Delhi/2016-Assessment year 2006-07

The ACIT, Central Circle-14 *v.* M/s. Witness Builders P. Ltd.
(Cross Objector) (Respondent)

C. O. No. 193/Delhi/2016 in I. T. A. No. 1971/Delhi/2016 (assessment year 2006-07)

M/s. Witness Builders P. Ltd. *v.* The ACIT, Central Circle-14

(Appellant) (Respondent)

I. T. A. No. 2603/Delhi/2016-Assessment year 2006-07

The ACIT, Central Circle-14 *v.* M/s. Witness Builders P. Ltd.

(Appellant) (Respondent)

I. T. A. No. 2280/Delhi/2016-Assessment year 2005-06

M/s. Worldwide Realtors (P) Ltd. *v.* The Dy. CIT, Central Circle-15 (Old), Central Circle-14 (New), New Delhi.

(Appellant) (Respondent)

I. T. A. No. 2601/Delhi/2016-Assessment year 2005-06

The ACIT, Central Circle-14 *v.* M/s. Worldwide Realtors (P) Ltd.

(Appellant) (Respondent)

23 The issues in these remaining Departmental appeals as well as the appeals/cross-objections of the assessee are identical. The issues in the remaining Departmental appeals are also with regard to delay of 20 days condoned by the learned Commissioner of Income-tax (Appeals) in filing the appeal before him, violation of rule 46A, allowing the grounds of appeal of the assessee qua the jurisdiction to make the additions under section 153A in the absence of recovery of any incriminating material and additions deleted on the merits.

24 In the remaining appeals of the assessee, the assessee challenged the additions on on the merits partly maintained by the learned Commissioner of Income-tax (Appeals).

25 The arguments of the learned representatives of both the parties are identical as have been considered in the case of *Alankar Saphire Developers* (I. T. A. No. 2277/Delhi/2016-assessment year 2003-04), (supra), decided above. In the case of *Ashutosh Developers P. Ltd.*, the learned Departmental representative also submitted that modus operandi of the assessee regarding share application money pending allotment is in issue along with land dealings, on which, allegations were before search made against the assessee, therefore, search was made in the group cases. The issue of share application money, unexplained credits and unexplained sources of investment in land is mentioned in the appraisal report and sale deeds were found during the course of search, therefore, there were recovery of the incriminating material during the course of search, therefore, such a legal proposition would be different in the present case.

On the other hand, the learned counsel for the assessee demonstrated **26** before us that all these items on which the Assessing Officer has made addition were part of the balance-sheet item which were already disclosed to the Revenue Department on filing the original return of income. The original assessments have already completed prior to the date of the search. Therefore, no incriminating material was found during the course of search. Therefore, the issue is covered by the judgment of the hon'ble jurisdictional Delhi High Court in the case of *Kabul Chawla* (supra). The Assessing Officer also made additions in respect of expenses, share capital and credit and debit mentioned in the balance-sheet. Thus, the facts are identical.

In the case of *Believe Developers Promoters Pvt. Ltd.*, the learned **27** Departmental representative similarly contended that sale deed was found during the course of search, source of investment was not filed by the assessee. The appraisal report contained all the allegations against the assessee, on which, no source was explained by the assessee before the Investigation Wing. Therefore, the facts of this case are also distinguishable.

On the other hand, the learned counsel for the assessee reiterated the **28** submissions made above and submitted that no incriminating material was recovered during the course of search so as to make the additions. The assessee disclosed all the items based on the balance-sheet in the original return of income.

In the case of *King Buildcon Pvt. Ltd.*, the learned Departmental rep- **29** resentative submitted that the Assessing Officer has access to the material and statement under section 132(4) was recorded during the course of search. During the course of search sale deed, valuation report were found and seized. During the post-search investigation, enquiries were conducted and share capital was referred to in the appraisal report which was the basis of making search against the group cases. Cash deposited in the bank is also referred to in the appraisal report. Agreement to sell, receipts were also found during the course of search.

The learned counsel for the assessee submitted that in the assessment **30** year there is no reference to any incriminating material so as to make the additions. Therefore, all the items were disclosed in the original return of income and assessment was completed on the date of search. The learned Commissioner of Income-tax (Appeals) correctly decided this issue in favour of the assessee.

In the case of *M. M. Buildcon Pvt. Ltd.*, the learned Departmental rep- **31** resentative submitted that annexure 91 (paper book-50) was recovered. The assessee made surrender of income and statement under section 132(4) was recorded, therefore, additions were correctly made in this case.

32 On the other hand, the learned counsel for the assessee submitted that no specific material qua any of the additions have been referred to by the Assessing Officer in the assessment order. The assessee did not make any surrender of amount for the assessment year under appeal. He has referred to the findings of the Assessing Officer and the learned Commissioner of Income-tax (Appeals) to show that no additions have been made based on any incriminating material. He has further submitted that no such addition was made in the original assessment order under section 153A/144 of the Income-tax Act, 1961. The present assessment order have been passed in pursuance of the order under section 264 of the Income-tax Act, 1961, in which no such issue have been raised. Therefore, the Assessing Officer could not have taken a new item to make the addition against the assessee which have not been considered by the learned Commissioner of Income-tax, Central-(2), New Delhi, in proceeding under section 264 of the Income-tax Act, 1961.

33 In the case of *Witness Builders Pvt. Ltd.*, the learned Departmental representative referred to the order of the Assessing Officer and the learned Commissioner of Income-tax (Appeals) to show that land was purchased at Badshahpur. Appraisal report did not find mention any cash deposit.

34 On the other hand, the learned counsel for the assessee submitted that the same additions are based on the items already mentioned in the balance-sheet and reported in the original return of income. The Assessing Officer has mentioned that documents were filed during the original assessment proceedings.

35 As regards the remaining Departmental appeals, the submissions of the learned Departmental representative are the same as have been considered above. The submissions of the learned counsel for the assessee is also the same that in all the above years the additions are based on the items which already mentioned in the balance-sheet which were disclosed in the original return of income and no assessments were pending on the date of the search, details of which are filed in paper book and synopsis. Therefore, completed assessment cannot be interfered in the absence of any incriminating material.

36 We have considered the rival submissions and perused the material on record and find that the issue is the same in the remaining appeals as is considered in the case of *Alankar Saphire Developers* (supra) in the assessment year 2003-04. The Assessing Officer has made all the additions which were disclosed in the books of account and balance-sheet and in the original return of income. Whatever points have been raised by the learned Departmental representative have not been supported by any incriminating

material found during the course of search. The appraisal report of the Department is an internal matter of the Investigation Wing which has nothing to do with the incriminating material if found during the course of search. What was the modus operandi of the assessee to keep the share application money pending or in land dealing are mere an allegation and may be the basis for conducting search in the group cases, but, nothing has been pointed out during the course of hearing of these appeals, if any of the additions are based on any incriminating material found during the course of search. Assessments were completed on filing the original returns of income and no assessment was pending or abated. Therefore, the issue is covered by the judgments of the hon'ble jurisdictional Delhi High Court in the cases of *Kabul Chawla* and *Meeta Gutgutia* (supra). We have already decided an identical issue of assumption of jurisdiction under section 153A of the Income-tax Act for deleting the above additions in the case of *Alankar Saphire Developers* (supra). Following the reasons for decision in this case, we do not find any infirmity in the order of the learned Commissioner of Income-tax (Appeals) in holding that no addition could be made against the assessee as no incriminating material was found during the course of search against the assessee. Therefore, there were no justification to make any addition against the assessee. The issue relating to condonation of delay and violation of rule 46A have also been decided being identical in the case of *Alankar Saphire Developers* (supra). Following the reasons for decision for the same, we do not find any infirmity in the order of the learned Commissioner of Income-tax (Appeals) in deciding these issues in favour of the assessee. In view of the above discussion, we hold that the learned Commissioner of Income-tax (Appeals) correctly decided these issues in favour of the assessee holding that delay shall have to be condoned and there is no violation of rule 46A and in deciding the issue of assumption of jurisdiction under section 153A in favour of the assessee, in the absence of any incriminating material during the course of search, when original assessments were already completed on the date of search. The issues on the merits decided by the learned Commissioner of Income-tax (Appeals) in favour of the assessee and against the assessee are thus left with academic discussion only. Accordingly, all the remaining appeals of the Department are dismissed and remaining appeals/cross-objections of the assessee are treated as allowed.

In the result, all the remaining appeals of the Department are dismissed and the remaining appeals of the assessee and cross-objection of the assessee are treated as allowed. 37

38

I. T. A. No. 1589/Delhi/2016 (assessment year 2005-06

M/s. Vinman Estates (P.) Ltd. *v.* The Dy. CIT, Central Circle-15 (Old), Central Circle-14 (New), New Delhi.

(Appellant) (Respondent)

I. T. A. No. 1980/Delhi/2016 (assessment year 2005-06

The ACIT, Central Circle-14 *v.* M/s. Vinman Estates (P.) Ltd.

(Appellant) (Respondent)

39 Both the above cross-appeals are directed against the order of the learned Commissioner of Income-tax (Appeals)-XXVI, New Delhi, dated January 7, 2016, for the assessment year 2005-06.

40 Briefly the facts in this case are also the same that search was conducted in the case of the assessee being the group case of MDLR group of cases. Notice under section 153A was issued. The assessee requested before the Assessing Officer that the original return filed under section 139 may be treated as return having been filed in response to the notice under section 153A of the Income-tax Act, 1961. The Assessing Officer completed the assessment under section 153A/143(3) of the Income-tax Act, 1961, dated December 29, 2009 at Rs. 3,69,911. The assessee similarly preferred application under section 264 of the Income-tax Act, 1961, before the learned Commissioner of Income-tax (Appeals), Central (2), New Delhi, who has disposed of the application and set aside the original assessment order and directed the Assessing Officer to reframe the assessment as per law. The Assessing Officer, therefore, proceeded to pass the impugned assessment order afresh. The objections of the assessee are dropping. The proceedings under section 153A were decided against the assessee. The Assessing Officer noted that during assessment year under appeal, the assessee has issued share capital of Rs. 1 lakh. During the original assessment proceedings as well as in reassessment proceedings, the assessee failed to discharge the onus under section 68 of the Income-tax Act, 1961, therefore, addition of Rs. 1 lakh was made under section 68 of the Income-tax Act, 1961. The Assessing Officer further noted that during the year the assessee has received advance for land from Shri Praveen Kumar amounting to Rs. 7 lakhs. No land was sold to any of the parties. The assessee was asked to furnish to prove the identity, creditworthiness and genuineness of the transaction in the case of Shri Praveen Kumar. No evidence was furnished during the assessment proceedings as well as reassessment proceedings. The Assessing Officer, therefore, made addition of Rs. 7 lakhs on account

of income from undisclosed sources. The Assessing Officer further noted that during initial assessment proceedings the assessee was asked to file copies of the agreements, details of land, for which, advance has been received from M/s. Unitech. In the absence of any details, notice under section 133(6) of the Act was issued regarding transaction made by M/s. Unitech with M/s. MDLR group of companies. M/s. Unitech confirmed that advance of Rs. 5.50 crores was given to the assessee, but, in the absence of any supporting documents, the Assessing Officer made addition of Rs. 5.50 crores being income from undisclosed sources. The Assessing Officer also noted that during the assessment year the assessee has given Rs. 30,000 as advance to others. In the absence of any evidence, addition of Rs. 30,000 was made on account of unexplained investment. The Assessing Officer also noted that the assessee has claimed administrative and general expenses of Rs. 18,081. The assessee failed to furnish evidence at the original assessment as well as in reassessment, therefore, the addition was made on account of disallowance of expenditure of Rs. 18,081. The Assessing Officer also noted that the assessee has claimed preliminary expenses to the tune of Rs. 76,470 during the original assessment as well as reassessment. The assessee failed to furnish any evidence, therefore, addition was made of Rs. 76,470 on account of preliminary expenses.

41 The assessee made a request before the learned Commissioner of Income-tax (Appeals) for condonation of delay of 20 days as well as challenged the additions on the merits and assumption of jurisdiction under section 153A of the Income-tax Act, 1961, for making the above additions, in the absence of recovery of any incriminating material.

42 The learned Commissioner of Income-tax (Appeals) condoned the delay in filing the appeal. The learned Commissioner of Income-tax (Appeals), however, decided the issue of assumption of jurisdiction under section 153A in the year under consideration on account of non-recovery of any incriminating material during the course of search against the assessee on the reasons that during the course of search operation agreement to sell with Shri Praveen Kumar was found and seized. Therefore, it is not a case where additions have been made without recovery of the incriminating material. The issue of proceedings under section 153A and making the additions was, therefore, decided against the assessee. The learned Commissioner of Income-tax (Appeals) also confirmed the addition of Rs. 7 lakhs and Rs. 1 lakh. The learned Commissioner of Income-tax (Appeals), however, deleted the additions of Rs. 30,000, additions of Rs. 5.50 crores, Rs. 76,470 and Rs. 18,081 of expenses. The Department in its appeal has challenged the order of the learned Commissioner of Income-tax (Appeals)

in condoning the delay in filing the appeal and deleting the addition of Rs. 30,000 and Rs. 5.50 crores.

43 The assessee in appeal challenged the additions of Rs. 7 lakhs and 1 lakh on the merits.

43.1. The assessee in its appeal raised an additional ground of appeal challenging the order of the learned Commissioner of Income-tax (Appeals) in upholding the initiation of proceedings under section 153A of the Income-tax Act and framing the assessment under section 153A/143(3) of the Income-tax Act, 1961, since no incriminating material was found as a result of search conducted on the assessee, therefore, the assessment framed is without jurisdiction. It is also contended in the additional ground that additions are made without jurisdiction since it is not based on any material found as a result of search on the applicant and relied upon the judgments of the hon'ble Delhi High Court in the cases of *Kabul Chawla* and *Meeta Gutgutia* (supra). The learned counsel for the assessee submitted that it is a legal ground which emanate from the order of the learned Commissioner of Income-tax (Appeals) and relied upon the judgment of the hon'ble Supreme Court in the case of *National Thermal Power Co. Ltd.* v. *CIT* (supra) and other decisions of the High Courts and submitted that the above additional ground may be admitted for disposal of the appeal being legal in nature.

44 On the other hand, the learned Departmental representative strongly opposed the request for admission of the additional ground of appeal.

45 After considering the rival submissions, we are of the view that since the learned Commissioner of Income-tax (Appeals) has decided this ground against the assessee and all the material are available on record of the impugned orders, therefore, it being the legal issue which goes to the root of the matter and legality of assessment order, therefore, we admit the same for disposal of the appeal of the assessee.

46 The learned counsel for the assessee on additional ground of appeal submitted that the learned Commissioner of Income-tax (Appeals) has decided this issue at pages 6 to 21 of the appellate order. The learned Commissioner of Income-tax (Appeals) has decided this issue against the assessee because agreement to sell in cash was seized during the course of search as belonging to Shri Praveen Kumar from whom advance was received. He has referred to para 14 of the assessment order in which the Assessing Officer has mentioned that the assessee has received advance for land from Shri Praveen Kumar amounting to Rs. 7 lakhs. No land was sold to any of the party. The assessee failed to prove the identity of Shri Praveen Kumar, his creditworthiness and genuineness of the transaction. Therefore,

in the absence of any evidence, addition of Rs. 7 lakhs was made. The learned counsel for the assessee has submitted that the assessee has filed original return of income declaring loss of Rs. 34,400 on July 18, 2005 for the assessment year under appeal. Paper book 6 is the balance-sheet of the assessee in which the assessee has shown advance received from Shri Praveen Kumar of Rs. 7 lakhs. Paper book 122 is the ledger account of Shri Praveen Kumar in the books of the assessee showing advance received from Shri Praveen Kumar. Paper book-127 is agreement to sell to show advance of Rs. 7 lakhs have been received from Shri Praveen Kumar which was found during the course of search. The learned counsel for the assessee, therefore, submitted that in the original return of income the assessee has already disclosed the receipt of Rs. 7 lakhs as advance received from Shri Praveen Kumar and original assessment was completed because no notice under section 143(2) of the Income-tax Act, 1961, was issued within 12 months from the date of filing of the return. Therefore, original return was completed on the date of the search. Since the advance received through agreement to sell was already disclosed to the Revenue Department in original return of income, therefore, recovery of the agreement to sell could not be treated as incriminating material so as to make any of the additions against the assessee. He has submitted that the issue is, therefore, covered by the judgments of the hon'ble jurisdictional High Court in the cases of *Kabul Chawla* and *Meeta Gutgutia* (supra). The learned counsel for the assessee in the alternate contention submitted that at the most if the agreement to sell is considered as incriminating material, the addition could be made of Rs. 7 lakhs only. The other additions are not based on any evidence or material found during the course of search, therefore, no other addition could be made against the assessee.

47 The learned Departmental representative reiterated the submissions made in the above group cases and also submitted that in the case of *Kabul Chawla* (supra), there should be nexus between the material and the addition, which is lacking in the case of the assessee. therefore, the additions have been rightly made.

48 We have considered the rival submissions. It is a fact that the assessee has already filed original return of income accompanied by profit and loss account, balance-sheet. In the original return of income, the assessee has disclosed the receipt of Rs. 7 lakhs from Shri Praveen Kumar as per balance-sheet. Copy of the ledger account shows that it is already disclosed in the books of account of the assessee. Therefore, receipt of Rs. 7 lakhs from Shri Praveen Kumar as advance was already disclosed in the original return of income. Further, on the date of search, the return was not pending as

same was completed because no proceedings were initiated against the assessee for passing the original assessment. Further, the original assessment orders were passed in the group cases in which the learned Commissioner of Income-tax, Central-(2), New Delhi, has invoked jurisdiction under section 264 of the Income-tax Act, 1961 and all the matters were restored to the file of the Assessing Officer for passing the order afresh, as per law. Thus, all the facts with regard to receipt of Rs. 7 lakhs from Shri Praveen Kumar was disclosed to the Revenue Department in the original return of income. therefore, mere recovery of the agreement to sell, through which, advance of Rs. 7 lakhs was received by the assessee from Shri Praveen Kumar could not be treated as incriminating material found in search. Thus, there is no recovery of any incriminating material during the course of search against the assessee so as to make any of the additions against the assessee. The issue is, therefore, covered by the judgments of the hon'ble jurisdictional High Court in the cases of *Kabul Chawla* and *Meeta Gutgutia* (supra). Identical issue have considered and decided in the group case of *Alankar Saphire Developers* (supra) and following the reasons for the decision in the same case of the group, we set aside the orders of the authorities below and delete all the additions. The additional ground is, therefore, allowed.

49 The remaining ground in the Departmental appeal and in appeal of the assessee on the merits are thus, left with academic discussion only. The issue of condonation of delay by the learned Commissioner of Income-tax (Appeals) is already considered and decided in the case of *Alankar Saphire Developers* (supra). Following the reasons for decision, we do not find any infirmity in the order of the learned Commissioner of Income-tax (Appeals) in condoning the delay in filing the appeal before him. Accordingly, the appeal of the assessee is allowed and the Departmental appeal is dismissed.

50 In the result, the appeal of the assessee allowed and the appeal of the Department dismissed.

51 To sum up, all the Departmental appeals are dismissed and all the appeals of the assessee and the cross-objection are treated as allowed.

52 Order pronounced in the open court.

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[2020] 81 ITR (Trib) 577 (Kolkata)

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

RECKITT BENCKISER (I.) PVT. LTD.

v.

DEPUTY COMMISSIONER OF INCOME-TAX

(and vice versa)

S. S. GODARA *(Judicial Member)* and
DR. A. L. SAINI *(Accountant Member)*

June 17, 2020.

SS ▸ ITA 1961, ss 40(a)(ii), 80-IB, 80-IC, 92CA(2)
AY ▸ 2010-11,2011-12
HF ▸ Assessee

INTERNATIONAL TRANSACTIONS—ARM'S LENGTH PRICE—ASSOCIATED ENTERPRISE—ROYALTY—TRADE-MARKS FOR TWO PRODUCTS REGISTERED AND OWNED BY ASSOCIATED ENTERPRISE—ROYALTIES PAID NOT ONLY IN RESPECT OF PATENT BUT FOR BASKET OF SERVICES—TRANSFER PRICING OFFICER NOT JUSTIFIED IN DETERMINING ARM'S LENGTH PRICE OF ROYALTY PAID IN CASE OF TWO ITEMS AS NIL—DIRECTION TO DELETE ARM'S LENGTH PRICE ADJUSTMENT FOR PAYMENT OF ROYALTY—INCOME-TAX ACT, 1961, s. 92CA(2).

INTERNATIONAL TRANSACTIONS—TRANSFER PRICING—ARM'S LENGTH PRICE—ADVERTISING, MARKETING AND PROMOTION OF SALES EXPENSES—NO UNDERTAKING BETWEEN ASSESSEE AND ITS ASSOCIATED ENTERPRISES TO INCUR EXPENSES FOR BRAND PROMOTION ACCORDING TO ANY GLOBAL OR NATION SPECIFIC STRATEGY—NO PROOF OF EXISTENCE OF INTERNATIONAL TRANSACTION—ARM'S LENGTH PRICE ADJUSTMENT MADE IN RESPECT OF ADVERTISING, MARKETING AND PROMOTION OF SALES EXPENSES TO BE DELETED—INCOME-TAX ACT, 1961, s. 92.

INTERNATIONAL TRANSACTIONS—TRANSFER PRICING—ASSOCIATED ENTERPRISES—ASSESSEE PROVIDING SERVICE TO ASSOCIATED ENTERPRISES AND EXPENSES REIMBURSED BY ASSOCIATED ENTERPRISES—UPWARD TRANSFER PRICING ADJUSTMENT WITHOUT CONSIDERING NATURE OF EXPENSES—FAILURE BY TRANSFER PRICING OFFICER TO ADJUDICATE ISSUE TAKING INTO ACCOUNT DOCUMENTS ALREADY SUBMITTED BY ASSESSEE—MATTER REMANDED—INCOME-TAX ACT, 1961.

INDUSTRIAL UNDERTAKING—SPECIAL DEDUCTION—APPORTIONMENT OF EXPENSES BETWEEN ELIGIBLE AND NON-ELIGIBLE UNITS—ALLOCATION

on basis of number of employees linked to factory operation divided by total number of employees in corporate office into sales of eligible units divided by total sales —Proper—Income-tax Act, 1961, s. 80-IB.

Industrial undertaking—Special deduction under section 80-IC —Condition precedent—Manufacture or production of article eligible for special deduction—Sale of scrap—Scrap produced during manufacture—Profits and gains from sale of scrap materials eligible to deduction—Income-tax Act, 1961, s. 80-IC.

Industrial undertaking—Special deduction under section 80-IC —Interest—Disallowance of interest allocated to eligible units—Assessee raising additional ground regarding quantification of disallowance—Matter remanded—Income-tax Act, 1961, ss. 80-IB, 80-IC.

Business expenditure—Disallowance—Tax on profits—Section 40(a)(ii) applies only to taxes and not to education cess—Education cess allowable—Income-tax Act, 1961, s. 40(a)(ii).

The assessee was a subsidiary of a United Kingdom based company and engaged in the business of manufacture and trading of household and pharmaceutical products. The assessee entered into a licence agreement with its associated enterprise for the transfer of intellectual property rights for the production, sale, distribution and marketing of their "products" domestically and internationally. The Transfer Pricing Officer noticed that the assessee had not provided details with reference to two products which were in existence for many years before the acquisition of the assessee by the B group. Therefore, he concluded that the assessee had not received any know-how with reference to those two products to support any payment of royalty and determined the arm's length price of the royalty paid in the case of those two items at nil under the comparable uncontrolled price method. A notice under section 92CA(2) of the Income-tax Act, 1961 was issued, and, rejecting the contention of the assessee, the Transfer Pricing Officer adopted the benefit test approach and made an arm's length price adjustment of Rs. 78.70 crores. The Dispute Resolution Panel had deleted the arm's length price adjustment. On appeal :

Held, *(i) that the assessee was a manufacturer and distributor of a large number of products. These brands were owned by its associated enterprise. The assessee had been paying royalty to its associated enterprises for a number of years which had been allowed in the assessment of earlier years. This*

year there was no change in facts and law. It was not open for the Department to take an entirely contrary or different stand unless a cogent case was made out by the Transfer Pricing Officer or the Assessing Officer on the basis of change in facts. The Transfer Pricing Officer had not pointed out a change in the facts or any provision of law which led him to take a view contrary to the view taken by his predecessors in previous years. The Transfer Pricing Officer could not take a contrary view and disturb the settled facts unless there was a change in law or facts. Therefore, the arm's length price adjustment made by the Transfer Pricing Officer was not sustainable in law.

RADHASOAMI SATSANG *v.* CIT [1992] 193 ITR 321 (SC) *applied.*

(ii) that the Transfer Pricing Officer had allowed royalty in respect of all except two products. The Transfer Pricing Officer had held that no benefit was derived by the assessee from its associated enterprises. The trade marks for the two products were registered and the brands were owned by the associated enterprises. The royalties were paid not only in respect of the patent but for a basket of services. It was a common occurrence that a person using a brand name pays certain brand royalty to the owner of brand. It was not the case of the Transfer Pricing Officer, that the royalty paid in respect of those products was without any use of the brand names. The assessee had in its transfer pricing study included payment of royalty and according to it the royalties were at arm's length. Considering these facts, the proposed disallowance of royalty in respect of the two products would not appear to be justified and proper. The Dispute Resolution Panel was right in deleting the disallowance of royalty in respect of the two products. Therefore, the arm's length price adjustment for payment of royalty of Rs. 35.05 lakhs for the assessment year 2010-11 and Rs. 78.70 crores for the assessment year 2011-12 were directed to be deleted.

CIT *v.* EKL APPLIANCES LTD. [2012] 345 ITR 241 (Delhi) and FRIGOGLAS INDIA P. LTD. *v.* DY. CIT [2016] 180 TTJ 401 (Delhi) *relied on.*

The assessee had incurred advertisement, marketing and promotion expenses to publicize the product.The Transfer Pricing Officer, treating advertisement marketing and promotion expenses as an international transaction for brand promotion as covered under the purview of section 92 of the Act computed the arm's length price of the international transaction pertaining to advertisement, marketing and promotion expenses at Rs. 104.43 crores. The Dispute Resolution Panel confirmed the arm's length price adjustment done by the Transfer Pricing Officer. On appeal :

Held, *that the assessee was not under any obligation to incur advertisement, marketing and promotion expenses. Nor did its parent company have*

any control over such decisions of the assessee. The activities of brand promotion were a global marketing and sales promotion strategy of the parent company, which was not the fact in the case of the assessee. There was no transaction or undertaking or agreement between the assessee and its associated enterprises. Incurrence of advertisement, marketing and promotion expenses was a domestic transaction which could not be treated as an instance of profit-sharing exercise. A unilateral action by one party in absence of any understanding or contract or binding obligation could not be termed as "transaction". In the assessee's case, the assessee had incurred advertisement, marketing and promotion expenditure in respect of its business operations in India and in order to boost its sales in India. Thus, no "transaction" could be said to exist in respect of such advertisement, marketing and promotion expenditure incurred by the assessee. There was no term or condition or provision in either of the licensing agreements which created any sort of obligation on the assessee to carry out any marketing and promotional activities in order to promote the brands and related intellectual property rights. The assessee had complete autonomy to incur expenses relating to marketing and promotion of its products for enhancing better sales and marketing and was under no obligation from any of its associated enterprises. Hence, the arm's length price adjustment made by the Transfer Pricing Officer and confirmed by the Dispute Resolution Panel was not justified. Therefore, the arm's length price adjustment made by the Transfer Pricing Officer Rs. 104.43 crores for the assessment year 2010-11 and Rs. 331.09 crores for the assessment year 2011-12 was to be deleted.

Maruti Suzuki India Ltd. *v.* CIT [2016] 381 ITR 117 (Delhi) *relied on.*

The assessee supported the associated enterprises in their projects procuring material from India and sending them to its associated enterprises in the form of market support services and the costs incurred by the assessee were reimbursed by the associated enterprises. The Transfer Pricing Officer upwardly adjusted the income of the assessee by Rs. 4.31 crores on this count. The Dispute Resolution Panel confirmed the order of the Transfer Pricing Officer. On appeal :

Held, *that there was no adjudication by the Transfer Pricing Officer or the Dispute Resolution Panel as to what services were rendered. According to the assessee, the expenses in question were in respect of system upgrade of the assessee which costs were reimbursed to the assessee by the associated enterprises. There was no element of any service that the assessee rendered to the associated enterprises. The assessee submitted three volumes of documents*

filed before the Transfer Pricing Officer and the Dispute Resolution Panel to establish that those were cost to cost reimbursements but there had been no adjudication thereon. Therefore, in the interest of justice and fair play, it would be appropriate to remit the issue to the Transfer Pricing Officer to adjudicate the issue taking into account three volumes of documents already submitted by the assessee. [Matter remanded.]

The assessee allocated residual cost to the eligible and non-eligible units in the ratio of number of the employees at the corporate office who were directly involved in the management of those eligible units such as production, procurement, quality and logistics to the total number of employees at the corporate office. According to the assessee those expenses primarily related to the corporate office of the company. However, the Assessing Officer held that the assessee had not applied the provisions of section 80-IB of the Act properly especially sub-section (5) thereof which clearly stated that the profits of the eligible unit had to be determined as if that was the only source of income of the assessee. The Commissioner (Appeals) accepted the basis of apportionment of expenses as made by the assessee. On appeal :

Held, *that the allocation done by the assessee on the basis of the number of employees directly linked with the factory operation was more logical. The residual cost was incurred at the head office and was not capable of being identified with any of the units run by the assessee. It was only because of this difficulty that the Assessing Officer and the assessee resorted to allocation of residual cost. Allocation of residual cost could not be done arbitrarily. The allocation was to be with due regard to the efforts put at the head office level to be eligible. That could be done only by allocation on the basis of number of employees linked to factory operations divided by the total number of employees into corporate office into sales of the eligible units divided by total sales. This allocation of residual cost done by the assessee was logical and there was no infirmity in the action of the Commissioner (Appeals) in accepting this basis of allocation.*

On the question of computation of the eligible income from sale of scrap whilst calculating deduction under section 80-IC of the Act :

Held, *that the scrap materials came into being during the manufacturing process of the industrial undertaking in the manufacture of certain products. The scrap materials had a saleable value. Profits and gains from the sale of scrap materials were eligible to deduction in an amount equal to twenty per cent. under section 80-IC of the Act, inasmuch as such gains or profits were derived from the industrial undertaking and includible in the gross total income of the assessee.*

The assessee claimed deduction under section 80-IB/80-IC to the tune of Rs. 16.02 crores on interest income. The claim was disallowed. However, the assessee raised an additional ground regarding quantification of the disallowance. It was pleaded that the interest income of Rs. 16.02 crores was inclusive of Rs. 3.39 crores relating to its P unit in respect of which it had claimed deduction under section 80-IC deduction. The said deduction was allowable to the extent of 30 per cent. only being sixth year of claim. It thus submitted that only 33 per cent. of Rs. 3.39 crores, i. e., Rs. 1.01 crore formed part of the section 80-IC deduction in respect of the P unit whereas the entire interest of Rs. 3.39 crores stood disallowed. The Department stated that the issue regarding quantification of disallowance required verification of facts. On appeal :

Held, *that issue was to be restored to the Assessing Officer for necessary factual verification of facts. [Matter remanded.]*

The assessee raised certain additional grounds for the assessment year 2011-12, contending that the Assessing Officer had erred in not extending the benefit of the Double Taxation Avoidance Agreements between India and the United Kingdom and India and Spain respectively qua the rate of tax towards payment of dividend to the shareholders. The assessee contended that in terms of section 90(2), dividends being the income in the hands of the non-resident could not be subjected to tax applying the dividend distribution tax at a rate in excess of the rate prescribed under the Double Taxation Avoidance Agreement and hence, the assessee could not be subject to additional income-tax in terms of section 115-O of the Act. The Assessing Officer also erred in not granting refund of the excess dividend distribution tax paid by the assessee :

Held, *that the issues were to be remitted to the Assessing Officer for factual verification and the assessee was directed to file details of the amount of dividend paid, copy of agreement and other relevant documents as required by the Assessing Officer. [Matter remanded.]*

For the assessment year 2011-12, the assessee contended that education cess was not tax and hence not disallowable under section 40(a)(ii) of the Act but was allowable expenditure. On appeal :

Held, *that section 40(a)(ii) applied only to taxes and not to education cess. The Assessing Officer was directed to allow the claim of education cess in computing total income of the assessee.*

Cases referred to :

All Cargo Global Logistics Ltd. *v.* Dy. CIT [2012] 18 ITR (Trib) 106 (Mumbai) [SB] (para 58)

Bombardier Transportation India Pvt. Ltd. *v.* Dy. CIT (I.T.A. No. 1626/Delhi/2015 dated September 14, 2017) (para 17)

Cadbury India Ltd. *v.* Addl. CIT (I. T. A. No. 7408/Mum/2010 and I. T. A. No. 7641/Mum/2010 dated November 13, 2013) (para 17)

Chambal Fertilisers and Chemicals Ltd. *v.* Jt. CIT (I. T. A. No. 52/Jaipur/2018 dated July 31, 2018) (paras 57, 58)

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

CIT (Dy.) *v.* Air Liquide Engineering India P. Ltd. [2014] 31 ITR (Trib) 205 (Hyd) (para 17)

CIT (Dy.) (LTU) *v.* CLSA India Ltd. [2013] 33 taxmann.com 260 (Mum) (para 17)

CIT *v.* EKL Appliances Ltd. [2012] 345 ITR 241 (Delhi) (paras 11, 17)

CIT (Dy.) *v.* JSW Ltd. [2020] 79 ITR (Trib) 585 (Mumbai) (para 61)

CIT *v.* Rajendra Prasad Moody [1978] 115 ITR 519 (SC) (para 17)

CIT *v.* Srinivasa Setty (B. C.) [1981] 128 ITR 294 (SC) (para 26)

CIT *v.* Walchand and Co. Pvt. Ltd. [1967] 65 ITR 381 (SC) (para 17)

Eastern Investments Ltd. *v.* CIT [1951] 20 ITR 1 (SC) (para 17)

Eli Lilly *v.* Commissioner [1985] 84 TC 996 (para 9)

Fenner (India) Ltd. *v.* CIT (No. 2) [2000] 241 ITR 803 (Mad) (para 46)

Frigoglas India P. Ltd. *v.* Dy. CIT [2016] 180 TTJ 401 (Delhi) (para 17)

Hughes (Inspector of Taxes) *v.* Bank of New Zealand [1938] 6 ITR 636 (HL) (para 17)

ITC Ltd. *v.* Asst. CIT (I. T. A. No. 685/Kol/2014 dated November 27, 2018) (para 58)

Kalimati Investment Co. Ltd. *v.* ITO (I. T. A. Nos. 2706 and 4508/Mumbai/2010 and 2552 and 2553/Mumbai/2011 dated May 9, 2012) (para 59)

L. G. Electronics India P. Ltd. *v.* Asst. CIT [2013] 22 ITR (Trib) 1 (Delhi) [SB] (paras 21, 25)

Lumax Industries Ltd. *v.* Asst. CIT (I. T. A. No. 5252/Delhi/2011 dated July 12, 2013) (para 11)

Maruti Suzuki India Ltd. *v.* CIT [2016] 381 ITR 117 (Delhi) (paras 26, 27, 28)

National Thermal Power Co. Ltd. *v.* CIT [1998] 229 ITR 383 (SC) (para 58)

Peerless General Finance and Investment Co. Ltd. *v.* Dy. CIT [2019] 76 ITR (Trib) 356 (Kolkata) (para 58)

Philips India Ltd. *v.* Asst. CIT (I. T. A. No. 2489/Kol/2017 dated April 4, 2018) (para 27)

PNB Finance Ltd. *v.* CIT [2008] 307 ITR 75 (SC) (para 26)

Radhasoami Satsang *v.* CIT [1992] 193 ITR 321 (SC) (para 16)

Reckitt Benckiser (India) Ltd. *v.* Addl. CIT (G.A. No. 1420 of 2014, I. T. A. T. No. 41 of 2014 dated December 23, 2014) (Cal) (paras 44, 46)

Reckitt Benckiser (India) Ltd. *v.* Dy. CIT (L. T. A. No. 2138/Kol/2009 dated April 20, 2018) (paras 39, 42)

Reebok India Co. *v.* Addl. CIT (I. T. A. No. 5857/Delhi/2012 dated June 14, 2013) (para 11)

Sassoon J. David and Co. (P.) Ltd. *v.* CIT [1979] 118 ITR 261 (SC) (para 17)

SC Enviro Agro India Ltd. *v.* Dy. CIT [2013] 143 ITD 195 (Mum) (para 11)

Sesa Goa Ltd. *v.* Jt. CIT (I. T. A. No. 72/Panaji/2012 dated March 8, 2013) (para 59)

Sony Ericsson Mobile Communications India (P) Ltd. *v.* CIT [2015] 374 ITR 118 (Delhi) (para 27)

Tega Industries Ltd. *v.* Asst. CIT (I. T. A. No. 404/Kol/2017 dated August 23, 2019) (para 58)

I. T. A. Nos. 404 and 529/Kol/2015 and 518 and 625/Kol/2016 (assessment years 2010-11 and 2011-12).

Deepak Chopra and *Rohan Khare*, Advocates, for the assessee.

Dr. P. K Srihari, Commissioner of Income-tax (Departmental representative), for the Department.

ORDER

The order of the Bench was pronounced by

1 Dr. A. L. Saini ***(Accountant Member)***.—These are the cross appeals filed by the Revenue and the assessee pertaining to the assessment years 2010-11 and 2011-12, and are directed against the separate fair assessment orders passed by the Assessing Officer/Transfer Pricing Officer, which incorporates the findings of the Dispute Resolution Panel (in short, "DRP").

2 The appeal filed by the Revenue in I. T. A. No. 529/Kol/2015 for the assessment year 2010-11 is barred by limitation by 54 days. The Revenue filed a petition for condonation of delay requesting the Bench to condone the delay. We have heard both the parties on this preliminary issue and having regard to the reasons given in the petition for condonation of delay, we condone the delay and admit the appeal of the Revenue for hearing on the merits.

Since the issues involved in all the appeals are common and identical, **3**
therefore, these appeals have been heard together and are being disposed of by this consolidated order. For the sake of convenience, the grounds as well as facts narrated in I. T. A. No. 625/Kol/2016, for the assessment year 2011-12, have been taken into consideration for deciding the appeals pertaining to transfer pricing issues, en masse.

At the outset itself, we note that these appeals filed by the Revenue as **4**
well as the assessee for the assessment years 2010-11 and 2011-12, contained multiple grounds of appeal. However, at the time of hearing, we have carefully perused all the grounds raised by the Revenue as well as the assessee. The most of the grounds raised by the Revenue as well as assessee, are either academic in nature or contentious in nature. However to meet the ends of justice, we confine ourselves to the core of the controversy and main grievances of the Revenue and the assessee as well. With this background, we summarize and concise the grounds raised by the Revenue as well as the assessee as follows :

Grounds relating to transfer pricing

1. Transfer pricing adjustment in relation to payment of royalty to the tune of Rs. 787,096,934

This ground covers ground Nos. 5 to 7 of the Revenue's appeal in I. T. A. No. 529/Kol/2015, for the assessment year 2010-11, ground No. 6 of the Revenue's appeal in I. T. A. No. 518/Kol/2016, for the assessment year 2011-12, ground Nos. 4a to 4b of the assessee's appeal in I. T. A. No. 625/Kol/2016 for the assessment year 2011-12 and additional grounds raised by the assessee for the assessment year 2011-12 wherein the assessee stated that payment of royalty was subsumed in the entity level transactional net margin method (TNMM), analysis conducted by the assessee using combined transaction approach.

2. Transfer pricing adjustment in relation to advertisement, marketing and promotion expenses (AMP).

This ground covers ground Nos. 5a to 5b of the assessee's appeal in I. T. A. No. 404/Kol/2015, for the assessment year 2011-12, ground Nos. 1 to 4 of the Revenue's appeal in I. T. A. No. 529/Kol/2015, for the assessment year 2010-11, ground Nos. 3a to 3b of the assessee's appeal in I. T. A. No. 625/Kol/2016, for the assessment year 2011-12, ground Nos. 4 to 5 of the Revenue's appeal in I. T. A. No. 518/Kol/2016, for the assessment year 2011-12.

3. Comparable companies arbitrarily chosen by the Transfer Pricing Officer for computation of mark up percentage of 22.34 per cent. over the alleged "agency cost" incurred by the assessee.

This ground covers ground No. 5 of the assessee's appeal in I. T. A. No. 625/Kol/2016 for the assessment year 2011-12 and ground No. 7 of the Revenues appeal in I. T. A. No. 518/Kol/2016 for the assessment year 2011-12.

4. That on the facts and in the circumstances of the case, the Dispute Resolution Panel erred in not considering the specific objections raised by the appellant with respect to overall adjustment of Rs. 21,842,032 made to transaction of "export of raw materials and finished products".

(This covers ground No. 6 of the assessee's appeal in I. T. A. No. 625/Kol/2016 for the assessment year 2011-12)

Grounds relating to corporate tax issue

1. Apportionment of expenses between fiscal units, non-fiscal units and head office of Rs. 261,160,962.

This ground covers ground No. 8 of the Revenues appeal in I. T. A. No. 529/Kol/2015 for the assessment year 2010-11 and ground Nos. 1 and 2 of the Revenues appeal in I. T. A. No. 518/Kol/2016 for the assessment year 2011-12.

2. Eligibility of income from sale of scraps whilst calculating deduction under section 80-IC of the Act of Rs. 20,723,924.

This ground covers ground No. 9 raised by the Revenue in I. T. A. No. 529/Kol/2015 for the assessment year 2010-11 and ground No. 3 raised by the Revenue in I. T. A. No. 518/Kol/2016 for the assessment year 2011-12.

3. Excess disallowance of interest income allocated to eligible units Rs. 23,400,187.

This ground covers ground No. 4 of the assessee's appeal in I. T. A. No. 404/Kol/2015 for the assessment year 2010-11

Additional grounds raised by the assessee

1. Refund of dividend distribution tax (DDT) paid in respect of non-resident shareholders.

This ground relates to the assessment year 2011-12

2. Deduction of education cess on income-tax paid by the assessee is allowable expenditure.

This ground relates to the assessment year 2011-12.

5 Now, we shall take these grounds one by one.

Grounds relating to transfer pricing

1. Transfer pricing adjustment in relation to payment of royalty to the tune of Rs. 787,096,934.

This ground covers ground Nos. 5 to 7 of the Revenue's appeal in I.T. A. No. 529/Kol/2015, for the assessment year 2010-11, ground No. 6 of the Revenue's appeal in I. T. A. No. 518/Kol/2016, for the assessment year 2011-12, ground Nos. 4a to4b of the assessee's appeal in I. T. A. No. 625/Kol/2016 for the assessment year 2011-12 and additional grounds raised by the assessee for the assessment year 2011-12 wherein the assessee stated that payment of royalty was subsumed in the entity level transactional net margin method (TNMM), analysis conducted by the assessee using combined transaction approach.

6 Facts of this ground, as stated in the Transfer Pricing Officer/Assessing Officer order are as follows : M/s. Reckitt Benckiser (India) Limited ("RBIL" in brief) is a subsidiary of Reckitt Benckiser Plc. UK. The Reckitt Benckiser (India) Limited is engaged in the business of manufacturing and trading of fast moving consumer goods products. The Reckitt Benckiser (India) Limited manufactures and distributes various brands of household products, and over the counter pharmaceutical products. Some of the key products are Dettol Soap, Disprin, Robin Blue, Cherry Blossom Show Polish, Harpic Toilet cleaner, Mortein Insecticide, Colin etc. The Reckitt Benckiser (India) Limited is registered in India under the Companies Act, 1956. The Reckitt Benckiser (India) Limited has entered into a license agreement with Reckitt Benckiser N. V. and Reckitt & Colman Limited for the transfer of intellectual property rights for the production, sale, distribution and marketing of Reckitt Benckiser "products" domestically and internationally. These include all intellectual property rights owned by the associated enterprises such as trademarks, design and model rights, know-how, and all current and future copyrights and rights to databases relating to design, distribution, marketing and sale of licensed products in the licensed territory.

7 The Transfer Pricing Officer on a perusal of the above details, noticed that the assessee has not provided details with reference to certain products/brands which were in existence for many years before the acquisition of the assessee by the Benckiser Group. Accordingly, in the notice under section 92CA(2) of the Income-tax Act, 1961, dated January 6, 2014, the assessee was asked as to why royalty was charged in such cases. The notice of the Transfer Pricing Officer is reproduced below :

"9. Please refer to payments made towards royalty on products manufactured by you. Various details have been filed in this regard. It is also seen that the royalty agreements signed by you represent a bundle of intangibles. However, the details filed by you in the case of

products as given in table below do not show any patents registered against them

Sl. No.	*Product brand*	*Royalty*
1.	Robin	3,17,30,459
2.	Teepol	26,26,458
3.	Disprin	76,00,559
4.	Fybogel	17,97, 835
5.	Robinson Barley	34,01,448
6.	Silvo	2,55,883
7.	Mincream	5,54,395
8.	Brasso liquid	22,46,003
9.	Cherry blossom-cherry liquid polish and handy shine	1,12,91,673
10.	Cherry blossom-cherry wax polish	2,81,77,923
11.	Colin	2,66.,06,148
12.	Sweetex	14,29,947
13.	Clearsi	20,68,889
14.	Easy of bang	97,81,751
15.	Lizol	5,53,80,624
16.	Mansion white and cardinal	98,28,670
	Total	19,47,78,665

9.1 You are requested to provide the details of such patents, etc., received by you in case of products under these brand names which are of recent development so as to provide you with continuing benefit. In case this is not provided and established, then you are requested to show cause as to why the royalty for the same should not be taken as Rs. nil as no benefit has been received and no patent or know-how has been transferred. Further, please specify which patents are registered for 'Dettol Antiseptic Liquid' as the details given by you do not pertain to Dettol Antiseptic Liquid. In case you are not able to provide the same which has a recent origin/development and which can be considered to provide you with continuing benefits, then please show cause as to why the royalty should not be considered as Rs. nil in case of this product.

10. The taxpayer has benchmarked the royalty using transactional net margin method as the most appropriate method with operating profit on cost as profit level indicator of the comparable. On the basis of search conducted on prowess and capitaline database the taxpayer had identified nine companies as comparable to Reckitt Benckiser

(India) Limited. The average operating profit on cost of the comparable companies were calculated at 16.04 while the operating profit on cost of the tested was calculated at 18.46 per cent. based on the above it is concluded that the transaction of royalty is at arm's length as the arithmetic mean of the comparable price is less than operating margin earned by Reckitt Benckiser (India) Limited. The approach adopted by the taxpayer to benchmark the transaction of royalty which is different in scope, risk and return has to be benchmarked appropriately and the most appropriate method is comparable uncontrolled price as the data for different types of royalty is available. This office has conducted a search for the similar agreements as that of the taxpayer from the publically available database. From perusal of those agreements, it was found that there is one agreements which can be considered as a comparable to the assessee which is as given below :

Sl. No	*Licensor*	*Licensee*	*Licensed property*	*Royalty*	*Comments*
1.	Jazor Laboratory Group Incorporation	Bruce Jezior and Manloe Lanbs, lnc	License agreement	1.5% of net sales	Grant the right to manufacture and distribute market and sell the products (i) Viro shield and work gluv (ii) the polymer base (iii) all polymer based products develop by Jazor, (iv) any product superceding or replacing Viro shield, work gluv or latex (v) any other product developed by Jazor using the same or substantially similar polymer base as the polymer base). Grant the right to assign to manloe the trade marks all trade names, trade marks and other commercial symbols and related logos including the trade names Viro shield, latex, and work gluv

Hence you are to show cause as to why not the payment for royalty be restricted to 1.5 per cent. of net sales.

In response to the notice the assessee submitted reply before the Transfer Pricing Officer as follows : (to the extent useful for our discussion is reproduced below) **8**

"(a) It would be erroneous on your part and highly prejudicial and unnecessarily harsh on us, if you adopt the 'benefit test' and indulge into the question of benefits derived by the assessee from the use of

brands specified in the notice. However, we appreciate that your goodself has expressed no doubt about the benefits derived by Reckitt Benckiser (India) Limited, it would be even more unreasonable to deny the otherwise accepted benefits only on the basis of non-availability of information with respect to details of patents. It must be carefully noted that, the 'benefits' derived by Reckitt Benckiser (India) Limited have been derived by use of the bunch of intangibles and not solely because of patents, which also has been agreed by your goodself in the subject notice. In facts and circumstances of the present case, the application of 'benefit test' is unwarranted, because payment of royalty has not been made by us on a standalone basis, it depends on the sales and thus application of 'benefit test' to royalty payment is irrational and erroneous. It is not correct to judge payment of royalty on the yardstick of 'benefit test'. Such a test to benchmark a transaction and arrive at the arm's length price is not based on any of the methods prescribed under section 92C of the Act.

(b) Our submissions regarding applicability of comparable uncontrolled price in the way suggested by your goodself as against transactional net margin method adopted by the company for the transaction of payment of royalty.

In this regard, at para 10 of the show-cause notice dated January 6, 2014, your goodself has sought to be rejected transactional net margin method, as adopted by the assessee, to benchmark the payment of royalty transaction and instead suggested to adopt comparable uncontrolled price on the grounds that the assessee's transaction on royalty is different in scope, risk and return.

We would like to submit that the assessee has benchmarked the transaction . . . . payment of royalty by applying transactional net margin method at entity level. We would like to submit that without the payment of royalty for the products it would not be possible for the assessee to carry on its business, hence the royalty transaction is nothing but an important and integral part of all other international transactions, and thus the assessee qualifies for application of transactional net margin method for benchmarking its royalty transaction.

We would invite the attention of your goodself to para 5.02.3 at page 48 of the transfer pricing study report submitted via submission dated July 7, 2014, wherein the assessee has categorically explained why comparable uncontrolled price cannot be considered as the most appropriate method for benchmarking the transaction of payment of

royalty. The relevant portion has been reproduced below for your ready reference :

'Comparable uncontrolled price method

The comparable uncontrolled price method cannot be applied to transaction involving the payment of royalty by Reckitt Benckiser (India) Limited for the following reasons :

Reckitt Benckiser (India) Limited does not pay royalty to third parties. Reckitt Benckiser (India) Limited pays royalty only to associated enterprises ;

RB group companies do not receive royalty from third parties in India ; and

There is no publicly available information on prices charged in independent transactions of similar or identical nature that reflects the characteristics of the royalty paid by Reckitt Benckiser (India) Limited.

Therefore, there are no comparable prices available in order to apply comparable uncontrolled price method.

Transactional net margin method

The applicability of transactional net margin method depends on a related party's functions performed, resources employed, and risks assumed. This method evaluated whether the amount charged in a controlled transaction is arm's length based on objective measures of profitability derived from uncontrolled parties that engage in similar business activities under similar circumstances. Since comparable information was available and comparison at an operating margin level is a reasonable comparison, transactional net margin method was selected as the most appropriate method. The transactional net margin method examines the net profit margin relative to an appropriate base, (e. g., costs, sales, assets) that a taxpayer realizes from a controlled transaction.

It is a well accepted principle that net margins are less affected by transactional difference than are prices (as in the case of comparable uncontrolled price) and gross margins (as in the case of RPM/cost plus method). In this case, since the functions performed by comparables identified by us were broadly similar to the functions performed by Reckitt Benckiser (India) Limited, the transactional net margin method, which involves net margin comparison, was considered as the most appropriate method for testing the margin of RBI."

9 However, the Transfer Pricing Officer rejected the contention of the assessee and worked out the transfer pricing adjustments in respect of royalty as follows :

"36. Thus on conjoint reading of the agreement entered into by the assessee with its associated enterprises and above facts it well established that the associated enterprises also provide the formula and trade name to the assessee to fracture the products, the products which has application in Skincare, etc.

Hence, the contention of the assessee is rejected and the royalty is restricted to 1.5 per cent. of the net sales. The calculation of royalty is as under :

Particulars	*Amount*
Gross sales (as per audited financial statement)	22,83,09,91,385
Less	
(a) Sales of raw material or packing material	6,66,80,033
(b) Export to associated enterprises	10,21,81,297
(c) Excise charges	28,66,70,314
Net sales on which royalty is paid	22,37,54,59,740
Royalty @ 1.5% x 22,37,54,59,740 33,56,31,896	
Actual royalty paid	1,118,772,987
Adjustment	78,3l,41,091

37. Without prejudice to the above contention, even if it considered, at later appellate proceedings, that the transactional net margin method is required to be considered as the most appropriate method on the facts of the case, the procedure for analysis carried out by the assessee is erroneous and faulty. In the analysis, the assessee has compared the profit margins earned by itself with the profit margins earned by entities considered as comparable, after making a search in the databases. Again such an approach mixes the profit margins attributable to the 'intangible' and 'other routine activities' carried out by the assessee and it tantamount to benchmarking the third party transactions of the assessee (through expenses incurred on heads other than 'intangibles' along with the 'intangible' related transactions. The guidance for the application of transactional net margin method, if considered as the most appropriate method, is provided in US regulations 1.482-5. In the discussion made in the paper on this issue, published in Business Economics April, 1997 issue, the author

Glenn Desouza (available at *http://www.freepatentsonline.com/article/Business-economics/19545602.html)* writes as follows :

'As defined by Treas. Reg. [section]1.482-5(a), the comparable profit method (CPM) evaluates an arm's length price by reference to the profitability of unrelated companies that engage in similar activities under similar circumstances. The earnings of the entity using the intellectual property (the so-called tested party) is compared to the earnings of companies engaged in similar activities but not owning such intellectual property. The excess earnings of the tested party is assumed to be the contribution of the intellectual property. The following example illustrates the application of the comparable profit method.

Uspharm, a U. S. Product Company is the developer of a drug, nograine, that is useful in treating migraine headaches with minimal side effects. Uspharm is negotiating with a leading Japanese pharmaceutical company, Jpharm for the exclusive Japanese distribution rights to nograine. What royalty rate should Jpharm pay ?

To answer this question, four companies were identified that are engaged in the manufacture and marketing of generic drugs. Their median return on sales (ROS) was 14 per cent. Uspharm has been realizing a 34 per cent. ROS on Nograine. This suggests that the patented status of nograine has allowed it to generate profits that are 20 percent above the generic level. Therefore, the total intellectual contribution (TIC) of nograine is estimated at 20 percent. The transfer pricing regulations provide no guidance on how to allocate the total intellectual contribution. The only example in the regulations [Treas. Reg. [section] 1.482-5(e), Example 4] allocates the entire total intellectual contribution to the developer. It is, however, unrealistic to allocate the entire total intellectual contribution to the developer of the intangible asset. Because the licensee assumes the risks and challenges of commercialization, the licensee will expect to capture some of the benefits produced by the technology. The simplest way to split the total intellectual contribution between the licensor and licensee is to use a rule of thumb.

Caves, who did a study of technology licenses, writes that 'in an imperfect license market, the monopolist of a technology cannot fully approximate maximum rent . . . . the bargaining appears to yield between one-third to one-half to the licensor with a mean of about 40 per cent.

Various court cases (all of which dealt with CUTS, not comparable profit method) confirm Cave's position as a reasonable rule of thumb. In Bausch & Lomb, the court favoured a 50-50 split between the licensor and licensee. In *Eli Lilly* v. *Commissioner* [1985] 84 TC 996, the court provided a 45-55 split. It is also possible to use a bargaining model to evaluate how the TIC will be split. To implement a bargaining model, it is necessary to determine the threat points. The threat point is the point at which the party will walk rather than deal. To determine the threat points it is necessary to identify the specific alternatives available to each party. For example, if Uspharm already has an 10 per cent. royalty offer from another company for the distribution rights, then 10 per cent. is the threat point. Uspharm will walk rather than accept a royalty lower than 10 per cent.

The actual deal will occur somewhere between the two threat points. The distance between the two threat points is the bargaining space. (11) Game theory tells us that the party with the higher risk preference will be able to push the deal closer to the other party's threat point. So, for example, if the licensor is more willing to take the risk of the negotiations collapsing, then it is the licensor who will benefit. In practice, determining risk-preference is a highly subjective process, so the pragmatic option is to split the bargaining space, in the example below, the bargaining space is split 50-50.'

This paper identifies that for the operation of transactional net margin method, the normal remuneration pertaining to routine activities, other than 'intangible' related returns are required to be determined and then on the basis of the relative contribution to the FAR of the 'intangible' related transaction, the benefit of the 'intangible' related profit is to be shared. From perusal of the transactional net margin method analysis carried out by the assessee, it can be seen that no such identification of remuneration related to routine functions was identified. As a matter of fact it was not even analysed whether the comparables which have been selected are paving any intangible related royalty payments are not. Consequently, even if on a without prejudice basis it is considered that transactional net margin method is the most appropriate method for benchmarking royalty payments, the analysis carried out by the assessee is absolutely incorrect, faulty and is not an indicator of the arms length nature of royalty payments.

38. Further on the basis of submissions made and details filed by the assessee, it is seen that the assessee has not been able to show

any evidence of receipt of any technical know-how, etc., for the products pertaining to 'Mincream' and 'Robinson Barley'—two brands continuing from 1940s up to the limitation period. Accordingly, based on the documents submitted to date, it is held that the assessee has not received any support/know-how with reference to these two brands/products to support any payment of royalty and the arm's length price of the royalty paid in case of these two items is determined to be Rs. Nil under the comparable uncontrolled price method. Thus, the total income of the assessee is required to be adjusted upwardly by Rs. 39,55,843 on this account.

Total adjustment in respect of royalty is 78,70,96,934 (78,31,41,091 + 39,55,843)."

10 Thus, during the Transfer Pricing Officer proceedings, as noted above, the assessee was asked as to why royalty was charged in respect of certain products/brands which were in existence years before acquisition of the assessee by Benckiser Group. The assessee gave detailed submission in respect of various products. The assessee-company stated that it has adopted the transactional net margin method for benchmark the royalty payment. The assessee-company also explained that none of the brands with respect to products manufactured by the assessee-company is owned by it. However, the Transfer Pricing Officer rejected the contention of the assessee and adopted the benefit test approach to compute the arm's length price of royalty paid. The learned Transfer Pricing Officer whilst relying on contemporaneous data of an agreement which did not even relate to the year in question restricted the percentage of royalty paid to 1.5 per cent., as narrated above. Besides, the Transfer Pricing Officer as done in the assessment year 2010-11, whilst applying the benefit test, determined the arm's length price of royalty paid on "Mincream" and "Robinson Barley" at nil. This way, the learned Transfer Pricing Officer made arm's length price adjustment of Rs. 35,05,809 in the assessment year 2010-11 and arm's length price adjustment of Rs. 78,70,96,934.

11 Aggrieved by the order of the learned Transfer Pricing Officer/Assessing Officer, the assessee filed the objections before the learned Dispute Resolution Panel, who has deleted the arm's length price adjustment (ALP) observing the followings :

"The ninth ground of objection relates to disallowance of royalty expenses of Rs. 35,05,803 in respect of two brands. The assessee pays royalty to Reckitt Benckiser NV and Reckitt and Colman Ltd in respect of intellectual property rights owned by the said associated enterprises. The Transfer Pricing Officer called for details of payments

relating to various brands/products. The assessee was also asked as to why royalty was charged in respect of certain products/brands which were in existence years before acquisition of the assessee by Benckiser Group. The assessee gave detailed submission in respect of various products. After examining the same, the Transfer Pricing Officer was of the view that the assessee had not been able to show any evidence of receiving technical know-how, etc., for two products namely, Mincream and Robinson Burley which were continuing since 1940 onwards. He therefore determined arms length price in respect of royalty for the two products at nil. The Assessing Officer has, accordingly, proposed addition of Rs. 35,05,809 in the draft order. The assessee has given following submission in the matter :

'We submit that Reckitt Benckiser (India) Limited has entered into royalty agreements with its associated enterprises (RCO and RBNV) for production, sales, distribution and marketing of products. Royalty payment is made by Reckitt Benckiser (India) Limited for the right to use the intellectual property rights which includes trademarks, patents, design and model rights, know-how and all current and future copyrights and rights to databases relating to the design, production, distribution, marketing and sale of the products. In this regard, Reckitt Benckiser (India) Limited submitted the details of patents and trademarks of the products for which royalty has been paid by Reckitt Benckiser (India) Limited to its associated enterprises. Reckitt Benckiser (India) Limited also submitted the detailed write-up on the benefits received by the company from its associated enterprises in the form of various intellectual property rights, improvements and developments, design and model, know-how, patents, products, trademarks, etc. We submit that the Reckitt Benckiser (India) Limited has received services on an ongoing basis with reference to intellectual property rights, products/brands, designs and model rights, know how from its associated enterprises. The same has resulted in the significant growth in all segments despite tough competition only due to the active involvement and contribution from the licensors.

However, the Transfer Pricing Officer in its order held that the assessee has not produced any evidence of any support/know-how received with respect to "Mincream" and "Robinson Barley" brands/products to support payment of Rs 3,505,809 as royalty and thus the arm's length price was taken at nil by using the comparable uncontrolled price method.

The Transfer Pricing Officer made the adjustment since the assessee was not able to produce any evidence of receipt of any technical know-how, etc., for the products, "Mincream" and "Robinson Barley" up to the date of limitation of passing the transfer pricing order.

In this regard, we submit that Reckitt Benckiser (India) Limited have benchmarked the transactions of payment of royalties as per transactional net margin method and a comparison on company wide basis of the net operating margin of Reckitt Benckiser (India) Limited is higher than that of comparable independent companies. We submit that the application of "benefit test" is unwarranted, because payment of royalty has not been made by Reckitt Benckiser (India) Limited on a standalone basis, it depends on the sales and thus application of "benefit test" to royalty payment is irrational and erroneous. Reliance is placed in the following judicial pronouncements :

CIT v. *EKL Appliances Ltd.* [2012] 345 ITR 241 (Delhi) ; [2012-TIOL-HC-DEL-TP].

Lumax Industries Ltd. v. *Asst. CIT* (I. T. A. No. 5252/Delhi/2011).

SC Enviro Agro India Ltd. v. *Dy. CIT* [2013] 143 ITD 195 (Mum).

We would like to humbly submit that it is beyond the scope of the powers of Transfer Pricing Officer to disallow the otherwise bona fide expenditure incurred by the assessee, only on the grounds that no detailed information has been filed with regard to technical aspects of the patent whose rights have been transferred to the assessee.

We submit that Reckitt Benckiser (India) Limited has received benefits/substantial benefits from the use of intangible property licensed by the associated enterprises and rights associated with such intangible property under the licensing agreement(s). It is submitted that the assessee gets its products manufactured on the basis of the technical know-how and technology specifications provided by the licensors. The assessee derives significant benefit in the form of growing revenue and profitability from the use of the patented technology which is owned and developed by the associated enterprises. Hence, we submit that Reckitt Benckiser (India) Limited have made the payment of royalty solely in connection with and in the course of its business. The expenditure of royalty has a direct nexus with the business of Reckitt Benckiser (India) Limited. It is not the case that such expenses are incurred in isolation or are not connected with Reckitt Benckiser (India) Limited's business. The expenditure incurred on

payment of royalties are completely bona fide and have been in connection with the business of the assessee. We wish to place reliance on the judicial pronouncement of the Delhi Tribunal in the case of *Reebok India Co.* v. *Addl. CIT* (I. T. A. No. 5857/Delhi/2012) wherein the following have been held—

- As per the terms of license agreement between assessee and the associated enterprises, the licensor has agreed to grant exclusive right to utilise the technology in manufacturing and distribution of products and the assessee in fact has got the goods manufactured on the basis of technology.
- That the assessee does not undertakes any significant research and development activity on its own and totally depends upon the associate enterprise for provision of technology and thus agreed that the entire business of the assessee depends upon the technology provided by the associated enterprises and without the license to use such technology, the assesses would not be able to continue its business.
- Premium value of products allows the assessee to increase the sales and charge higher price which leads to higher profitability and that growth in the revenue of the assessee clearly demonstrates the benefit derived by the assessee from the use of technology.
- On the basis of the same licensing agreement the royalty was paid in earlier years. In earlier years the payment of the royalty has not been held to be non-bona fide expenditure by Transfer Pricing Officer.
- . . . . . the Transfer Pricing Officer's conclusion that there is no benefit to the assessee from the payments of royalty is unsustainable. In view of the foregoing discussion we hold that payment of royalty satisfies the benefit test.

In view of the above, we submit before your honours that in the interest of equity and justice it would be highly prejudicial if the bona fide payments made by Reckitt Benckiser (India) Limited in form of royalty with respect to subjected brands are treated to be nil.

In this regard, we also submit that the Transfer Pricing Officer also erred in not following the principle of consistency to the extent applicable to the income-tax proceedings. The Transfer Pricing Officer also erred in not considering the fact that during the financial year 2009-10, there has been no change in the facts and circumstances in the case of

the assessee as compared to earlier years and accordingly no transfer pricing adjustment was called for in respect of the payment of royalty by the assessee to its associated enterprises. In light of the principle of legitimate expectations and natural justice it would be unfairly prejudicial to Reckitt Benckiser (India) Limited, if the hon'ble Panel considers the royalty payment made for use of the intellectual property rights inappropriate. The facts in current assessment proceedings are exactly similar to facts in previous assessment years and that there has been no change in the business model of Reckitt Benckiser (India) Limited or in the nature, terms and conditions, functions performed, risk assumed and asset employed by Reckitt Benckiser (India) Limited in relation to its international transactions during the financial year 2009-10 as compared to preceding years, hence the assessee humbly submits that the action proposed by the Transfer Pricing Officer in taking a different stand is highly perverse and against established legal and equitable principles. In view of the above, we request the hon'ble panel to delete the disallowance of royalty payment with respect to Min Cream and Robinson Barley.'

We have considered facts of the case. The assessee is a manufacturer and distributor of a large number of products/brands for which are owned by its associated enterprises. The assessee has been paying royalty to its associated enterprises for a number of years which has been allowed in the assessment of earlier years. Even in the year under consideration also, the Transfer Pricing Officer has allowed royalty in respect of all but two products manufactured and sold by the assessee. However, in respect of two products, viz., Mincream and Robinson Burley, the Transfer Pricing Officer has held that no benefit was derived by the assessee from its associated enterprises. It is not denied that the trade marks for the two products, viz., Mincream and Robinson Burley were registered and the said brands were owned by the associated enterprises. The royalties are paid not only in respect of patent but for a basket of services. It is a common occurrence that a person using a brand name pays certain brand royalty to the owner of brand. It is not the case of the Transfer Pricing Officer, that the royalty paid in respect of these products was without any use of the said brand names. The assessee has in its transfer pricing study included payment of royalty and according to it the royalties are at arm's length. Considering these facts the proposed disallowance of royalty in respect of Mincream and Robinson Burley does not appear to be proper. The same is, accordingly, directed to be deleted."

Note : For the assessment year 2011-12, the learned Dispute Resolution Panel did not pass a detailed order but it relied on its directions for the assessment year 2010-11.

12 Aggrieved by the order of the Dispute Resolution Panel/Assessing Officer, the Revenue as well as the assessee is in appeal before us.

13 We heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case law relied upon, and perused the fact of the case including the findings of the learned Dispute Resolution Panel/Assessing Officer and other materials brought on record. Before us, the learned counsel for the assessee reiterated the submissions made before the authorities below and relied on the findings of the learned Dispute Resolution Panel. On the other hand, the learned Departmental representative for the Revenue has primarily reiterated the stand taken by the learned Transfer Pricing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity. We note that in the assessment year 2011-12, the learned Transfer Pricing Officer proceeded by rejecting the combined transaction approach under transactional net margin method as adopted by the assessee in its transfer pricing study report and held that comparable uncontrolled price method to be the most appropriate method whilst applying the benefit test (vide pages 259 to 273 of paper book-1). Thereafter, the learned Transfer Pricing Officer whilst relying on contemporaneous data of an agreement which did not even relate to the year in question restricted the percentage of royalty paid to 1.5 per cent. (vide pages 273 to 281 of paper book-1). Besides, the Transfer Pricing Officer as done in the assessment year 2010-11, whilst applying the benefit test, determined the arm's length price of royalty paid on "Mincream" and "Robinson Barley" at nil. (vide page 281 of paper book-1).

14 Aggrieved by the order of the learned Transfer Pricing Officer, the assessee filed objections before the learned Dispute Resolution Panel. The learned Dispute Resolution Panel relying on its own directions for the assessment year 2010-11, had directed the Transfer Pricing Officer to delete the arm's length price adjustment.

15 The learned Transfer Pricing Officer, vide his order dated January 21, 2016, as per the direction of the Dispute Resolution Panel deleted the adjustment made towards payment of royalty on "Mincream" and "Robinson Barely" however, confirmed the remainder adjustment as there was no finding on the method and no adjudication on the comparable chosen by the Transfer Pricing Officer.

We note that the assessee is a manufacturer and distributor of a large **16**
number of products/brands. These brands are owned by its associated enterprises. The assessee has been paying royalty to its associated enterprises for a number of years which has been allowed in the assessment of earlier years. This year there is no change in facts and law so far the assessee company and its associated enterprises (AEs) are concerned. It is a well settled legal position that factual matters which permeate through more than one assessment year, if the Revenue has accepted a particular view or proposition in the past, it is not open for the Revenue to take an entirely contrary or different stand in a later year on the same issue, involving identical facts unless and until a cogent case is made out by the Transfer Pricing Officer/Assessing Officer on the basis of change in facts. For that we rely on the order of the hon'ble Supreme Court in *Radhasoami Satsang* v. *CIT* [1992] 193 ITR 321 (SC), wherein it was held as follows (page 329) :

> "We are aware of the fact that, strictly speaking, res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year. On these reasoning, in the absence of any material change justifying the Revenue to take a different view of the matter and, if there was no change, it was in support of the assessee we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income-tax in the earlier proceedings, a different and contradictory stand should have been taken."

We are of the view that the above cited precedent on principle of consistency is squarely applicable to the assessee under consideration. In the facts of the assessee's case, the learned Transfer Pricing Officer has not pointed out the change in facts or any provision of law which led him to take a view contrary to the view taken by his predecessors in previous years. We note that the assessee has been paying royalty to its associated enterprises (AEs) for a number of years which has been allowed in the assessment of earlier years. Therefore, the Transfer Pricing Officer cannot take a contrary view and disturb the settled facts unless there is a change in law or facts. Therefore, the arm's length price adjustment made by Transfer Pricing Officer is not sustainable in law.

17 We note that Transfer Pricing Officer has allowed royalty in respect of all except two products, viz., Mincream and Robinson Burley, the Transfer Pricing Officer has held that no benefit was derived by the assessee from its associated enterprises. It is not denied that the trade marks for the two products, viz., Mincream and Robinson Burley were registered and the said brands were owned by the associated enterprises. The royalties are paid not only in respect of patent but for a basket of services. It is a common occurrence that a person using a brand name pays certain brand royalty to the owner of brand. It is not the case of the Transfer Pricing Officer, that the royalty paid in respect of these products was without any use of the said brand names. The assessee has in its transfer pricing study included payment of royalty and according to it the royalties are at arm's length. Considering these facts the proposed disallowance of royalty in respect of Mincream and Robinson Burley does not appear to be justified and proper. For that we rely on the following judgments :

(i) *CIT* v. *EKL Appliances Ltd.* [2012] 345 ITR 241, 249 (Delhi)

"It seems to us that the decision taken by the Tribunal is the right decision. The Transfer Pricing Officer applied the comparable uncontrolled price method while examining the payment of brand fee/royalty. The comparable uncontrolled price method which in its expanded form is known as 'comparable uncontrolled price' method is provided for in rule 10B(1)(a) of the Income-tax Rules, 1962. It is one of the methods recognised for determining the arm's length price in relation to an international transaction. Rule 10B(1) says that for the purposes of section 92C(2), the arm's length price shall be determined by any one of the five methods, which is found to be the most appropriate method, and goes on to lay down the manner of determination of the arm's length price under each method. The five methods recognized by the rule are (i) comparable uncontrolled price method (CUP), (ii) re-sale price method, (iii) cost plus method, (iv) profit split method and (v) transactional net marginal method (TNMM). The manner by which the arm's length price in relation to an international transaction is determined under comparable uncontrolled price is prescribed in clause (a) of sub-rule (1) of rule 10B. The following three steps have been prescribed.

'(a) comparable uncontrolled price method, by which,

(i) the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions, is identified ;

(ii) such price is adjusted to account for differences, if any, between the international transaction and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market ;

(iii) the adjusted price arrived at under sub-clause (ii) is taken to be an arm's length price in respect of the property transferred or services provided in the international transaction ;'

The Organization for Economic Co-operation and Development ('OECD', for short) has laid down 'transfer pricing guidelines' for multinational enterprises and tax administrations. These guidelines give an introduction to the arm's length price principle and explains article 9 of the Organization for Economic Co-operation and Development Model Tax Convention. This article provides that when conditions are made or imposed between two associated enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises then any profit which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, if not so accrued, may be included in the profits of that enterprise and taxed accordingly. By seeking to adjust the profits in the above manner, the arm's length principle of pricing follows the approach of treating the members of a multi-national enterprise group as operating as separate entities rather than as inseparable parts of a single unified business. After referring to article 9 of the model convention and stating the arm's length principle, the guidelines provide for 'recognition of the actual transactions undertaken' in paragraphs 1.36 to 1.41. Paragraphs 1.36 to 1.38 are important and are relevant to our purpose. These paragraphs are reproduced below :

'1.36 A tax administration's examination of a controlled transaction ordinarily should be based on the transaction actually undertaken by the associated enterprises as it has been structured by them, using the methods applied by the taxpayer in so far as these are consistent with the methods described in Chapters II and III. In other than exceptional cases, the tax administration should not disregard the actual transactions or substitute other transactions for them. Restructuring of legitimate business transactions would be a wholly arbitrary exercise the inequity of which could be compounded by double taxation created where the other tax administration does not share the same views as to how the transaction should be structured.

1.37 However, there are two particular circumstances in which it may, exceptionally, be both appropriate and legitimate for a tax administration to consider disregarding the structure adopted by a taxpayer in entering into a controlled transaction. The first circumstance arises where the economic substance of a transaction differs from its form. In such a case the tax administration may disregard the parties' characterization of the transaction and re-characterise it in accordance with its substance. An example of this circumstance would be an investment in an associated enterprise in the form of interest-bearing debt when, at arm's length, having regard to the economic circumstances of the borrowing company, the investment would not be expected to be structured in this way. In this case it might be appropriate for a tax administration to characterize the investment in accordance with its economic substance with the result that the loan may be treated as a subscription of capital. The second circumstance arises where, while the form and substance of the transaction are the same, the arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner and the actual structure practically impedes the tax administration from determining an appropriate transfer price. An example of this circumstance would be a sale under a long-term contract, for a lump sum payment, of unlimited entitlement to the intellectual property rights arising as a result of future research for the term of the contract (as previously indicated in paragraph 1.10). While in this case it may be proper to respect the transaction as a transfer of commercial property, it would nevertheless be appropriate for a tax administration to conform the terms of that transfer in their entirety (and not simply by reference to pricing) to those that might reasonably have been expected had the transfer of property been the subject of a transaction involving independent enterprises. Thus, in the case described above it might be appropriate for the tax administration, for example, to adjust the conditions of the agreement in a commercially rational manner as a continuing research agreement.

1.38 In both sets of circumstances described above, the character of the transaction may derive from the relationship between the parties rather than be determined by normal commercial conditions as may have been structured by the taxpayer to avoid or minimize tax. In such cases, the totality of its terms would be the result of a condition that would not have been made if the parties had been engaged in

arm's length dealings. Article 9 would thus allow an adjustment of conditions to reflect those which the parties would have attained had the transaction been structured in accordance with the economic and commercial reality of parties dealing at arm's length.'

The significance of the aforesaid guidelines lies in the fact that they recognise that barring exceptional cases, the tax administration should not disregard the actual transaction or substitute other transactions for them and the examination of a controlled transaction should ordinarily be based on the transaction as it has been actually undertaken and structured by the associated enterprises. It is of further significance that the guidelines discourage re-structuring of legitimate business transactions. The reason for characterization of such re-structuring as an arbitrary exercise, as given in the guidelines, is that it has the potential to create double taxation if the other tax administration does not share the same view as to how the transaction should be structured.

Two exceptions have been allowed to the aforesaid principle and they are (i) where the economic substance of a transaction differs from its form and (ii) where the form and substance of the transaction are the same but arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner.

There is no reason why the Organization for Economic Co-operation and Development guidelines should not be taken as a valid input in the present case in judging the action of the Transfer Pricing Officer. In fact, the Commissioner of Income-tax (Appeals) has referred to and applied them and his decision has been affirmed by the Tribunal. These guidelines, in a different form, have been recognised in the tax jurisprudence of our country earlier. It has been held by our courts that it is not for the Revenue authorities to dictate to the assessee as to how he should conduct his business and it is not for them to tell the assessee as to what expenditure the assessee can incur. We may refer to a few of these authorities to elucidate the point. In *Eastern Investments Ltd.* v. *CIT* [1951] 20 ITR 1 (SC), it was held by the Supreme Court that (page 6) : 'there are usually many ways in which a given thing can be brought about in business circles but it is not for the court to decide which of them should have been employed when the court is deciding a question under section 12(2) of the Income-tax Act'. It was further held in this case that 'it is not

necessary to show that the expenditure was a profitable one or that in fact any profit was earned. In *CIT* v. *Walchand and Co. Pvt. Ltd.* [1967] 65 ITR 381 (SC), it was held by the Supreme Court that in applying the test of commercial expediency for determining whether the expenditure was wholly and exclusively laid out for the purpose of business, reasonableness of the expenditure has to be judged from the point of view of the businessman and not of the Revenue. It was further observed that the rule that expenditure can only be justified if there is corresponding increase in the profits was erroneous. It has been classically observed by Lord Thankerton in *Hughes (Inspector of Taxes)* v. *Bank of New Zealand* [1938] 6 ITR 636 (HL) that 'expenditure in the course of the trade which is unremunerative is none the less a proper deduction if wholly and exclusively made for the purposes of trade. It does not require the presence of a receipt on the credit side to justify the deduction of an expense. The question whether an expenditure can be allowed as a deduction only if it has resulted in any income or profits came to be considered by the Supreme Court again in *CIT* v. *Rajendra Prasad Moody* [1978] 115 ITR 519 (SC), and it was observed as under (page 523) :

'We fail to appreciate how expenditure which is otherwise a proper expenditure can cease to be such merely because there is no receipt of income. Whatever is a proper outgoing by way of expenditure must be debited irrespective of whether there is receipt of income or not. That is the plain requirement of proper accounting and the interpretation of section 57(iii) cannot be different. The deduction of the expenditure cannot, in the circumstances, be held to be conditional upon the making or earning of the income.'

It is noteworthy that the above observations were made in the context of section 57(iii) of the Act where the language is somewhat narrower than the language employed in section 37(1) of the Act. This fact is recognised in the judgment itself. The fact that the language employed in section 37(1) of the Act is broader than section 57(iii) of the Act makes the position stronger.

In the case of *Sassoon J. David and Co. (P.) Ltd.* v. *CIT* [1979] 118 ITR 261 (SC), the Supreme Court referred to the legislative history and noted that when the Income-tax Bill of 1961 was introduced, section 37(1) required that the expenditure should have been incurred 'wholly, necessarily and exclusively' for the purposes of business in order to merit deduction. Pursuant to public protest, the word 'necessarily' was omitted from the section.

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

Even rule 10B(1)(a) does not authorise disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same or that in the view of the Revenue the expenditure was unremunerative or that in view of the continued losses suffered by the assessee in his business, he could have fared better had he not incurred such expenditure. These are irrelevant considerations for the purpose of rule 10B. Whether or not to enter into the transaction is for the assessee to decide. The quantum of expenditure can no doubt be examined by the Transfer Pricing Officer as per law but in judging the allowability thereof as business expenditure, he has no authority to disallow the entire expenditure or a part thereof on the ground that the assessee has suffered continuous losses. The financial health of the assessee can never be a criterion to judge allowability of an expense ; there is certainly no authority for that. What the Transfer Pricing Officer has done in the present case is to hold that the assessee ought not to have entered into the agreement to pay royalty/brand fee, because it has been suffering losses continuously. So long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purposes of business, it is no concern of the Transfer Pricing Officer to disallow the same on any extraneous reasoning. As provided in the Organization for Economic Co-operation and Development guidelines, he is expected to examine the international transaction as he actually finds the same and then make suitable adjustment but a wholesale disallowance of the expenditure, particularly on the grounds which have been given by the Transfer Pricing Officer is not contemplated or authorised.

Apart from the legal position stated above, even on the merits the disallowance of the entire brand fee/royalty payment was not warranted. The assessee has furnished copious material and valid reasons as to why it was suffering losses continuously and these have been referred to by us earlier. Full justification supported by facts and figures have been given to demonstrate that the increase in the employees cost, finance charges, administrative expenses, depreciation cost and capacity increase have contributed to the continuous losses. The comparative position over a period of five years from 1998 to 2003 with relevant figures have been given before the Commissioner of Income-tax (Appeals) and they are referred to in a tabular form in his order in paragraph 5.5.1. In fact there are four tabular statements furnished by the assessee before the Commissioner of Income-tax (Appeals) in support of the reasons for the continuous losses. There is no material brought by the Revenue either before the Commissioner of Income-tax (Appeals) or before the Tribunal or even before us to show that these are incorrect figures or that even on the merits the reasons for the losses are not genuine.

We are, therefore, unable to hold that the Tribunal committed any error in confirming the order of the Commissioner of Income-tax (Appeals) for both the years deleting the disallowance of the brand fee/royalty payment while determining the arm's length price. Accordingly, the substantial questions of law are answered in the affirmative and in favour of the assessee and against the Revenue. The appeals are accordingly dismissed with no order as to costs."

(ii) *Frigoglas India P. Ltd.* v. *Dy. CIT* [2016] 180 TTJ 401 (Delhi)

"9. On the issue of royalty, the learned authorised representative submitted that the assessee has entered into royalty agreement with its associated enterprises—Frigoglass SAIC (Head Office) on account of receipt of ICM Technology and for use of trademark. It was submitted that comparable uncontrolled price method could not be applied in the case as neither the associated enterprises nor the assessee have entered into similar royalty arrangements with third parties and the data for external comparable transactions between independent parties in India was not available. It was submitted that the only method which could be correctly applied was transactional net margin method (which has been applied by the assessee). It was further submitted that the benchmarking approach adopted by the assessee has been wrongly rejected and that the application of comparable uncontrolled price method was erroneous. It was submitted that

FIPL's principal activity being manufacturing of glass door refrigerators, the international transactions form an integral part of FIPL's business of manufacture and sale of glass door refrigerators. Accordingly, for the purpose of economic analysis, the assessee combined the international transaction pertaining to payment of royalty as in this case ; the transaction was so closely linked or continuous that it could not have been evaluated adequately on an individual basis. Therefore, the transactions pertaining to payment of royalty were considered as closely linked to the manufacture of glass door refrigerators and a combined transactions approach was used. The learned authorised representative submitted that since the operating margin of the assessee was higher than the arithmetic mean of the operating margins of the comparable companies and the cost pertaining to the payment of royalty had already been benchmarked, the international transaction pertaining to the payment of royalty by FIPL to Frigoglass SAIC should be considered to be at arm's length from the assessee's perspective. The learned authorised representative further submitted that Frigoglass SAIC had hired an independent external consultant for reviewing the arm's length nature of four per cent. royalty applied by the head office for the licensing of the ICM technology and trademarks to related group entities and based on the terms and conditions of the licence agreement between Frigoglass SAIC and its affiliates and in view of the broadly comparable licencing agreements identified from the search of publicly available licence agreements, it was concluded that a royalty rate of four per cent. on sale of products for the use of trademarks and ICM technology was considered to be an arm's length rate. It was also submitted that no independent third party will let any other entity use its intellectual property rights (IPR) and allow to enjoy the benefits from the usage of such intellectual property rights without charging a fee. It was submitted that FIPL enjoys a lot of benefits in manufacturing and marketing from the use of the intellectual property rights owned by Frigoglass SAIC. It was submitted that FIPL had started enjoying the benefits from the usage of the trademarks and ICM technology from very inception although a formal agreement was entered into in September 2007 and had started making payment for such services from the assessment year 2009-10 only. It was further submitted that the activities performed by the associated enterprises in terms of the royalty agreement were ICM sales, customer service, marketing services, product development and future technologies. It was submitted that most of the

clients of the FIPL were global clients and the use of the trademark had a positive impact on the sales of FIPL in India. The learned authorised representative made a reference to the comparative profitability chart from the financial year 2005-06 to financial year 2009-10 and submitted that the profitability has been increasing on an year to year basis because of availing of the services of Frigoglass SAIC and, therefore, since the benefits received from FIPL from receipt of such services outweigh the payment for such services, the assessee was justified in making payments for royalty.

10. It was also submitted that royalty has been paid only as per the terms of the agreement. The learned authorised representative submitted that the disallowance for royalty was ultimately made on the ground of commercial expediency and he placed reliance 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 that of the Income-tax Appellate Tribunal, Hyderabad "B" Bench in the case of *Dy. CIT* v. *Air Liquide Engineering India P. Ltd.* in I. T. A. No. 1040/Hyd/2011 [2014] 31 ITR (Trib) 205 (Hyd) for the proposition that so long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purposes of business, it was no concern of the Transfer Pricing Officer to disallow it on any extraneous reasoning. He submitted that on the facts of the case, the payment of royalty deserves to be allowed in toto as it was allowable business expenditure . . . .

16. We have heard the rival parties at length and carefully perused the material on record. As far as the issue of royalty is concerned, we find that the assessee had filed in the course of the Transfer Pricing Officer assessment as well as before the Dispute Resolution Panel, detailed submissions, including agreement between associated enterprises and the assessee, justifying how the technical know-how supplied by its associated enterprises was crucial to the running of its business. In *CIT* v. *EKL Appliances Ltd.* [2012] 345 ITR 241 (Delhi), the hon'ble Delhi High Court had the occasion to consider an issue of disallowance of royalty by the Transfer Pricing Officer because the assessee in that case had been suffering losses, the hon'ble High Court while holding that so long as the expenditure or payment by the assessee has been demonstrated to have been incurred or laid out for the purposes of business, it is no concern of the Transfer Pricing Officer to disallow the same on any extraneous reasoning, observed as follows (page 250 of 345 ITR) :

'The Organization for Economic Co-operation and Development ("OECD", for short) has laid down "transfer pricing guidelines" for multinational enterprises and tax administrations. These guidelines give an introduction to the arm's length price principle and explains article 9 of the Organisation for Economic Co-operation and Development model tax convention. This article provides that when conditions are made or imposed between two associated enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises then any profit which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, if not so accrued, may be included in the profits of that enterprise and taxed accordingly. By seeking to adjust the profits in the above manner, the arm's length principle of pricing follows the approach of treating the members of a multi-national enterprise group as operating as separate entities rather than as inseparable parts of a single unified business. After referring to article 9 of the model convention and stating the arm's length principle, the guidelines provide for the "recognition of the actual transactions undertaken" in paragraphs 1.36 to 1.41. Paragraphs 1.36 to 1.38 are important and are relevant to our purpose. These paragraphs are reproduced below :

"1.36 A tax administration's examination of a controlled transaction ordinarily should be based on the transaction actually undertaken by the associated enterprises as it has been structured by them, using the methods applied by the taxpayer in so far as these are consistent with the methods described in Chapters II and III. In other than exceptional cases, the tax administration should not disregard the actual transactions or substitute other transactions for them. Restructuring of legitimate business transactions would be a wholly arbitrary exercise the inequity of which could be compounded by double taxation created where the other tax administration does not share the same views as to how the transaction should be structured.

1.37 However, there are two particular circumstances in which it may, exceptionally, be both appropriate and legitimate for a tax administration to consider disregarding the structure adopted by a taxpayer in entering into a controlled transaction. The first circumstance arises where the economic substance of a transaction differs from its form. In such a case the tax administration may disregard the parties' characterization of the transaction and recharacterise it in accordance with its substance. An example of this circumstance

would be an investment in an associated enterprise in the form of interest-bearing debt when, at arm's length, having regard to the economic circumstances of the borrowing company, the investment would not be expected to be structured in this way. In this case it might be appropriate for a tax administration to characterize the investment in accordance with its economic substance with the result that the loan may be treated as a subscription of capital. The second circumstance arises where, while the form and substance of the transaction are the same, the arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner and the actual structure practically impedes the tax administration from determining an appropriate transfer price. An example of this circumstance would be a sale under a long-term contract, for a lump sum payment, of unlimited entitlement to the intellectual property rights arising as a result of future research for the term of the contract (as previously indicated in paragraph 1.10). While in this case it may be proper to respect the transaction as a transfer of commercial property, it would nevertheless be appropriate for a tax administration to conform the terms of that transfer in their entirety (and not simply by reference to pricing) to those that might reasonably have been expected had the transfer of property been the subject of a transaction involving independent enterprises. Thus, in the case described above it might be appropriate for the tax administration, for example, to adjust the conditions of the agreement in a commercially rational manner as a continuing research agreement.

1.38 In both sets of circumstances described above, the character of the transaction may derive from the relationship between the parties rather than be determined by normal commercial conditions as may have been structured by the taxpayer to avoid or minimize tax. In such cases, the totality of its terms would be the result of a condition that would not have been made if the parties had been engaged in arm's length dealings. Article 9 would thus allow an adjustment of conditions to reflect those which the parties would have attained had the transaction been structured in accordance with the economic and commercial reality of parties dealing at arm's length."

The significance of the aforesaid guidelines lies in the fact that they recognise that barring exceptional cases, the tax administration should not disregard the actual transaction or substitute other transactions for them and the examination of a controlled transaction

should ordinarily be based on the transaction as it has been actually undertaken and structured by the associated enterprises. It is of further significance that the guidelines discourage re-structuring of legitimate business transactions. The reason for characterisation of such re-structuring as an arbitrary exercise, as given in the guidelines, is that it has the potential to create double taxation if the other tax administration does not share the same view as to how the transaction should be structured.

Two exceptions have been allowed to the aforesaid principle and they are (i) where the economic substance of a transaction differs from its form and (ii) where the form and substance of the transaction are the same but arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner.

There is no reason why the Organisation for Economic Co-operation and Development guidelines should not be taken as a valid input in the present case in judging the action of the Transfer Pricing Officer. In fact, the Commissioner of Income-tax (Appeals) has referred to and applied them and his decision has been affirmed by the Tribunal. These guidelines, in a different form, have been recognised in the tax jurisprudence of our country earlier. It has been held by our courts that it is not for the Revenue authorities to dictate to the assessee as to how he should conduct his business and it is not for them to tell the assessee as to what expenditure the assessee can incur. We may refer to a few of these authorities to elucidate the point. In *Eastern Investments Ltd.* v. *CIT* [1951] 20 ITR 1 (SC), it was held by the Supreme Court that (page 6) : "there are usually many ways in which a given thing can be brought about in business circles but it is not for the court to decide which of them should have been employed when the court is deciding a question under section 12(2) of the Income-tax Act". It was further held in this case that "it is not necessary to show that the expenditure was a profitable one or that in fact any profit was earned. In *CIT* v. *Walchand and Co. Pvt. Ltd.* [1967] 65 ITR 381 (SC), it was held by the Supreme Court that in applying the test of commercial expediency for determining whether the expenditure was wholly and exclusively laid out for the purpose of business, reasonableness of the expenditure has to be judged from the point of view of the businessman and not of the Revenue. It was further observed that the rule that expenditure can only be justified if

there is corresponding increase in the profits was erroneous. It has been classically observed by Lord Thankerton in *Hughes (Inspector of Taxes)* v. *Bank of New Zealand* [1938] 6 ITR 636 (HL) that "expenditure in the course of the trade which is unremunerative is none the less a proper deduction if wholly and exclusively made for the purposes of trade. It does not require the presence of a receipt on the credit side to justify the deduction of an expense. The question whether an expenditure can be allowed as a deduction only if it has resulted in any income or profits came to be considered by the Supreme Court again in *CIT* v. *Rajendra Prasad Moody* [1978] 115 ITR 519 (SC), and it was observed as under (page 523) :

"We fail to appreciate how expenditure which is otherwise a proper expenditure can cease to be such merely because there is no receipt of income. Whatever is a proper outgoing by way of expenditure must be debited irrespective of whether there is receipt of income or not. That is the plain requirement of proper accounting and the interpretation of section 57(iii) cannot be different. The deduction of the expenditure cannot, in the circumstances, be held to be conditional upon the making or earning of the income. It is noteworthy that the above observations were made in the context of section 57(iii) of the Act where the language is somewhat narrower than the language employed in section 37(1) of the Act. This fact is recognised in the judgment itself. The fact that the language employed in section 37(1) of the Act is broader than section 57(iii) of the Act makes the position stronger."

In the case of *Sassoon J. David and Co. (P.) Ltd.* v. *CIT* [1979] 118 ITR 261 (SC), the Supreme Court referred to the legislative history and noted that when the Income-tax Bill of 1961 was introduced, section 37(1) required that the expenditure should have been incurred "wholly, necessarily and exclusively" for the purposes of business in order to merit deduction. Pursuant to public protest, the word "necessarily" was omitted from the section.

The position emerging from the above decisions is that it is not necessary for the assessee to show that any legitimate expenditure incurred by him was also incurred out of necessity. It is also not necessary for the assessee to show that any expenditure incurred by him for the purpose of business carried on by him has actually resulted in profit or income either in the same year or in any of the subsequent years. The only condition is that the expenditure should have been incurred "wholly and exclusively" for the purpose of business and

nothing more. It is this principle that, inter alia, finds expression in the Organisation for Economic Co-operation and Development guidelines, in the paragraphs which we have quoted above.

Even rule 10B(1)(a) does not authorise disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same or that in the view of the Revenue the expenditure was unremunerative or that in view of the continued losses suffered by the assessee in his business, he could have fared better had he not incurred such expenditure. These are irrelevant considerations for the purpose of rule 10B. Whether or not to enter into the transaction is for the assessee to decide. The quantum of expenditure can no doubt be examined by the Transfer Pricing Officer as per law but in judging the allowability thereof as business expenditure, he has no authority to disallow the entire expenditure or a part thereof on the ground that the assessee has suffered continuous losses. The financial health of the assessee can never be a criterion to judge allowability of an expense ; there is certainly no authority for that. What the Transfer Pricing Officer has done in the present case is to hold that the assessee ought not to have entered into the agreement to pay royalty/brand fee, because it has been suffering losses continuously. So long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purposes of business, it is no concern of the Transfer Pricing Officer to disallow the same on any extraneous reasoning. As provided in the Organisation for Economic Co-operation and Development guidelines, he is expected to examine the international transaction as he actually finds the same and then make suitable adjustment but a wholesale disallowance of the expenditure, particularly on the grounds which have been given by the Transfer Pricing Officer is not contemplated or authorised.

Apart from the legal position stated above, even on the merits the disallowance of the entire brand fee/royalty payment was not warranted. The assessee has furnished copious material and valid reasons as to why it was suffering losses continuously and these have been referred to by us earlier. Full justification supported by facts and figures have been given to demonstrate that the increase in the employees cost, finance charges, administrative expenses, depreciation cost and capacity increase have contributed to the continuous losses. The comparative position over a period of five years from 1998 to 2003 with relevant figures have been given before the Commissioner of

Income-tax (Appeals) and they are referred to in a tabular form in his order in paragraph 5.5.1. In fact there are four tabular statements furnished by the assessee before the Commissioner of Income-tax (Appeals) in support of the reasons for the continuous losses. There is no material brought by the Revenue either before the Commissioner of Income-tax (Appeals) or before the Tribunal or even before us to show that these are incorrect figures or that even on the merits the reasons for the losses are not genuine.'

17. Here, in the present appeal, what we see is the Transfer Pricing Officer sitting on judgment on the business and commercial expediency of the assessee which is erroneous as per the provisions of the Act as laid down clearly by the hon'ble Delhi High Court in *EKL Appliances* (supra). As far as the Department's reliance on the hon'ble Delhi High Court's judgment in *CIT* v. *Abhinandan Investments Ltd.* [2016] 6 ITR-OL 139 (Delhi) and on the decision of the co-ordinate Bench of the Delhi Tribunal in the case of *Bombardier Transportation India Pvt. Ltd.* v. *Dy. CIT* (I. T. A. No. 1626/Delhi/2015) is concerned, these judgments were rendered on a different set of facts and hence the ratio as laid down by these are not applicable to the facts of the present appeal.

Furthermore, we are of the opinion that once transactional net margin method has been applied to the assessee-company's transaction, it covers within its ambit the royalty transactions in question too and hence the Department's contention for applying the comparable uncontrolled price method is erroneous. We draw support from the decision of the Mumbai Bench of the Tribunal in *Cadbury India Ltd.* v. *Asst. CIT* in I. T. A. No. 7408/Mum/2010 and I. T. A. No. 7641/Murn/2010 wherein the Bench has upheld the use of transactional net margin method for royalty by holding :

'33. The Transfer Pricing Officer has made the disallowance in question mainly on the basis of the benefit test. In this regard, it is seen that the payment of royalty cannot be examined divorced from the production and sales. Royalty is inextricably linked with these activities. In the absence of production and sale of products, there would be no question arising regarding payment of any royalty. Rule 10A(d) defines "transaction" as a number of closely linked transactions. Royalty, then, is a transaction closely linked with production and sales. It cannot be segregated from these activities of an enterprise, being embedded therein. That being so, royalty cannot be considered, and examined in isolation on a standalone basis. Royalty is to

be calculated on a specified agreed basis, on determining the net sales which, in the present case, are required to be determined after excluding the amounts of standard bought out components, etc., since such net sales do not stand recorded by the assessee in its books of account. Therefore, it is our considered opinion that the assessee was correct in employing an overall transactional net margin method for examining the royalty.'

19. In the case of *Dy. CIT (LTU)* v. *CLSA India Ltd.* [2013] 33 taxmann.com 260 (Mum), the Bench held that comparable uncontrolled price method cannot be applied if the relevant information is not available. No such comparable transaction has been brought on record by the Assessing Officer or even by the Dispute Resolution Panel. No such comparable case has been placed by the Revenue even now.

20. Hence, following the ratio of the hon'ble Delhi High Court in *CIT* v. *EKL Appliances* (supra), we hold that the addition made by the Transfer Pricing Officer and upheld by the Dispute Resolution Panel is unsustainable and is liable to be deleted. Hence, ground Nos. 4.1 and 4.2 are allowed."

Taking into account the facts narrated and the case law cited above, we note that the trade-marks for the two products, viz., Mincream and Robinson Burley were registered and the said brands were owned by the associated enterprises. The royalties are paid not only in respect of patent but for a basket of services. It is a common occurrence that a person using a brand name pays certain brand royalty to the owner of brand. It is not the case of the Transfer Pricing Officer, that the royalty paid in respect of these products was without any use of the said brand names. The assessee has in its transfer pricing study included payment of royalty and according to it the royalties are at arm's length. **18**

Considering these facts the proposed disallowance of royalty in respect of Mincream and Robinson Burley does not appear to be justified and proper. The learned Dispute Resolution Panel was right in deleting the disallowance of royalty. Therefore, the arm's length price adjustment for payment of royalty of Rs. 35,05,809 for the assessment year 2010-11 and Rs.78,70,96,934 for the assessment year 2011-12 are directed to be deleted.

In the result appeal of the Revenue is dismissed and appeal of the assessee is allowed. **19**

Summarized ground No. 2 reads as follows : **20**

2. Transfer pricing adjustment in relation to advertisement, marketing and promotion expenses (AMP).

This ground covers ground Nos. 5a to 5b of the assessee's appeal in I. T. A. No. 404/Kol/2015, for the assessment year 2011-12, ground Nos. 1 to 4 of the Revenue's appeal in I. T. A. No. 529/Kol/2015, for the assessment year 2010-11, ground Nos. 3a to 3b of the assessee's appeal in I. T. A. No. 625/Kol/2016, for the assessment year 2011-12, ground Nos. 4 to 5 of the Revenue's appeal in I. T. A. No. 518/Kol/2016, for the assessment year 2011-12.

21 Brief facts qua the issue are that Reckitt Benckiser (India) Limited (RBIL) is a subsidiary of Reckitt Benckiser Plc., UK. The Reckitt Benckiser (India) Limited is engaged in the business of manufacturing and trading of fast moving consumer goods products. The Reckitt Benckiser (India) Limited manufactures and distributes various brands of household products, and over-the-counter pharmaceutical products. Some of the key products are Dettol Soap, Dispirin, Robin Blue, Cherry Blossom shoe polish, Harpic toilet cleaner, Mortein insecticide, Colin, etc. The Reckitt Benckiser (India) Limited is registered in India under the Companies Act, 1956. The Reckitt Benckiser (India) Limited has entered into a License Agreement with Reckitt Benckiser N. V. and Reckitt and Colman Limited for the transfer of intellectual property rights for the production, sale, distribution and marketing of Reckitt Benckiser "products" domestically and internationally. These include all intellectual property rights owned by the associated enterprises such as trademarks, design and model rights, know-how', and all current and future copyrights and rights to databases relating to design, distribution, marketing and sale of licensed products in the licensed territory.

The assessee-company incurred advertisement, marketing and promotion (AMP) expenses. The Transfer Pricing Officer issued the notice to the assessee-company stating that why not an adjustment on account of advertisement, marketing and promotion (AMP) expenses in excess of "bright line test" laid down by the Special Bench in *L. G. Electronics India P. Ltd.* v. *Asst. CIT* [2013] 22 ITR (Trib) 1 (Delhi) [SB] (I. T. A. No. 5140/Delhi/2011) should be made ?

In response, the assessee submitted that Reckitt Benckiser (India) Limited is engaged in the business of manufacturing and trading of Fast Moving Consumer Goods ('FMCG')/products. The Reckitt Benckiser (India) Limited manufactures and distributes various brands of household products, and over-the-counter pharmaceutical products. Some of the key products are Dettol Soap, Disprin, Robin Blue, Cherry Blossom shoe polish, Harpic toilet cleaner, Mortein insecticide, Colin, etc. The Reckitt Benckiser

(India) Limited manufactures products at its own facilities and also engages third party contract manufacturers for manufacturing some products. The detailed list of products and their brands have been submitted before Transfer Pricing Officer. It is to be noted that, the name of all products sold by Reckitt Benckiser, in India bear the name of the brand, (e. g., the products of brand "Airwick", Airwick spray, Airwick aerosol, Airwick Freshmatic, Airwick-Car Air Freshner, etc.). The assessee has incurred certain expenses on advertisement, amounting to Rs. 302.43 crores (which includes sales promotion expenses, rebates and discount, etc.,) during financial year (FY) 2009-10, details of which are tabulated as under :

Sl. No.	*Nature of expense incurred*	*Amount (in Rs.)*
1.	Advertisement expenses	187,82,64,010
2.	Business promotion expenses directly related to sales	18,34,40,339
3.	Market research expenses	13,11,01,455
4.	Freebies/gifts/bonus packs/consumer promos	83,15,37,573
	Total	302,43,43,377

All activities, of advertisement performed were targeted for consumers in India and were related to its domestic sales only. No part of advertisement activity was performed for consumers outside India or was related to exports.

The expenditure incurred by the assessee on advertisement pertained to only those products that it was dealing in, (i. e., existing products and certain new products launched by it in India), it did not include any expenditure on so-called 'corporate advertisement'.The money spent on advertisement was to publicize the 'product' and the same was not a 'brand' publicity exercise. Special Bench decision in *L. G. Electronics India P. Ltd.* (supra) does not apply to the assessee under consideration. Therefore, there is no any transfer pricing adjustment is required.

However, the learned Transfer Pricing Officer rejected the contention of **22**
the assessee and held that arm's length price adjustment (ALP) of advertisement, marketing and promotion (AMP) expenses has to be computed in the case of the assessee, as directed in the *L. G. Electronics* case (supra). With regard to determination of the arm's length price of the international transaction pertaining to brand promotion based on excessive advertisement, marketing and promotion expenses, the learned Income-tax Appellate Tribunal, Special Bench, Delhi (supra) have held in para 23.5 of their

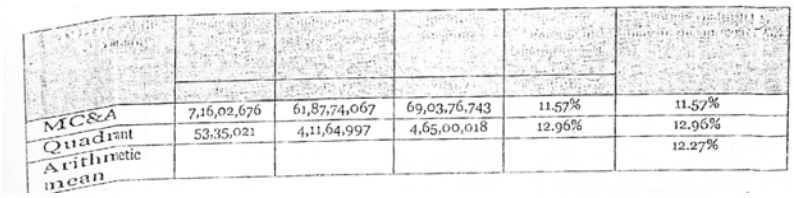
order that an arm's length margin needs to be added to the cost as determined by using the bright line test.

Based on the assessee's own comparables, the cost part of the price of the international transaction pertaining to brand promotion is computed as under :

Company	*AMP (Rs. in lakhs)*	*Sales (Rs. in lakhs)*	*AMP/ Sales*
Dabur India Limited	39003	285687	13.65%
Godrej Consumer Products Ltd.	10168.9	126788.12	8.02%
Jyothy Laboratories Limited	2620.25	57476.16	4.56%
Marico India Limited	351.12	2024.3	17.35%
Nirma Limited	54.35	3329.18	153%
Corona Plus Industries Limited	7019716	300719,404	233%
Hipolin Limited	549.44	3609.67	15.22%
Jocil Limited	9.64	16820.65	0.06%
Jyothy Laboratories Limited	2620.25	33982.65	7.71%
Pee Cee Cosma Soap Limited	7.82	2876.19	0.27%
Standard Surfactants Limited	2.12	4234.18	0.35%
Ultramarine & Pigments Limited	72.84	10105.32	0.72%
Average mean			6.09%

Thus, as per the table above, comparable companies have an advertisement, marketing and promotion expenses to sales ratio of 6.09 per cent. while the assessee has a ratio of 11.03 per cent. Hence an excess amount of Rs. 93,02,03,439 (representing 4.94 per cent.=11.03 per cent. - 6.09 per cent.) is considered as cost part of the arm's length price of international transaction pertaining to brand promotion.

To arrive at the margin on such cost, search for entities carrying out normal marketing and advertising resulted in two companies namely M/s. Marketing Consultants & Agency Limited and M/s. Quadrants Communications Ltd. The mark-up on cost earned by these two entities is as follows :



MC&A	7,16,02,676	61,87,74,067	69,03,76,743	11.57%	11.57%
Quadrant	53.35,021	4,11,64,997	4,65,00,018	12.96%	12.96%
Arithmetic mean					12.27%

Thus, a mark up of 12.27 per cent. is to be added to the cost of the brand promotion activity of the assessee. Accordingly, the margin on cost is computed at Rs. 11,41,35,962 (93,02,03,439 × 12.27 per cent.) which the assessee should have earned over its cost incurred for brand promotion activities. Thus, the arm's length price of the international transaction pertaining to advertisement, marketing and promotion expenses was computed by the Transfer Pricing Officer at Rs. 104,43,39,401 (93,02,03,439 + 11,41,35,962).

Aggrieved by the order of the learned Transfer Pricing Officer, the assessee filed objections before the learned Dispute Resolution Panel. The learned Dispute Resolution Panel had confirmed the arm's length price adjustment done by the Transfer Pricing Officer observing the following : **23**

> "We have considered the rival contentions. The definition of the term 'international transaction' defined in section 92B is quite wide and includes an arrangement, understanding or concerted action, which may be informal or in writing. It has been held by the special bench of the hon'ble Tribunal in the case of *L. G. Electronics India P. Ltd.* (supra), that if an assessee has simultaneously or independently advertised the brand or logo of the foreign associated enterprises the same is to be treated as international transaction within the meaning of section 92F. The Transfer Pricing Officer has reproduced several relevant extract in his order. While all the facts in the assessee's case may not be identical to the facts of *L. G. Electronics* (supra), here also, the assessee was advertising the products, prominently displaying the brands were owned by foreign associated enterprises. In our opinion, ratio of the decision in the case of *L. G. Electronics* (supra) is applicable on the assessee's case. This ground is accordingly rejected."

Aggrieved by the order of the Dispute Resolution Panel/Transfer Pricing Officer, the assessee is in appeal before us. **24**

We heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case law relied upon, and perused the fact of the case including the findings of the learned Dispute Resolution Panel and other materials brought on record. The learned counsel for the assessee submitted before us that the facts of the case of the Special Bench ruling in *L. G. Electronics* (supra) is different from the facts of the present case of the assessee. The assessee-company is engaged in only product promotion and not brand promotion and hence benefit of advertisement, marketing and promotion expenses accrues to the assessee and not to its associated enterprises. The **25**

bright line test ("BLT") is not one of the prescribed methods under the Act and hence cannot be applied in the assessee's case under consideration. The various expenses in the nature of sales promotion expenses, business promotion expenses (including free gifts/freebie/bonus packs, etc.,) market research expenses has to be excluded from the computation of advertisement, marketing and promotion expenditure. The learned counsel also pointed out that addition of any profit mark-up over the costs of advertisement, marketing and promotion expenses is unwarranted from the facts of the assessee's case.

On the other hand, the learned Departmental representative for the Revenue has primarily reiterated the stand taken by the Transfer Pricing Officer/Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity. We note that issue before us relates to Transfer Pricing Officer's action in applying provision of section 92 of the Act in respect of advertisement marketing and promotion (AMP) expenses treating them as international transaction covered under the purview of section 92 of the Act. The assessee had entered into licence agreement with its associated enterprises Reckitt Benckiser NV and Reckitt Colman Ltd. for transfer and intellectual property right for provision of sale, distribution and marketing of Reckitt Benckiser products. It was manufacturing and distributing various brands of such products and had incurred substantial marketing and promotion expenses in respect of same amounting to Rs. 3,02,43,43,377. Such expenses were related to the promotion of the brand owned by the associated enterprises of the assessee which were prominently displayed in the advertisement. The Transfer Pricing Officer further observed that advertisement, marketing and promotion expenses were substantially higher than the comparables selected by the assessee. The excess of such expenses was considered by him to be for brand promotion done for the associated enterprises. The Transfer Pricing Officer, placing reliance upon the decision of Special Bench of Income-tax Appellate Tribunal, Delhi in the case of *L. G. Electronics India P. Ltd.* v. *Asst. CIT* [2013] 22 ITR (Trib) 1 (Delhi) [SB](I. T. A. No. 5140/Delhi/2011), held that such brand promotion was to be treated as international transaction under section 92B of the Act. The Transfer Pricing Officer applied bright line test (BLT) and after applying mark up of 12.27 per cent., based on margin of entities carrying out marketing and advertising activities, made arm's length price adjustment of Rs. 104,43,39,401. We note that in the case of *L. G. Electronics* (supra), the Indian company was acting on behalf of/for the benefit of Korean company and had "no autonomy" in decisions relating to expenditure incurred on marketing and promotion. In

the assessee's case, the assessee-company was not under any obligation to incur advertisement, marketing and promotion expenses and also its parent company had no control over such decisions of Reckitt Benckiser (India) Ltd. The activities of brand promotion were a global marketing and sales promotion strategy of the parent called "Blue Ocean Strategy", which is not the fact in the case of Reckitt Benckiser (India) Limited. There is no transaction/undertaking/agreement between Reckitt Benckiser (India) Limited and its associated enterprises, as different from that which was existed in *L. G. Electronics* case (supra). Therefore, the assessee-company's case cannot be compared with *L. G. Electronics* case (supra).

We note that incurrence of the advertisement, marketing and promotion **26**
expenses, being a domestic transaction cannot be touted as an instance of profit-sharing exercise. We note that the Transfer Pricing Officer failed to appreciate that, though a "transaction" under section 92F(v) includes arrangement or understanding ; it per se involves a bilateral arrangement or contract between the parties. A unilateral action by one party in absence of any understanding or contract or binding obligation could not be termed as "transaction". In the assessee's case, Reckitt Benckiser (India) Limited has incurred advertisement, marketing and promotion expenditure in respect of its business operations in India and in order to boost its sales in India. Thus, no "transaction" could be said to exist in respect of such advertisement, marketing and promotion expenditure incurred by the assessee.

At the cost of repetition we state that there is no term or condition or provision in either of the licensing agreements to the effect which create any sort of obligation on Reckitt Benckiser (India) Limited to carry out marketing and promotional activities in order to promote the brands and related intellectual property rights. Neither there is an undertaking between Reckitt Benckiser (India) Limited and any of its associated enterprises) ("AE(s)") including the brand owners to incur such expenses for brand promotion as per any global or nation specific strategy, unlike in *L.G. Electronics* (supra) case. The Reckitt Benckiser (India) Limited has complete autonomy to incur expenses relating to marketing and promotion of its products for enhancing better sales and marketing and is under no obligation from any of its associated enterprises. In the light of above facts we note that arm's length price adjustment (ALP) made by the Transfer Pricing Officer and confirmed by the Dispute Resolution Panel is not justified for that we rely on the judgment of the hon'ble Delhi High Court in the case of *Maruti Suzuki India Ltd.* v. *CIT* [2016] 381 ITR 117 (Delhi), wherein it was held as follows (page 145) :

"It is contended by the Revenue that the mere fact that the Indian entity is engaged in the activity of creation, promotion or maintenance of certain brands of its foreign associated enterprises or for the creation/promotion of new/existing markets for the associated enterprises, is by itself enough to demonstrate that there is an arrangement with the parent company for this activity. It is urged that merely because Maruti Suzuki India Ltd. and SMC do not have an explicit arrangement/agreement on this aspect cannot lead to the inference that there is no such arrangement or the entire advertisement, marketing and promotion activity of the Indian entity is unilateral and only for its own benefit. According to the Revenue, 'the only credible test in the context of transfer pricing provisions to determine whether the Indian subsidiary is incurring advertisement, marketing and promotion expenses unilaterally on its own or at the instance of the associated enterprises is to find out whether an independent party would have also done the same'. It is asserted : 'An independent party with a short-term agreement with the MNC will not incur costs which give long-term benefits of brand and market development to the other entity. An independent party will, in such circumstances, carry out the function of development of markets only when it is adequately remunerated for the same'.

Reference is made by Mr. Srivastava to some sample agreements between Reebok (UK) and Reebok (South Africa) and IC Issacs and Co. and BHPC Marketing to urge that the level of advertisement, marketing and promotion expenses spend is a matter of negotiation between the parties together with the rate of royalty. It is further suggested that it might be necessary to examine whether in other jurisdictions the foreign associated enterprises, i. e., SMC is engaged in advertisement, marketing and promotion expenses/brand promotion through independent entities or their subsidiaries without any compensation to them either directly or through an adjustment of royalty payments.

Absence of a machinery provision

The above submissions proceed purely on surmises and conjectures and if accepted as such will lead to sending the tax authorities themselves on a wild-goose chase of what can at best be described as a 'mirage'. First of all, there has to be a clear statutory mandate for such an exercise. The court is unable to find one. To the question whether there is any 'machinery' provision for determining the existence of an international transaction involving advertisement,

marketing and promotion expenses, Mr. Srivastava only referred to section 92F(ii) which defines arm's length price to mean a price 'which is applied or proposed to be applied in a transaction between persons other than associated enterprises in uncontrolled conditions'. Since the reference is to 'price' and to 'uncontrolled conditions' it implicitly brings into play the bright line test. In other words, it emphasises that where the price is something other than what would be paid or charged by one entity from another in uncontrolled situations then that would be the arm's length price. The court does not see this as a machinery provision particularly in light of the fact that the bright line test has been expressly negatived by the court in *Sony Ericsson*. Therefore, the existence of an international transaction will have to be established de hors the bright line test.

There is nothing in the Act which indicates how, in the absence of the bright line test, one can discern the existence of an international transaction as far as advertisement, marketing and promotion expenditure is concerned. The court finds considerable merit in the contention of the assessee that the only transfer pricing adjustment authorised and permitted by Chapter X is the substitution of the arm's length price for the transaction price or the contract price. It bears repetition that each of the methods specified in section 92C(1) is a price discovery method. Section 92C(1) thus is explicit that the only manner of effecting a transfer pricing adjustment is to substitute the transaction price with the arm's length price so determined. The second proviso to section 92C(2) provides a 'gateway' by stipulating that if the variation between the arm's length price and the transaction price does not exceed the specified percentage, no transfer pricing adjustment can at all be made. Both section 92CA, which provides for making a reference to the Transfer Pricing Officer for computation of the arm's length price and the manner of the determination of the arm's length price by the Transfer Pricing Officer, and section 92CB which provides for the 'safe harbour' rules for determination of the arm's length price, can be applied only if the transfer pricing adjustment involves substitution of the transaction price with the arm's length price. Rules 10B, 10C and the new rule 10AB only deal with the determination of the arm's length price. Thus for the purposes of Chapter X of the Act, what is envisaged is not a quantitative adjustment but only a substitution of the transaction price with the arm's length price.

What is clear is that it is the 'price' of an international transaction which is required to be adjusted. The very existence of an international transaction cannot be presumed by assigning some price to it and then deducing that since it is not an arm's length price, an 'adjustment' has to be made. The burden is on the Revenue to first show the existence of an international transaction. Next, to ascertain the disclosed 'price' of such transaction and thereafter ask whether it is an arm's length price. If the answer to that is in the negative the transfer pricing adjustment should follow. The objective of Chapter X is to make adjustments to the price of an international transaction which the associated enterprises involved may seek to shift from one jurisdiction to another. An 'assumed' price cannot form the reason for making an arm's length price adjustment.

Since a quantitative adjustment is not permissible for the purposes of a transfer pricing adjustment under Chapter X, equally it cannot be permitted in respect of advertisement, marketing and promotion expenses either. As already noticed hereinbefore, what the Revenue has sought to do in the present case is to resort to a quantitative adjustment by first determining whether the advertisement, marketing and promotion expenses spend of the assessee on application of the bright line test, is excessive, thereby evidencing the existence of an international transaction involving the associated enterprises. The quantitative determination forms the very basis for the entire transfer pricing exercise in the present case.

As rightly pointed out by the assessee, while such quantitative adjustment involved in respect of advertisement, marketing and promotion expenses may be contemplated in the taxing statutes of certain foreign countries like U.S.A., Australia and New Zealand, no provision in Chapter X of the Act contemplates such an adjustment. An advertisement, marketing and promotion expenses transfer pricing adjustment to which none of the substantive or procedural provisions of Chapter X of the Act apply, cannot be held to be permitted by Chapter X. In other words, with neither the substantive nor the machinery provisions of Chapter X of the Act being applicable to an advertisement, marketing and promotion expenses transfer pricing adjustment, the inevitable conclusion is that Chapter X as a whole, does not permit such an adjustment.

It bears repetition that the subject matter of the attempted price adjustment is not the transaction involving the Indian entity and the agencies to whom it is making payments for the advertisement,

marketing and promotion expenses. The Revenue is not joining issue, the court was told, that the Indian entity would be entitled to claim such expenses as revenue expense in terms of section 37 of the Act. It is not for the Revenue to dictate to an entity how much it should spend on advertisement, marketing and promotion expenses. That would be a business decision of such entity keeping in view its exigencies and its perception of what is best needed to promote its products. The argument of the Revenue, however, is that while such advertisement, marketing and promotion expenses may be wholly and exclusively for the benefit of the Indian entity, it also enures to building the brand of the foreign associated enterprises for which the foreign associated enterprises is obliged to compensate the Indian entity. The burden of the Revenue's song is this : an Indian entity, whose advertisement, marketing and promotion expenses is extraordinary (or "non-routine") ought to be compensated by the foreign associated enterprises to whose benefit also such expense enures. The 'non-routine' advertisement, marketing and promotion expenses spend is taken to have 'subsumed' the portion constituting the 'compensation' owed to the Indian entity by the foreign associated enterprises. In such a scenario what will be required to be benchmarked is not the advertisement, marketing and promotion expenses itself but to what extent the Indian entity must be compensated. That is not within the realm of the provisions of Chapter X.

The problem with the Revenue's approach is that it wants every instance of an advertisement, marketing and promotion expenses spend by an Indian entity which happens to use the brand of a foreign associated enterprises to be presumed to involve an international transaction. And this, notwithstanding that this is not one of the deemed international transactions listed under the *Explanation* to section 92B of the Act. The problem does not stop here. Even if a transaction involving an advertisement, marketing and promotion expenses spend for a foreign associated enterprises is able to be located in some agreement, written (for e. g., the sample agreements produced before the court by the Revenue) or otherwise, how should a Transfer Pricing Officer proceed to benchmark the portion of such advertisement, marketing and promotion expenses spend that the Indian entity should be compensated for ?

As an analogy, and for no other purpose, in the context of a domestic transaction involving two or more related parties, reference may be made to section 40A(2)(a) under which certain types of

expenditure incurred by way of payment to related parties is not deductible where the Assessing Officer 'is of the opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods'. In such event, 'so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction'. The Assessing Officer in such an instance deploys the 'best judgment' assessment as a device to disallow what he considers to be an excessive expenditure. There is no corresponding 'machinery' provision in Chapter X which enables an Assessing Officer to determine what should be the fair 'compensation' an Indian entity would be entitled to if it is found that there is an international transaction in that regard. In practical terms, absent a clear statutory guidance, this may encounter further difficulties. The strength of a brand, which could be product specific, may be impacted by numerous other imponderables not limited to the nature of the industry, the geographical peculiarities, economic trends both international and domestic, the consumption patterns, market behaviour and so on. A simplistic approach using one of the modes similar to the ones contemplated by section 92C may not only be legally impermissible but will lend itself to arbitrariness. What is then needed is a clear statutory scheme encapsulating the legislative policy and mandate which provides the necessary checks against arbitrariness while at the same time addressing the apprehension of tax avoidance.

As explained by the Supreme Court in *CIT* v. *Srinivasa Setty (B.C.)* [1981] 128 ITR 294 (SC) and *PNB Finance Ltd.* v. *CIT* [2008] 307 ITR 75 (SC) in the absence of any machinery provision, bringing an imagined international transaction to tax is fraught with the danger of invalidation. In the present case, in the absence of there being an international transaction involving advertisement, marketing and promotion expenses spend with an ascertainable price, neither the substantive nor the machinery provision of Chapter X are applicable to the transfer pricing adjustment exercise."

27 Our view is also fortified by the decision of the co-ordinate Bench of Income-tax Appellate Tribunal, Kolkata in the case of *Philips India Ltd.* v. *Asst. CIT* I. T. A. No. 2489/Kol/2017, order dated April 4, 2018 wherein it was held as follows :

"11. We have heard the rival submissions. At the outset, we find that the learned Transfer Pricing Officer, the learned Assessing Officer and the learned Dispute Resolution Panel had categorically accepted the basic fact that the assessee is a manufacturer and also

engaged in distribution of products. While this is so, we are not able to comprehend the argument advanced by the learned Departmental representative that the assessee is only a distributor and thereby the decision of *Sony Ericsson* would apply to the case. We find that since the assessee is a manufacturer-cum-distributor as accepted by the lower authorities, the decision rendered in *Maruti Suzuki* supra would be applicable to the assessee's case, since the contention of the learned Departmental representative that the assessee is only distributor, is not emanating from the records of the lower authorities. We find that the issue under dispute before us is squarely addressed by this Tribunal in the assessee's own case for the assessment year 2011-12 supra wherein it was held :

'43. We have heard the rival submissions and perused the materials available on record. The preliminary issue here arises whether the advertisement, marketing and promotion expenses constitute the international transactions so as to attract the provisions of transfer pricing of the Income-tax Act, 1961. The claim of the learned authorised representative is that the advertisement, marketing and promotion transaction does not represent the international transaction between the associated enterprise's therefore no question of determining the arm's length price of advertisement, marketing and promotion transactions. We find force in the argument of the learned authorised representative in the given facts and circumstances. Therefore, in our considered view the advertisement, marketing and promotion expenses cannot be regarded as international transaction. In holding so we find the support and guidance from the judgment of the hon'ble Delhi High Court in the case of *Maruti Suzuki India Ltd.* v. *CIT* reported in [2016] 381 ITR 117 (Delhi) wherein it was held as under (page 141) :

"The result of the above discussion is that in the considered view of the court the Revenue has failed to demonstrate the existence of an international transaction only on account of the quantum of advertisement, marketing and promotion expenditure by Maruti Suzuki India Ltd. Secondly, the court is of the view that the decision in *Sony Ericsson Mobile Communications India (P.) Ltd.* [2015] 374 ITR 118 (Delhi) holding that there is an international transaction as a result of the advertisement, marketing and promotion expenses cannot be held to have answered the issue as far as the present assessee-Maruti Suzuki India Ltd. is concerned since finding in *Sony Ericsson* to the above effect is in the context of those assessees whose cases

have been disposed of by that judgment and who did not dispute the existence of an international transaction regarding advertisement, marketing and promotion expenses."'

In view of we note that the facts of the above cases are identical to the present issue, thus, the principle laid down by the hon'ble Delhi High Court in the case of *Maruti Suzuki India Ltd.* (supra) are applicable to the instant case. Respectfully following the same we dismiss the ground of appeal filed by the Revenue."

28 We note that the advertisement, marketing and promotion transaction does not represent the international transaction between the assessee and its associated enterprise's as the Revenue failed to bring on record any contract or arrangement between the assessee and its associated enterprises for making advertisement, marketing and promotion expenses for promotion of brand of its associated enterprises. In the assessee's case, the assessee-company was not under any obligation to incur advertisement, marketing and promotion expenses and also its parent company had no control over such decisions of Reckitt Benckiser (India) Limited. These are routine advertisement expenses. Therefore, in the assessee's case the advertisement, marketing and promotion expenses cannot be regarded as international transaction as held by the hon'ble Delhi High Court in the case of *Maruti Suzuki India Ltd.* v. *CIT* reported in [2016] 381 ITR 117 (Delhi). Therefore, we allow the appeal of the assessee and dismiss the appeal of the Revenue and delete the arm's length price adjustment made by the Transfer Pricing Officer Rs. 104,43,39,401 for the assessment year 2010-11 and Rs. 331,09,56,767 for the assessment year 2011-12.

29 Summarized ground No. 3 reads as follows :

"3. Comparable companies arbitrarily chosen by the Transfer Pricing Officer for computation of mark up percentage of 22.34 per cent. over the alleged 'agency cost' incurred by the assessee.

This ground covers ground No. 5 of the assessee's appeal in I. T. A. No. 625/Kol/2016 for the assessment year 2011-12 and ground No. 7 of the Revenue's appeal in I. T. A. No. 518/Kol/2016 for the assessment year 2011-12."

30 Facts of the issue which can be stated quite shortly as per the Transfer Pricing Officer order are as follows : From the submission of the details during the course of proceedings it is noticed by the Transfer Pricing Officer that there are recovery of expenses amounting to Rs. 19,30,38,246 from R.B. corporate services. From the details submitted in three volumes it was observed that the assessee was supporting the associated enterprises in its project GSC and Project Bedrock by procuring material from India

and sending them to its associated enterprises which is in the form of market support services. Hence wide letter dated January 16, 2015 the assessee was asked to explain the same and the assessee was also show caused to as why not the margin be in respect of support services company be calculated in this regard.

In response to that the assessee in its letter dated January 16, 2015 sub- **31**
mitted before Transfer Pricing Officer as follows :

"5.07 *Chargeback of expenses by Reckitt Benckiser (India) Limited to associated enterprises.*

During the financial year 2010-11, Reckitt Benckiser (India) Limited has incurred certain expenses on behalf of Reckitt Benckiser group companies. The same has been cross-charged to RB group companies. We understand that these expenses have been charged-back based on actual cost incurred by Reckitt Benckiser (India) Limited on behalf of associated enterprises. We further, understand that the expenses incurred by Reckitt Benckiser (India) Limited on behalf of RB group companies, the function performed by Reckitt Benckiser (India) Limited relates to mere facilitation of payment on behalf of group entities. In this regard, Reckitt Benckiser (India) Limited is a facilitator and it provides no additional service.

Accordingly, the 'cost only' reimbursement by RB group companies to Reckitt Benckiser (India) Limited could be regarded as the arm's length price for the above expenses.

In view of the above, we submit that the 'cost only' reimbursement by associated enterprises to the company could be regarded as the arm's length price for the above expenses.

Project Bedrock

We submit that Project Bedrock is a project implemented for global transition of the network services provider from infonet NL to AT & T for overall cost reduction on network undertaken at the behest of RBCSL. The cost incurred in relation to such change in service provider (such as change in server for enhancement of the connectivity between Reckitt Benckiser (India) Limited and RB Global Offices including expenses on network lines, etc.,) was incurred by Reckitt Benckiser (India) Limited during the year. However, as a matter of financial support to the assessee, these costs incurred by Reckitt Benckiser (India) Limited have been reimbursed by the associated enterprises. It may be appreciated that no services have been rendered by the assessee to the associated enterprises, on the contrary

the assessee has received services from third parties and is the sole beneficiary of the services received by it. The expenses recovered from the assessee are purely on account of financial support extended by the associated enterprises. Hence, a question of charging a mark-up on costs reimbursed by the associated enterprises does not arise."

32 However, the learned Transfer Pricing Officer rejected the contention of the assessee and computed the upward transfer pricing adjustment as follows :

"40. The submission of the assessee is not tenable as the recovery from associated enterprises is not one off or infrequent transaction. From the perusal of the bill, etc., submitted during the proceedings the assessee was regularly procuring materials from different Independent parties in India which were then send to the associated enterprises for use in the project of the associated enterprises. This regular transaction is akin to support services provided by the assessee to its associated enterprises. An independent entity under similar circumstances would not give such services to third party since this involves monetary expenditure as well as efforts and any independent enterprise would ask for remuneration for such efforts. To arrive at the on such effort, search for entities carrying out normal market support services resulted in the following companies. The mark-up on cost earned by these entities is as follows :

Sl. No.	*Name of the comparable*	*OP/OC*
1.	Apitco Limited	25.17%
2.	Global Procurement Consultants Limited	30.86%
3.	T S R Darashaw Limited	28.91%
4.	IDC (India) Limited (formerly Cyber Media)	10.60%
5.	I C R A Management Consulting Services Ltd.	16.14%
	Average	22.34%

In view the above the assessee would have 22.34 per cent. on such recoveries. The value is calculated as under 22.34 per cent. on transaction purported to be recoveries, i. e., 22.34 per cent. of Rs. 19,30,38,246 = 4,31,24,744.

Thus the income of the assessee is to be upwardly adjusted by Rs. 4,31,24,744 on this count."

33 Aggrieved by the addition made by the learned Transfer Pricing Officer, the assessee filed objections before the learned Dispute Resolution Panel.

The learned Dispute Resolution Panel confirmed the order of the Transfer Pricing Officer, observing as follows :

"Dispute Resolution Panel directions :

The assessee has rendered services to its associated enterprises. The assessee was procuring material from the third parties for its associated enterprises for its usage and consumption. The assessee has recovered costs from the associated enterprises for such services. The contention in respect of the recovery of only costs as third parties were involved is not tenable it the assessee was the channel for such procurement services so as to ensure proper delivery of such services. This being a critical function and involving costs for the assessee should definitely entail a cost plus mark up model to ensure arm's length compensation for the assessee for the services rendered. Based on nature of services rendered, it is also appropriate to restrict such mark up on the agency costs of the assessee and not on the costs of material procured. The mark up shall hence be only on the services component. The assessee has only generally objected to the choice of comparables and not substantively challenged the item-wise choice of comparables so chosen by the Transfer Pricing Officer, hence no specific directions are issued. The objection is accordingly disposed of as above."

Aggrieved by the order of the learned Dispute Resolution Panel/Transfer Pricing Officer, the assessee is in appeal before us. **34**

We heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case law relied upon, and perused the fact of the case including the findings of the learned Dispute Resolution Panel and other materials brought on record. The learned counsel for the assessee submitted before us that the Transfer Pricing Officer has erred in proposing an addition in relation to expenses recovered by Reckitt Benckiser (India) Limited from its associated enterprises, without appreciating that there is no element of service provided by Reckitt Benckiser (India) Limited in respect of the impugned international transactions. The learned Transfer Pricing Officer also did not appreciate that recovery of expenses was only on cost basis. On the other hand, the learned Departmental representative for the Revenue has primarily reiterated the stand taken by the Transfer Pricing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity. **35**

We note that the Transfer Pricing Officer without appreciating the true nature of expenses, held the same to be in the nature of support services of

"procuring material" being provided by the assessee to its associated enterprises eligible for a mark up. (pages 281 to 282 and 288 of paper book-1). Accordingly, the Transfer Pricing Officer selected the comparables engaged in marketing support services/technical support services and applied a mark up of 22.34 per cent. on the said expense.

We note that the Dispute Resolution Panel upheld the action of the Transfer Pricing Officer whilst observing that the assessee was indeed providing services to the associated enterprises. (Page 15 of the Dispute Resolution Panel directions). However, the Dispute Resolution Panel directed the Transfer Pricing Officer to restrict the adjustment to agency cost and to not include cost of material whilst applying the mark up. (Pages 15 to 16 of Dispute Resolution Panel directions). Accordingly, the Transfer Pricing Officer vide order dated January 21, 2016 restricted the cost to the agency cost and hence the adjustment was reduced from INR 4.31 crores to INR 2.71 crores. The assessee is in appeal before us to adjudicate the agency cost.

We have gone through the order of the Transfer Pricing Officer/Dispute Resolution Panel and noticed that there is no adjudication by the Transfer Pricing Officer or the Dispute Resolution Panel as to what services were rendered. As per the learned counsel, the expenses in question were in respect of system upgrade of the assessee which costs were reimbursed to the assessee by the associated enterprises. Hence, there was no element of any service that the assessee rendered to the associated enterprises. The assessee submitted, three volumes of documents before the Transfer Pricing Officer and the Dispute Resolution Panel to establish that these were cost to cost reimbursements and there has been no adjudication on the same. Therefore, in the interest of justice and fair play we think it fit and appropriate to remit this issue back to the file of the Transfer Pricing Officer to adjudicate the issue taking into account three volumes of documents already submitted by the assessee. For statistical purposes, the ground raised by the assessee and the Revenue are allowed.

36 Summarised ground No. 4 reads as follows :

> "4. That on the facts and in the circumstances of the case, the Dispute Resolution Panel erred in not considering the specific objections raised by the appellant with respect to overall adjustment of Rs. 21,842,032 made to transaction of 'export of raw materials and finished products'.
>
> (This covers ground No. 6 of the assessee's appeal in I. T. A. No. 625/Kol/2016, for the assessment year 2011-12)"

At the outset itself, the learned counsel for the assessee submitted that **37** the Transfer Pricing Officer rejected the external transactional net margin method as applied by RBIPL for benchmarking the transaction and instead applied the internal transactional net margin method. (Pages 288 to 291 and 294 of paper book-1). Aggrieved by the order of the Transfer Pricing Officer, the assessee carried the matter before the learned Dispute Resolution Panel. The learned Dispute Resolution Panel inadvertently did not give any directions vis-a-vis the said issue. However, vide rectified directions dated February 18, 2016 rejected the approach of the Transfer Pricing Officer of using external transactional net margin method. The Transfer Pricing Officer is yet to give effect to the rectified Dispute Resolution Panel directions. Therefore, the learned counsel prayed the Bench that the learned Transfer Pricing Officer may be directed to give effect to the rectified the Dispute Resolution Panel Directions. In the interest of justice and fair play, we direct the Transfer Pricing Officer to give effect to the rectified the Dispute Resolution Panel directions. For statistical purposes, the ground raised by the assessee are allowed.

Grounds relating to corporate tax issue

Summarised ground No. 1 of corporate tax issue reads as follows : **38**

> "1. Apportionment of expenses between fiscal units, non-fiscal units and head office of Rs. 261,160,962.
>
> This ground covers ground No. 8 of the Revenue's appeal in I. T. A. No. 529/Kol/2015 for the assessment year 2010-11 and ground Nos. 1 and 2 of the Revenue's appeal in I. T. A. No. 518/Kol/2016 for the assessment year 2011-12. "

When this issue was called out for hearing, the learned counsel for the **39** assessee invited our attention to the order dated April 20, 2018, passed by the Tribunal in the assessee's own case in I. T. A. No. 2138/Kol/2009, for the assessment year 2005-06, whereby the issue of apportionment of expenses between fiscal units have been discussed and adjudicated in favour of the assessee. The learned counsel for the assessee submitted that the present issue is squarely covered by the above said order of the Tribunal, a copy of which is also placed before the Bench.

The learned Departmental representative relied upon the orders of the **40** authorities below.

We see no reason to take any other view of the matter then the view so **41** taken by the Division Bench of this Tribunal in the assessee's own case vide order dated April 20, 2018. In this order, the Tribunal has, inter alia, observed as under :

"4. As far as ground No. 3 raised by the Revenue is concerned, it is seen that the details of the bad debts written off, given at page Nos. 128 and 129 of the assessee's paper book read with page 145 of the paper book. The details of bad debts written off, as given in page 145 of the paper book is as follows :

RECKITT BENCKISER (INDIA) LIMITED ("RBIL")

Assessment year 2005-06

DETAILS OF BAD DEBTS AND OTHER CHARGES WRITTEN OFF DURING THE YEAR

Debtor's name	*Address*	*Amount (Rs.)*	*Financial year ("FY") of credit*
Juneja Stores	Juneja Bhavan, Sadar Bazar, Ambikapur	1,022	2002-03
Modi General Store	Baldeo Chowk, Panna	6,095	2002-03
Kamdar Distributor	15, Tawa Complex, E-5, Bitton Mkt., Arera Colony, Bhopal	5,667	2002-03
Sandhya Agencies	Shop Nos. 1 and 5, Vatsala Niwas, Near Mahila Bank, Gole Colony, Nasik City	4,078	2002-03
Ambaji Timber	137-B, New Sindhi Colony, Berasia Road, Bhopal-18	1,67,648	2002-03
Durga Enterprise	523, G. T. Road, Mahesh, Sreerampur, Hooghly, West Bengal	7,729	2002-03
RBIL	Burdwan, West Bengal	1,236	2002-03
Saha Brothers	Madhabitala P. O., Katwa, Dist-Burdwan (W. B.), Katwa, West Bengal	8,376	2002-03
Das Brothers	Main Road, Patherkandi, Karimkanj, Assam-788724	1,268	2002-03
E G Agencies (P.) Ltd.	34/1, A. T. Mukerjee Road, Narkeldanga (Shyampur) Budge Budge, 24 Bgs (South)	1,566	2002-03
Care & Cure	Post Office : Basirhat, S. N. Mazumdar Road, North-24-Bgs	2,659	2002-03
Mahamaya Enterprise	Subhash Road, Bankura, West Bengal 722101	9,130	2002-03
Birbhum Tea Co.	Chittaranjan Road P. O., Suri, Dist-Birbhum (W. B.) Suri, West Bengal	19,267	2002-03
Vikas Enterprises	Sinha Library Road, Ayodhya Apartment (Q-1B), Patna, Bihar 800 001	21,714	2002-03
Basak Brothers	Municipality Office Road P. O., Raiganj, DT-W. Dinajpur Raikanj/West Bengal 733 134	38,630	2001-02

Maity Enterprise	Baikunta Bhavan, Belda, Midnapur Belda/West Bengal 721424	1,97,878	2001-02
RBIL-CSD	Indian Roadways Corporation, Villpar, Dankuni, Post Chakundi, Hoogly/ West Bengal	11,905	2001-02
Calcutta C & FA	L-1, L-2 Strand Roadsand Warehouse (Aparna Group) Kolkata	10,466	2001-02
		5,16,334	

The deduction claimed by the assessee was in respect of units 1, 2, 3 and 4. The unit 1 commercial operation commenced only on February 2, 2004 which is evidenced by the audit report in form 10CCB which is placed at page 90 of the assessee's paper book. The unit No. 2 commenced commercial operation only with effect from April 3, 2004 which is evidenced by form No. 10CCB, placed at page 79 of the assessee's paper book. The unit No. 3 commenced commercial operation only on December 8, 2004 as it is evidenced by the form No. 10CCB, copy of the page 101 of the assessee's paper book. The unit No. 4 commenced commercial operation with effect from February 2, 2005 which is evidence by form No. 10CCB from placed at paper book page 68. It can thus perusal of the bad debts written off' would show that all the debts pertained to the assessment year 2002-03 and earlier financial years. The units for which deduction under sections 80-IB and 80-IC were claimed by the assessee, came into existence only in the financial year 2004-05. Thus, it is clear that the bad debts written off which was claimed as deduction did not pertain to any of the units for which the assessee claimed deduction under sections 80-IB and 80-IC of the Act. Therefore, apportionment of bad debt written off to the eligible units and registering profit of those eligible units for the purpose of allowing deduction under sections 80-1B and 80-IC, as done by the Revenue authorities is unsustainable. The apportionment is directed to be deleted. Ground No. 3 raised by the assessee is allowed.

5. As far as ground No. 2 raised by the Revenue is concerned, this issue again pertains to apportionment of residual cost of Rs. 40.43 crores. The total cost as per the profit and loss account of the assessee is a sum of Rs. 717.26 crores. The details of the other expenses is given in schedule 16 to the profit and loss account. As far as residual cost is concerned, the assessee allocated residual cost amount to the eligible and non-eligible units in the ratio of number of employees at the corporate office who are directly involved in the management of

these eligible units like production, procurement, quality, logistics, etc., to the total number of employees at the corporate office. According to the assessee these expenses primarily relates to the corporate office of the company. The benefit of which is derived by the whole organisation including the eligible units, the allocation of cost incurred on account of residual cost among eligible and non-eligible units should have to be done in the ratio of eligible workers of eligible undertakings to the total number of workers across all the manufacturing units. The Assessing Officer, however, was of the following views :

'Regarding the issue of bifurcation of residual cost as has been discussed in detail in the earlier part of the order, the assessee has not applied the provisions of section 80-IB of the Act properly especially sub-section (5) thereof which clearly states that the profit of the eligible unit has to be determined as if this is the only source of income of the assessee.

The profit of the eligible unit has to be calculated in such a way as if this is the only source of income of the assessee. The relevant portion of the section is reproduced as under :

"(5) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made." (emphasis supplied)

As per section 80-IA(5) read with section 80-IB(13) and 80-IC(7), for the purposes of computing the quantum of allowable deduction under section 80-IB, the profits and gains of the eligible unit of the assessee has to be computed as on such eligible business were the only source of income of the assessee during the year.

The above expenses, even though booked centrally in the head office books, have been incurred for all the units of the assessee-company. Hence ; in order to arrive at the true and correct value of the profits and gains derived from the eligible units, these expenses are required to be allocated to all the units in the proper manner. The best way to divide these expenses would be to allocate among eligible

and non-eligible units in the ratio of workers of eligible undertakings to the total number of workers across all the manufacturing locations from where the assessee has sourced its requirements, instead of in the ratio of number of executives at the corporate office who are directly involved in the management of these eligible units to the total number of executives at the corporate office as has been done by the assessee-company. This is because the expenditure incurred by the assessee-company on the residual functions have also been used and benefited the whole company including the eligible units hence it has to be bifurcated in the ratio of total workforce of the eligible units with total number of workers of the company to arrive at the correct and true profit. This is also supported by the fact that on an average all the expenditures which has either been bifurcated in the ratio of sales or on the basis of actuals are in the percentage of almost average of 22 per cent. whereas the percentage of these particular expenditures are around 5.69 per cent. This itself proves beyond doubt that this expenditure has not been bifurcated properly by the assessee-company.

Moreover, the assessee's arguments that the accounts of the company are audited does not have a bearing on the deduction being claimed under section 80-IB/80-IC of the Act. The Income-tax Act specifically provides that the profits of these undertakings is required to be computed in the manner as if these are independent and only source of income of the assessee company. This effect has probably not been given by the auditor who has filed the accountants report along with claim of deduction. This is also proved by the fact that this has not been mentioned by the auditor who has submitted the accountants report as per the provisions of section 80-IB/80-IC as to the procedure for bifurcating the expenditure for the eligible units. In view of this, there is no force in the assessee's arguments and the same are rejected.

The assessee was asked to furnish the revised working after allocating the residual cost in the manner as detailed above which was submitted by a vide letter dated April 11, 2008 and made part of this order as Annexure A of this order.'

6. On appeal by the assessee, the Commissioner of Income-tax (Appeals) accepted the basis of apportionment of the residual cost as made by the assessee with the following observations :

'7.3.3. With regard to change in the basis of allocation of residual cost by the Assessing Officer. I find merit in the appellant's argument

that the residual costs pertain to those cost which could not be allocated or identified with single function or unit due to the general utility to all the functions and units of the company. The basis of allocation of this cost is the number of executive. These costs include the residuary costs of all the support functions which have not been allocated to the cost of goods sold. As per the appellant, at corporate office level there were 101 persons during the financial year 2004-05 out of which, persons were working in supply function which is directly linked to factory operation. This worked out to 21.78 per cent. The ratio of sale of fiscal units to overall sales was 26.10 per cent. The effective percentage of residual cost thus worked out to 5.68 per cent. (21.78 per cent. × 26.10 per cent.), which the appellant applied for allocating the residual cost to the eligible units. For allocation expenses, the appellant has taken into consideration number of person as well as sales of the eligible units. The Assessing Officer has allocated the residual costs of the corporate office on the basis of the number of workers. Hence, I find more logic on the basis of allocation of expenses adopted by the appellant as the appellant has also taken turnover of the eligible units into consideration.'

7. We have heard the rival submissions, the learned Departmental representative reiterated the stand of the Assessing Officer as reflected in the order of the assessment. The learned counsel for the assessee relied on the order of the learned Commissioner of Income-tax (Appeals). We have given a careful consideration to the rival submissions, we note that the basis of allocation of residual cost to the eligible units has been done by the Assessing Officer is as follows :

Particulars	*Jammu*	*Baddi*	*Parwando (Liquid)*	*Parwando (Soap)*	*Total*
Deduction claimed by the assessee as per auditor's certificate in form 10CCB	1,108.06	1,519.14	2,044.55	1,493.27	6,165.02
Add : Allocation of residual cost by the assessee	38.62	42.17	116.22	32.82	229.83
	1,146.68	1,561.31	2,160.77	1,526.09	6,394.85
Less : Allocation of residual cost as per assessment order	76.16	83.16	229.19	64.73	453.24
	1,070.52	1,478.15	1,031.58	1,461.36	5,941.61
Less : Allocation of bad debt not allocated to eligible units	0.22	0.24	0.67	0.19	1.32
Revised deduction	1,070.30	1,477.91	1,930.91	1,461.17	5,940.29

It can be seen from the above chart that the allocation done by the assessee on the basis of number of employees who are directly linked with the factory operation is more logical. The residual cost is incurred at the head office and is not capable of being identified with any of the units which are running by the assessee. It is only because of this difficulty that the Assessing Officer and the assessee resorted to allocation of residual cost. When it comes to allocation of residual cost, it cannot be done arbitrarily. The allocation should have due regard to the efforts put at the head office level to be eligible. That can be done only by allocation on the basis of number of employees linked to factory operation divided by total number of employees into corporate office into sales of the eligible units divided by total sales. This allocation of residual cost done by the assessee was logical and we find no infirmity in the action of the Commissioner of Income-tax (Appeals) in accepting this basis of allocation. We, therefore, do not find any merit in ground No. 2 raised by the Revenue and the same is dismissed.

In the result, ground No. 3 raised by the assessee is allowed and ground No. 2 raised by the Revenue is dismissed'. "

42 As the issue is squarely covered in favour of the assessee by the decision of Co-ordinate Bench in assessee's own case (supra) in I. T. A. No. 2138/Kol/2009 for the assessment year 2005-06, and there is no change in facts and law and the Revenue is unable to produce any material to controvert the above said findings of the co-ordinate Bench (supra). Therefore, respectfully following the decision of co-ordinate Bench we dismiss the appeals of the Revenue for the assessment year 2010-11 and the assessment year 2011-12.

43 Summarised ground No. 2 of corporate tax issue reads as follows :

"2. Eligibility of income from sale of scraps whilst calculating deduction under section 80-IC of the Act of Rs. 20,723,924.

This ground covers ground No. 9 raised by the Revenue in I. T. A. No. 529/Kol/2015 for the assessment year 2010-11 and ground No. 3 raised by the Revenue in I. T. A. No. 518/Kol/2016 for the assessment year 2011-12."

44 When this issue was called out for hearing, the learned counsel for the assessee invited our attention to the order dated December 23, 2014, passed by the hon'ble Calcutta High Court in the assessee's own case in *Reckitt Benckiser (India) Ltd.* v. *Addl. CIT* G. A. No. 1420 of 2014, I. T.A. T. No. 41 of 2014, whereby the issue of eligibility of income from sale of scraps have been discussed and adjudicated in favour of the assessee. The

learned counsel for the assessee submitted that the present issue is squarely covered by the above said order of the hon'ble Calcutta High Court, a copy of which is also placed before the Bench.

45 The learned Departmental representative relied upon the orders of the authorities below.

46 We see no reason to take any other view of the matter then the view so taken by the decision of the hon'ble Calcutta High Court in the assessee's own case vide order dated December 23, 2014. In this order, the hon'ble Calcutta High Court has inter alia observed as under :

> "On the question raised by the Revenue in its appeal, we two decision thereon by the High. Court of Madras in *Fenner (India) Ltd.* v. *CIT (No. 2)* [2000] 241 ITR 803 (Mad) relied on by the Revenue in urging its case regarding the question formulated in the assessee's appeal. In paragraph 13 of the said decision the High Court of Madras held as follows (page 806 of 241 ITR) :
>
> '13. As already stated, in the Industrial undertaking in the manufacture of V-Belts, oil seals, O-Rings and rubber-moulded products, certain scrap materials resulted in, which has a saleable value. To say that the scrap materials has no direct link or nexus with the industrial undertaking cannot at all be expected to commend acceptance, especially, on the facts and in the circumstances of the case. For the sake of emphasis, we may say that the scrap materials come within the manufacturing process of the industrial undertaking in the manufacture of certain products such as V-Belts, oil seals, O-Rings and certain rubber moulded products, etc. In this view of the matter, we are of the view that profits and gains from the sale of scrap materials eligible to deduction in an amount equal to twenty per cent. under section 80HH, inasmuch as such gains or profits are derived from the industrial undertaking and includible in the gross total income of the assessee and the question relatable to the profit on the sale of scrap is thus answered in favour of the assessee.'
>
> We are persuaded by the reasoning of the said court and answer the question accordingly. The question in the Revenue's appeal is answered in the negative, in favour of the assesses and against the Revenue. Accordingly, both the applications being GA No. 1420 of 2014 and GA No. 1735 of 2014 are disposed of and the appeals being I. T. A. T No. 41 of 2014 and I. T. A. T. No. 59 of 2014 are dismissed."

47 As the issue is squarely covered in favour of the assessee by the decision of the hon'ble Calcutta High Court in the assessee's own case (supra) and there is no change in facts and law and the Revenue is unable to produce

any material to controvert the above said findings of the co-ordinate Bench. Therefore, respectfully following the decision of co-ordinate Bench we allow grounds of appeal raised by the assessee.

Summarized ground No. 3 of corporate tax issue reads as follows : **48**

> "3. Excess disallowance of interest income allocated to eligible units Rs. 23,400,187.
>
> This ground covers ground No. 4 of the assessee's appeal in I. T. A. No. 404/Kol/2015 for the assessment year 2010-11."

When this issue was called out for hearing, the learned counsel for the **49** assessee invited our attention to the order dated September 14, 2018, passed by the Tribunal in the assessee's own case in I. T. A. No. 2113, 2150, 2114 and 2151/Kol/2013 and I. T. A. Nos. 760 and 762/Kol/2014 for the assessment years 2006-07, 2008-09, 2009-10, whereby the issue of excess disallowance of interest income allocated to eligible units have been discussed and remanded the matter back to the Assessing Officer for factual verification. The learned counsel for the assessee submitted that the present issue is squarely covered by the above said order of the Tribunal, a copy of which is also placed before the Bench.

The learned Departmental representative relied upon the orders of the **50** authorities below.

We see no reason to take any other view of the matter then the view so **51** taken by the co-ordinate Bench of the Income-tax Appellate Tribunal, Kolkata in the assessee's own case vide order dated September 14, 2018. In this order, the Tribunal has, inter alia, observed as under :

> "Assessment year 2009-10 the assessee's and the Revenue's cross appeals in I. T. A. Nos. 760 and 762/Kol/2014. The assessee's first substantive ground seeks to reverse both the lower authorities' action disallowing its section 80-IB/80-IC deduction claim to the tune of Rs. 16,02,07,000 pertaining to interest income. Mr. Khaitan concedes very fairly that the assessee's very claim has already been declined by the hon'ble jurisdictional High Court (supra). We uphold the impugned disallowance of interest income for the purpose of allowability of section 80-IB/80-IC deduction. It transpires from the case file that the assessee has also raised an additional ground at this stage regarding quantification of the impugned disallowance. It is pleaded that the above interest income of Rs. 1,60,27,000 is inclusive of Rs. 3,39,26,000 relating to its parwanu unit in respect of which it had claimed section 80-IC deduction. It is clarified that the said deduction was allowable to the extent of 30 per cent. only being sixth year of

claim. It thus submits that only 33 per cent. of Rs. 3,39,26,000, i. e., Rs. 1,01,77,800 formed part of section 80-IC deduction in respect of Parwanu unit whereas the entire interest of Rs. 3,39,26,000 stands disallowed/added in both the lower proceedings. It pleads double addition of interest income amounting to Rs. 2,37,48,200 therefore, the learned Commissioner of Income-tax-Departmental representative on the other hand vehemently contends that there is no dispute on the non-allowbility of interest income for the purpose of section 80-IB/80-IC deduction. It then avers that the assessee has raised an additional ground regarding quantification on the impugned disallowance which requires verification of facts. We find force in the Revenue's contention, therefore, and restore the instant additional issue raised at the assessee's behest dated June 24, 2018 to the Assessing Officer for necessary factual verification of facts. This additional ground is taken as accepted for statistical purposes".

52 As the issue is squarely covered by the decision of the co-ordinate Bench of the Income-tax Appellate Tribunal, Kolkata in the assessee's own case (supra). Therefore, this issue is being remanded back to the file of the Assessing Officer for factual verification. For statistical purposes, the ground raised by the assessee is allowed.

53 Additional grounds raised by the assessee

1. Refund of dividend distribution tax (DDT) paid in respect of non-residence shareholders.

This ground relates to the assessment year 2011-12.

54 The assessee has raised this additional ground stating that the Assessing Officer ("AO") erred in not extending the benefit of applicable Double Taxation Avoidance Agreements between India-UK and India-Spain ("DTAA") respectively qua the rate of tax towards payment of dividend to the shareholders namely Reckitt Benckiser Plc., UK and Lancaster Square Holdings, Spain. The Assessing Officer also failed to appreciate that in terms of section 90(2), dividends being the income in the hands of the non-resident could not be subjected to tax by applying dividend distribution tax at a rate in excess of the rate prescribed under the Double Taxation Avoidance Agreement and hence, erred in subjecting the appellant to additional income-tax in terms of section 115-O of the Act and the Assessing Officer also erred in not granting refund of the excess dividend distribution tax paid by the appellant.

We are of the view that this issue should be remitted back to the file of the learned Assessing Officer for factual verification. The assessee is directed to file before the Assessing Officer, the amount of dividend paid,

copy of agreement and other relevant documents, as required by the Assessing Officer. Therefore we direct the Assessing Officer to examine relevant Double Taxation Avoidance Agreements between India-UK with reference to payment of dividend to the shareholders and adjudicate the issue in accordance to law. For statistical purposes, the additional ground raised by the assessee is allowed.

55 The second additional ground raised by the assessee reads as follows:

> "2. Deduction of education cess on income-tax paid by the assessee is allowable expenditure. This ground relates to the assessment year 2011-12."

56 We note that issue raised by the assessee in this additional ground is no longer res integra. The learned counsel of the assessee submitted that education cess is not tax and hence not disallowable under section 40(a)(ii) of the Act. We note that the Central Board of Direct Taxes Circular No. 91/58/66-IT](19) dated May 18, 1967, wherein it has been clarified that the effect of omission of the word "cess" from section 40(a)(ii) of the Act is that only taxes paid are to be disallowed and not cess. Relevant extract of circular is as under :

> "Recently a case has come to the notice of the Board where the Income-tax Officer has disallowed the 'cess' paid by the assessee on the ground that there has been no material change in the provisions of section 10(4) of the old Act and section 40(a)(ii) of the new Act. The view of the Income-tax Officer is not correct. Clause 40(a)(ii) of the Income-tax Bill, 1961 as introduced in Parliament stood as under : '(ii) any sum paid on account of any cess, rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of or otherwise on the basis of any such profits or gains'. When the matter came up before the Select Committee, it was decided to omit the word 'cess' from the clause. The effect of the omission of the word 'cess' is that only taxes paid are to be disallowed in the assessments for the years 1962-63 and onwards. The Board desire that the changed position may please be brought to the notice of all the Income-tax Officers so that further litigation on this account may be avoided."

57 We also rely on the judgment of the hon'ble Rajasthan High Court in the case of *Chambal Fertilizers and Chemicals Ltd.* v. *Jt. CIT* (I. T. A. No. 52 of 2018) which after taking into account aforementioned Central Board of Direct Taxes circular held that section 40(a)(ii) applies only to taxes and not to education cess. Relevant extract of the decision is reproduced for ease of reference :

"13. On the third issue in Appeal No. 52 of 2018, in view of the circular of Central Board of Direct Taxes where word 'cess' is deleted, in our considered opinion, the Tribunal has committed an error in not accepting the contention of the assessee. Apart from the Supreme Court decision referred that assessment year is independent and word cess has been rightly interpreted by the Supreme Court that the cess is not tax in that view of the matter, we are of the considered opinion that the view taken by the Tribunal on issue No. 3 is required to be reversed and the said issue is answered in favour of the assessee."

58 We note that co-ordinate Benches of this Tribunal in the following cases held that education cess should be allowed as an expense. The relevant judgments are given below :

(i) *ITC Ltd.* v. *Asst. CIT* (I. T. A. No. 685/Kol/2014)

"The assessee's additional last/substantive ground avers that it is entitled for the educations secondary higher education cess as overhead deduction amounting to Rs. 42,36,18,317 under section 37 of the Act. We note that the hon'ble Rajasthan High Court's decision in DB Income Tax Appeal No. 52 of 2018 (*Chambal Fertilizers Ltd.* v. *Dy. CIT* decided on July 31, 2018) takes into account Central Board of Direct Taxes circular dated May 18, 1967 for holding such cess(es) to be allowable as deduction. Their lordships hold that section 40(a)(ii) applies only on taxes such than earn cess(es). We, therefore, reject the Revenue's contentions supporting the impugned disallowance. The assessee's instant substantive ground is accepted. The Assessing Officer is direction to verify all the relevant facts and allow the impugned cess(es) as deduction under section 37 of the Act. The assessee's appeal I. T. A. No. 685/Kol/2014 is partly accepted in above terms.

(ii) *Peerless General Finance and Investment Co. Ltd.* v. *Dy. CIT* (I.T.A. No. 937/Kol/2018) [2019] 76 ITR (Trib) 356, 380 (Kolkata)

"Additional ground raised by the assessee in I. T. A. No. 937/Kol/2018 for the assessment year 2010-11 reads as under : 'That on the facts and in the circumstances of the case, the authorities below erred in not allowing deduction under section 37(1) of the Income-tax Act, 1961, on account of education cesses paid by the assessee while arriving at the assessed income for the year under appeal.

After giving our thoughtful consideration to the submission of the parties and perusing the judicial decisions relied upon by the learned authorised representative, we find that the issue involved in the

present ground of appeal is no longer res integra. The education cess being not 'income-tax' is allowable as deduction under section 37(1) of the Act. For this, we rely on the judgment of the co-ordinate Bench of the Income-tax Appellate Tribunal, Kolkata in the case of *ITC Ltd.* I. T. A. No. 685/Kol/2014, order dated November 27, 2018, wherein it was held that education cess is an allowable expenditure under section 37(1) of the Act. Therefore, we direct the Assessing Officer to verify all the relevant facts and allow education cess as deduction under section 37(1) of the Act."

(iii) *Tega Industries Ltd.* v. *Asst. CIT* (I. T. A. No. 404/Kol/2017)

"We further to notice that the assessee has raised an identical additional ground in both cases seeking to claim education cess on provision for income-tax amount of Rs. 71,65,049 and Rs. 77,76,699 (assessment year-wise) ; respectively as allowable in computing total income other than minimum alternate tax under section 115JB of the Act. The hon'ble apex court's land mark decision *National Thermal Power Co. Ltd.* v. *CIT* [1998] 229 ITR 383 (SC) as considered by this Tribunal's Special Bench order *All Cargo Global Logistics Ltd.* v. *Deputy CIT* [2012] 18 ITR (Trib) 106 (Mumbai) [SB] ; [2012] 137 ITD 26 (Mum) [SB] settles the law that we are very well entertain such a legal question in order to determine the correct tax liability when all the relevant facts form part of records. We thus allow the assessee's additional ground to be raised.

12. Coming to the merits of the hon'ble Rajasthan High Court's decision in *Chambal Fertilisers and Chemicals Ltd.* v. *Jt. CIT* (D. B. Income-tax Appeal No. 52 of 2018, dated July 31, 2018 taking note of Central Board of Direct Taxes's Circular No. 91/58/66 dated May 18, 1965 as well as co-ordinate Bench's order in *ITC Ltd.* v. *Asst. CIT* (I. T. A. No. 685/Kol/2014 dated November 27, 2018 hold that such a claim of education cess is very much allowable in computing total income under the provisions of the Act."

The learned Departmental representative relied on the earlier decision of **59**
the Income-tax Appellate Tribunal dated February 27, 2019, wherein this Tribunal had disallowed the claim on the basis of two contentions : (i) Education cess is an additional surcharge and hence forms of income-tax and (ii) Decision of *Kalimati Investment Co. Ltd.* v. *ITO* (I. T. A. Nos. 2706 and 4508/Mumbai/2010, 2552 and 2553/Mumbai/2011) and *Sesa Goa Ltd.* v. *Jt. CIT* (I. T. A. No. 72/Pnj/2012) squarely applicable against the assessee.

We accept the submissions of the assessee concurring with the deci- **60**
sions of the Rajasthan High Court and binding favourable decisions of

the jurisdictional Tribunal and thus we allow the claim of the education cess. The Assessing Officer is directed to allow the claim of education cess in computing total income of the assessee-company. This additional ground raised by the assessee is allowed.

61 Before parting, it is noted that the order is being pronounced after 90 days of hearing. However, taking note of the extraordinary situation in the light of the Covid-19 pandemic and lockdown, the period of lockdown days need to be excluded. For coming to such a conclusion, we rely upon the decision of the co-ordinate Bench of the Mumbai Tribunal in the case of *Dy. CIT* v. *JSW Ltd.* in I. T. A. No. 6264/Mum/2018 and I. T. A. No. 6103/Mum/2018 [2020] 79 ITR (Trib) 585 (Mumbai) for the assessment year 2013-14 order dated May 14, 2020.

62 In the result, the appeals of the assessee are partly allowed for statistical purposes whereas the appeals of the Revenue are dismissed to the extent indicated above.

63 Order pronounced in the court on June 17, 2020.

[2020] 81 ITR (Trib) 648 (Kolkata)

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

ARVIND METALS AND MINERALS P. LTD.

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

S. S. GODARA *(Judicial Member)* and
DR. A. L. SAINI *(Accountant Member)*

July 8, 2020.

SS ▶ ITA 1961, s 28, 37, 43(5)(a), 43B
AY ▶ 2014-15
HF ▶ Assessee

BUSINESS LOSS—SPECULATION BUSINESS—DEFINITION—LOSS ON FORWARD BOOKING OF FOREIGN EXCHANGE—TRANSACTION NOT SPECULATIVE IN NATURE—TO BE ALLOWED AS BUSINESS LOSS—INCOME-TAX ACT, 1961, SS. 28, 43(5)(a).

BUSINESS EXPENDITURE—DEDUCTION ONLY ON ACTUAL PAYMENT—PRIOR PERIOD EXPENSES—ASSESSEE DEPOSITING EMPLOYEES' STATE INSURANCE PAYMENT FOR EARLIER YEAR AND FOR RELEVANT ASSESSMENT YEAR—EFFECT OF SECTION 43B—AMOUNT ALLOWABLE IN YEAR IN WHICH ACTUALLY PAID—INCOME-TAX ACT, 1961, S. 43B.

Business expenditure—Travelling and conveyance expenses—Failure by assessee to submit few bills and vouchers before Assessing Officer for verification—Disallowance restricted to Rs. 50,000—Adjudication not to be treated as precedent—Income-tax Act, 1961, s. 37.

Appeal to Appellate Tribunal—Pronouncement of orders—Extraordinary situation in light of Covid-19 pandemic and lockdown—Period of lockdown days to be excluded—Income-tax Act, 1961.

The assessee was an importer. In order to hedge against foreign currency exposure, the assessee entered into forward contracts. There were instances where due to lack of availability of funds the forward contract entered by the assessee with the banks could not be executed and was cancelled and the difference between the rate originally agreed and the rate on the date of cancellation was recovered by the bank from the customers. The assessee in such a situation debited the charges to its profit and loss account under the head "loss on forward cancellation". The Assessing Officer considered the transaction as speculative in nature and disallowed the loss on forward booking of foreign exchange of Rs. 1.45 lakhs as regular business loss under section 28 of the Income-tax Act, 1961. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal :

Held, *that the provision of section 43(5)(a) of the Act stated that forward contract was not a speculative transaction and the loss could not be regarded as speculation. The Act clearly excluded hedging foreign currency transactions from the definition of speculative transaction. Hence, the disallowance of Rs. 1.45 lakhs on the ground of speculative transaction required to be deleted.*

CIT *v.* Soorajmull Nagarmull [1981] 129 ITR 169 (Cal) *relied on.*

The Assessing Officer disallowed prior period expenses of Rs. 1.12 lakhs being ESI payment relating to the previous year 2013-14 holding that the expenditure did not relate to the assessment year 2014-15. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal :

Held, *that the assessee submitted that prior to the assessment year 2014-15, the assessee was unaware to the employees' State insurance provision and its applicability to the organisation. On becoming aware of the provisions and its applicability to the organisation, the assessee deposited the entire sum as required which included payments for the assessment year 2013-14. Since the assessee made payments relating to the assessment year 2013-14 during the*

previous year relevant to the assessment year 2014-15, applying the provisions of section 43B of the Act, it was allowable expenditure. The disallowance of Rs. 1.12 lakhs was liable to be deleted.

The assessee challenged the ad hoc disallowance of travelling and conveyance expenses of Rs. 1.78 lakhs. On appeal :

Held, *that the Assessing Officer had passed the order under section 143(3) of the Act but the assessee had failed to submit a few bills and vouchers relating to travelling and conveyance expenses before the Assessing Officer for his verification. Therefore, Rs. 50,000 out of Rs. 1.78 lakhs was to be disallowed to fill the gap of small anomalies done by the assessee. The Assessing Officer was directed to delete the balance amount of Rs. 1.28 lakhs. [However the Tribunal made it clear that this could not be treated as a precedent in any preceding or succeeding the assessment year.]*

The order was pronounced after 90 days of hearing. However, taking note of the extraordinary situation in the light of the Covid-19 pandemic and lockdown, the period of lockdown days needed to be excluded.

DY. CIT *v.* JSW LTD. [2020] 79 ITR (Trib) 585 (Mum) *relied on*.

CIT *v.* SOORAJMULL NAGARMULL [1981] 129 ITR 169 (Cal) (para 8) *and* DY. CIT *v.* JSW LTD. [2020] 79 ITR (Trib) 585 (Mum) (para 15) *referred to*.

I. T. A. No. 434/Kol/2019 (assessment year 2014-15).

Manish Tiwari, Fellow Chartered Accountant, for the assessee.

Supriyo Paul, Joint Commissioner of Income-tax, for the Department.

ORDER

The order of the Bench was pronounced by

1 DR. A. L. SAINI ***(Accountant Member)***.—The captioned appeal filed by the assessee, pertaining to the assessment year 2014-15, is directed against the order passed by the Commissioner of Income-tax (Appeals)-2, Kolkata, in appeal No. 10115/CIT(A)-2/2017-18, which in turn arises out of the assessment order passed by the Assessing Officer under section 143(3) of the Income-tax Act, 1961 (in short, "the Act") dated December 27, 2016.

2 The grounds of appeal raised by the assessee are as follows :

1. (a) That on the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) is wrong and unjustified in confirming the Assessing Officer's order where loss on forward booking of foreign exchange of Rs. 1,45,374 was disallowed as regular business loss under section 28.

(b) That on the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) is wrong and unjustified in treating the loss of Rs. 1,45,374 as speculative loss without considering that for payment of import purchases the assessee (importer) is required to make prior booking of foreign exchanges.

2. That on the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) is wrong and unjustified in confirming the Assessing Officer's disallowances of prior period expenses Rs. 1,12,214 without considering the statutory payments of ESI under section 43B.

3. That on the facts and in the circumstances of the case, the learned Commissioner of Income-tax (Appeals) is wrong and unjustified in confirming the Assessing Officer's ad hoc disallowance of travelling and conveyance of Rs. 1,78,912 made arbitrarily without application of mind.

4. That the appellant craves leave to add, alter, adduce or amend any ground or grounds on or before the date of hearing of the appeal.

Ground No. 1 relates to the addition of Rs. 1,45,374 on account of loss on forward booking of foreign exchange. **3**

Brief facts qua the issue are that during the scrutiny proceedings, the Assessing Officer noticed that the assessee-company had debited profit and loss account of Rs. 1,45,374 on account of loss of forward contract cancellation. In this regard, the assessee-company was asked to explain the allowability of this expense. In reply, the assessee-company filed letter dated December 16, 2016. Relevant portion of the letter is reproduced below : **4**

> "We are an importer and in order to minimise the risk of currency fluctuation we book foreign currency in advance with the banks for the specified date in which we were to make the payment. At times, due to non-availability of fund partial amount of the foreign currency needs to be cancelled. The differential rates of forward booking and cancellation are then debited to our account which is being charged under the head "loss on forward cancellation". This is not the speculative transaction as the same is being done with the underlying document for which foreign currency are being booked and is honoured on the due date."

However, the Assessing Officer rejected the contention of the assessee and held as follows :

> "A forward contract is an agreement between a buyer and a seller getting the seller to deliver a specified asset of specified quality and

quantity to the buyer on a specified date at a specified place and the buyer in turn is obligated to pay the seller a pre-negotiated price in exchange of the delivery. The definition of 'speculative transaction' in section 43(5) gives a simple test for deciding for the purpose of income-tax what a speculative transaction means. If a contract for sale or purchase is ultimately settled out and no actual delivery of the goods was effected under the settlement then it is a speculative transaction. Profit/loss in respect of unperformed contracts is considered speculation profit/loss. In short, in order that a transaction may fall within the scope of the expression 'speculative transaction', it must be a transaction in which a contract for purchase of sale of any commodity, intending stocks and shares, is periodically or ultimately settled otherwise than by actual delivery or transfer of the commodity or scrips. In view of the above facts of the issue, I have decided to treat this loss as speculation loss and accordingly, adjustment is made in the computation of total income."

5 Aggrieved by the order of the Assessing Officer the assessee carried the matter in appeal before the learned Commissioner of Income-tax (Appeals) who has confirmed the addition made by the Assessing Officer observing the followings :

"I have considered the grounds of appeal, statement of facts and submission of the authorised representative of the appellate company as well as the order of the Assessing Officer framed in the light of the materials available on record before the Assessing Officer during the assessment proceedings. The Assessing Officer has mentioned that these expenses does not pertain to the year under consideration. I agree with the view as taken by the Assessing Officer. Keeping in view of the facts as mentioned above, in the absence of any cogent material evidence, 1 do not find any infirmity in the order of the Assessing Officer and the same is hereby upheld. In view of the above, this ground of appeal is dismissed."

6 Aggrieved by the order of the learned Commissioner of Income-tax (Appeals), the assessee is in appeal before us.

7 The learned counsel for the assessee has relied on the submissions made before the authorities below and on the other hand the learned Departmental representative has primarily reiterated the stand taken by the Assessing Officer which we have already noted in our earlier para and the same is not being repeated for the sake of brevity.

We have heard both the parties and carefully gone through the sub- 8
mission put forth on behalf of the assessee along with the documents furnished and the case law relied upon, and perused the fact of the case including the findings of the learned Commissioner of Income-tax (Appeals) and other materials available on record. We note that this ground relates to disallowance of loss on forward booking of Rs. 1,45,374 considering the same as speculative in nature. The assessee-company being an importer has foreign currency exposure. Hence in order to hedge its foreign currency exposure, the assessee-company enters into an agreement with the bank in advance for the specified date on which the payments are to made.There are instances where due to lack of availability of funds the forward contact entered by the assessee-company with the banks cannot be executed. In such a situation the forward contract is required to cancel. When the contract is cancelled, the difference between the rate originally agreed and the rate on the date of cancellation is recovered by the bank from the customers. The assessee-company in such a situation where any payment is made to banks of cancellation of forward contract, debits the charges to its profit and loss account under the head "loss on forward cancellation". The assessee submitted before us relevant bank statements highlighting the charges paid to bank. In the instant case, the learned Assessing Officer without considering the facts of the case, considered the above transaction as speculative in nature and disallowed the same. We note that clause (a) of sub-section (5) of section 43 of the Act states that forward contract is not a speculative transaction. The provision of section 43(5)(a) of the Act is reproduced below :

> "a contract in respect of raw material or merchandise entered into by a person in the course of his manufacturing or merchanting business to guard against loss through future price fluctuations in respect of his contracts for actual delivery of goods manufactured by him or merchandise sold by him,
>
> shall not be deemed to be speculative transactions."

A plain reading of section 43(5)(a) makes it clear that the impugned loss cannot be regarded as speculation. The Act clearly excludes hedging foreign currency transactions for the definition of speculative transaction. Hence the actions of the learned Assessing Officer in considering the loss on hedging foreign currency exposure as speculative is not justified. For that we rely on the judgment of the hon'ble Calcutta High Court in the case of *CIT* v. *Soorajmull Nagarmull* [1981] 129 ITR 169 (Cal) wherein the court observed that "where the assessee enters into forward contracts in foreign exchange in order to cover the loss arising due to difference in

foreign exchange rate and/or valuation, is not of speculative in nature and was incidental to the assessee's regular course of business. As such it was allowable as a trade loss". In view of the above facts and legal position on the issue involved, the disallowance of Rs. 1,45,374 on the ground of speculative transaction requires to be deleted hence we delete the disallowance of Rs. 1,45,374.

9 Ground No. 2 raised by the assessee relates to disallowance of prior period expenses of Rs. 1,12,214.

10 Brief facts qua the issue are that, during the scrutiny proceedings the Assessing Officer noticed that prior period expense of Rs. 1,12,214 had been debited in the accounts by the assessee-company. On query, the assessee-company submitted that said expense is related to the ESI payment related to the previous year 2013-14. The Assessing Officer rejected the plea of the assessee and held that the expenditure is not related for this assessment year, therefore, the entire expense under the head prior period expense was disallowed.

11 Aggrieved by the order of the Assessing Officer the assessee carried the matter in appeal before the learned Commissioner of Income-tax (Appeals) who has confirmed the action of the Assessing Officer observing the followings :

> "I have considered the grounds of appeal, statement of facts and submission of the authorised representative of the appellant company as well as the order of the Assessing Officer framed in the light of the materials available on record before the Assessing Officer during the assessment proceedings. The Assessing Officer has mentioned that these expenses does not pertain to the year under consideration. I agree with the view as taken by the Assessing Officer. Keeping in view of the facts as mentioned above, in the absence of any cogent material evidence, I do not find any infirmity in the order of the Assessing Officer and the same is hereby upheld. In view of the above, this ground of appeal is dismissed."

12 We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case law relied upon, and perused the fact of the case including the findings of the learned Commissioner of Income-tax (Appeals) and other materials available on record. We note that this ground relates to disallowance of Rs. 1,12,214 towards ESI payment relating to the assessment year 2013-14. The learned counsel submits that during the relevant assessment year, the assessee-company deposited the ESI for the assessment year 2013-14 after it came to know that the company

was liable to comply with the provisions of ESI Act. Hence, it deposited the same with the relevant authority for earlier year and for the relevant assessment year at once during the assessment year 2014-15. The learned counsel submitted that during the earlier year, i.e., prior to the assessment year 2014-15, the assessee-company was unaware to the ESI provision and its applicability to the organisation. Hence, on becoming aware of the provisions and its applicability to the organisation, the assessee deposited the entire sum as required under the ESI Act which included payments for the assessment year 2013-14. We note that the provisions of section 43B of the Act which provides that certain expenditure/payments which are otherwise eligible for deduction under the Act shall be allowed as a deduction only in the year of actual payment irrespective of the year of accrual of such expenditure. Since the assessee made payments relating to the assessment year 2013-14 during the relevant assessment year 2014-15, applying the provisions of section 43B of the Act, the same is allowable expenditure. In view of the above facts we delete the disallowance of Rs. 1,12,214.

13 Ground No. 3 raised by the assessee relates to ad hoc disallowance of travelling and conveyance expenses of Rs. 1,78,912.

14 At the outset itself, the learned counsel for the assessee submitted before the Bench that the order is passed by the Assessing Officer under section 143(3) of the Act therefore no ad hoc disallowance should be made by the Assessing Officer. However, the learned Departmental representative submits that the assessee failed to submit a few bills and vouchers relating to travelling expenses and conveyance expenses therefore, the Assessing Officer made ad hoc disallowance. We have heard the learned Departmental representative for the Revenue and noted that the Assessing Officer has passed the order under section 143(3) of the Act but the assessee has failed to submit a few bills and vouchers relating to travelling expenses/conveyance expenses before the Assessing Officer for his verification, therefore, we disallow Rs. 50,000 out of Rs. 1,78,912 to fill the gap of small anomalies done by the assessee. It is made clear that the instant adjudication shall not be treated as a precedent in any preceding or succeeding the assessment year. Therefore, we direct the Assessing Officer to delete the balance amount of Rs. 1,28,912 (1,78,912 – 50,000). Hence, ground No. 3 raised by the assessee is partly allowed.

15 Before parting, it is noted that the order is being pronounced after 90 days of hearing. However, taking note of the extraordinary situation in the light of the Covid-19 pandemic and lockdown, the period of lockdown days need to be excluded. For coming to such a conclusion, we 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 (Mum) in I. T. A. No. 6264/Mum/2018 and I. T. A. No. 6103/Mum/2018 for the assessment year 2013-14 order dated May 14, 2020.

16 In the result, the appeal of the assessee is partly allowed.

Order pronounced in the court on July 8, 2020

End of Volume 81

[2020] 81 ITR (Trib) (S. N.) 81 (Delhi)

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

ASSISTANT COMMISSIONER OF INCOME-TAX

v.

OSCAR INVESTMENT LTD.

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

August 11, 2020.

SS ▸ ITA 1961, s 263
AY ▸ 2011-12
HF ▸ Assessee

REVISION—ADDITION MADE PURSUANT TO REVISIONAL ORDER—TRIBUNAL QUASHING REVISIONAL ORDER—RESULTANT PROCEEDINGS WOULD NOT SURVIVE—INCOME-TAX ACT, 1961, S. 263.

The assessee declared an income of Rs. 69 crores under the normal provisions and Rs. 68.42 crores under section 115JB of the Income-tax Act, 1961. The original assessment was completed on a total income of Rs. 70.93 crores. The Assessing Officer made addition of Rs. 1.92 crores on account of administrative and other expenses in terms of rule 8D(2)(iii) of the Income-tax Rules, 1962. The Principal Commissioner passed the order under section 263 and directed the Assessing Officer to recompute the deduction under section 14A read with rule 8D(2). The Assessing Officer pursuant to the order of the Principal Commissioner under section 263 passed the assessment order making the addition against the assessee. The Commissioner (Appeals) deleted the addition. On appeal :

Held, *that the assessment order whereby the addition had been made was passed pursuant to the order passed by the Principal Commissioner under section 263. Since the order under section 263 had been quashed by the Tribunal, all resultant proceedings including the present appeals would not survive.*

I. T. A. No. 5174/Delhi/2017 (assessment year 2011-12).

Ms. Parmita M. Biswas, Commissioner of Income-tax-Departmental representative, for the Department.

Tarandeep Singh, Chartered Accountant, for the assessee.

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[2020] 81 ITR (Trib) (S. N.) 82 (Ahmedabad)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — AHMEDABAD VIRTUAL COURT "D" BENCH]

DEEM ROLL TECH LTD.

v.

DEPUTY COMMISSIONER OF INCOME-TAX

RAJPAL YADAV *(Vice-President)* and
WASEEM AHMED *(Accountant Member)*

August 11, 2020.

SS ▸ ITA 1961, s 68
AY ▸ 2013-14
HF ▸ Assessee

CASH CREDITS—SHARE APPLICATION MONEY—CHEQUES NEITHER PRESENTED NOR ENCASHED IN ACCOUNTING YEAR RELEVANT TO ASSESSMENT YEAR—ASSESSEE PASSING JOURNAL ENTRY AND ULTIMATELY SHARE APPLICATION MONEY RECEIVED IN SUBSEQUENT YEAR—NO AMOUNT IN REAL SENSE CREDITED IN ACCOUNTS OF ASSESSEE FOR CURRENT YEAR—NO ENQUIRY COULD BE MADE—INCOME-TAX ACT, 1961, S. 68.

The Assessing Officer recorded that the assessee failed to discharge the onus cast upon it by virtue of section 68 of the Income-tax Act, 1961 in respect of share application money of Rs. 2 crores received from 28 entities and made addition of Rs. 2 crores. The Commissioner (Appeals) concurred with the Assessing Officer and confirmed the addition of Rs. 2 crores. On appeal :

Held, *that the cheques were neither presented nor encashed in the accounting year relevant to the assessment year. The date of issuance of cheque was immaterial. Thus, the assessee had not received any money on account of share application during the accounting year relevant to the assessment year 2013-14, and it was a notional receipt only. The assessee had just passed the journal entry and ultimately the share application money was received in the subsequent year, i. e., assessment year 2014-15. Therefore, no inquiry could be made in this year. Section 68 contemplates that where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof, or the explanation offered by the assessee is not, in the opinion of the Assessing Officer satisfactory, then the sum so credited in the accounts may be treated as income of the assessee of that previous year. The assessee had demonstrated that it had not received any money on account of share application during this year. This statement had been proved by the assessee from*

the details obtained from the bank. Thus, no amount in the real sense had been found to be credited in the accounts of the assessee for the assessment year 2013-14 and if that be so, there was no need to examine this evidence, i. e., confirmation, capacity and genuineness of the 28 applicants. The addition was not sustainable in the assessment year 2013-14 and was deleted.

I. T. A. No. 437/Ahd/2018 (assessment year 2013-14).

P. F. Jain, authorised representative, for the assessee.

Vinod Tanwani, Senior Departmental representative, for the Department.

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[2020] 81 ITR (Trib) (S. N.) 83 (Jaipur)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — JAIPUR "B" BENCH VIRTUAL COURT]

KEDIA EXPORTS P. LTD.

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

(and vice versa)

VIJAY PAL RAO *(Judicial Member)* and
VIKRAM SINGH YADAV *(Accountant Member)*

June 19, 2020.

SS ▶ ITA 1961, ss 37, 145(3)
AY ▶ 2009-10, 2012-13 to 2014-15
HF ▶ Assessee

BUSINESS EXPENDITURE—BOGUS PURCHASES—ESTIMATION OF INCOME—ONCE BOOKS OF ACCOUNT REJECTED ASSESSING OFFICER REQUIRED TO ESTIMATE INCOME OF ASSESSEE ON REASONABLE AND PROPER BASIS—PAST HISTORY CAN FORM BASIS FOR ESTIMATING CURRENT YEAR'S GROSS PROFIT—GROSS PROFIT ESTIMATED AT 10.22 PER CENT. AS AGAINST GROSS PROFIT DECLARED BY ASSESSEE AT 10.04 PER CENT. FOR INSTANT YEAR—ADDITION EQUIVALENT TO GROSS PROFIT RATE OF 0.18 PER CENT. ON DECLARED TURNOVER UPHELD—INCOME-TAX ACT, 1961, SS. 37, 145(3).

Notice under section 148 of the Income-tax Act, 1961 was issued to the assessee for the assessment year and in response thereto the assessee filed its return declaring loss as declared in the original return. Notice under section 143(2) was issued and assessment was completed under section 147 read with

section 143(3). According to the Assessing Officer, the assessee had made bogus purchases of Rs. 50,79,735 from its group concerns as evident from the information gathered by the Investigation Wing. Accordingly, he rejected the assessee's books of account under section 145(3) and disallowed 25 per cent. of the purchases and made an addition of Rs. 12,69,933 in the hands of the assessee. The Commissioner (Appeals) upheld the rejection of the books of account and estimated the gross profit rate at 11.5 per cent. resulting in a gross profit of Rs. 36,49,755 against a gross profit of Rs. 31,87,206 shown by the assessee. Hence, he restricted the addition to Rs. 4,62,549 as against Rs. 12,69,933 made by the Assessing Officer and allowed partial relief to the assessee. On appeal :

Held, *that even if the Assessing Officer had doubted the genuineness of the purchases from the parties, once the books of account of the assessee were rejected invoking the provisions of section 145(3), he was bound to frame the assessment on best judgment in terms of the provisions of section 144 read with section 145(3). Therefore, after rejection of books of account, the Assessing Officer was required to estimate the income of the assessee on some reasonable and proper basis. For estimation of income of the assessee after rejection of books of account, the past history of the assessee or history of similarly situated businessman was a proper and reasonable basis. There was no finding that in the past, the assessee had obtained any accommodation entries as in the instant year. Once the past year results had attained finality the same results could form the basis for estimating the gross profit rate for the current year. The average of the past three years of the gross profit declared by the assessee was 10.22 per cent. Thus, the gross profit declared for the instant year at 10.04 per cent. was lower than the average gross profit declared by the assessee in the preceding three years by 0.18 per cent. Therefore, the gross profit was estimated at 10.22 per cent. as against the gross profit declared by the assessee at 10.04 per cent. for the instant year and the differential trading addition equivalent to gross profit rate of 0.18 per cent. on declared turnover was proper.*

I. T. A. Nos. 1047, 1048, 1049, 1050, 1066, 1067, 1068 and 1069/Jaipur/2019 (assessment years 2009-10, 2012-13, 2013-14 and 2014-15).

S. R. Sharma and *Rajnikant Bhatra*, Chartered Accountant, for the assessee.

Ms. Chanchal Meena, Additional Commissioner of Income-tax, for the Department.

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[2020] 81 ITR (Trib) (S. N.) 85 (Delhi)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — DELHI VIRTUAL COURT "G" BENCH]

SILBURN PAPERS PVT. LTD.

v.

INCOME-TAX OFFICER

R. K. PANDA *(Accountant Member)* and
SUDHANSHU SRIVASTAVA *(Judicial Member)*

August 7, 2020.

SS ▸ ITA 1961, s 37
AY ▸ 2013-14
HF ▸ Assessee

BUSINESS EXPENDITURE—UNVERIFIABLE PURCHASES—ESTIMATION OF GROSS PROFIT RATE—SALES OF ASSESSEE ACCEPTED BY ASSESSING OFFICER—NO COMPARABLE CASE SHOWING REASONABLE RATE OR ANY PURCHASE SHOWING SUCH HIGHER GROSS PROFIT RATE—PAYMENTS THROUGH BANKING CHANNELS AND PURCHASES SUBSTANTIATED BY DOCUMENTS—FAILURE BY SOME PARTIES TO RESPOND TO NOTICE NOT BASIS TO MAKE HUGE ADDITION WHERE PURCHASES ACCEPTED IN PRECEDING YEAR—PAST RESULTS CAN FORM BASIS FOR ESTIMATING GROSS PROFIT RATE—INCOME-TAX ACT, 1961, S. 37.

The Assessing Officer, on the basis of the fact that trade creditors had failed to reply to the notice and the report of the inspector, found that purchases to the tune of Rs. 5,75,55,703 were unverifiable. After considering the average gross profit rate of the last three years at 3.16 per cent. he adjusted the gross profit rate at 27 per cent. on the unverifiable purchases of Rs. 5,75,55,703 and made an addition of Rs. 1,55,29,870 to the total income of the assessee. The Commissioner (Appeals) restricted the gross profit rate to 25 per cent. on the unverifiable purchases of Rs. 5,75,55,703 and gave relief of Rs. 11,51,101 to the assessee. On appeal :

Held, *that once the past years' results had attained finality and were not in dispute, they could form the basis for estimating the gross profit rate for the current year. For the assessment year 2012-13, the assessee had shown a gross profit rate at 2.9 per cent. on a turnover of Rs. 3,48,63,147 and a gross profit rate of 4.28 per cent. in the assessment year 2014-15 on a turnover of Rs. 8,62,24,688. The Assessing Officer had not brought on record any comparable case to show the reasonable rate in such type of trade or any purchase showing such higher gross profit rate. The payments had been made through*

banking channels and the assessee had substantiated the purchases by providing various documents such as purchase invoices, copies of the ledger account, evidence of payment through banking channels, value added tax returns duly reflecting the purchases, etc. Merely because some of the parties did not respond to the notice that could not be held against the assessee to make such a huge addition especially when purchases from those parties were accepted in the preceding year and no reopening of assessment under section 147 or 263 of the Income-tax Act, 1961 had taken place. Adoption of the gross profit rate of 4.5 per cent. on the turnover of Rs. 9,93,23,196 under the facts and circumstances of the case would meet the ends of justice. The Assessing Officer was directed to recompute the addition accordingly.

KEDIA EXPORTS PVT. LTD. *v.* ASST. CIT [2020] 81 ITR (Trib) (S.N.) 83 (Jaipur) *followed*.

I. T. A. No. 3552/Delhi/2018 (assessment year 2013-14).

P. C. Yadav, Advocate, for the assessee.

Saras Kumar, Senior Departmental representative, for the Department.

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[2020] 81 ITR (Trib) (S. N.) 86 (Delhi)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — DELHI "SMC-2" BENCH]

MAHARISHI DAYANAND EDUCATIONAL SOCIETY

v.

INCOME-TAX OFFICER (EXEMPTIONS)

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

August 13, 2020.

AY ▸ 2014-15
HF ▸ Assessee

APPEAL TO COMMISSIONER (APPEALS)—EDUCATIONAL INSTITUTION—EXEMPTION—COMMISSIONER (APPEALS) NOT MENTIONING IN HIS ORDER IF ANY NOTICE SERVED UPON ASSESSEE FOR HEARING OF APPEAL—APPELLATE ORDER PASSED WITHOUT GIVING SUFFICIENT OPPORTUNITY TO ASSESSEE—IN PENALTY PROCEEDINGS RECEIPTS SHOWN AT FIGURE LOWER THAN PRESCRIBED LIMIT WHICH REQUIRES ADJUDICATION ON MERITS—COMMIS-

sioner (Appeals) to redecide appeal on merits—Income-tax Act, 1961.

The assessee filed its return for the assessment year 2014-15 showing nil income. The Assessing Officer noted that the assessee was running an educational institution and had claimed exemption under section 10(23C)(iiiad) of the Income-tax Act, 1961. The assessee had shown gross receipts at Rs. 1,03,19,223 and after debiting various expenses at Rs. 89,58,819, the net surplus had been shown at Rs. 13,60,413 which was claimed exempt. The assessee's gross receipts were more than Rs. 1 crore and the assessee was not registered under section 10(23C)(vi) or under section 12AA. Thus, he made an addition of Rs. 13,60,413. The Commissioner (Appeals) in the absence of the assessee dismissed the appeal of the assessee. On appeal :

Held, *that the Commissioner (Appeals) in his order did not mention if any notice had been served upon the assessee for hearing of the appeal. The appellate order had been passed without giving reasonable, sufficient opportunity of being heard to the assessee. Further the contention of the assessee that in penalty proceedings the receipts shown were below the prescribed limit which required adjudication on the facts on the merits. In this view of the matter, his order was set aside and the matter was restored to him with a direction to redecide the appeal of assessee in accordance with law, by giving reasonable, sufficient opportunity of being heard to the assessee.*

I. T. A. No. 3909/Delhi/2019 (assessment year 2014-15).

Gautam Jain, Advocate, for the assessee.

R. K. Gupta, Senior Departmental representative, for the Department.

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[2020] 81 ITR (Trib) (S. N.) 88 (Jaipur)

[Before the Income-tax Appellate Tribunal — Jaipur "B" Bench]

INCOME-TAX OFFICER

v.

KAILASH CHAND BANGUR

Vijay Pal Rao ***(Judicial Member)*** and
Vikram Singh Yadav ***(Accountant Member)***

August 10, 2020.

SS ▸ ITA 1961, s 254(2)
AY ▸ 2011-12
HF ▸ Assessee

Appeal to Appellate Tribunal—Rectification of mistake—Mistake apparent from record—Tribunal taking firm view following decisions of court including jurisdictional High Court—Decision of jurisdictional High Court binding on Tribunal—Failure to consider judgment in favour of Department of another High Court—Decision not cited by Department at time of hearing of appeal—Not a mistake apparent from record—Income-tax Act, 1961, s. 254(2).

In an application under section 254(2) of the Income-tax Act, 1961, the Department sought recall of the appellate order on the ground that while the Tribunal had decided the appeal of the assessee following decisions of the Karnataka High Court and other decisions on the point of validity of initiation of penalty proceedings, there was a judgment of the Madras High Court which was in favour of the Department and failure to consider it amounted to a mistake apparent on record requiring rectification :

Held, *dismissing the application, that while deciding this issue the Tribunal had taken a firm view which was supported by various judgments including the judgment of the Rajasthan High Court. The judgment of the Rajasthan High Court was binding on the Tribunal specifically the Jaipur and Jodhpur Benches of the Tribunal. The decision of the Madras High Court was not relied upon or cited by the Department at the time of hearing of the appeal. Further, even where there was a divergent view the Tribunal was bound by the view taken by the Rajasthan High Court. Hence, the fact that the decision which was not cited by the Department at the time of hearing was not considered could not be a considered mistake in the order of the Tribunal. The jurisdiction of the Tribunal under section 254(2) of the Income-tax Act,*

1961 was limited and did not permit review or revision of its own decision taken on the merits.

I. T. A. No. 859/Jaipur/2016 M. A. No. 54/Jaipur/2019 (assessment year 2011-12).

Smt. Rooni Pal, Deputy Commissioner of Income-tax, for the Department.

Sandeep Jhanwar, Advocate, for the assessee.

For the order please go to : *http://www.taxlawsonline.com/sn*

[2020] 81 ITR (Trib) (S. N.) 89 (Delhi)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — DELHI "I-1" BENCH]

AMERICAN EXPRESS (I) P. LTD.

v.

DEPUTY COMMISSIONER OF INCOME-TAX

N. K. BILLAIYA *(Accountant Member)* and
MS. SUCHITRA KAMBLE *(Judicial Member)*

August 13, 2020.

SS ▸ ITA 1961, ss 10A, 92CA
AY ▸ 2011-12
HF ▸ Assessee

INTERNATIONAL TRANSACTIONS—TRANSFER PRICING—ARM'S LENGTH PRICE—BENCHMARKING OF TRANSACTIONS—COMPARABLE COMPANIES—INFORMATION ENABLED TECHNOLOGY SERVICES—EXTRAORDINARY EVENTS TAKING PLACE IN RELEVANT PERIOD—COMPANY EXCLUDIBLE FROM FINAL LIST OF COMPARABLES—INTEREST RECEIVABLES—IF WORKING CAPITAL ADJUSTMENT GRANTED, NO SEPARATE ADJUSTMENT FOR INTEREST RECEIVABLES REQUIRED—PAYMENTS IN RESPECT OF TECHNOLOGY SERVICE, FEE CHARGE OUT, RECEIPT OF SERVICES, PROFESSIONAL CHARGES AND RELOCATION EXPENSES—MOST OF RELOCATION EXPENSES IN RESPECT OF SALARY PAID TO EMPLOYEES OF ASSESSEE WHO TRAVELLED ABROAD FOR BUSINESS OF ASSESSEE—ASSESSING OFFICER TO VERIFY DETAILS AND EXAMINE WHETHER PAYMENTS BY ASSESSEE WERE TO ITS OWN EMPLOYEES WHO TRAVELLED ABROAD AND DECIDE AFRESH—ASSESSING OFFICER TO GIVE CREDIT OF TAX DEDUCTION AT SOURCE—INCOME-TAX ACT, 1961, S. 92CA.

EXEMPTION—EXPORT—EXEMPTION ALLOWED IN EARLIER YEARS—DENIAL OF EXEMPTION IN CURRENT YEAR NOT JUSTIFIED—INCOME-TAX ACT, 1961, S. 10A.

The assessee was a wholly owned subsidiary of a U. S. A. based company and was in data management, information analysis and control activities for export to various affiliates worldwide. During the year 2011-12 the gross turnover of the assessee was Rs. 794.70 crores with the net profit of Rs. 150.71 crores. In accordance with the provisions of section 92CA of the Income-tax Act, 1961 the international transactions entered into by the assessee with its associated enterprises were referred to the Transfer Pricing Officer for determination of arm's length price. The assessee chose eleven comparable companies to demonstrate that its international transactions relating to the provisions of information technology enabled services were at the arm's length. The Transfer Pricing Officer chose only three comparables out of the eleven chosen by the assessee and added five more comparables and finally selected eight comparable companies and computed the arm's length price making an upward adjustment of Rs. 1,03,08,58,566. This was confirmed by the Dispute Resolution Panel. The assessment order was framed pursuant to the order of the Panel. On appeal :

Held, *(i) that the Tribunal in the assessee's case finding that because of the extraordinary events that took place in 2010-11, I, A, TCS E-S and TCS ES were not good comparables and were liable to be excluded from the list of comparables to benchmark the international transactions. On finding parity in the facts with the year 2011-12, the Assessing Officer was directed for to exclude I and TCS ES from the final list of comparables. The Assessing Officer was directed to consider the inclusion of CP in the light of the findings given in the case of other comparables.*

(ii) That the interest of credit period granted by the company under normal trade practices was unjustly charged. If working capital adjustment was granted, no separate adjustment for interest receivable was required.

(iii) That the assessee had established a new unit. Once deduction under section 10A on the same unit had been allowed in the earlier years no different view could be taken for the same unit on similar facts for denying the exemption in the instant assessment year. Accordingly, the Assessing Officer was directed to allow deduction under section 10A.

The Assessing Officer and the Panel observed that the assessee had made payments in respect of certain amounts, such as for technology service, fee charge out, receipt of services, professional charges and relocation expenses. The Assessing Officer and the Panel were of the view that such payments required tax deduction at source in terms of section 195. Details of such payments relate to relocation charges of Rs. 1,86,68,714 which were treated as fees for technical services or royalty in terms of the Double Taxation

Avoidance Agreement between India and the U. S. A. The Assessing Officer and the Panel were of the strong belief that reimbursement of relocation expenses for seconded employees was a part and parcel of the same secondment agreement and terms and salary and service agreements were in the nature of fees for technical services and were chargeable to tax, both under section 9(1)(vii) and under article 12(4) of the Agreement, and thus liable to tax deduction at source which had not been done by the assessee. Accordingly, addition of Rs. 1,86,68,714 was made. On appeal :

Held, *that most of the relocation expenses were in respect of salary paid to employees of the assessee who travelled abroad for business of the assessee. However, these details needed verification. The issue was restored to the Assessing Officer. The Assessing Officer was directed to verify the details and examine whether the payments had been made by the assessee to its own employees who travelled abroad and decide the issue afresh after giving reasonable opportunity of being heard to the assessee.*

Held also, *that the Assessing Officer was directed to give credit of tax deduction at source in accordance with law.*

I. T. A. No. 355/Delhi/2016 (assessment year 2011-12).

Nageshwar Rao and *S. Chakrabarty*, Advocates, for the assessee.

Anupam Kant Garg, Commissioner of Income-tax-Departmental representative, for the Department.

For the order please go to : http://www.taxlawsonline.com/sn

[2020] 81 ITR (Trib) (S. N.) 91 (Mumbai)

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

DIPESH RAMESH VARDHAN AND OTHERS

v.

DEPUTY COMMISSIONER OF INCOME-TAX

MAHAVIR SINGH *(Vice-President)* and
MANOJ KUMAR AGGARWAL *(Accountant Member)*

August 11, 2020.

SS ▸ ITA 1961, s 153A
AY ▸ 2014-15
HF ▸ Assessee

SEARCH AND SEIZURE—ASSESSMENT IN SEARCH CASES—UNEXPLAINED INCOME—PURCHASE OF SHARES AND SALE TRANSACTIONS THROUGH ONLINE MODE, WHEREBY IDENTITY OF BUYER OF SHARES WOULD NOT BE

KNOWN TO ASSESSEE—ADDITIONS ON BASIS OF THIRD PARTY STATEMENT—NOTHING ON RECORD TO ESTABLISH VITAL LINK BETWEEN ASSESSEE GROUP AND THIRD PARTY OR ANY OF HIS GROUP ENTITIES—NOTHING TO CONTROVERT DENIAL BY ASSESSEE OF KNOWLEDGE OF THIRTY PARTY AND HIS ASSOCIATES AND ESTABLISH LINK BETWEEN THIRD PARTY AND ASSESSEE—FAILURE TO PROVIDE ASSESSEE OPPORTUNITY TO CROSS-EXAMINE THIRD PARTY—ADDITIONS UNSUSTAINABLE—INCOME-TAX ACT, 1961, S. 153A.

Search operations under section 132 of the Income-tax Act, 1961 were carried out by the Department at various residential and business premises of the assessee group. The assessee purchased certain shares in STL in September, 2011. The shares were converted into dematerialised form in the assessee's account during the month of March, 2012. The transactions took place through banking channels. The investments were duly reflected by the assessee in the financial statements of the respective years. Copies of the financial statements of STL for the financial years 2009-10 and 2010-11 which led to investment by the assessee in STL were furnished during the course of assessment proceedings. Subsequently, STL amalgamated with SAL pursuant to a scheme of amalgamation. Under the scheme of amalgamation, the share exchange ratio was fixed as 1 : 1 and accordingly the shares in STL were exchanged for shares in SAL and these were credited in the assessee's dematerialised account. The assessee sold these shares through the online platform provided by the recognised stock exchange and delivered the shares in the dematerialised form to the clearing house and received sale consideration through its stock-broker. The sale consideration was received through banking channels. To verify the transactions, summons under section 131 were issued at the address of SAL to which there was no response. A search action was conducted at various places of one V wherein it was revealed that V was controlling SAL and was engaged in manipulating the share price of SAL. Based on the outcome of the search proceedings, the Assessing Officer formed an opinion that SAL was merely a paper company engaged in providing accommodation entries to various beneficiaries. He held that the transactions were manipulated by the assessee in connivance with V to evade taxes on unaccounted income. The commission was estimated at 2 per cent. He made an addition of Rs. 299.76 lakhs in the hands of the assessee. The Commissioner (Appeals) noted that the entire network of documents was manipulated and created by V and his associates with the sole purpose of providing bogus long-term capital gains to various beneficiaries including the assessee and his family members. He concluded that the director of SAL was a dummy director and V was the actual controller of SAL. The steep rise in the prices of

shares was manipulated and controlled and managed by V and his associates. The exit providers to the assessee were manipulated and controlled by V and his associates. The persons controlling these entities were invariably persons of very small means. Their identity was used by V to create bogus companies. These persons were not aware about the share transactions. As per the statement of V an intermediary who introduced V to him and the group was a beneficiary of long-term capital gains. The shares were acquired offline and a large number of shares were allotted as bonus or preferential shares. Such offline purchase of shares on which abnormal long-term capital gains from penny stock companies had been declared, would be a strong indicator of the bogus nature of entire transactions. He confirmed the additions. On appeal :

Held, *that there was nothing on record to establish a vital link between the assessee group and V or any of his group entities. The assessee, all along, denied having known V or any of his group entities. Nothing had been brought on record to controvert this and establish the link between V and the assessee. Opportunity to cross-examine V was never provided to the assessee which made the order a nullity inasmuch as it amounted to violation of the principal of natural justice because of which the assessee was adversely affected. The whole basis for making the addition was a third party statement without there being any tangible material. Additions merely on the basis of suspicious, conjectures or surmises could not be sustained in the eyes of law. No independent investigation had been conducted by the Assessing Officer to bring on record any tangible corroborative material. There was no evidence or even allegation of any cash exchange between the assessee and the group entities of V. This was further evidenced by the fact that no substantial incriminating material or wealth of that magnitude had been found during the course of search operations on the assessee which would corroborate such presumption and prove that the transactions were sham transactions, in any manner. Resultantly, the additions on account of long-term capital gains as well as the estimated commission were liable to be deleted.*

I. T. A. Nos. 7648, 7662, 7651, 7650 and 7649/Mumbai/2019 (assessment year 2014-15)

Vimal Punamiya, authorised representative, for the assessees.

Jayant Jhaveri, Commissioner of Income-tax Departmental representative, and *Udool Raj Singh*, Senior Departmental representative, for the Department.

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[2020] 81 ITR (Trib) (S. N.) 94 (Delhi)

[BEFORE THE INCOME-TAX APPELLATE TRIBUNAL — DELHI VIRTUAL COURT "I-1" BENCH]

BOEING INDIA PVT. LTD.

(successor to Boeing International Corporation India Pvt. Ltd.)

v.

ASSISTANT COMMISSIONER OF INCOME-TAX

N. K. BILLAIYA *(Accountant Member)* and
MS. SUCHITRA KAMBLE *(Judicial Member)*

August 17, 2020.

SS ▸ ITA 1961, ss 40(a)(ia), 144C
AY ▸ 2015-16
HF ▸ Assessee

INTERNATIONAL TRANSACTIONS—TRANSFER PRICING—DRAFT ASSESSMENT ORDER—JURISDICTIONAL REQUIREMENT—ASSESSING OFFICER PASSING ORDER IN NAME OF NON-EXISTING PERSON—NOT VALID AND ENTIRE PROCEEDING INHERENTLY WITHOUT JURISDICTION—MISTAKE NEITHER PROCEDURAL IRREGULARITY NOR RECTIFIABLE —INCOME-TAX ACT, 1961, S. 144C.

INTERNATIONAL TRANSACTIONS—TRANSFER PRICING—ARM'S LENGTH PRICE—ASSESSEE A DEBT-FREE COMPANY—NO INTEREST PAID TO CREDITOR OR SUPPLIER NOR INTEREST EARNED FROM UNRELATED PARTY—ASSESSEE'S REVENUE ENTIRELY FROM ITS ASSOCIATED ENTERPRISES—NO QUESTION OF RECEIVING ANY INTEREST ON RECEIVABLES—TRANSFER PRICING ADJUSTMENT NOT WARRANTED—INCOME-TAX ACT, 1961.

BUSINESS EXPENDITURE—DISALLOWANCE—PAYMENTS LIABLE TO DEDUCTION OF TAX AT SOURCE—REIMBURSEMENT OF SALARY COST TO EXPATRIATE EMPLOYEES—ASSESSEE PAYING TO ITS OWN EMPLOYEES—NO DISALLOWANCE COULD BE MADE—INCOME-TAX ACT, 1961, S. 40(a)(ia).

The effective date of a merger of B with the assessee was February 15, 2018. This was brought to the notice of the Assessing Officer intimating that B was dissolved and all proceedings were transferred in the name of the assessee. Thereafter the Transfer Pricing Officer framed an order in the name of the assessee. However, the Assessing Officer framed a draft assessment order in the name of B. The assessee raised objections before the Dispute Resolution Panel that the Assessing Officer had framed the draft assessment order in the name of a non-existent entity. The Assessing Officer filed a remand report

before the Panel accepting that the Department was aware that B had merged into the assessee. However, the Panel directed the Assessing Officer to rectify the mistake and pass a final assessment order in the name of the amalgamated company. On appeal :

Held, *that issuance of a valid draft order was the sine qua non for section 144C of the Income-tax Act, 1961 to apply. The passing of a draft assessment order is a jurisdictional requirement and if the Assessing Officer passes such an order in the name of a non-existing person, there can never be a valid draft order in the eyes of law, and the entire proceeding inherently would be without jurisdiction. The draft assessment order has legal connotations as it lays the foundation for any prospective reduction in the income of the assessee or creates a tax liability over and above the returned income. Thus, it is not merely a procedural step in the assessment proceedings. A draft assessment order in the name of an eligible assessee provides the requisite jurisdiction to the Assessing Officer under section 144C(1). If there is a mistake while complying with such a jurisdictional requirement, the mistake cannot be termed a procedural irregularity or mistake rectifiable under section 292B.*

FEDEX EXPRESS TRANSPORTATION AND SUPPLY CHAIN SERVICES (INDIA) (P.) LTD. *v.* DY. CIT (I. T. A. No. 857/Mum/2016 dated July 11, 2019) *followed*.

The assessee was a debt-free company. No interest was paid to the creditor or supplier nor was any interest earned from an unrelated party. Being a 100 per cent. captive service provider, the revenue of the assessee was 100 per cent. from its associated enterprises. The Transfer Pricing Officer held that the payment for invoices raised by the assessee were not received within the time stipulated as per the service agreement with the associated enterprises which was 30 days. Therefore, such outstanding amount or delayed payments were in the nature of unsecured loans or advances to the associated enterprises and treating the amount as advance, the Transfer Pricing Officer imputed interest at the rate of 4.3405 per cent. being six months interest at the LIBOR plus 400 basis points on the outstandings receivables from the associated enterprises and, accordingly, proposed an adjustment of Rs. 22,96,268. The Dispute Resolution Panel allowed the interest on outstanding payment to be netted against interest on the outstanding receivables and reduced the adjustment to Rs. 22,16,059. On appeal :

Held, *that the question of receiving any interest on receivables did not arise. There was no merit in the transfer pricing adjustment of Rs. 22.16 lakhs and it was, accordingly, to be deleted.*

The Assessing Officer sought clarification in respect of the services performed by the foreign companies and whether the salary paid to the expatriates had been included in the total salary. The assessee was asked to explain the work performed by the expatriates and the reimbursement of expenses to the foreign companies. The assessee furnished necessary details and explained that reimbursement of salary cost to the expatriate employees was not taxable as fees for included services, both under the provisions of the Act and the relevant Double Taxation Avoidance Agreement and no withholding of tax was required. The Assessing Officer held that the assessee had failed to deduct tax at source on the expenditure towards salaries and other allowances and invoking the provisions of section 40(a)(i) and made a disallowance of Rs. 56,58,19,799. This was confirmed by the Panel. On appeal :

Held, *that the secondees were, in fact, in the employment of the assessee and as per the terms, the associated enterprise was paying salaries in the home country of the secondees and, therefore, there was reimbursement by the assessee. The assessee had been paying to its own employees. The assessee had deducted tax at source under section 192. The provisions of section 195 did not apply. There was no merit in the disallowance.*

I. T. A. No. 9765/Delhi/2019 (assessment year 2015-16).

Arvind Datar, Senior Advocate, *Ms. Anuradha Dutt*, *Sachit Jolly*, *Tushar Jarwal*, *Rahul Sateeja* and *Ms. Disha Jham*, Advocates, for the assessee.

Surender Pal, Commissioner of Income-tax-Departmental representative, for the Department.

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End of Volume 81